BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 25.09.2023

PRONOUNCED ON : 03.11.2023

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

W.P.(MD)No.17308 of 2023
and
W.M.P.(MD)No.14495 of 2023

P.K.Selvaraj ... Petitioner

Vs.

1.The Managing Director,
The Tamil Nadu Cooperative Milk
Producers Federation Ltd.,
Aavin Illam,
Madhavaram Milk Colony,
Chennai.

2.The General Manager/District Revenue Officer,
A1301 Madrai District Milk Producers
Cooperative Union Ltd.,
Aavin Campus,
Sathamangalam,
Madurai District. ... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorarified Mandamus, calling for the records pertaining to the impugned order issued by the second respondent in Na.Ka.No.3234/Pa.Ku.4/2022 dated 31.05.2022 and quash the same in so far as conditional retirement I.e. Allowing the petitioner to retire from service without prejudice to pending disciplinary proceedings in Na.Ka.No. 2062/Tho.U/2020 dated 21.05.2020 and consequently directing the respondents to pay the retirement benefits such as provident fund Gratuity and encashment of earned leave and other monetary benefits more fully regular pension within the time stipulated by this Court.

For Petitioner : Mr.C.Jeganathan
For RR 1 & 2 : Mr.J.Deva Senan, Standing Counsel

ORDER

The prayer in the writ petition reads as follows:-

The Writ petition has been filed for issuance of a Writ of Certiorarified Mandamus, to quash the impugned order issued by the second respondent in Na.Ka.No.3234/Pa.Ku.4/2022 dated 31.05.2022 and conditional retirement i.e., allowing the petitioner to retire from service without prejudice to pending disciplinary proceedings in Na.Ka.No.2062/Tho.U/2020 dated 21.05.2020 and to direct the respondents to pay the retirement benefits such as provident fund Gratuity and encashment of earned leave and other monetary benefits more fully regular pension.

2.Heard Mr.C.Jeganathan, learned counsel for the petitioner, Mr.J.Deva Senan, learned Standing counsel appearing for the respondents 1 and 2 and perused the entire materials available on record.

The case of the petitioner is as follows:-

3.The petitioner was appointed as basic servant in the year 1981 in the second respondent office through the employment exchange and subsequently, he was promoted as a Technician and on 31.05.2022, on attaining the age of superannuation, he was allowed to retire from service on condition as to without prejudice to the surcharge proceedings initiated against him by the competent authority. The second respondent is a separate entity registered under the Tamil Nadu Cooperative Societies Act and the same has separate bylaws and service rules for its employees. The employees working in the second respondent Society had decided to register the Cooperative Credit Society for availing loan facilities and the same was registered under the Tamil Nadu Cooperative Societies Act in the name and style of "A3101 Madurai Milk Producers Employees Cooperative Thrift and Credit Society Limited" and herein after mentioned as "Employees Credit Society". The said Society has separate bylaws and rules for its functioning and other activities under the direct control of the Deputy Registrar of

Cooperative Societies, Madurai. The employees of the Employees Credit Society are in no way connected with the affairs of the second respondent Society and both are independent and separate from each other in its administration and functions. The petitioner was elected as the Director of Employees Credit Society for the period from 2013 to 2018.

4.Certain misappropriation in Employees Credit Society was brought to the notice of the Deputy Registrar of Cooperative Societies, Madurai. The Deputy Registrar of Cooperative Societies initiated statutory proceedings under Section 81 of the Tamil Nadu Cooperative Societies Act, 1983, to conduct an enquiry in the Employees Credit Society. For the conduct of the statutory enquiry, an enquiry Officer was appointed and he conducted an elaborate enquiry and submitted a report before the Deputy Registrar, Madurai on 10.01.2020, wherein it was concluded that a huge sum of misappropriation has been committed by the employees of the Employees Credit Society to a tune of Rs.7,92,41,676/-. On the basis of the recommendation of the Enquiry Officer to take disciplinary action and surcharge proceedings against the petitioner and others, the Deputy Registrar of Madurai issued a show case notice under Section 87 of the Tamil Nadu Cooperative Societies Act to the petitioner. However the

Enquiry Officer did not recommend for any criminal action against the petitioner. The petitioner submitted a detailed explanation pleading that he had functioned only in the capacity of the Director of the said Employees Credit Society and he has nothing to do with the alleged misappropriation in the said Society. However, without considering the explanation made by the petitioner alleging that from the capacity of the Director, he did not act to prevent the alleged misappropriation in the said Credit Society, the surcharge order was passed on 18.02.2021 against the petitioner by the Deputy Registrar, Madurai holding that the petitioner was jointly and severally responsible for misappropriation of Rs.7,92,41,676/-.

5.Assailing the same, the petitioner had preferred a statutory appeal in C.M.A.C.S.No.38 of 2021 before the Cooperative Tribunal and the same is pending. In addition to that, the second respondent issued a charge memo on the findings of the Enquiry Officer under Section 81 of the Tamil Nadu Cooperative Societies Act, 1983 on 21.05.2020 and the same was challenged before this Court in W.P.(MD)No.16543 of 2021 and this Court was pleased to dispose of the same granting liberty to the petitioner to file a revision petition before the competent authority under Section 153 of the Tamil Nadu Cooperative Societies Act. Subsequently, based on the said charge memo, a domestic enquiry Officer was appointed. Enquiry was conducted and the same was concluded by filing of the report by the Enquiry Officer on 14.12.2021. However, till date, the respondents have not passed any final order and the same is pending with the second respondent. It is only under such background, the petitioner was allowed to retire from service on 31.05.2022 by the second respondent vide impugned proceedings dated 31.05.2022 on attaining superannuation without prejudice to the pending disciplinary proceedings. Assailing the said conditional order of retirement, this writ petition came to be filed.

6.Per contra the second respondent has filed a counter affidavit and the learned Standing counsel for the respondents submitted that for the persons against whom grave charges are pending, retirement benefits would be settled only after the charges are disposed of. The writ petitioner has caused huge loss to the Employees Credit Society and in the aforesaid circumstances, if the retirement benefits are released, the writ petitioner will escape from the monetarily liability to the Employees Credit Society, which is also a part of the second respondent Union even though the Management is different. He categorically submitted that the employees of the second respondent Union are the members and depositors in the Employees Credit

Society and hence, the misappropriation committed by the petitioner and others in the Employees Credit Society will have serious implications in the second respondent Union as well. That apart as per bylaw of the second respondent Society under conduct, discipline and appeal, Rule 14 gives authority to the second respondent Union to proceed with a departmental enquiry even after retirement and the same mandates in case of disciplinary proceedings pending post the retirement, the terminal benefits would be settled only after the conclusion of disciplinary proceedings. On that basis, he pressed for dismissal of the writ petition.

Analysis:-

7.Having heard the rival contentions made by both the parties and having perused the materials available on record, now the point to be decided is as to whether the conditional retirement allowing the petitioner to retire from service without prejudice to the pending disciplinary proceedings is sustainable ?

8.The Hon'ble Full Bench of this Court in the case of ***S.Andiannan v The Joint Registrar and another*** reported in ***2015 (4) CTC 1***, while dealing with the case of disciplinary proceedings after retirement of a cooperative

Society employee have passed favourable order and the relevant portion of the case is extracted as follows:-

"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 Cooperative 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 Cooperative 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 Department proceeding 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 an Employee is established, in the manner known to law, the Employer/Cooperative 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 Cooperative 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 Cooperative 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 cooperative Society governed by the Tamil Nadu Cooperative Societies Act can be continued even after the retirement of the said Employee. The decisions relied on by both the learned counsel have 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 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-laws of the Cooperative 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 the 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 Cooperative 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 Cooperative 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 cooperative 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 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."*

9.Yet another order passed by this Court in the case of ***D.Immanvel v. The Joint Registrar of Co-operative Societies and others in W.P.(MD)No. 13895 of 2017*** in similar lines is extracted is as follows:-

" 4.The issue on hand is squarely covered by the said decision. In the said decision it was held that disciplinary action proceedings cannot be continued against an employee of the Co-operative Society in the absence of service rules enabling the disciplinary authority to continue the disciplinary proceedings even after retirement. In the present case, till date the charge memo has not been issued. It has not been shown as to whether the special bye-laws or service rules enable the management to continue such proceedings."

10.However the learned counsel for the second respondent categorically submitted that bylaw 14 of the second respondent Union provides for continuation of disciplinary proceedings even after retirement and the relevant portion are extracted as follows:-

> *"For persons against whom grave charges are pending, retirement benefits will be settled after the charges are disposed of. In cases where an individual continues to be under suspension due to pendency of disciplinary proceedings after attaining the age of superannuation, he/she shall continue to draw the subsistence allowance subject to a minimum pension he is entitled to receive, if he/she is allowed to retire normally."*

11.On the basis of bylaw 14, the learned counsel for the second respondent vehemently submitted that in the presence of bylaw empowering the employer to continue the departmental proceedings against the employee even after the retirement, the disciplinary proceedings initiated against the petitioner is legally sustainable and hence, there is no legal bar on the part of the second respondent for having passed the impugned order of conditional retirement permitting him to retire without prejudice to the pending disciplinary proceedings and hence, need not be interfered.

12.Now as per the facts and circumstances of the case, it is now necessary to extract Sections 87(1) to 87(4) of Tamil Nadu Cooperative 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 willful negligence or has made any payment which is not in accordance with this Act, the rules or the by – laws, 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 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 to the assets of the society by way of compensation in respect of the misappropriation, misapplication of funds, fraudulent retainer,

breach of trust or willful negligence or payments which are not in accordance with this Act, the rules or the by–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.

(2) Without prejudice to any other mode of recovery which is being taken or may be taken under this Act or any other law for the time being in force, any sum ordered under this section to be repaid to a registered society or recovered as a contribution to its assets may be recovered as if it were an arrear of land revenue and for the purpose of such recovery the Registrar shall have the powers of a Collector under the Tamil Nadu Revenue Recovery Act, 1864 (Tamil Nadu Act II of 1864).

(3) This section shall apply notwithstanding that such person or officer or servant may have incurred criminal liability by this act.

(4) The Registrar or the person authorised by him shall, when acting under this section, have all the powers of a Civil Court while trying a suit under the Code of Civil Procedure,

1908 (Central Act V of 1908) in respect of the following matters, namely:-

(a) summoning and enforcing the attendance of any person and examining 59 him on oath;

(b) requiring the discovery and production of any documents;

(c) reception of evidence on affidavits;

(d) requisitioning any public record from any court or office,

(e) issuing commission for examining of witnesses."

13.A bare reading of the said Sections would show that it relates to recovery of amount from any employee or any other person who has caused financial loss to the cooperative Society and hence, the terms surcharge necessarily cannot be related to the punishment being imposed on the employee. Hence, it is clear that Section 87 of the Tamil Nadu Cooperative Societies Act could not be construed as an enabling provision to the authorities to continue or extent the departmental proceedings after the retirement of an employee. It is well settled in various decisions of the Hon'ble Apex Court that if any loss caused by any employee is established in the manner know to law, the employer can recover the amount by way of surcharge with or without interest, however, surcharge proceedings cannot be initiated against any retired employee. Though in this case, the surcharge proceedings has been commenced even before the retirement of the petitioner and the same culminated in passing of surcharge order on 18.02.2021. The statutory appeal preferred by the petitioner as against the surcharge order dated 18.02.2021, in C.M.A.C.S.No.38 of 2021 is pending before the learned Cooperate Tribunal.

14.That apart it is already a settled proposition of law that the object of Section 87 of Tamil Nadu Cooperative Societies Act is only to recover the loss caused to the Cooperative Society by an employee, if the same is established as per procedure known to law. Hence, surcharge proceedings cannot be penal in nature and any loss caused by the employee could be recovered by the Cooperative Society in terms of Section 87(2) of Tamil Nadu Cooperative Societies Act, 1983 and the same cannot be recovered from the retiral benefits of the employee. In the instant case, the parallel surcharge proceedings and disciplinary proceedings have been initiated as against the petitioner for the same set of facts. Though the surcharge proceedings has been concluded vide order dated 18.02.2021 despite the Enquiry Officer concluding his enquiry in departmental proceedings by filing a report on 14.12.2021 before the second respondent, so far the second respondent has not come forward to pass final order in the disciplinary proceedings. However, the petitioner was permitted to retire vide impugned order proceedings dated 31.05.2022 without prejudice to the pending disciplinary proceedings.

15.Having permitted the petitioner to retire from service taking into account that the disciplinary proceedings and surcharge proceedings have proceeded for the same set of facts. Necessarily the mode of recovery if any, which is intended to be initiated as against the petitioner by the second respondent could be only in accordance with procedure contemplated under Section 87 of the Tamil Nadu Cooperative Societies Act, 1983.

16.In view of the same, this Court hereby quashes the impugned conditional order of retirement vide proceedings of the second respondent in Na.Ka.No.3234/Pa.ku.4/2022 dated 31.05.2022 and thereafter, direct the second respondent to allow the petitioner to retire from service unconditionally and consequentially, the respondents are directed to pay the retirement benefits and other monetary benefits to the petitioner to which the petitioner is entitled to within a period of 12 weeks from the date of receipt of copy of this order. However, the respondents are permitted to conclude the disciplinary proceedings and surcharge proceedings in terms of Section 87 of the Tamil Nadu Cooperative Societies Act, 1983 and recovery under surcharge cannot be made from the retirement benefits of the employee.

17.Though the learned Standing Counsel for the respondents relying on bylaw of Section 14 of the second respondent Union submitted that the second respondent has the authority to proceed with the disciplinary proceedings even after retirement, this Court is of the considered opinion that whenever there is a conflict between the governing act and the bylaws of the employer in dealing with the disciplinary proceedings, to be more specific in this case, when there is conflict between the provision of Section 87 of Tamil Nadu Cooperative Societies Act, 1983 and bylaw 14 of the second respondent Union, the provisions of the Act would supersede the bylaws.

18.Accordingly, the Writ Petition stand allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

03.11.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes
Mrn

To

1.The Principal Secretary to Government,
State of Tamil Nadu,
Commercial Tax and Registration (K) Department,
Fort St. George,
Chennai – 600 009.

2.The Inspector General of Registration,
Office of the Inspector General of Registration,
Chennai – 28.

L.VICTORIA GOWRI, J.

Mrn

W.P.(MD)No.17308 of 2023

03.11.2023