



W.P.No.28997 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	23.02.2023
Pronounced on	15.03.2023

CORAM

THE HONOURABLE MR.JUSTICE M.S.RAMESH

W.P.No.28997 of 2018

S.Senbagavalli

... Petitioner

Vs.

1.The Registrar of Co-operative Societies,
Poonthamallee High Road,
Kilpauk, Chennai-600 010.

2.The Joint Registrar of Co-operative Societies,
Dharmapuri Region,
Collectorate Complex,
Dharmapuri.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, praying to issue a Certiorarified Mandamus, calling for the records relating to the memo Na.Ka.740/2013 Pa Tho (2) dated 19.07.2017 of the second respondent, quash the same and consequently, direct the second respondent to release the gratuity amount standing to the credit of the petitioner's deceased husband to the petitioner, without any further delay.

For Petitioner : Mr.S.Venkataraman

For Respondents : Mr.D.Gopal, GA



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ORDER

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Challenging the order of the second respondent, dated 19.07.2017, the present Writ Petition has been filed by the petitioner, who is the wife of the deceased employee Subramanian.

2. Heard Mr.S.Venkataraman, learned counsel for the petitioner and Mr.D.Gopal, learned Government Advocate appearing on behalf of the respondents.

3. The petitioner's husband, namely, Late Subramanian (hereinafter referred to Late employee) was subjected to surcharge proceedings on the allegations that he along with the President and other Board of Directors had caused loss to the assets of the Society, while he was serving as a Co-operative Sub Registrar / Managing Director in Uthangarai Agricultural Producers Co-operative Marketing Society for the period between 01.12.1996 to 05.04.1998. A surcharge order dated 07.06.2004 was passed, holding the late employee and other liable for the loss amount of Rs.22,64,379/-, together with interest of Rs.21,62,078/- upto 31.03.2002, totalling to Rs.44,26,457/-, with further interest at 21%. The surcharge order was set aside on 'appeal' by the Special Tribunal for Co-operative Cases



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(Tribunal) on 04.10.2012 and on revision, the Madras High Court had remitted back the matter to the Tribunal for reconsideration. Thus, the matter is now pending before the Tribunal. The late employee was permitted to retire from the Government service with effect from 31.05.2008 on attaining the age of superannuation, without prejudice to the surcharge order and to the out come of the enquiry under Section 81 of the Tamil Nadu Co-operative Societies Act, 1983. The petitioner's husband died on 27.03.2015.

4. In this background, the second respondent herein had issued the impugned order dated 19.07.2017, sanctioning the General Provident Fund Accumulation, Encashment of earned and unearned leave on private affairs and Special Provident Fund to the petitioner. However, the provisional pension that was being paid was stopped and the family pension proposal was also not forwarded to the Accountant General.

5. The main issue that arises for consideration in this case, is with regard to the right of the Society to continue the proceedings under Section 87 of the Act against a retired employee.



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6. When a reference was made to a Larger Bench of Three Judges in the case of ***S. Andiyannan Vs. The Joint Registrar, Co-operative Societies, Madurai & another*** reported in **2015 (3) LW 513** with regard to the aforesaid issue, the Hon'ble Full Bench had held that surcharge proceedings under Section 87 of the Act, cannot be continued after the retirement of any employee, in the absence of any enabling provision in the relevant Service Rules or Bye-Laws of the Society. Such a finding was rendered in the following manner:-

"27. A bare reading of the said Section would show that it relates to recovery of the amount from any employee or any other person who has caused financial loss to the co-operative society. It is not in dispute that the term "surcharge" need not necessarily related to punishment being imposed on the employee. As contended by the learned counsel appearing for the petitioners, the scope of Section 87 of the Act pertaining to surcharge is to recover the amount from the person, who caused loss to the co-operative society. In the light of the decisions rendered by the Hon'ble Apex Court, it is clear that Section 87 of the Act could not be construed as an enabling provision to the authorities to continue or extent the departmental proceeding



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after the retirement of an employee. It is well settled in various decisions of the Hon'ble Supreme Court that if the loss caused by any employee is established, in the manner known to law, the employer/co-operative society can recover the amount, by way of surcharge with or without interest, however, surcharge proceeding cannot be initiated against any retired employee.

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.*

29. *The first legal question referred to this Bench is whether the disciplinary proceedings initiated against an employee of a co-operative society governed by the Tamil Nadu Co-operative Societies Act can be continued even after the retirement of the said employee. The decisions relied on by both the learned counsel have*



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categorically make it clear that the legal position is that the authority could continue the departmental enquiry against retired employee, only subject to applicable statutory Rules or bye-law, which govern the terms and conditions of his service of the employee. Hence, the relevant Rules governing the service conditions of the employee is the determining factor as to whether and in what manner a domestic enquiry can be continued against an employee, who retired after reaching the age of superannuation. Hence, had there been any enquiry initiated while the delinquent employee was in service, it could be continued even after his retirement, subject to the service Rules or bye-law of the co-operative society. If the service Rules relating to the employee permits for continuation, there would be no bar in continuing the departmental proceeding, that was initiated while he was in service, even after his retirement. It is also categorically held by the Hon'ble Supreme Court in the latest decisions, that in such circumstances, even if the guilt is proved, there is no possibility of imposing punishment of dismissal or removal from service, as the same is not legally sustainable.

30. Answer to the first question referred to this Bench : Under the Tamil Nadu Co-operative



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Societies Act, 1983, once an employee retired from service, there could be no authority vested with the employer for continuing any disciplinary proceeding, in the absence of relevant service Rules permitting the employer to continue the disciplinary proceeding. In other words, if there is no service Rules or bye-law of the society empowering the employer to continue the departmental proceeding, the employer, would have no authority to continue the departmental proceeding after the retirement of the employee.

31. Answer to the second question referred to this Bench:

As contemplated under Section 87 of the Tamil Nadu Co-operative Societies Act, 1983, the term 'surcharge' is not penal in nature, hence if there is admission with regard to the loss caused by the employee or the same is established by the co-operative institution, based on the proceeding already initiated for surcharge, the same could be recovered in the manner known to law. However, the provision relating to surcharge under Section 87 of the Act is not impliedly empowering the disciplinary authority to continue any disciplinary proceeding against an employee, who retired from service, in the absence of any Service Rules or Bye-law. Hence, Section 87 of the said Act cannot be construed



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as an enabling provision or impliedly empowering provision to the employer to continue any disciplinary proceeding after the retirement of any employee, in the absence of any Service Rules.”

7. The aforesaid extracts are self explanatory. Thus, when the late employee had reached the age of superannuation on 31.05.2008 and was permitted to retire from services, without prejudice to the surcharge proceedings, the continuance of the proceedings against a retired employee, who is also no more, is impermissible, by applying the ratio laid down by the Hon'ble Full Bench in the case of *S.Andiyannan (supra)*

8. This apart, the gratuity amount payable to the legal heirs of the late employee, which alone has been withheld by the respondents, cannot be attached in view of Section 13 of the Payment of Gratuity Act, 1972. Section 13 of the PG Act reads as follows:-

Section 13:- Protection of gratuity.—*No gratuity payable under this Act [and no gratuity payable to an employee employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop exempted under section 5] shall be liable to attachment in*



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*execution of any decree or order of any civil,
revenue or criminal court.*

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9. After the death of the late employee, the gratuity amount payable to his legal heirs have been withheld, in view of the pending surcharge proceedings. By virtue of the protection guaranteed under Section 13 of the PG Act, the respondents may not be in a position to lay their hands on the gratuity amount payable to the legal heirs, even assuming that the surcharge proceedings goes against the late employee.

10. There is yet another aspect of the matter. The Hon'ble Supreme Court in the case of ***State of Punjab Vs. Rafiq Masih (White Washer)*** reported in ***(2015) 4 SCC 334***, has categorically held that recovery from employees, particularly, when the mistake of excess payment was on the part of the employer, is impermissible in law. The relevant portion of the order reads as follows:-

"18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein



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recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

11. In view of the aforesaid law laid down by the Hon'ble Supreme Court, the respondents will not be in a position to recover the alleged loss from the legal heirs of the late employee, who was



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permitted to retire from service.

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12. For all the foregoing reasons, the order of the second respondent, with regard to stoppage of provisional pension and gratuity amount to the petitioner herein, cannot be sustained and accordingly, the impugned order of the second respondent dated 19.07.2017, is quashed to the limited extent of denying the monetary benefits to the petitioner. Consequently, there shall be a direction to the respondents herein to forthwith pass orders, releasing the gratuity amount standing to the credit of the Late employee namely, Subramanian, to the petitioner herein, together with pensionary benefits, including the family pension, if any, within a period of two weeks from the date of receipt of a copy of this order. Accordingly, the Writ Petition stands allowed. There shall be no order as to costs.

15.03.2023

Index : Yes
Order : Speaking
Neutral Citation : Yes

DP

Note:Issue order copy on 17.03.2023



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To

- 1.The Registrar of Co-operative Societies,
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- 2.The Joint Registrar of Co-operative Societies,
Dharmapuri Region,
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M.S.RAMESH,J.

DP

ORDER MADE IN

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