

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.07.2016

Date of Pronouncement : 05.08.2016

CORAM :

The Hon'ble MR.SANJAY KISHAN KAUL, CHIEF JUSTICE
AND

The Hon'ble MR.JUSTICE R.MAHADEVAN

W.A. No.1213 of 2008

S.Ramadevi

... Appellant

-Vs-

1. The Special Officer,
Ambur Co-operative Sugar Mills,
Vadapudupet, Vellore District.

2. The Presiding Officer,
Principal District Court,
Vellore.

3. A.Kabali

4. V.Sathyamurthy

... Respondents

Appeal filed under Clause 15 of the Letters Patent against the order dated 30.07.2008 passed in W.P.No.7211 of 2004 on the file of this Court.

W.P.No.7211 of 2004 : Petition filed under Article 226 of the constitution of India seeking for issuance of Writ of Certiorari calling for the records of the first respondent culminating in the order dated 24.11.2003 made in CTA No.11 of 2002 on the file of the first respondent and quash the same and conform the order of the surcharge officer contained in S.C.No.3, dated 03.11.2001.

For Appellant : Mr.P.Chandrasekaran
for Mr.S.Vadivelu

For Respondents : Mrs.G.Thilakavathi for R-1

J U D G M E N T

THE HON'BLE CHIEF JUSTICE

The appellant was employed as a Chief Accountant with the Ambur Co-operative Sugar Mills / first respondent from November 1992 to March 1997. The controversy to be examined in the present appeal commences from an enquiry under Section 81 of the Tamil Nadu Co-operative Societies Act, 1983 (hereinafter referred to as 'the said Act') ordered by the Commissioner for Sugar on 10.04.2000 for the loss caused to the Mill in respect of the period from July 1993 to December 1995. At the relevant point of time, the enquiry was not only against the appellant, but also against the third respondent, who was the Selection Grade Assistant and the fourth respondent, who was working as an Accountant in the Mill.

2. In the aforesaid proceedings, there was allegation of fabrication of documents relating to remittances made to different institutions and the three incumbents were held for having acted negligently to cause loss to the Mill. The remittances which were made from the salary of the employees was deducted in excess of their actual dues and after remitting the actuals to the concerned credit account, the excess was diverted to the personal account of the Selection Grade Assistant / the third respondent. Thus, he was the direct financial beneficiary.

3. The allegation against the appellant was that as the Chief Accounts Officer and as part of duties and responsibilities, she failed to verify and supervise the work of the staff attached to the accounts department and if she had carried out the task of due verification, the occasion for excess deductions, then remittances could not have occurred resulting in the loss to the employees. In pursuance to the enquiry conducted, a report was filed by the Enquiry Officer dated 09.01.2001 recommending for initiation of criminal actions and surcharge proceedings.

4. As a consequence of the aforesaid enquiry report and the loss having been caused, the surcharge proceedings under Section 87 of the said Act were initiated. Suffice to say that in so far as fixation of liability for surcharge from the appellant is concerned, the same could have been based only on 'willful negligence' as per the said provisions. The relevant provision reads as under:

'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 wilful negligence or has made any payment which is not in accordance with this Act, the Rules or the Bylaws, 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 contributor 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 the 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 of the misappropriation, misapplication of funds, fraudulent retainer, breach of trust or wilful negligence or payments which are not in accordance with this Act, the Rules or the Bylaws 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.''

(emphasis supplied)

5.The surcharge proceedings commenced with the notice dated 05.05.2001 by the Surcharge Officer. Personal hearing was afforded to the delinquent officers on at least five occasions. The appellant and the Accountant participated in the proceedings, but the Selection Grade Assistant did not render any explanation nor appeared for the enquiry.

6.It is the case of the first respondent / Special Officer of the Mill that two written requests were received from the appellant dated 03.08.2001 and 27.09.2001 where she sought for certain documents as under:

- (i) Details of the cheque signed by her.
- (ii) Depositions given by her u/s. 81 enquiry.
- (iii) Report u/s.81 of the Enquiry Officer for the period 1997-1999 and other related documents signed by her.

7.Since the records relating to the vouchers and counter-signing of the challans were voluminous, she was required to verify the same by visiting the Mill on a given date. The relevant portion of the report of the enquiry under Section 81 of the said officer and her depositions were furnished which reflected that she had admitted the signatures in the cheques, vouchers and remittances. Her defence was that since the records had been verified by two other officers in hierarchy, i.e. the Selection Grade Assistant and the Accountant, she had counter-signed the same in good faith and her duty was only to counter-sign the cheques prepared by the third respondent and signed by the fourth respondent. It may be noticed that the Accountant had been exonerated in the proceedings.

8.It is also the case of the first respondent that adequate opportunities had been given to the appellant in the proceedings by presenting their management witnesses for cross-examination on 05.09.2001 and 20.09.2001, but it is the appellant who refused to cross-examine on the premise that only after verifying the records she can cross-examine them. On the subsequent date of 24.10.2001, she chose not to cross-examine.

9.The surcharge proceedings resulted in the Surcharge Order of 03.11.2001 finding the third respondent guilty of misappropriation and also holding the appellant liable for the loss. This order was assailed by the appellant before the Co-operative Appellate Tribunal in C.T.A.No.11 of 2002 (second respondent), which allowed the appeal on 24.11.2003 setting aside the surcharge order on the ground that there was no willful negligence on the part of the appellant and there was further violation of principles of natural justice.

10.The first respondent thereafter filed Writ Petition No.7211 of 2004, which was allowed by the learned Single Judge on 30.07.2008 holding the appellant liable for the loss. This has resulted in the present writ appeal.

11.Learned counsel for the appellant sought to canvass the case in the following terms:

- a) The surcharge proceedings are barred by time in view of the

- first proviso to Section 87 (1) of the said Act;
- b) The appellant was not furnished with a copy of the full report of the enquiry officer as requested by her, but only extracts of the report were given; and
 - c) The conclusion of the surcharge officer making the appellant liable for loss does not refer to any willful negligence which is actually a statutory requirement under Section 87 (1) of the said Act.

12.If we refer to the records, it is not in dispute that as per the Office Order dated 29.03.1982, powers delegated to the Chief Accountant included the order for payment of salary of all the staff, order of refund, order of remittance and authentication or endorsement. Thus, the appellant could not have absolved herself of the responsibility completely by stating that she was merely required to sign as a formality. However, since she was not the beneficiary or none of the other parameters of Section 87 of the said Act would apply to the case at hand, the only question would be whether it could be said that she was 'willfully negligent' as differentiated from mere negligence.

13.A perusal of the enquiry report under Section 81 of the said Act dated 09.01.2001 shows that it was submitted to the Commissioner of Sugars qua the Selection Grade Assistant / third respondent, Mr.A.Kabali, in the general finding, that he had been working for more than 25 years and was accepted as a fit person of the job by others. He was supposed to be working to the confidence of everybody. The pay bill was prepared by him in the computer and the abstract of the department wise pay bill alone used to be furnished to the Accountant, Chief Accountant (appellant), the Office Manager and the Special Officer and signatures obtained. They had been signing on the bills of the department wise pay bill abstract without seeing the pay bills. It is also the finding that it was not known as to whether the Accountant or the Chief Accountant or the Special Officer had asked for the pay bills. Thus, Mr.A.Kabali, by taking advantage of the fact that it was not possible for others to verify or check up and test the salary list which was running into 300 pages, had added the amounts payable by him towards the loan availed of by him for RD, Life Insurance Corporation premium and other deposits without deducting the same from his salary and sent the same along with amounts recovered from the salary of others. On that basis, he obtained signatures in the pass orders and cheques / demand drafts and while sending the same to the financial institutions, he had included his name and the names of his benamis and settled his loan instalments, without giving any room of suspicion to anyone. In this process, he misappropriated a sum of Rs.4,42,650.75 during the period from

July 1993 to December 1995.

14. In so far as the appellant was concerned, it was held that since she was in charge of a powerful post as a Chartered Accountant and was responsible to save the funds of the Mill properly and to control the expenses subject to financial position, as the head of the accounts department, she has failed in her duties and responsibilities by approving the pay bills without verifying the false recovery list prepared by the pay bill preparing clerk and casually signed the cheques without knowing for whom such cheques have been sent for or for what purpose and with the result, by reason of such activities, gave room for misappropriation. These findings are important because in the conspectus of the same, the question would arise of the liability of the appellant in surcharge proceedings.

15. On a reading of the order of the Surcharge Officer dated 03.11.2001, negligence was attributed to the appellant by reason of being the head of the department and having acted against rules and regulations of the said Act and the duties and responsibilities fixed on her under the bylaws of the Mill. It has been further observed that since she was negligent and careless 'with selfish motives for gain', the huge monetary loss had been caused.

16. In allowing the appeal, what has weighed with the appellate authority is that though the abstract pay bill was required to be verified by the Accountant, he had been exonerated in the surcharge proceedings. He alone was supervising each and every matter. The signatures of the appellant were not in question, but her stand in her depositions was noticed that she had signed the cheques as a co-signatory based on the cheque pay order of the Pay Bills Assistant and verified by an authorised Bills Accountant. It was her statement that she had to merely ensure that the amount mentioned in the cheque correlated to the pay order amount.

17. The appellate authority also took note of the fact that some vital documents had not been furnished and produced for the inspection of the appellant, that amounted to denial of principles of natural justice. The surcharge proceedings had been passed only on perusal of documents.

18. The third aspect is that it was not correct to opine that each and every entry had to be scrutinised by the appellant and the pay bill used to be prepared by Kabali / the third respondent and verified by the Accountant / the fourth respondent. It was a computerised bill and thereafter, it would reach the Chief Accountant in that summarised form with the

third respondent / Kabali being trusted as the employee of 25 years of service. The fact that she signed the cheques, thus, would not amount to willful negligence.

19. We have gone into these details as the impugned order of the learned Single Judge dated 30.07.2008 only discusses the issue of an opportunity having been given to the appellant, but her failure to utilise that opportunity. Thus, principles of natural justice were followed. The learned Single Judge also noticed that the other two private respondents had not challenged the surcharge proceedings and the order had become final against them. We may note here that in the case of the fourth respondent / Accountant, he was not held liable and the third respondent did not even participate in the proceedings being the direct beneficiary. The learned Single Judge has observed that the appellant had the responsibility of protecting the interest of the Society and she could not escape from the liability by stating that she signed the bill on dotted lines prepared by the subordinates.

Findings:

A. Surcharge Proceedings barred by limitation

20. Learned counsel for the appellant while making his submissions accepted that the issue of surcharge proceedings being barred by limitation has obviously not been canvassed before any of the authorities below, as that is not even being an aspect which is discussed. He, however, submits that in ground (7) of the writ appeal grounds, the issue was sought to be raised and since it was a question of limitation, it could be raised any time.

21. On the other hand, learned counsel for the first respondent sought to submit that use of the expression "'shall'" in the proviso should be read as "'may'" since it is a case where public funds are involved and sometimes proceedings may take time. In support of her contention, she has relied upon the judgment of the Division Bench of this Court in W.A.No.949 of 2008 (between S.V.K.Sahasramam vs. The Deputy Registrar of Co-op. Societies, Tiruvannamalai District) and Others) decided on 29.08.2008. The factual matrix related to an enquiry under Section 81 of the said Act. The issue which was examined was whether the period for completion of enquiry as provided under Section 81 of the said Act was mandatory or not and whether the word "'shall'" has to be construed as mandatory. In that context, the Division Bench observed that the expression used in the section whether mandatory or not would be decided on various factors and mere expression of the word "'shall'" alone is not decisive in the matter. In this behalf, a reference was made to

the celebrated case of Montreal Street Railway Company vs. Normandin, AIR 1917 Privy Council 142, quoting as under:

'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.'

22. The Division Bench also made a reference to two judgments of Hon'ble Supreme court in State of U.P. vs. Babu Ram Upadhyaya, AIR 1961 SC 751 and the Constitution Bench judgment in State of U.P. vs. Manbodhan Lal, AIR 1957 SC 912. After discussing the issue, the Division Bench opined that the enquiry under Section 81 of the said Act could not be compared to an enquiry against an individual employee and such enquiry is to be followed by a proceeding under Section 87 of the said Act. A categorical finding was given that both the period under Section 81 and the second proviso to Section 87 could not be held to be mandatory, especially as allegations of embezzlement and misappropriation of public funds are involved and the members of general public who have been cheated have no control over those who hold the enquiry in respect of the time limit and thus, holding such enquiry as time barred would be great injustice. The time period was, thus, held not to be mandatory.

23. Learned counsel for the appellant has not shown any legal view to the contrary and thus, this issue is really not res integra in view of the decision recorded aforesaid of the Division Bench. The plea of time barred is, thus, rejected.

Issue No. 2 : Furnishing copies of documents and Principles of Natural Justice.

24. In so far as furnishing of copies of certain documents and giving adequate opportunities to put forth the case is concerned, the proceedings do show that the appellant was permitted inspection of the material records. Depositions were given to her. She was given repeated opportunities to cross-examine the witnesses, which she earlier declined on account of absence of documents and thereafter also refused to cross-examine the witnesses. It cannot be said, there was inadequacy of opportunity violating the principles of natural justice as applicable to such proceedings. The judgment sought to be relied upon by the learned counsel for the appellant of the learned Single Judge of this Court in Sambandam vs. The Deputy Registrar (Credit) Co-op. Societies, Mylapore, Madras, 1999 (3) MLJ 310, would not really apply, as in the facts of that case, the enquiry report had not been furnished, while the protest in

the present case is apparently on an incomplete enquiry report. It does appear from the conduct of the appellant that excuses were sought to be made, despite sufficient opportunities to defend her case, of violation of principles of natural justice rather there being actually any such absence. The second plea is also, thus, rejected.

Issue No.3 : Willful negligence

25.The third and the last plea is actually the most crucial as to whether the appellant could be said to have acted with willful negligence. In this behalf, the learned counsel for the appellant has relied upon two judgments of this Court in S.Subramanian vs. The Deputy Registrar of Co-operative Societies (Housing), Cuddalore & others, 2002-3-L.W. 185, and K.Ajay Kumar Gosh and Others vs. Tribunal for Co-operative Cases, (2009) 4 MLJ 992, to contend that when requirements of Section 87 had not been satisfied, which warrants initiation of surcharge proceedings, the liability cannot be fastened. There has to be willful and wanton premeditation with a view to cause loss to the assets of the Society and 'mere negligence cannot be a ground for surcharge and it must be willful negligence or intentional negligence and not mere carelessness or intention or inadvertence or a single lapse by oversight'. We extract the observations in the case of K.Ajay Kumar Gosh, supra, as hereunder:

'19.A detailed discussion has been made by making reference to various judgments on this aspect in another judgment reported in Sathyamangalam Cooperative Urban Bank Ltd. vs. Deputy Registrar of Cooperative Society and Another, (1980) 2 MLJ 17, it is held thus:

'The degree of negligence that is contemplated under Section 71 (1) of the Tamil Nadu Cooperative Societies Act is not mere negligence, but wilful negligence. The word 'wilful' has not been defined in the Act. 'Wilfulness' or 'wantonness' imports pre-meditation or knowledge and consciousness that an injury or loss is likely to result from the act done or from the omission to act. It imports a constructive intention as to the consequences which, entering into the wilful act, the law imputes to the offender and in this way a charge, which otherwise would be mere negligence, becomes by reason of a reckless disregard of probable consequences, a wilful wrong. The act done or omitted to be done must be intended or must involve such reckless disregard of security and right as to imply bad faith. In examining whether there is

wilful negligence, it has to be seen first whether the person concerned is guilty of negligence and if so, whether the said wilful negligence is the proximate cause of the injury or loss sustained.''

20. In the light of the decisions referred to above, it is clear that to pass surcharge order under Section 87 of the Act, appellants should have done an actionable wrong either by commission or omission in a deliberate and reprehensible manner with reckless callousness and with a supine indifference, without taking due care and caution ordinarily expected from a reasonable and prudent man under those existing circumstances. In the absence of such categorical finding by the Respondents, it is not possible to mulct the appellants with the loss caused to the society.''

26. We are, thus, of the view that as the legal principles are quite settled, we have to only look into the application of the same in the facts of the present case. We are of the view that the appellate authority was right in coming to the conclusion that there is no wilful negligence in the case of the appellant and this aspect has really not even been seriously touched upon by the learned Single Judge. Merely because loss is caused would not suffice. The appellant is not the beneficiary. There is no such wilful negligence attributed to her. This is apparent from even the enquiry report, which we have referred to aforesaid. Mere use of the words "negligence and careless with selfish motive for gain" would not suffice when actually the facts do not make out such a case. Thus, the surcharge officer certainly fell into an error in imposing the liability on the appellant. The enquiry report discussed aforesaid itself shows that it is the third respondent who is found to have taken advantage of the situation in seeking to obtain illegal gain for himself. The pay bill was prepared by the third respondent in the computer and the abstract of the department wise pay bill alone used to be furnished to the Accountant and the Chief Accountant (appellant) and signatures obtained. Thus, both of them had been signing on the department wise pay bill abstract without seeing the pay bills. The third respondent / Mr. A. Kabali, thus, took advantage of the fact that it was not possible for others to verify the cheques and test the salary list which was running into 300 pages. It is in these circumstances that the fourth respondent has been exonerated of the liability even though the abstract pay bill was required to be verified by him as an Accountant and he alone was supervising each and every matter. The cheques signed by the appellant are actually in the nature of counter-signature and the Accountant himself had been exonerated. Merely because the appellant was the head of the department, the liability could

not be fastened on her as no case of willful negligence is made out.

27.We are, thus, of the view that the appellant is entitled to succeed on this ground.

28.The result of the aforesaid is that the impugned order of the learned Single Judge dated 30.07.2008 in W.P.No.7211 of 2004 is set aside and the order of the Cooperative Appellate Tribunal dated 24.11.2003 in C.T.A.No.11 of 2002 is affirmed.

29.Writ appeal is, accordingly, allowed, leaving the parties to bear their own costs.

Sd/-
Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

sra

To

1. The Special Officer,
Ambur Co-operative Sugar Mills,
Vadapudupet, Vellore District.
2. The Presiding Officer,
Principal District Court,
Vellore.

+1cc to Mr.S.Vadivelu, Advocate, S.R.No.44507

+1cc to Mrs.G.Thilakavathi, Advocate, S.R.No.44552

W.A.No.1213 of 2008

MP (CO)
CA(23/08/2016)

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