IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.12.2021

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THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.NO.14737 OF 2017

P.Rajamanickam ...Petitioner

-Vs-

1. The Secretary to Government,
   Co-operation, Food and Consumer
   Protection Department,
   Fort St.George, Chennai-9.

2. The Registrar of Co-operative
   Societies,
   No.170, N.V.N.Maligai,
   Kilpauk, Chennai-10. ...Respondents

Prayer:

Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Writ of Certiorarified Mandamus, calling for the records of the order in G.O.(2D).No.77 dated 30.08.2012 and consequential order in G.O.(3D).No.12 dated 31.08.2012 on the file of the 1st respondent, quash the same and direct the respondents to permit the petitioner to retire from service and pay all monetary benefits with 9% statutory interest from the date of superannuation till payment.

For Petitioner : Mr.M.Palaniswamy

For R1 : Mr.C.Selvaraj,
Additional Government Pleader

For R2 : Mr.S.Jayachandran,
Government Advocate

ORDER

With the consent of both the parties, this writ petition is taken up for final disposal.

2. The petitioner herein, while serving as a Deputy Registrar under the second respondent herein, was subjected to surcharge proceedings under Section 87 of the Tamil Nadu

Cooperative Societies Act, 1983 and an enquiry under Section 81 of the Tamil Nadu Cooperative Societies Act, 1983, as well as a disciplinary action.

3. Insofar as the surcharge proceedings are concerned, the same is now pending before this Court in C.M.A.(CS).No.4 of 2005 under Section 152 of the Act, pursuant to the orders of this Court passed in C.R.P.No.2749 of 2013. The disciplinary action initiated under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules, ended in favour of the petitioner and further action was dropped. In this background, on 30.08.2012, the first respondent herein had passed an order of suspension, by not permitting the petitioner to retire on his date of superannuation, i.e. 31.08.2012. Consequently, another order was passed on 31.08.2012, retaining him in service under Rule 56(1)(c) of the Fundamental Rules. These orders are under challenge in the present writ petition.

4. The learned counsel for the petitioner would submit that a mere pendency of the surcharge proceedings will not entitle the respondents to retain the petitioner in service and without permitting him to retire from service. In support of such a submission, the learned counsel placed reliance on a decision of the Hon'ble Full Bench of this Court in the case of S.Andiyannan Vs. The Joint Registrar, Co-operative Societies, Madurai and another reported in 2015 Writ L.R. 755, as well as a decision of the Hon'ble Division Bench of this Court in the case of The Management, V.T.742 Tiruvannamalai District Consumer Co-operative Wholesale Stores Ltd. Vs. R.Dhayalan and another passed in W.A.No.1395 of 2021, dated 25.08.2021.

5. This apart, the learned counsel would also submit that Rule 56(1)(c) of the Fundamental Rules entitles the Government to retain a person in service after the age of superannuation, whenever there are charges or enquiries in criminal proceedings and therefore, since the proceedings under Section 87 of the Act cannot not be deemed as a criminal proceeding, the action on the part of the respondents in placing reliance on Rule 56(1)(c), cannot be substantiated.

6. Per contra, the learned Additional Government Pleader appearing for the first respondent would place reliance on the averments made in the counter affidavit and submit that the surcharge proceedings and the disciplinary action are separate independent actions and even though the petitioner may have been exonerated from the departmental action, the loss that had occurred to the Government is yet to be recovered, which is the subject matter of the appeal under Section 152 of the Act and which is pending. In this background, the learned Additional Government Pleader would submit that there is no infirmity in

the action initiated by the respondents in placing the petitioner under suspension and not permitting him to retire.

7. Rule 56(1)(c) of the Fundamental Rules enables the Government to retain a Government servant in service, after the age of retirement, whenever charges of criminal misconduct or other grave charges are contemplated or is pending. The relevant rule is extracted hereunder for convenience.

> "Rule 56(1)(c) of Fundamental Rules provides that "Notwithstanding anything contained in Clause (a), a Government servant -
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> (i) who is already under suspension on a charge of misconduct; or
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> (ii) in respect of whom an order of suspension has been issued and against whom an enquiry into grave charges of criminal misconduct is pending; or
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> (iii) in respect of whom an order of suspension has been issued and against whom an enquiry into allegations of criminal misconduct is pending;
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> (iv) in respect of whom an order of suspension has been issued and an enquiry into grave charges is contemplated or is pending; or
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> (v) in respect of whom an order of suspension has been issued and a complaint of criminal offence is under investigation or trail shall not be permitted to retire on his reaching the date of retirement, but shall be retained in service until the enquiry is concluded and the final orders passed thereon."

8. While dealing with the scope of surcharge proceedings under Section 87 of the Act, the Hon'ble Full Bench in the case of S.Andiyannan's case (supra) had observed that such surcharge proceedings need not be penal in nature, in the following manner:-

> "28.So far as the second legal question is concerned, it is crystal clear that the object of Section 87 of the Act is only to recover the loss caused to any co-operative institution by an employee, if it is established as per procedure known to law.

Surcharge need not be penal in nature, if the loss caused by him is admitted by the employee or established by the authority against him, that could be recovered by the co-operative society. However, even surcharge proceedings cannot be initiated after the retirement of an employee to recover the same from his retiral benefits."

9. Likewise, in R.Dhayalan's case (supra), the claim of a Government employee for retirement benefits was considered favourably, when the decision of the surcharge proceeding came to be challenged by the Society. While holding that the respondents therein would not be justified in denying the retirement benefits to the petitioner therein, the Hon'ble Division Bench had placed reliance on another Division Bench order in the case of R.Murugesan Vs. The Joint Registrar of Coop. Societies, Thiruvannamalai Region, Thiruvannamalai passed in W.A.No.1856 of 2012 dated 23.03.2011, as well as the decision of the Hon'ble Full Bench in S.Andiyannan's case (supra). The relevant portion of the order of the Hon'ble Division Bench reads as follows:-

"6. Even prior to the Full Bench decision, a Division Bench of this Court in W.A.No.1856 of 2012, vide the judgment dated 23.03.2011 (R.Murugesan V. The Joint Registrar of Coop. Societies, Thiruvannamalai Region, Thiruvannamalai) held that the co~operative employee cannot be kept under suspension beyond the date of superannuation, in the absence of any provision under the Tamil Nadu Co~operative Societies Act or under the Bye~laws of the Societies. At this juncture, it is apt to reproduce paragraphs 6 and 7 of the judgment of the said Division Bench of this Court in the following manner :

"6. The core issue that arises for consideration in this writ appeal, is that in the absence of any rule, whether it is open to the first respondent to initiate and continue the disciplinary proceedings after attaining the age of superannuation. The said issue is no longer res integra, as it has been answered by a Division Bench of this Court reported in 2010 (2) CTC 569 (M.K.S.Balasubramanian vs. Kancheepuram Central Cooperative Bank Limited, rep. by its Special Officer). In the said judgment, the Division Bench, wherein one of us (NPVJ) is a member, has taken into consideration the judgments reported in 1999 (3) SCC 666 (Bhagsrathi Jena vs. Board of Directors, O.S.F.C., and others), 2006 (4) MLJ 504 (F.Muthusamy vs. Tamil Nadu Cements Corporation Ltd., 2007 (5) CTC 491 (N.Kunnai Gowder vs. The Coimbatore District Co~operative Milk Producers-- Union Ltd., 2008 (2) SCC 41 (U.P.State Sugar Cooperation Ltd., and Others vs. Kamal Swaroop Tondon) and also distinguished the judgment rendered by the Division Bench of this Court reported in 2010 (2) CTC 234 (Registrar of Co~operative Societies, Kilpauk, Chennai~10 and another vs. G.Manoharan) and held as follows:

"9. It is an admitted case of the respondent that the byelaw though provided for a right to continue the Bank to proceed with disciplinary proceedings after allowing the appellant to retire the said amendment is stayed by this Court and the said stay order is still in force. Hence, the said amendment cannot be relied on by the respondent to sustain the order retaining the power to proceed with Disciplinary Proceedings after permitting the appellant to retire.

10. In the decisions reported in 2008 (2) MLJ 585 and F. Muthusamy v. Tamil Nadu Cements Corporation Ltd., 2006 (4) MLJ 504, it is held that disciplinary proceedings cannot continue after retirement unless the service rules provides for such right to continue.

11. In the decision, reported in Bhagsrathi Jena v. Board of Directors, O.S.F.C., and others, 1999 (3) SCC 666, in a similar matter in para 7 it is held thus:

"In view of the absence of such a provision in the above said regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30.6.1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

12. Thus, the respondent is not justified in imposing the condition namely reserving its right to proceed disciplinary proceedings while allowing the appellant to retire from his service on 33. 2005. The direction given by the learned Single Judge to the respondent to retain the amount of Rs.2,69,933/~ from terminal benefits payable to the appellant is perfectly justified as the respondent can effect recovery of the loss sustained after initiating surcharge proceedings under Section 87 of Tamil Nadu Co~operative Societies Act, 1983, which is extracted hereunder:

"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 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 his 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:..."

The above provision empowers to proceed against a person whether he was an officer or a servant, either past or present and even if the person is dead recovery can be made from the legal heir of the said person if he inherited the property. In the decision reported in U.P. State Sugar Co~operation Ltd. and others v. Kamal Swaroop Tondon, 2008 (2) SCC 41, it is held that a retired employee could be proceeded to recover the loss caused by him and amount could be recovered from the retirement benefits. In para 40 it is held thus:

".....in our considered opinion, the High Court was wrong in holding that the proceedings were initiated after the respondent retired and there was no power, authority or jurisdiction with the Corporation to take any action against the writ petitioner and in setting aside the orders passed against him. In our judgment, proceedings could have been taken for the recovery of financial loss suffered by the Corporation due to negligence and carelessness attributable to the respondent employee. The impugned action, therefore, cannot be said to be illegal or without jurisdiction and the High Court was net right in quashing the proceedings as also the orders issued by the Corporation. The Appeal, therefore, deserves to be allowed by setting aside the order of the High Court."

Ultimately, the Division Bench has modified the order passed by the learned Single Judge, by holding that the condition to continue the disciplinary proceedings after retirement against the appellant therein is unsustainable and granting liberty to the respondent to proceed with the surcharge proceedings under Section 87 of the Tamil Nadu Co~operative Societies Act, 1983 for the alleged loss."

7. In yet another judgment of this Court made in W.P.No.27170 of 2011, dated 29.11.2013, wherein one of us (NPVJ) is a member, a similar issue was considered in the light of the decision reported in 2012 (3) CTC 488 (P.Thangavel vs. The Chairman, Common Cadre Committee/Joint Registrar of Co~operative Societies), and M.K.S.Balasubramanian-s case was also considered and all other decisions on that legal point, have been submitted and this Court held that the Co~operative employee cannot be kept under suspension beyond the date of superannuation, as there is no provision either under the Tamil Nadu Co~operative Societies Act or under the bye~laws and granted liberty to initiate surcharge proceedings for the alleged loss."

7. The writ Court has allowed the writ petition on the ground that in the absence of rule or as per the dictum laid down by the Full Bench in S.Andiyannan's case (cited supra), the disciplinary proceedings cannot be continued against a person, who had retired, however serious, the act of misconduct committed by the employee of the Society.

8. The contention of the learned counsel for the appellant is that the Writ Court had not distinguished the disciplinary proceedings and the surcharge proceedings. In the instant case, the surcharge proceedings had concluded, as no appeal was filed by the employee and it has reached finality. It is the argument of the learned counsel for the appellant that if the first respondent/ employee is allowed to retire, it will be difficult for the Society to recover the amount from him, as the retiral benefits have to be disbursed to him.

> 9. As the employee, the first respondent is entitled for the retiral benefits after his retirement and even the Gratuity of an employee cannot be treated as a charge and it is for the service rendered by him. Therefore, the statutes are conscious of the fact that the Provident Fund and the Gratuity Fund cannot be attached or be subject to any other process of any court or other authority, which is made clear under Sections 78 and 79 of the Tamil Nadu Co~operative Societies Act. Therefore, we see no reason to interfere with the order of the learned Single Judge.
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> 10. At this stage, it is pertinent to state that Section 87 of the Tamil Nadu Co~operative Societies Act, which deals with the surcharge proceedings, itself provides for recovery of the quantified amount from the employee by invoking the Tamil Nadu Revenue Recovery Act, 1864 treating the same as an arrear of land revenue. Therefore, there is no merit in the argument of the appellant stating that if the retirement benefits are disbursed to the respondent, it would be difficult for them to recover the amount."

10. A perusal of the aforesaid decisions, in the light of the Fundamental Rule 56(1)(c), would reveal that the Government would not be entitled to keep a Government servant under suspension, without permitting him to retire, on the ground that the surcharge proceedings are pending. As a matter of fact, the Fundamental Rule 56(1)(c) would apply only to cases where there are charges of misconduct or grave charges or criminal misconduct is pending or is contemplated or a complaint of criminal investigation is under trial. These exemptions under the Fundamental Rule 56(1)(c) will not include the surcharge proceedings and in the light of the decisions cited above, I am of the view that a mere pendency of the surcharge proceedings would not entitle the Government to place their employees under suspension, on the ground that the surcharge proceedings under Section 87 of the Act are pending.

11. It would be appropriate to mention here that the payment of gratuity is an entitlement of the Government employee and in

the absence of any specific rules or regulations to withhold it on the ground that, the surcharge proceedings are pending for recovery of the alleged loss to the Government, there is absolutely no justification in the action initiated by the respondent herein.

12. The Hon'ble Division Bench of this Court in the case of The Joint Registrar of Co-operative Societies, Namakkal and others Vs. K.Ambarayan and another passed in W.A.Nos.663 and 668 of 2015 dated 11.04.2018, had ratified this proposition in the following manner:-

> "8.The employee must be in a position to enjoy the benefits consequent to his retirement. The payment of gratuity is not a matter of charity. It is the entitlement of the employee to receive the gratuity. There should be a valid reason to detain the payment of statutory benefits. We are therefore of the view that the appellants were not justified in keeping the benefits under the pretext that surcharge proceedings were pending. We therefore confirm the order passed by the learned single Judge."

13. For all the foregoing reasons, I do not find any legality in the impugned orders passed by the first respondent herein and accordingly, the orders dated 30.08.2012 and 31.08.2012 on the file of the first respondent are quashed. Consequently, there shall be a direction to the first respondent herein to pass orders, permitting the petitioner to retire from his service and pay him all the Death-cum-Retirement benefits, as expeditiously as possible, in any event, within a period of four weeks from the date of receipt of a copy of this order.

14. The Writ Petition stands allowed, accordingly. No costs.

Sd/-
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

hvk

To

1. The Secretary to Government,
   Co-operation, Food and Consumer
   Protection Department,
   Fort St.George, Chennai-9.

2. The Registrar of Co-operative Societies,
   No.170, N.V.N.Maligai,
   Kilpauk, Chennai-10.

+2ccs to Mr.M.Palaniswamy, Advocate, S.R.No.67407
+1cc to the Government Pleader, S.R.No.67900

W.P.No.14737 of 2017

RGN(CO)
PM/14/02/2022