(2006) 11 MAD CK 0260

In the Madras High Court

Case No : Writ Petition No. 317 of 2001

Senthil Kumar — APPELLANT

Vs

The Cooperative Tribunal [Principal District Judge], The Assistant Director of Handlooms and Textiles and M.H.21, Annai Bhagavathi Weavers Cooperative Production and Sales Society — RESPONDENT

Date of Decision : 03-11-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 27
Constitution of India, 1950 — Article 226
Tamil Nadu Co-operative Societies Act, 1961 — Section 81, 81(4), 81(6), 87

Citation : (2006) 11 MAD CK 0260

Hon'ble Judges : R. Banumathi, J

Bench : Single Bench

Advocate : G. Devadoss, for the Appellant; V. Bhavani Subbaroyan, Government Advocate for 2nd Respondent and M.K. Hidayathulla, for 3rd Respondent, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—The Order of the Cooperative Tribunal made in [C.S.] No. 150/1995, dated 18.03.1997, relating to the Surcharge Proceedings is challenged in this Writ Petition.

2. P. Karuppusamy was the ex-clerk and one Ganapathi was the former Special Officer of the third Respondent Society. Jauvli stock deficit to the tune of Rs. 5,76,221.93 was noticed during the year 1993. Surcharge Proceedings have been initiated against the said Karuppusamy and the Special Officer Ganapathi. Karuppusamy died on 16.11.1993. Surcharge proceedings continued against his legal heirs in accordance with law, by including them in the proceedings. Final orders were issued directing the legal heirs of Karuppusamy and the former Special Officer Ganapathi to pay the amount of Rs. 5,76,221.93 jointly and severally with interest.

3. Challenging the surcharge proceedings, legal heirs of the deceased Karuppusamy viz., the Petitioner herein and others have filed appeal before the Cooperative Tribunal in C.M.A. No. 150/1995. Former Special Officer Ganapathi also preferred C.M.A. No. 120/1995. Both the appeals were dismissed by the common order dated 18.03.1997, which is challenged in this Writ Petition.

4. Legal heirs of Karuppusamy hotly contested the appeal. They have also filed the application I.A. No. 41/1997, under Order 41 Rule 27 CPC, to receive additional documents. Parties against whom surcharge Order was passed made allegations and counter allegations against each other. Confirming the order of surcharge and finding that both Karupusami and Ganapathi are responsible for stock deficit, the Tribunal has dismissed both the appeals.

5. The learned Counsel for the Petitioner mainly urged that Section 81 enquiry was not completed within three months and in any event, not completed within six months, as stipulated u/s 81(4) of the Act and such an, the enquiry is vitiated, since it violates the mandatory time stipulated u/s 81(4). Placing reliance upon 2005 (2) LLN 503 and other decisions, the learned Counsel for the Petitioner submitted that if the enquiry was not completed within the stipulated period, surcharge proceedings initiated against Karuppusamy cannot be sustained.

6. In the present case, u/s 81 of the Tamil Nadu Cooperative Societies Act, enquiry was ordered on 14.08.1991. The Enquiry Report was issued by the Enquiry Officer on 12.05.1992.

7. In surcharge proceedings, as per the common order made in S.C. No. 6/1993, dated 28.04.1994, sum of Rs. 5,76,221.93 was ordered to be recovered. Challenging the same, legal heirs of Karuppusamy, including the Petitioner, have filed C.M.A. No. 150/1995 and the then Special Officer has filed C.M.A. No. 120/1995. Both the C.M.A.s were disposed of by a common Judgment. Aggrieved against that Judgment, the former Special Officer Ganapathi has filed Writ Petition W.P. No. 11969/1997. That Writ Petition was dismissed by Justice K.Raviraja Pandian by order dated 25.01.2001. Writ Appeal No. 837/2001 preferred by the said Ganapathi was also dismissed. When the Judgment in C.M.A. No. 120/1995 has been confirmed by the Division Bench, the Petitioner cannot successfully challenge the surcharge proceedings and the Judgment of the Tribunal.

8. With the above observations, the matter could have been set at rest. But I have proceeded to consider further in view of the forcible arguments advanced by the learned Counsel for the Petitioner. Placing reliance upon a number of decisions, the learned Counsel for the Petitioner vehemently contended that the time stipulated in Section 81(4) of the Tamil Nadu Cooperative Societies Act is mandatory and when the enquiry was not completed within the time stipulated as per Section 81(4), the surcharge proceedings initiated u/s 87 is vitiated. In support of his contention that second proviso to Section 87 is mandatory in

nature, the learned Counsel for the Petitioner has placed reliance upon:

Dr. S. Subramania Iyer Vs. The Secretary, The Karaikudi Co-operative Town Bank, ;

W.P. Nos. 4724 & 17955/97; W.P. Nos. 5335 & 5336/98.

9. Section 81(4) reads as under:

The inquiry shall be completed within a period of three months from the date of ordering the inquiry or such further period or periods not exceeding three months at a time as the next higher authority may permit provided that such extended periods shall not exceed six months in the aggregate.

10. The word used in Section 81(4) is "the enquiry shall be completed within a period of three months and... such extended periods shall not exceed six months in the aggregate. Use of the word ''shall'' raises a presumption that the particular provision is imperative, as held in State of U.P. Vs. Manbodhan Lal Srivastava, ; but this prima facie inference may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction. There are numerous cases where the word ''shall'' has, therefore, been construed as merely directory ILR 10 Cal 557 (Burjore and Bhawani Pershad v. Bhagana)]. The word ''shall, observes HIDAYATULLAH, J. "is ordinarly mandatory but it is sometimes not so interpreted if the context of the intention otherwise demands". In AIR 1961 SC 765 [State of U.P. v. Babu Ram], SUBBARAO, J. Has pointed out that: "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".

11. Use of the word ''shall'' in Section 81(4) itself is not decisive to hold that the time stipulated thereon is mandatory. Court having regard to the object and the scope of enactment and the context in which time has been stipulated for completion of enquiry and the consequences of the words that follow, should come to the conclusion whether the word ''shall'' is mandatory or arbitrary.

12. Let us now consider what is the scope of Section 81. u/s 81, the Registrar may of his own motion and shall on the application of majority of the Board... hold enquiry or direct some person, authorised by him in writing, to hold an enquiry as to the financial condition of a Registered Society or any alleged misappropriation, fraudulent retention of any money or property, breach of trust, corrupt practices or mismanagement in relation to that society or into any part especially of the working of that society.

13. When the enquiry is held u/s 81 and under Sub-section 3, the Registrar shall, within such time as may be prescribed, communicate the result of the enquiry to the Government, Financial Banking and to the Society concerned for further action. u/s 81(6), ''The Registrar may, by order in writing, direct the registered society or any officer of the society or its financing bank to take such action as may be specified in the order to remedy, within such time as may be specified

therein, the defects, if any, disclosed as a result of the inquiry''.

14. Thus the enquiry u/s 81 is for the purpose of regulating the business of the Society, rectifying the defects and enquire into 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.

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.

16. In this case, as noted earlier, the Division Bench has already confirmed the common Judgment of the Tribunal. All the decisions cited by the learned Counsel for the Petitioner relate to departmental enquiry. In those decisions, Court has found non-completion of enquiry within the stipulated time caused prejudice to the employee and therefore found that non-completion of enquiry within the time frame vitiates the enquiry. That ratio cannot be applied to the case on hand where there is huge amount of stock deficit and misappropriation.

17. In the affidavit, the Petitioner has raised the contention that his Date of Birth is 03.05.1974 and that when the C.M.A. No. 150/1995 was filed he was a major. But the appeal was filed by his elder brother Mani, showing the Petitioner as the minor. In the affidavit, it is further averred that he is not in talking terms with his elder brother from the year 1993 till this date and that he did not have any information regarding the case and only when he visited the third Respondent Society in July 2000, he came to know about the surcharge proceedings and the order passed against him. This plea taken by the Petitioner has no substance and the Petitioner has averred falsehood. In the C.M.A. the Petitioner was shown as a minor represented by his mother and all of them were represented by counsel. As noted earlier, C.M.A. No. 150/1995 was hotly contested. It is not as if the Petitioner alone was the appellant. The Petitioner''s mother, his brothers and sisters were also parties in the C.M.A. No. 150/1995. Petitioner is not right in contending that he was unaware of the CMA proceedings and the result thereon. If the Petitioner was a major at that time, the family of the Petitioner ought to

have taken steps for declaring the Petitioner as a Major. When the Petitioner has remained part of the family, now he cannot raise objection regarding the Judgment in C.M.A. No. 150/1995.

18. That apart, though the Tribunal has passed the common Judgment in 1997, the Petitioner has filed the Writ Petition only in the year 2000. The party seeking aid of this Court under Article 226 of the Constitution of India should exercise due diligence and approach this Court within a reasonable time.

19. All the contentions raised by the Petitioner and the appellants in C.M.A. No. 150/1995 were duly considered by the Tribunal and the impugned order of the Tribunal does not suffer from any error of law or serious infirmity calling for interference.

20. In the result, the Writ Petition is dismissed. No costs. W.M.P. No. 386/2001 is also dismissed.

