

(2008) 12 MAD CK 0110

In the Madras High Court

Case No : Writ Petition No"s. 10077, 10078 and 10210 of 2004 and W.P.M.P. No"s. 11749 and 11751 of 2004

C. Balakrishnan and R. Santhamoorthy

APPELLANT

Vs

The Principal District Judge (Co-operative Tribunal) and Others

RESPONDENT

Date of Decision : 11-12-2008

Acts Referred:

Citation : (2008) 12 MAD CK 0110

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : G. Devadoss, for the Appellant; C.K. Vishnupriya, AGP (R2) and P.S. Sivashanmugasundaram, (R3), for the Respondent

Final Decision : Dismissed

Judgement

K. Chandru, J.—Heard Mr. G. Devadoss, learned Counsel for the petitioners; Mrs. C.K. Vishnupriya, learned Additional Government

Pleader for the second respondent and Mr. P.S. Sivashanmugasundaram, learned Counsel for the third respondent and perused the records.

2. In these three writ petitions, the challenge is to the order passed by the first respondent dated 28.2.2004 in three different appeals filed by the petitioners herein u/s 152 of the Co-operative Societies Act, 1983.

3. W.P. No. 10077 of 2004 is directed against the order passed in C.M.A.(Co-op) No. 23 of 1999. The petitioner therein was working as a

Special Officer in the third respondent Society from 03.5.1995 to December 1996. W.P. Nos. 10078 and 10210 of 2004 have been filed by the

very same petitioner challenging the order passed in C.M.A.(Co-op.) No. 22 of 1999 and C.M.A.(Co-op.) No. 21 of 1999 respectively. The

petitioner therein was working as a Special Officer in the third respondent Society from 19.5.1994 to 02.1.1996. These two petitioners were

issued with surcharge proceedings u/s 87 of the Tamil Nadu Co-operative Societies Act, 1983 (for short, "the Act") dated 03.11.1999 by the

second respondent. It was against the said order dated 03.11.1999 passed by the second respondent, the abovesaid Civil Miscellaneous Appeals

were filed. After the rejection of those appeals, the writ petitions were filed before this Court.

4. While W.P. Nos. 10077 and 10078 of 2004 were admitted on 17.4.2004, W.P. No. 10210 of 2004 was admitted on 19.4.2004. By interim

orders dated 17.4.2004, the petitioner in the first writ petition was directed to pay a sum of Rs. 3,50,000/- and the petitioner in the second writ

petition was directed to pay a sum of Rs. 75,000/- within a period of eight weeks from the date of receipt of that order. In both the cases, it was

made clear that if the payments were not made, the stay orders will stand automatically vacated. In W.P. No. 10210 of 2004, this Court, by an

order dated 19.4.2004, directed the petitioner therein to deposit 25% of the amount within four weeks. Subsequently, it was brought to the notice

of this Court that the petitioner had not complied with the said direction. Therefore, the miscellaneous petition was dismissed by an order dated

25.11.2005. It is also not clear as to whether in the first two petitions orders have been complied with. In any event, all these three matters were

grouped together and directed to be listed for final disposal.

5. On behalf of the second and third respondents, counter affidavits have been filed supporting the stand of the Tribunal. As against the order of

surcharge proceedings, before the first respondent Tribunal, two principal contentions were raised. The first contention was that while passing the

surcharge order (against which the appeals were filed), the second respondent was not satisfied about the petitioners being guilty of willful

negligence, wantonness and whether commission or omission on their part was deliberate. Only when reckless and callous actions take place or

the loss has been caused deliberately to the assets of the society, action can be taken against them. Reliance was placed upon the Division Bench

judgment of this Court in S. Subramanian v. Deputy Registrar of Co-operative Societies, Housing, Cuddalore and Ors. reported in 2002 (3) LW

185 and also the judgment in Chokkappan v. Special Tribunal for Co-operative Cases, Madras reported in 1991 (1) MLJ 587.

6. However, the Tribunal was of the view that mens rea is required for certain classes of misdemeanor but the same is not applicable to every

misdemeanor pointed out in the said provision. When once the loss has been proved for not following the rules and regulations, certainly, Section

87 will get attracted. The decisions relied on by the petitioner will not apply to the facts of this case.

7. The second point urged by the petitioner was that after the commencement of the enquiry u/s 87, it was not completed within a period of six

months or within the extended period of six months. The Tribunal held that the period prescribed u/s 87 is only for completion of action. In case,

an action is not completed, there is no specific provision under the Act for the proceedings taken to get vitiated. It was not the intention of the

Legislature to abrogate the proceedings taken within the time frame. If such a construction is made, even for delays caused by the defaulters, such

proceedings will come to an end.

8. In the affidavit filed in support of the writ petitions, the petitioners have reiterated the very same contentions which were urged before the

Tribunal. According to the petitioners, the surcharge proceedings commenced on 13.7.1998 and ought to have been completed on or before

13.1.1999. Since no permission was obtained for extending the period, the proceedings should be held to be lapsed. Even assuming without

admitting that there was any permission obtained from the next higher authority, the extended period will come to a close on 13.7.1999 and,

therefore, the surcharge order passed on 03.11.1999 was beyond the period of limitation. A further contention was also raised that there was no

willful negligence or misappropriation or fraudulent retention so as to bring the surcharge proceedings within Section 87 of the Act. In the counter

affidavits filed by the second respondent, it was stated clearly that the surcharge proceedings commenced on 13.7.1998 and final orders were

passed on 03.11.1999. A stand was taken that the surcharge proceedings were completed within one year and there was no bar for passing

orders beyond one year.

9. Mr. G. Devadoss, learned Counsel for the petitioners placed reliance upon the

following decisions of this Court:

- i. Order in W.P. Nos. 5335 and 5336 of 1998 (unreported), dated 25.11.1998;
- ii. Order in W.P. Nos. 4724 and 17955 of 1998 (unreported), dated 15.12.1998;
- iii. T.V. Ekambaram and two Ors. v. The Co-operative Tribunal-cum-District Judge reported in 2000 (II) CTC 659;
- iv. Gabriel v. The Deputy Registrar (Housing), Cuddalore reported in 2003 (3) CTC 23;
- v. R. Kamalam v. The Deputy Registrar of Co-operative Societies, Thuckallay and two Ors. reported in 2004 W. L.R.267;
- vi. Order in W.A. Nos. 221 and 222 of 1999 dated 22.4.2004 (unreported);
- vii. V. Subramanian v. Assistant Director (Sugar Project), Surcharge Officer, Office of the Commissioner of Sugars and Anr. reported in 2005 (2) LLN 503; and
- viii. Order in W.P. No. 6710 of 2001, dated 15.12.2005 (unreported).

10. Except for the unreported decision in W.A. Nos. 221 and 222 of 1999 dated 22.4.2004 (Sl. No. (vi) cited above), the other decisions cited

are all orders of the learned Single Judges of this Court. Even in the order of the Division Bench, only a reference to the provision of the Act has

been made. Further in that decision, whether the said section is susceptible for different interpretations and the term ""shall"" found therein was

mandatory or directory was not discussed. In this context, it is necessary to refer to the latest decisions of this Court.

11. The first decision is rendered by a learned Single Judge of this Court in Senthil Kumar v. Co-operative Tribunal (Principal District Judge)

Madurai and Ors. reported in (2007) 7 MLJ 1048. In the said decision rendered by R. Banumathi, J. in paragraphs 14 and 15, it has been

observed as follows:

Para 14: Thus the enquiry u/s 81 is for the purpose of regulating the business of the Society, rectifying the defects and enquire in the financial

impropriety, misappropriation or fraudulent retention of any money etc. Enquiry u/s 81 and Enquiry Report is the basis of the Surcharge

Proceedings. The Surcharge Proceedings emanates only from the enquiry u/s 81 where there appears to be misappropriation of funds of the

Society or breach of trust etc.

Para 15 : The word ""shall"" is used only for completion of enquiry within the time frame, mainly for the purpose of further action and to initiate

Surcharge Proceedings. In case of proved surcharge, to hold that non-completion of enquiry u/s 81(4) within the stipulated period, would vitiate

the entire Surcharge Proceedings and would amount to doing violence to the section. What would be the consequences if the person is bent upon

dragging on the proceedings before the Enquiry Officer or in the Surcharge Proceedings. In such cases, can it be said that the delay in completing

the proceedings would vitiate the Surcharge Proceedings. Any such interpretation would not be in consonance with the object and scope of the

enactment. In consideration of the object of the Section and the context in which it is used and the consequences, this Court holds that the word

""shall"" used in Section 81(4) and second proviso to Section 87 are only directory. Whether non-completion of the enquiry within the time

stipulated vitiates the Surcharge Proceedings would depend upon the facts and circumstances of the case.

12. Very recently, a Division Bench of this Court presided by A.K. Ganguli, C.J. vide its decision in *S.V.K. Sahasramam v. Deputy Registrar of*

Co-operative Societies, Tiruvannamalai Circle, Tiruvannamalai and Ors. reported in (2008) 8 MLJ 231 had dealt with this issue extensively. In

paragraphs 10 to 13, it has been stated as follows:

Para 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 and two others Vs. The Co-operative Tribunal cum District Judge, Madurai and 2 others*, and in the case of *Gabriel Vs. The*

Deputy Registrar (Housing) and T.No.1735, Anna Nagar Co-operative Housing Building Society Ltd., . 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.

Para 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 Judge 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 wellsettled proposition laid down by the Supreme Court as pointed out hereinabove.

Para 12 : We, therefore, affirm the order of the learned Single Judge in this case. We are of the view that in a case where there are allegations of

embezzlement and misappropriation of public funds, the members of general public who have been cheated have no control over those who hold

the enquiry in respect of the time limit. To hold that such an enquiry which has been continued beyond the time limit is bad would cause great

injustice.

Para 13: Therefore, if such enquiry is continued beyond the time limit mentioned in the relevant statute, the said time cannot be held to be

mandatory in view of the principles laid down in *Montreal Street Railway Company v. Normandi* (supra), which has been affirmed by the Supreme

Court.

13. As can be seen from para 10 above, the decision in *T.V. Ekambaram's* case (cited supra) and *Gabriel's* case (cited supra) have been found

to be not good law. Even the other decisions referred to by the learned Counsel also had taken a similar view, which runs counter to the recent

pronouncement of the Division Bench in *Sahasramam's* case (cited supra).

14. Since only these two contentions were raised before the Tribunal as well as before this Court and argued extensively, this Court is not called

upon to decide any other issue. In the light of the above binding precedent rendered by the Division Bench, this Court has no hesitation in

dismissing the writ petitions filed by the petitioners. Accordingly, all the three writ petitions will stand dismissed. However, there will be no order as

to costs. Consequently, the connected miscellaneous petitions are also dismissed.