BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 19.07.2024

CORAM

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA
AND
THE HONOURABLE MR.JUSTICE K.RAJASEKAR

W.A.(MD).No.884 of 2018
and
C.M.P.(MD).No.5580 of 2018

1.The Deputy Registrar
of Cooperative Societies,
Madurai Region, Madurai,
No.41-42 Krishnarayar Tank Street,
Old R.D.C.C. Bank Buildings,
Madurai – 625 001.

2.The Enquiry Officer/
Cooperative Sub Registrar,
A 294 Madurai Cum Ramnad
District Public Servants Cooperative
Credit Society,
Madurai. ... Appellants/Respondents

Vs.

P.Periyasamy ... Respondent/Writ Petitioner

PRAYER: Writ Appeal filed under Clause 15 of Letters Patent Act, praying to set aside the order dated 21.07.2017 made in W.P.(MD).No.12784 of 2017 and allow the Writ Appeal.

For Appellants : Mr.M.Senthil Ayyanar
Government Advocate
For Respondent : Mr.M.Saravanakumar

JUDGMENT

(Judgment of the Court was made by K.RAJASEKAR,J.)

This Intra-Court appeal has been filed by the respondents in the Writ Petition challenging the order passed in W.P.(MD).No.12784 of 2017 dated 21.07.2017, wherein, the learned Single Judge has quashed the impugned surcharge notice issued against the writ petitioner in Na.Ka.No.4074/2016 Sa.Pa.(1) dated 28.03.2017.

2. The case of the writ petitioner is that he joined as Clerk in the Madurai District Central Co-operative Bank on 19.03.1975 and after serving several posts, he was allowed to retire as Assistant Accountant on attaining the age of superannuation on 02.09.2012. After the retirement, the surcharge proceedings under Section 87 of the Tamil Nadu Co-operative Societies Act (hereinafter referred to as 'Act'), was initiated against the writ petitioner by issuing show cause notice dated 28.03.2017, which is challenged in the Writ Petition.

3. According to the writ petitioner, he retired in the year 2012 and the surcharge notice was issued under Section 87 of the Act after his retirement. Since this proceedings have been initiated after his retirement, the same is bad in law as per the judgment of the Full Bench of this Court in ***S.Andiyannan Vs. The Joint Registrar, Co-operative Societies, Madurai Region, Madurai and another*** reported in ***2015 Writ L.R. 755.*** It is also submitted that the proceedings were initiated beyond the limitation period prescribed under Section 87 of the Act and there is no wilful negligence on the part of the writ petitioner to initiate proceedings against him and on these grounds also, the impugned show cause notice is liable to be set aside.

4. The Writ Court accepted the arguments advanced by the writ petitioner and the Writ Petition was allowed by holding that the show cause notice issued to the retired employee is not valid.

5. Aggrieved over the order of the learned Single Judge, the respondents, who are the officials under the Co-operative Societies Act, have filed this Writ Appeal on the ground that Section 87 of the Act is only a surcharge proceedings and it shall not be equated with the disciplinary proceedings initiated by the disciplinary authority. Section 87 of the Act

provides powers for initiating proceedings against the persons who have caused loss to the Society by their action, omission etc. and delay in initiation of the proceedings is not a ground to quash the entire proceedings.

6. The learned Government Advocate appearing for the appellants submits that the judgment of the Full Bench of this Court cited supra is not applicable to the case of the writ petitioner and the question of law answered by the Full Bench is not with regard to the powers of the competent authority to initiate proceedings under Section 87 of the Act. He would further submit that the limitation period prescribed under Section 87 is not mandatory and prays to set aside the order of the learned Single Judge.

7. The learned counsel for the respondent/writ petitioner submits that the judgment of the Full Bench of this Court cited supra has categorically held that the surcharge proceedings under Section 87 of the Act shall not be invoked against the retired employees. Section 87 prescribes the limitation period of seven years, whereas, in the present case, the surcharge proceedings have been initiated after the limitation period ends. Hence, the

show cause notice is bad in law. The learned counsel would further submit that there is no dereliction of duty or wilful negligence committed by the writ petitioner and thereby, the initiation of surcharge proceedings is not sustainable.

8. We have heard the submissions made on both sides and perused the materials available on record.

9. The Full Bench of this Court in ***S.Andiyannan Vs. The Joint Registrar, Co-operative Societies, Madurai Region, Madurai and another*** reported in ***2015 Writ L.R. 755*** has considered the two questions with regard to the reference made before the Full Bench and the relevant paragraphs are extracted hereunder:

> *"**4.** The first question of the Reference relates to the disciplinary proceeding being initiated against employees of any co-operative society, governed by the Tamil Nadu Co-operative Societies Act, 1983 and this Bench has been asked to consider and answer, whether the disciplinary proceeding initiated against an employee of a co-operative society could be continued even after the retirement of the employee. The second question of law relates to the scope of Section 87 of the*

Tamil Nadu Co-operative Societies Act, 1983 to decide whether it could be considered as an enabling provision, impliedly empowering the disciplinary authority to continue the disciplinary proceeding. In other words, the question is to decide whether the disciplinary authority is impliedly empowered to continue the disciplinary proceeding even after the retirement of any employee of a co-operative society, in view of Section 87 of the Tamil Nadu Co-operative Societies Act, 1983, on the ground that it is an enabling provision."

Further, it is observed 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 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 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/cooperative society can recover the amount, by way of surcharge with or without interest, however, surcharge proceedings 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.*

....

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."*

10. A bare reading of the paragraphs 27 and 28 would show that the Full Bench has taken the view that the surcharge proceedings is not a punishment being imposed on the employee. The purpose of Section 87 is for recovering the amount from the person, who caused loss to the Co-operative Society. The Full Court has relied on the judgment of the Hon'ble Apex Court in ***Dev Prakash Tewari Vs. U.P. Coop. Institutional Service Board*** reported in ***(2014) 7 SCC 260***, wherein, it has been held that no authority is vested with the employer to continue the disciplinary proceeding against an employee after his retirement from service, even for the purpose of imposing any reduction in retiral benefits payable to the employee, in the absence of Service Rules enabling the authority to continue the same.

11. The issue involved in this Writ Appeal is whether the surcharge proceedings could be initiated against the retired employee of the Society. Section 87 of the Co-operative Societies Act reads as follows:

> ***"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, either on his own or in connivance with any other person, has misappropriated or fraudulently retained or transferred 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 negligence or has made any payment which is not in accordance with this Act, rules or 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 or such other person and after giving a reasonable opportunity to the person concerned and in the case of his demise, to his representative who inherits his estate or a person who holds 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 retention or transfer of money or other property, breach of trust or negligence or payments which are not in accordance with this Act, rules or 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 detection 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 arrears 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 his 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 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."

12. The Full Bench has considered the question whether Section 87 of the Co-operative Societies Act shall be construed as an enabling provision, impliedly empowering the disciplinary authority to continue the disciplinary proceedings even after the retirement of any employee and answered that no such disciplinary proceedings after the retirement of any employee in the absence of any Service Rules is permitted. However, in paragraphs 27 and

28, it is observed that it is well settled that 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/cooperative society can recover the amount, by way of surcharge with or without interest, however, surcharge proceedings cannot be initiated against any retired employee to recover the same from his retiral benefits. This observation would only mean that the surcharge proceedings cannot be initiated for the purpose of making recovery from the retirement benefits of the employee. It does not mean that no surcharge proceedings shall be initiated against the retired employees. The Full Bench has interpreted Section 87 of the Act only to find out whether Section 87 enables the employer/Co-operative Society to initiate disciplinary proceedings against the retiring employees or not.

13. In ***U.P. State Sugar Corpn. Ltd. v. Kamal Swaroop Tondon,*** reported in ***(2008) 2 SCC 41***, the Hon'ble Apex Court, while deciding the issue of initiation of recovery proceedings, even after an employee is retired, for the loss caused to a Corporation, in concluding paragraph 40, has held as follows:

*“**40.** Considering the facts and circumstances in their entirety, 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 not 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.”*

Further, the Apex Court had relied on its own judgment in ***Calcutta Insurance Limited Vs. Workmen*** reported in ***(1967) 2 SCR 596*** in paragraph 13 and held as follows:

*"**18.** The Court then said:*

“13. In principle, it is difficult to concur in the above opinion. Gratuity cannot be put on the same level as wages. We are inclined to think that it is paid to a workman to ensure good conduct throughout the period he serves the employer. ‘Long and meritorious service’ must mean long and unbroken period of service meritorious to the end. As the period of service must

be unbroken, so must the continuity of meritorious service be a condition for entitling the workman to gratuity. If a workman commits such misconduct as causes financial loss to his employer, the employer would under the general law have a right of action against the employee for the loss caused and making a provision for withholding payment of gratuity where such loss caused to the employer does not seem to aid to the harmonious employment of labourers or workmen. Further, the misconduct may be such as to undermine the discipline in the workers—a case in which it would be extremely difficult to assess the financial loss to the employer.""

14. On plain reading of Section 87 of the Act, it is very clear and it unambiguously declares that even against past employees, i.e., retired employees, initiation of surcharge proceedings, which is not in the nature of disciplinary proceedings, is permissible.

15. The scheme of Tamil Nadu Co-operative Societies Act, 1983 is having provisions for initiation of separate proceedings under the Chapter IX, which is titled as 'Audit, Inquiry, Inspection and Investigation, Surcharge and Supersession'.

(i) Subsection (1) of Section 80 makes it obligatory on the Registrar to audit or cause to be audited by some person authorised by him in writing, the accounts of every registered Society at least once in every financial year. Further, Section 80 mandates every officer or employee of the Society and every member and past member to furnish such information in regard to the transaction and working of the Society. It further provides that if the result of the audit discloses any defect, the registered Society shall, within three months from the date of communication of the result of the audit, take steps to remedy the defects disclosed in the audit. The Registrar is also empowered to order the re-audit of the accounts.

(ii) Section 81 empowers the Registrar on his own motion and shall, on the application of majority of the Board or 1/3rd of the members of the Board or on the request of the financing bank or of the District Collector, hold an inquiry into the constitution, working and financial condition of the registered Society including the allegations of misappropriation, fraudulent retention of any money or property, breach of trust, corrupt practice or mismanagement of the Society etc. The Enquiry Officer under Section 81 is given power to call for records from any person for the purpose of conducting enquiry. Section 81(6) empowers the Registrar to direct the registered Society or any officer of the Society or its financing bank to take action as may be specified in the order to remedy, within such time, as may be specified therein, the defects, if any, disclosed in the enquiry.

(iii) Section 82 empowers the Registrar of his own motion or on application of a creditor of a registered Society inspect or investigate the affairs of the registered Society and also probe into the allegations of misappropriation, fraudulent retention of any money or property, breach of trust, corrupt practice or mismanagement of the Society etc. It further states that if it is found that anything is required to remedy, then the Registrar may order it to do the same.

(iv) Section 83 empowers the financing bank to inspect the books of every registered Society, which is indebted to it.

(v) Section 84, 85 and 86 speaks about the maintenance of books and payment of costs for conducting enquiry and meeting out certain expenses.

(vi) Section 87 has a special provision, which empowers the Registrar himself or by the person authorised by him, on his own motion or on the application of the Board, liquidator or any creditor or contributory, frame charges and after giving a reasonable opportunity to the person concerned, who was found to have misappropriated or fraudulently retained any property or other property or has caused 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 the Act, Rules or by-laws, answer the charges and make an order requiring him to repay or restore the money or property or any part thereof after conducting enquiry. For this purpose, the Registrar has been given the power of the Civil Court in the matters of summoning any person, production of documents, receiving evidence on affidavits and issuing commission etc.

16. This initiation of surcharge proceedings is not a departmental proceedings initiated by the disciplinary authority. It is a separate proceedings enumerated under the Scheme of the Act so as to make good of the loss caused to the Society under various circumstances found while conducting audit under Section 80, enquiry under Section 81, inspection or investigation under Section 82 or inspection of books under Section 83 or during winding up of the Society. As held by the Apex Court in *U.P. State Sugar Corporation Limited*'s case cited supra, proceedings can be initiated against the person who has caused loss to the employer due to negligence or carelessness of its own employee under general law. Whereas, in this case, there is a specific provision contained in Section 87 of the Tamil Nadu Co-operative Societies Act for initiation of surcharge proceedings against the

past and present employees. In this case, the respondent is the past employee and he cannot claim that no action could be taken against him under this provision. Therefore, we are of the view that the contention that the proceedings initiated against the respondent after his retirement is illegal, is hereby rejected.

17. The First Bench of this Court in ***S.V.K. Sahasramam v. Deputy Registrar of Co-op. Societies, Tiruvannamalai Circle, Tiruvannamalai*** reported in ***2008 (8) MLJ 231,*** while considering the time limit provided under Section 81(4) of the Act, is mandatory or not and whether the word “shall” used in Section 81(4) has to be construed as mandatory or not, has also dealt with the provisions of Section 87 and held as follows:

> *“6. 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. This question came up for consideration before the Privy Council in the celebrated case of Montreal Street Railway Company vs. Normandin reported in A.I.R. 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 hereinbelow :-

> *"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 hereunder :-

> *"The question may be looked at from another 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 v. 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 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 be the Federal Court in the case of Biswanath Khemka v. King-Emperor, 1945 F.C.R. 99 : A.I.R. 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 proceeding 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 Construction 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 Upadhya (supra). Justice K. Subba Rao, as His Lordship then was, speaking for the majority, quoting the same passage from Montreal Street Railway Company (supra), has come to the same conclusion [See page 765] :-

"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 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 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."

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

7. In our view, the learned Judge of the writ court, therefore, placed reliance on the correct proposition of law and the judgment of the Apex Court and the formulation of the principles of the Privy Council. Subsequently also, in a two judge bench decision of the Supreme Court in the case of T.V. Usman vs. Food Inspector, Tellicherry Municipality reported in A.I.R. 1994 S.C. 1818, the same principles have been reiterated [See paragraph 14]:-

> *"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:*
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> *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. (emphasis in original) 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:

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. The learned counsel for the appellant, however, relied on a recent judgment of the Supreme Court in the case of Vidya Vikas Mandal vs. Education Officer reported in (2008) 1 S.C.C. (L&S) 759. In that case, the learned Judges of the Supreme Court came to a finding that submission of enquiry report beyond the time limit prescribed therefor was not sustainable. This Court is of the opinion that the consideration in a departmental enquiry is totally different from the consideration which weighs with the Court in another enquiry which is of a public nature and which in the nature of a fact finding enquiry in order to find out whether the affairs of a co-operative society are conducted properly or they are conducted in an illegal manner by way of indulging in corruption, resulting in erosion of public funds. Therefore, the judgment of the Supreme Court given in a different fact situation in the case of Vidya Vikas Mandal (supra) cannot be pressed into service in the facts of the present case.

....

10. Before the learned Judge of the writ court, the appellant relied on two learned single Bench judgments of this

Court rendered in the case of T.V. Ekambaram vs. The Co-operative Tribunal-cum-District Judge, Madurai reported in 2000 (2) C.T.C. 659 and in the case of Gabriel vs. The Deputy Registrar (Housing), Cuddalore reported in 2003 (3) C.T.C. 23. In both these two judgments, the provisions of Section 87 of the said Act which relate to surcharge proceedings were examined and the learned Judges in both the aforesaid judgments construed the following proviso to Section 87:

> *"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."*

Considering the said time limit of six months, the learned Judges came to the conclusion that the said period of six months is mandatory.

11. We are constrained to hold that even though no appeal has been taken to us from the said judgments, yet having regard to the well settled legal position which has been referred to hereinabove, the finding of the learned Judges in these two judgments that the period of six months in the second proviso to Section 87 of the said Act is mandatory is not a correct finding in law. We find that even though before the learned Judge of the writ court those two judgments of the learned single Bench were cited, the learned Judge of the writ *court was not swayed by those two decisions and came to a correct finding, relying upon the well settled proposition laid down by the Supreme Court as pointed above hereinabove."*

As declared above by the First Bench of this Court, the limitation period prescribed are only directory and even after the lapse of the period prescribed under the Sections, the competent authority is entitled to proceed or conduct enquiry either under Section 81 or under Section 87 as the case may be. The above judgment is consistently followed by this Court in ***Tamil Nadu Co-operative Marketing Federation Limited Vs. D.Lakshmikantham @ Thamizharasi and others*** passed in ***W.P.No.3323 of 2010 vide order dated 23.01.2012*** and ***G.Pannerselvam and others v. Deputy Registrar of Co-operative Societies, Dharmapuri and others*** reported in ***(2009) 2 MLJ 901.***

18. As regards the contention that the writ petitioner has not committed any wilful negligence, the facts of this case shows that originally, an enquiry was conducted under Section 81 to find out whether any loss was caused to the Society and if so, the persons, who were responsible, to be identified. Accordingly, enquiry under Section 81 was conducted by the Enquiry Officer and a report was also submitted on 19.01.2017. Only thereafter, the Joint Registrar has confined to issue surcharge proceedings

under Section 87, calling upon the writ petitioner to submit his explanation. This notice was issued only for the purpose of ascertaining whether the writ petitioner has caused loss to the Society by his omission or commissions of any act, as stated in Section 87 and the writ petitioner has not submitted his explanation or reply, but he has directly approached this Court on the ground that there is no jurisdiction. Show cause notices issued for conducting any enquiry could be challenged only under limited grounds such as lack of jurisdiction, any bar prescribed under the law or the notice was issued with malafide intention.

19. In the present case, enquiry under Section 81 of the Act was conducted and in the enquiry, it was found that while the writ petitioner was working as a Secretary, he failed to initiate proceedings to recover the loans on behalf of the Society. This enquiry proceedings was not initiated only against the writ petitioner herein, it has also been initiated against almost seven persons, out of which, six persons were working as Secretary and the loss caused to the Society by their inaction, omission to take action against the defaulters leads to a total sum of Rs.27,77,061/-. The notice clearly reveals that this notice was not issued with malafide intention, but it is only

based on the materials placed under enquiry report based on the enquiry conducted under Section 81 of the Act. Therefore, this Court is of the view that no grounds are made out to quash the show cause notice. Section 87 specifically empowers the Registrar to initiate proceedings against any person, if 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. In this case, there is a specific allegation against the writ petitioner that he has willfully avoided the initiation of recovery proceedings leading to loss of Rs.8,85,489/- during his tenure. In this case, only the show cause notice issued against the writ petitioner has been challenged and this Court is of the view that since there is no violation of any jurisdiction or malafide intention or any bar in issuance of show cause notice under Section 87 against the writ petitioner herein, the interference by the learned Single Judge is not proper.

20. Accordingly, the order passed by the learned Single Judge in W.P.(MD).No.12784 of 2017 dated 21.07.2017 is hereby set aside and the Writ Appeal stands allowed. The appellants are hereby directed to proceed with the surcharge proceedings and complete the same at the earliest by following the principles of natural justice as prescribed under Section 87 of the Act. There shall be no order as to costs. Consequently, connected miscellaneous petition stands closed.

(A.D.J.C.,J.) (K.R.S.,J.)
19.07.2024

NCC : Yes / No
Index : Yes / No
Lm

A.D.JAGADISH CHANDIRA,J.
and
K.RAJASEKAR,J.

Lm

W.A.(MD).No.884 of 2018

19.07.2024