



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED :27.03.2018

CORAM:

THE HONOURABLE MR.JUSTICE S.M.SUBRAMANIAM

W.P(MD)No. 15753 of 2013
and
MP(MD)Nos.1 and 2 of 2014

V.Karmegam ... Petitioner
Vs.

1.The Deputy Registrar of Co-Operative Societies (Housing),
Virudhunagar Region,
Virudhunagar.

2.The Enquiry Officer,
Co-Operative Sub-Registrar (Housing),
Paramakudi,
Ramanthapuram District. ... Respondents

PRAYER:Writ Petition filed under Article 226 of the Constitution of India praying for issuance a Writ of Certiorari, calling for the records pursuant to the impugned notice made in Na.Ka.No. 1986/2011/Sa.Pa.dated 27.05.2013 issued by the 1st respondent and quash the same in so far as the petitioner is concerned.

For Petitioner : Mr.D.Sadiq Raja
For Respondents 1 & 2 : Mr.M.Muthu,
Additional Government Pleader

ORDER

The notice issued by the first respondent under Section 87 (1) of the Tamil Nadu Co-operative Societies Act, in proceedings dated 27.05.2013 is under challenge.

2.On perusal of the impugned order, it is clearly stated that based on the enquiry report, surcharge proceedings were initiated under Section 87 (1) of the Tamil Nadu Co-Operative Societies Act. The learned Counsel appearing on behalf of the writ petitioner states that the allegations are pertaining to the year 1993 and therefore no action can be initiated after a lapse of many years.

3.This Court is of an opinion that such contention deserves no consideration at all, in view of the fact that it is a surcharge notice issued under Section 87(1) of the Tamil Nadu Co-Operative Societies Act. The writ petitioner has to submit his explanations/objection in respect of the allegations set out in the

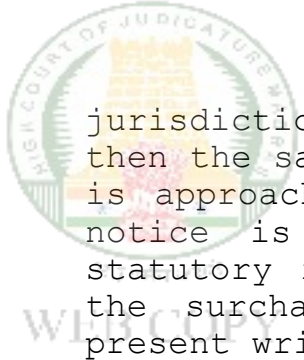


surcharge notice. This apart, the writ petitioner was also holding the post of the Secretary in the Co-Operative Society till 30.04.2010.

4.This being the factum, the question of delay would not arise at all. Further, if any irregularities or otherwise is noticed in respect of the administration of the Co-Operative Society, the Registrar may order for an enquiry under Section 81 of the Tamil Nadu Co-Operative Societies Act. Section 81 deals with statutory enquiry to be conducted by the enquiry officer appointed by the Registrar in this regard. The power of Registrar is delegated to the Deputy Registrar of Co-Operative Societies by way of notification. Thus, in the present case, the enquiry under Section 81 was ordered and enquiry office submitted a final report on 09.05.2012. Three actions are permitted based on the enquiry report submitted under Section 81 of the Act, 1.The departmental disciplinary proceedings against the employee in the event of the any irregularities or illegalities, 2.Surcharge proceedings under section 87 of the Tamil Nadu Co-Operative Societies for the loss caused to the Co-Operative Society by such irregularities or illegalities and 3.Criminal prosecution by registering the complaint before the Commercial Crime Investigation Unit.

5.Thus, the three aforesaid actions are permissible based on the enquiry report submitted under section 81 of the Tamil Nadu Co-Operative Societies Act. It is not clarified in this case, whether disciplinary proceedings and the criminal prosecution are initiated writ petitioner or not? However, the present writ petition is filed challenging the notice issued under Section 87 (1) of the Tamil Nadu Co-Operative Societies Act. The procedures to be followed in respect of the surcharge notice are that on receipt of the notice, the employee has to participate in the process of enquiry to be conducted by the Deputy Registrar of Co-Operative Societies by availing the opportunity. The employee is at liberty to defend his case. If final order is passed under Section 87 of the Tamil Nadu Co-Operative Societies Act, then the aggrieved person can approach the Designated Co-Operative Tribunal under Section 152 of the Tamil Nadu Co-Operative Societies Act. The Special Co-Operative Tribunals are constituted and the respective District Court is designated as Co-Operative Tribunal for the purpose of entertaining the appeals under Section 152 of the Act. This being the Statutory Provisions contemplated under the Act, no writ can be entertained against the surcharge notice issued under Section 87 of the Act. Appeal under Section 152 is entertained by the District Co-Operative Tribunal and the Presiding Officer is in the rank of a District Judge. Thus, the all the grievances of the respective parties can be adjudicated before the Tribunal under Section 152 of the Act. Under these circumstances, no writ can be entertained in respect of the notice.

6.The writ proceedings can be entertained against such notices only on exceptional circumstances and on limited grounds. If surcharge notice is issued by incompetent authority, having no



jurisdiction or if the same is issued against the statutory rule, then the same can be entertained. Even in that case, the person who is approaching the High Court has to establish that the surcharge notice is issued without jurisdiction or in violation of the statutory rules in force. Thus, the judicial review in respect of the surcharge notice is certainly limited and accordingly, the present writ petition is devoid of merits.

7. In respect of the limitation prescribed under provision 87 (1) of the Tamil Nadu Co-Operative Societies Act, it is categorically held that such time limit prescribed in the Act, is only directory in nature and not mandatory. Non adherence to the time limit prescribed in the Rule would not vitiate the entire surcharge proceedings. The purpose and object of the Act to be taken into account while deciding such type of matters and the principles settled by the Hon'ble Supreme Court in the case of Montreal Street Railway Company Vs. Normandin AIR 1917 Privy Council 142. SIR ARTHUR CHANNEL, speaking for the judicial Committee of the Privy Council, clarified the position at page 144 of the report as follows:

"The question whether provisions in a statute are directory or imperative has very frequently arisen 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 statutes must be looked at."

The learned Judge relied on Maxwell on "The Interpretation of Statutes" and the portion on which reliance was placed is set out herein below:

"Where the prescription of a statute relate to the performance of a public duty and where the invalidation of acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and government of those on whom the duty is imposed, or, in other words as directory only. The neglect of them may be penal, indeed, but it does not affect the validity of the act done in disregard of them. "

The aforesaid principles have been followed by the Constitution Bench of the Supreme Court in the case of State of U.P. Vs. Manbodhan Lal (supra), wherein paragraphs 10 and 11 at pages 917 and 918 of the report are relevant and they are extracted here under:

"The question may be looked at from an other point of view. Does the Constitution provide for the contingency as to what is to happen in the event of non-compliance with the requirements of Article 320 (3) (c)?. It does not, either in express terms or by implication, provide that the result of such a non-compliance is to invalidate the proceedings ending with the final order of the Government."



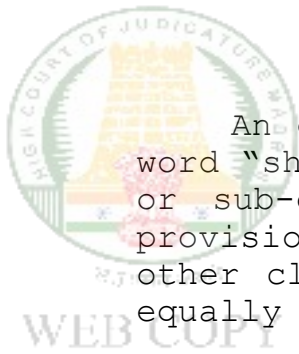
This aspect of the relevant provisions of part XIV of the Constitution, has a direct bearing on the question whether Article 320 is mandatory. The question whether a certain provision in a statute imposing a duty on a public body or authority was mandatory or only directory, arose before their Lordships of the Judicial Committee of the Privy Council in the case of *Montreal Street Railway Company Vs. Normandin*, 1917 A.C.170 (B).

In that case the question mooted was whether the omission to revise the jury lists as directed by the statute, had the effect of nullifying the verdict given by a jury. Their Lordships held that the irregularities in the due revision of the jury lists, will not ipso facto avoid the verdict of a jury. The Board made the following observations in the course of their judgment.

"...The question whether provisions in a statute are directory or imperative has very frequently arisen 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 at. The cases on the subject will be found collected in MAXWELL, on the INTERPRETATION OF STATUTES, 5th Edn., p.596 and following pages. 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 to hold such provisions to be directory only, the neglect of them, though punishable, not affecting the validity of the acts done. "

The principle laid down in this case was adopted by the Federal Court in the case of *Biswanath Khemka Vs. King-Emperor*, 1945 FCR 99: AIR 1945 FC 76 (C). In that case, the Federal Court had to consider the effect of non-compliance with the provisions of Section 256 of the Government of India Act, 1935, requiring consultation between public authorities before the conferment of magisterial powers or of enhanced magisterial powers etc.,

The Court repelled the contention that the provisions of Section 256, aforesaid, were mandatory. It was further held that non-compliance with that Section would not render the appointment otherwise regularly and validly made, invalid or inoperative. That decision is particularly important as the words of the Section then before their Lordships of the Federal Court, were very emphatic and of a prohibitory character.



An examination of the terms of Article 320 shows that the word "shall" appears in almost every paragraph and every clause or sub-clause of that article. If it were held that the provisions of Article 320 (3) (c) are mandatory in terms, the other clauses or sub-clauses of that article, will have to be equally held to be mandatory.

If they are so held, any appointments made to the public services of the Union or a State, without observing strictly, the terms of these sub-clauses in clause (3) of Article 320, would adversely affect the person so appointed to a public service, without any fault on his part and without his having any say in the matter.

This result could not have been contemplated by the makers of the Constitution. Hence, 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 proceedings or the outcome of the proceeding, would be invalid.

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. In that connection, the following quotation from Crawford on Statutory Constitution Article 261 at p.516, is pertinent:

"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..."

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. Vs. Babu Ram Upadhyaya (supra). JUSTICE. K. SUBBA RAO as His Lordship then was, speaking for the majority, quoting the same passage from Mantreal Street Railway Company Vs. Normandi (supra), has come to the same conclusion.

"The relevant rules of interpretation may be briefly stated thus: When a statute used 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 circumstance, 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 trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered."

The decision of the Supreme Court in State of U.P.Vs.Manbodhan Lal (supra) was also reiterated.

The two judges Bench of the Hon'ble Supreme Court of India, in the case of T.V.Usman Vs. Food Inspector, Tellicherry Municipality AIR 1994 SC 1818: (1994) 1 SCC 754, the same principles have been reiterated.

"In Maxwell on Interpretation of Statutes, Eleventh Edn., at page 362 it is stated as under:

Where, indeed, the whole aim and object of the legislature would be plainly defeated if the command to do the thing in a particular manner did not imply a prohibition to do it in any other manner, no doubt can be entertained as to the intention; that is to say, such a requirement would be imperative.

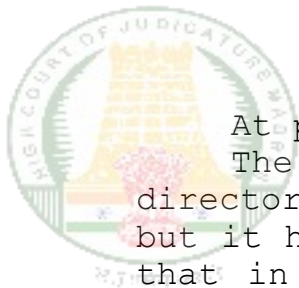
It is further stated on page 364 that:

The general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially.

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.

In Craies Statute Law, Seventh Edn., at page 62 it is stated thus:

When a statute is passed for the purpose of enabling something to be done, and prescribes the formalities which are to attend its performance, those prescribed formalities which are essential to the validity of the thing when done are called imperative or absolute; but those which are not essential and may be disregarded without invalidating the thing to be done, are called directory.



At page 250 it is further stated thus:

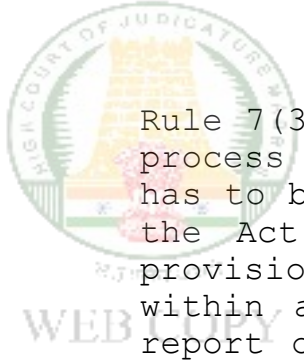
The question whether the provisions in a statute are directory or imperative has frequently arisen in this country, but it has been said that no general rule can be laid down and that in every case the object of the statute must be looked at. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in respect 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 to hold such provisions to be directory only, the neglect of them, though punishable not affecting the validity of acts done.

In *Dattatraya Moreshwar v. State of Bombay*, A.I.R. 1952 S.C.181, it was held as under:

S.V.K. Sahasramam vs The Deputy Registrar Of Co-Op. ... on 29 August, 2008

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.

In Rule 7(3) no doubt the expression shall is used but it must be borne in mind that the rule deals with stages prior to launching the prosecution and it is also clear that by the date of receipt of the report of the Public Analyst the case is not yet instituted in the court and it is only on the basis of this report of the Public Analyst that the authority concerned has to take a decision whether to institute a prosecution or not. There is no time-limit prescribed within which the prosecution has to be instituted and when there is no such limit prescribed then there is no valid reason for holding the period of 45 days as mandatory. Of course that does not mean that the Public Analyst can ignore the time-limit prescribed under the rules. He must in all cases try to comply with the time-limit. But if there is some delay, in a given case, there is no reason to hold that the very report is void and on that basis to hold that even prosecution cannot be launched. May be, in a given case, if there is inordinate delay, the court may not attach any value to the report but merely because the time-limit is prescribed, it cannot be said that even a slight delay would render the report void or inadmissible in law. In this context it must be noted that



Rule 7(3) is only a procedural provision meant to speed up the process of investigation on the basis of which the prosecution has to be launched. No doubt, sub-section (2) of Section 13 of the Act confers valuable right on the accused under which provision the accused can make an application to the court within a period of 10 days from the receipt of copy of the report of Public Analyst to get the samples of food analysed in the Central Food Laboratory and in case the sample is found by the said Central Food Laboratory unfit for analysis due to decomposition by passage of time or for any other reason attributable to the lapses on the side of prosecution, that valuable right would stand denied. This would constitute prejudice to the accused entitling him to acquittal but mere delay as such will not per se be fatal to the prosecution case even in cases where the sample continues to remain fit for analysis in spite of the delay because the accused is in no way prejudiced on the merits of the case in respect of such delay. Therefore it must be shown that the delay has led to the denial of right conferred under Section 13(2) and that depends on the facts of each case and violation of the time-limit given in sub-rule (3) of Rule 7 by itself cannot be a ground for the prosecution case being thrown out."

8. Accordingly, the writ petition is devoid of merits and deserves no consideration. Accordingly, writ petition stands dismissed. However, there shall be no orders as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar (AS)

/True Copy/

Sub Assistant Registrar

To

1. The Deputy Registrar of Co-Operative Societies (Housing),
Virudhunagar Region,
Virudhunagar.
2. The Enquiry Officer,
Co-Operative Sub-Registrar (Housing),
Paramakudi,
Ramanthapuram District.

+1cc to M/S.D.Sadiq Raja, Advocate SR.No. 58876

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dsk