

HON'BLE SRI JUSTICE A. RAMALINGESWARA RAO

WRIT PETITION No.25990 of 2003

ORDER:

Heard learned counsel for the petitioner and the learned Government Pleader.

2. The petitioner worked as a Secretary of the 2nd respondent-society and there were allegations against him. An enquiry under Section 51 of the Andhra Pradesh Co-operative Societies Act, 1964 (for short, 'the Act') was initiated. Basing on the report of the said enquiry, a show cause notice was issued to the petitioner holding the petitioner was liable for an amount of Rs.1,44,237/- and he was asked to file his objections. Accordingly, he filed his objections denying his liability. It is the case of the petitioner that without conducting any enquiry, relying on the findings of the enquiry report submitted under Section 51 of the Act, the 1st respondent passed an order on 17.07.1999 holding him liable for the above amount. Challenging the same, the petitioner filed O.A. No.158 of 1999 before the A.P. Co-operative Tribunal, Vijayawada (for short, 'the Tribunal'), and it confirmed the order of the 1st respondent by order dated 18.10.2003. Challenging the same, the present writ petition was filed.

3. Learned counsel for the petitioner submits that no enquiry was conducted by the 1st respondent and basing on the report submitted under Section 51 of the Act by the enquiry officer, an order was passed by the 1st respondent holding the petitioner liable and hence, the order as confirmed by the order of the Cooperative Tribunal is liable to be set aside.

4. Learned Government Pleader appearing for the 1st respondent, on the other hand, submits that due opportunity was given to the petitioner to submit his explanation and after providing such opportunity, the order was passed by the 1st respondent and hence, the principles of natural justice are not violated.

5. The petitioner was working as Secretary in the 2nd respondent-society and during the year 1997, it was alleged that he misappropriated an amount of Rs.1,44,237/-. The District Cooperative Officer, Krishna, Machilipatnam, ordered for an enquiry under Section 51 of the Act by appointing an enquiry officer. He submitted a report against the petitioner stating that he misappropriated an amount of Rs.1,15,766-74 ps and criminal proceedings were also taken against him in C.C. No.5 of 2000 before the Special Court under the Act at Vijayawada, wherein he was acquitted on 18.10.2001. As many as ten charges were alleged against the petitioner and the petitioner was held liable by the 1st respondent in his order dated 17.7.1999. A reading of the said order discloses that no enquiry was conducted and the said order was based on the report of the enquiry officer submitted under Section 51 of the Act. When the petitioner preferred an appeal before the A.P.Cooperative Tribunal, Vijayawada, the Tribunal framed the following issues:

"i) Whether the first respondent provided sufficient opportunity to the appellant in the surcharge enquiry and followed the principles of natural justice?

ii) Whether the witnesses examined in the original case as well as surcharge enquiry spoke the true facts?

iii) Whether the appellant is liable to pay the surcharge amount?

iv) Whether the surcharge is liable to be set aside?"

6. Before the Tribunal, Exs.A.1 to A.12 and Exs.R.1 to R.6 were marked. The Tribunal held all the points against the petitioner.

7. With regard to the first point, the Tribunal held that the petitioner took nine months time to file his written statement and he filed detailed written objections to the notice by the 1st respondent. With regard to the examination of witnesses, it was stated that necessary evidence was recorded in Section 51 enquiry in detail and further held that if any evidence on the side of the petitioner was necessary, he should have requested the 1st respondent to examine the witnesses produced by him, but he did not choose to examine anybody. The decisions cited by the petitioner reported in **S.Rama Subba Rao v. President, Kaikaluru Irrigation and Power Department Sub-Divisional Employees' Co-operative Credit Society Limited¹** and **Challa Sanyasinaidu v. Deputy Registrar of Co-operative Societies, Srikakulam²**, were held to be not applicable to the case, as opportunity was given to the petitioner. It held that this Court in the decision reported in **Borusu Nageswara Rao v. Secretary, A.P.Cooperative Tribunal, Vijayawada³**, observed that the necessity of conducting an independent enquiry by way of examining the witnesses would arise only when issues involved are so contentious or complicated. The Tribunal came to the conclusion that the petitioner availed sufficient opportunity and in view of the same, it was held that the order passed by the 1st respondent was not vitiated.

¹ 1994(2) ALT 39

² 1998(1) ALD 455

³ 2003(4) ALT 220

8. Now it has to be seen whether the said finding recorded by the Tribunal in the light of the above facts is correct in law?

9. Section 60 of the Act deals with surcharge and Section 61 of the Act deals with disputes which we are referred to the Registrar. Section 62 of the Act provides for action to be taken by the Registrar on such reference. The relevant portion of Section 60 reads as follows:

"60. **Surcharge:**—

(1) Notwithstanding anything contained in any other law for the time being in force where in the course of an audit under Section 50 or an inquiry under Section 51 or an inspection under Section 52 or Section 53, to the winding up of a society, it appears that any person who is or was entrusted with the organization, affairs 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 has been guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or willful negligence or has made any payment contrary to the provisions of this Act, the rules or the bye-laws, the Registrar himself, or any person specially authorized by him in this behalf, of his own motion or on the application of the committee, liquidator or any creditor or contributor, may inquire into the conduct of such person or officer or servant and 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 authorized 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, breach of trust, or willful negligence as the Registrar or the person authorized as aforesaid thinks just :

Provided that no order shall be passed against any person referred to in this sub-section unless the person concerned has been given an opportunity of making his representation.

(2) Any sum ordered under this section to be repaid to a society or recovered as a contribution to its assets may be recovered on a requisition being made in this behalf by the Registrar to the Collector in the same manner as arrears of land revenue.

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

10. A Division Bench of this Court in **Challa Sanyasinaidu's** case (supra 2), while examining Sections 52 and 60 of the Act, noticed the

decision of the learned Single Judge of this Court in **S.Ramadas v. The Subordinate Judge and others**⁴, where the learned Single Judge took the view that once proceedings under Section 60 of the Act are initiated, the enquiry thereof should be akin to Civil Court enquiry as the Civil Court's jurisdiction is barred expressly in view of Section 121 of the Act. The learned Single Judge took the same view in another decision of this Court in **S.Rama Subba Rao's** case (supra 1). However, a contrary view was taken by another learned Judge of this Court in **Mohd. Ghouse v. Deputy Registrar of Co-operative Societies, Vikarabad and others**⁵. In view of the said conflicting judgments, the Division Bench considered the scope of Sections 52 and 60 of the Act in **Challa Sanyasinaidu's** case (supra 2) and observed as follows:

"The Scheme of Section 60 of the Act in our view unfolds itself as follows:

In the course of inspection under Section 52 of the Act, the Registrar may cause the inspection of Books of the Society with a view to find out the irregularities, acts of omission and commission. This enquiry is only administrative in nature, and if the Registrar prima facie is satisfied of the irregularities on the basis of the report of the enquiry officer, he may initiate surcharge proceedings under Section 60. That report may form the basis for the Registrar to proceed under Section 60 and issue a surcharge order eventually. The person against whom a report is sent under Section 52 has no opportunity to squarely meet the allegations against him at that stage. He is not allowed to cross examine the witnesses from whom statements are recorded implicating his involvement. He cannot also adduce rebuttal evidence. That is not the stage where a demand can be made against him to pay back the sum or liability fastened to him as per the report of the enquiry officer. On the contrary, Section 60 clearly contemplates an opportunity being given to the delinquent by making a representation. In our view, this is the proper occasion where the officer or the servant has to be given an opportunity of explaining his stand and allow him to participate in the enquiry before a final order is passed. This is a valuable right given to the delinquent which cannot be brushed aside in a routine manner. After

⁴ 1992(3) ALT 50

⁵ 1986(2) ALT 108 (NRC)

the show-cause-notice is served and an explanation is called for, an opportunity should be given to the affected person to cross-examine the witnesses examined in the course of enquiry under Section 52 or permit him to examine his witnesses to rebut their evidence. Until this is done the spirit of making a representation, as contemplated under Section 60, cannot be fulfilled. Although Section 60 does not prescribe any particular procedure before passing surcharge order, nonetheless, it is mandatory that principles of natural justice shall be followed in the enquiry. Evidence recorded behind the back of the defaulter cannot be relied upon to fasten the liability on him without giving him an opportunity to cross-examine the witnesses. The Registrar in his surcharge proceedings is a Court whose order can very well form the subject-matter of judicial review under Article 226 of the Constitution of India. Therefore, it is in the fitness of things that an opportunity like supply of copy of enquiry report, statements of witnesses recorded during the said enquiry, and also an opportunity to cross-examine those witnesses, or permit him to examine his own witnesses by the delinquent by way of rebuttal should be allowed before an order under Section 60 is passed. Therefore, we respectfully agree with the view taken by the learned Judge in *S. Rama Subba Rao v. President, Kaikuluru Irrigation and Power Department Sub-Divisional Employees Co-operative Credit Society Limited* (supra). Even in *Mohd. Ghouse v. Deputy Registrar of Cooperative Societies, Vikarabad and others* (supra) the learned Judge has rightly observed that the proviso to Section 60 mandates adequate opportunity before passing the order, and the issuance of notice proposing to fix the liability under Section 60 is imperative and as such there is no breach of principles of natural justice. Having said so, the learned Judge went on observing that Section 60 is an immediate and necessary consequence of enquiry and audit and inspection and the enquiry for the second round is considered to be superfluous and the affected person is not prejudiced or disadvantaged as the enquiry is done in anterior proceedings. These later observations of the learned Judge appear to strike a contrary note, and we do not therefore subscribe to the same. "

11. A learned Single Judge of this Court in **V.V.Satyanarayana v. Chebrolu Primary Agricultural Co-operative Society Limited and others**⁶, observed as follows:

"It is clear from the Inspection Report that the Inspection Officer recorded the statements of several persons on the basis of which he found that the petitioner committed several irregularities. While conducting proceedings under Section 60 of the Act, it is the obligation of respondent No.2 to give an opportunity to the petitioner to rebut the statements made by several witnesses in the inspection, by permitting him to cross-examine such witnesses. As respondent No.2 failed to follow

⁶ 2009(2) ALD (NOC 23)

this procedure, the order passed by him and confirmed by respondent No.3 suffers from serious procedural illegality."

12. Another learned Single Judge in **Karimnagar Co-operative Urban Bank Limited v. B.Hanumanlu and others**⁷, considered the scope of Sections 51, 60 and 77 of the Act and held that whenever surcharge proceedings are initiated, the concerned authorities had to independently make out a case as to misappropriation of funds of the society by the charged employee. Yet another learned Single Judge of this Court in **K.Kanaka Rao v. Chairman, A.P.Co-operative Tribunal, Hyderabad and others**⁸, after reviewing the entire case law, held that the fastening of liability on the petitioner without conducting an independent enquiry by recording the evidence and without giving an opportunity to the petitioner to cross-examine them, amounts to violation of the principles of natural justice and hence the same cannot be sustained.

13. In view of the above cited decisions, what the learned counsel for the petitioner would submit is that the said procedure was not followed and the impugned order which was passed based on the enquiry conducted under Section 51 of the Act is vitiated.

14. Though, the audit, inquiry, inspection and surcharge were included in Chapter–VII of the Act, each action is independent of the other. Section 54 of the Act directs the Registrar to draw the attention of the society to the defects noticed in the audit conducted under Section 50 or inquiry held under Section 51 or inspection made under Section 52 or Section 53 for taking action within the prescribed time and to remedy such

⁷ 2012(5) ALD 792

⁸ 2011(6) ALD 340

defects. Section 59 of the Act empowers the Registrar to keep any officer or servant under suspension pending such audit, inquiry or inspection. Section 60 of the Act states that if the audit or inquiry or inspection reveals the misappropriation or fraudulent retention of money or property of the society or any one is found guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or willful negligence or has made any payment contrary to the provisions of the Act or, the rules or the bye-laws, an “enquiry” as to the conduct of such person shall be made and an order should be passed.

15. The enquiry provided therein is an administrative enquiry, which necessarily implies application of principles of natural justice. If an opportunity was provided during the course of audit or inquiry or inspection under Sections 50 to 53 of the Act, such opportunity does not enure for the benefit of enquiry to be conducted under Section 60 of the Act. The enquiry under Section 60 of the Act is different from the enquiry under other provisions of the Act. The surcharge proceedings are intended to determine the liability of the person charged. In view of the same, due opportunity should be given to the delinquent or charged officer in accordance with the principles of natural justice. The initial burden lies on the society to prove the charge and it is open to the delinquent to adduce evidence in defence. Though, this procedure cannot be elevated to the procedure in a civil suit, the principles of natural justice have to be complied with and that is what was stated in the decisions cited above.

16. The Supreme Court way back in the year 1973, in **Union of India v. G.R.Prabhavalkar and others**⁹, held that the requirement of personal hearing is not part of the principles of natural justice unless the statutes specifically provides for the same. However, when the Presenting Officer produces evidence in support of the charges, the delinquent should be given an opportunity to cross-examine those witnesses and lead evidence on his own. The Supreme Court in **Government of Mysore v. J.V.Bhat**¹⁰ had held that the application of principles of natural justice would depend on the nature of functions imposed by the statutes and the requirements they are designed to meet. It was also held that the nature of hearing would vary according to the nature of the function and relates to the rights affected. The Supreme Court considered the following observations in the earlier decisions while coming to the above conclusion:

"4. In *State of Orissa v. Dr. (Miss) Dr. Binapari Dei* [(1967) 2 SCR 625] this Court held:

"The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitray authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed, it need not be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

In *A.K.Kraipak v. Union* [(1970) 1 SCR 457 = (1969) 2 SCC 262] it was held:

⁹ (1973) 4 SCC 183

¹⁰ (1975) 1 SCC 110

“The rules of natural justice operate in areas not covered by any law validly made, that is, they do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice. If that is their purpose there is no reason why they should not be made applicable to administrative proceedings also, especially when it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial ones, and an unjust decision in an administrative enquiry may have a far reaching effect than a decision in a quasi-judicial enquiry.”

It is further observed:

“The concept of natural justice has undergone a great deal of change in recent years. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case, the framework of the law under which the enquiry is held and the constitution of the Tribunal or the body of persons appointed for that purpose. Whenever a complaint is made before a court that some principle of natural justice had been contravened, the court has to decide whether the observance of that rule was necessary for a just decision on the facts of that case. The rule that enquiries must be held in good faith and without bias, and not arbitrarily or unreasonably, is now included among the principles of natural justice.”

This Court also pointed out:

“The dividing line between an administrative power and a quasi-judicial power is quite thin and is being gradually obliterated. For determining whether a power is an administrative power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised..... In recent years the concept of quasi-judicial power has been undergoing a radical change. What was considered as an administrative power some years back is now being considered as a quasi-judicial power.”

It also observed:

“With the increase of the power of the administrative bodies it has become necessary to provide guidelines for the just exercise of their power. To prevent the abuse of that power and to see that it does not become a new despotism, Courts are gradually evolving the principles to be observed while exercising such powers. In matters like these, public good is not

advanced by a rigid adherence to precedents. New problems call for new solutions. It is neither possible nor desirable to fix the limits of a quasi-judicial power.”

5. The *audi alteram partem* rule was held to be applicable by implication, to a case of deprivation of right in property in *Daud Ahmed v. District Magistrate Allahabad* [(1972) 3 SCR 405 = AIR 1972 SC 896, 899 = (1972) 1 SCC 655, 659] where this Court held:

“It is the nature of the power and the circumstances and conditions under which it is exercised that will occasion the invocation of the principle of natural justice. Deprivation of property affects rights of a person. If under the Requisition Act the petitioner was to be deprived of the occupation of the premises the District Magistrate had to hold an enquiry in order to arrive at an opinion that there existed alternative accommodation for the petitioner or the District Magistrate was to provide alternative accommodation.”

17. The enquiry under Section 60 of the Act may visit the delinquent with penal consequences and it necessarily requires the observance of principles of natural justice. An element of adjudicatory function is involved in coming to the conclusion and it requires weighing of evidence and recording reasons for its conclusions. The above survey of the case law leads to the following conclusions:

- (i) A notice should be given to the delinquent clearly indicating the charges leveled against him and the documents on which reliance is placed.
- (ii) In case the Presenting Officer produces any oral evidence, the delinquent should be given an opportunity to cross-examine the said witness.
- (iii) The delinquent shall be given an opportunity to produce the oral and documentary evidence on his side.
- (iv) The process of enquiry shall not be elevated to the level of a judicial enquiry by applying the provisions of C.P.C. and the Evidence Act, but should give a fair opportunity to both sides.

- (v) The ultimate order of the enquiry officer should contain reasons for his conclusions and a copy of the same shall be communicated to the affected party.

18. This process was lost sight of by the Tribunal while deciding O.A. No.158 of 1999 and it was under the impression that the opportunity provided to the petitioner by the inquiry officer under Section 51 of the Act was a sufficient opportunity and, in the absence of any request made to the petitioner for examining witnesses, it is not open to the petitioner to challenge the surcharge order. Since this Court is satisfied with regard to the violation of procedure, the impugned order dated 17.07.1999 passed by respondent No.1, as upheld by the Tribunal in O.A. No.158 of 1999 dated 18.10.2003, is set aside and the matter is remanded to respondent No.1 for conducting enquiry afresh in accordance with law and to pass orders thereon. It is needless to observe that the petitioner shall cooperate with such an enquiry and the entire proceedings shall conclude within a period of six (6) months from the date of receipt of a copy of this order.

19. With the above observations, this writ petition is allowed. There shall be no order as to costs. As a sequel, miscellaneous petitions, if any pending in this writ petition, shall stand closed.

A. RAMALINGESWARA RAO, J

Date: 10th November, 2016

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