

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.01.2017

DELIVERED ON: 23.01.2017

C O R A M:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

W.P. Nos.9024, 9025,9026 and 9027 of 2001

R.N.Seetharaman,
S/o. R.S.Narashima Chettiyar,
219-A, Swami Ayyar New Street,
Coimbatore - 1
Coimbatore District.

... Petitioner in all WPs

Vs.

1.The Deputy Registrar of
Co.op.Societies,
Erode Circle,
Veerappan Chattram,
Erode - 4.

... 1st Respondent in all WPs

2. The Special Officer,
K1114 Dharapuram,
Agrl. Producers Co.op.
Marketing Society,
Dharapuram.

...2nd Respondent in all WPs

3. The Principal District Judge
And Special Tribunal
for Co.op.Cases
Erode District,
Erode - 11.

...3rd Respondent in W.P.9024 of 2001 &

4th Respondent in W.P.9025 of

2001 & 9027 of 2001 and

5th Respondent in 9026 of 2001

4. P.Muthusamy,
Ex-special officer,
K.1114 Dharapuram
Agrl.Producers Co.op.
Marketing Society
119, Padmavathipuram,
Avinashi Road,
Gandhi Nagar Post,
Tiruppur -3.

... 3rd Respondent in W.Ps.9025 of 2001

9026 of 2001 and 9027 of 2001

5. K.Murugan,
Ex-Special officer,
Dharapuram Agrl. Producers
Co.op. Marketing
Society,
now residing at :-
107, 79-A, Millerpuram,
Tuticorin - 8
Tuticorin District.

.... 4th Respondent W.P.9026 of 2001

Prayer: Writ Petitions filed under Article 226 of the Constitution seeking issuance of Writ of Certiorari calling for the entire records relating to the impugned Decree and Judgment passed by the Principal District Judge and Special Tribunal for Co-operative Cases, Erode, made in C.M.A.No.53/1997, C.M.A.No.3/1998, C.M.A.No.54/1997 and C.M.A.No.51/1997 dated 13.6.2000 confirming the orders of surcharge passed by the 1st respondent in Na.Ka.No.16052/95-J dated 30.11.1996 and quash the same.

For Petitioner	Mr.C.Prakasam
For Respondent No.1	Mr.L.P.Shanmugasundaram, SGP for Co-op.Societies
For Respondent No.2	Ms.S.Aparna for M/s.P.Bagyalakshmi
For other Respondents	NIL

COMMON ORDER

Heard.

2. All these four writ petitions have been filed challenging the orders of the Co-operative Tribunal, Erode Dist. constituted under Section 152 of the Tamil Nadu Co-operative Societies Act, 1983 (for short "the Act"). The Appeals under the said provision were filed by the Petitioner against the surcharge order passed by the 2nd Respondent made in Na.Ka.No.16052/95-J dated 30.11.1996 under Section 87 of the Act. All the four appeals were assigned different appeal numbers i.e. C.M.A.No.53/1997, C.M.A.No.3/1998, C.M.A.No.54/1997 and C.M.A.No.51/1997 dated 13.6.2000. They were disposed of by similar orders dated 30.11.1996 dismissing the appeals and confirming the orders of surcharge passed against the petitioner.

3. Even at the time of filing of these writ petitions, the petitioner was 60 years old and was an ex-employee working in the 2nd Respondent Society as a Clerk. The Petitioner is liable to pay as per the surcharge orders and confirmed by the Co-op. Tribunal, the following amounts :-

C.M.A.No.53/1997	Rs.96,413.19 (together with interest @18% till the date of payment)
C.M.A.No.3/1998	Rs.4018.90 (- do -) (Manivannan, Salesman Rs.2115.15)
C.M.A.No.54/1997	Rs.28,119.67 (together with interest @18% till the date of payment) (jointly and severally to be paid by the petitioner and the 3 rd and 4 th Respondents in W.P.9026 of 2001)
C.M.A.No.51/1997	Rs.9186.75 (together with interest @18% till the date of payment) (jointly and severally to be paid by the petitioner and the 3 rd Respondent in W.P.9027 of 2001)

4. All the four writ petitions were admitted on 30.4.2001. Pending the writ petitions, this Court declined to grant an order of interim stay of the operation of the orders of the Tribunal in C.M.A.No.53/1997 and 54/1997 alone vide a common Order dated 30.4.2001 made in W.M.P.Nos 12796,12800 of 2001 on the ground that the amounts involved are very low and those W.M.Ps were dismissed. In W.M.P.12798 of 2001 directed against C.M.A.No.3/1998 and in W.M.P.No.12802 of 2001 directed against C.M.A.No.51/1997, an order of interim stay was granted, subject to the condition that the petitioner should deposit 50% of the amount covered by the order. Though the learned judge wanted to decline granting of interim stay in respect of orders confirming payment of low amounts, by mistake, in the W.M.Ps. which were directed against heavy amounts, no interim orders were granted and in respect of two orders confirming surcharge of low amounts, interim orders were granted on condition. Whether the conditions were complied with or not, no records are available even in respect of the heavy amounts where no interim orders were granted. It is also not clear as to whether the society went for a recovery proceedings. In effect, the petitioner preferred to have the dismissal of the stay applications rather than obtaining conditional orders where he would have been expected to deposit 50%. This fact was also not brought to the notice of the learned Judge either by the Registry or by the counsel appearing for the Co-operative Society.

5. It must be noted that the petitioner alone had filed the four writ petitions and the Special Officers working in the 2nd Respondent Society at the relevant time (M/s.P.Muthusamy and

K.Murugan) have not chosen to challenge the surcharge orders before the Tribunal and also have not filed any writ petition against those orders. Even before this Court, though they have been arrayed as respondents, they have not chosen to appear either in person or through counsel.

6. On behalf of the 2nd Respondent, a common counter affidavit dated 10.7.2014 was filed. When the matters came up for final hearing before a learned

Judge, by orders dated 30.4.2014, the 1st Respondent was directed to produce the original file relating to the report under section 81 of the Act. The Co-operative Tribunal also, on receipt of the notice from this Court, has despatched the records relating to C.M.A.No.53/1997, 3/1998 and 51/1997 alone. Either the records relating to C.M.A.No.54/1997 were not received or not circulated before this Court by the Registry.

7. Before dealing with the contentions raised by the petitioner, it is necessary to set down the circumstances under which the surcharge proceedings were initiated by the 2nd Respondent Society and the consequential orders came to be passed. The Registrar of Co-operative Societies, Chennai-10, on coming to know that the affairs of the 2nd Respondent Society were not properly conducted, by his proceedings dated 1.4.1993, ordered for an enquiry under section 81 of the Act. Pursuant to the same, a Co-Operative Sub-Registrar-cum-Superintendent, Special Audit Team was appointed as the Enquiry Officer. He conducted enquiry from 15.4.1993 to 30.9.1993. He finally submitted his elaborate report running into 139 pages to the department. In that report, there was also a reference about the role played by the petitioner in causing shortage of stock.

8. Based on the report, the 2nd Respondent initiated proceedings under section 87 of the Act. Based on the involvement of the petitioner, a show cause notice dated 1.12.1995 was given to the petitioner asking his explanation to be submitted within 15 days. Similar notices were also issued to the other 57 employees, including the then Special Officer (P.Muthusamy) of the society. In those notices, the relevant portion of the report under section 81 of the Act was also given.

9. The petitioner was issued an enquiry notice to appear on 29.10.1996 in respect of the surcharge order regarding shortage of stocks to the extent of Rs.96413.19. The petitioner sent a reply dated 11.11.1996 asking for adjournment of the enquiry. He also asked for a copy of the report and in the absence of the same, permission to scrutinize the record in the office. By a letter dated 25.11.1996, he was permitted to peruse the records

in the 1st Respondent's office on the date specified. The petitioner stated that the letter sent to him was received by his wife as he was not in station and he wanted another date to peruse the documents. Since the petitioner was adopting delaying tactics, the explanation offered by the Special Officer of the society was considered and final orders were passed on 30.11.1996.

10. In respect of shortage of stock to the extent of Rs.4018.90, notices dated 1.12.95 were issued fixing the liability on the petitioner as well as one Manivannan, former Salesman. The said notice was received by the petitioner's wife Jayasree. In spite of the same, the petitioner did not appear for enquiry on 28.11.1996. Based on the explanation offered by the Special Officer, the petitioner and the said Manivannan were fastened with the liability and were asked to share the amount of payment of Rs.2115.15 paise. It was stated that in spite of opportunities to peruse the document in the office of the 1st Respondent, he did not do so and also failed to utilize the opportunity afforded to him by not attending the enquiry.

11. In respect of surcharge relating to Rs.28119.67, notices were issued to the petitioner and Muthusamy and Murugan, former Special Officers. All the three persons did not appear for the enquiry held on 28.1.1996. Thereafter, explanation was received from the society. The 2nd Respondent held that the petitioner did not deny the charges and also did not utilize the opportunity of perusing the records and also did not appear for the enquiry.

12. In respect of the surcharge proceedings relating to the levy of Rs.9186.75, it was stated that the petitioner failed to utilize the opportunity of perusing the records and also did not appear for the enquiry and hence, the surcharge order was finalized as per the records and after getting explanation from the society.

13. Aggrieved by these four orders, four appeals were filed before the Co-operative Tribunal by the petitioner and the other Special Officers who were also fixed with equal liabilities along with petitioner, did not file any appeal. In all the four appeals, the grounds raised by the petitioner before the Tribunal are as follows:-

- a. No charges were proved against the petitioner.
- b. Section 87 proceeding can be conducted only on limited grounds
- c. The charges leveled against the petitioner do not come within the ambit of Section 87.
- d. The alleged loss of asset were only based on presumption
- e. The report under section 81 should not have been accepted and the same was not furnished.

- f. There is no evidence to show that the price of the commodities sold were fixed low.
- g. Actual fixation of the price of the commodities were not furnished.
- h. No reasonable opportunity was given and enquiry was not adjourned as the petitioner did not receive the notice personally.
- i. Merely because no explanation was submitted will not amount to acceptance of the report.

14. The Tribunal assigned various numbers to those appeals (C.M.A.No.53/1997, C.M.A.No.3/1998, C.M.A.No.54/1997 and C.M.A.No.51/1997 dated 13.6.2000) and passed identical orders dated 13.6.2000 dismissing all the four appeals. In order to appreciate the order of the Tribunal, it is necessary to extract one such order of the Tribunal made in C.M.A.No.53 / 1997 which is as follows:-

"A detailed statement of accounts for loss to the societies, under 12 heads were furnished to the appellant and he was called for to explain for the same. The said proceedings was initiated under Section 81 of the Act. The total misappropriated amount works out to Rs.96,413.19. The appellant did not offer any explanation for the same. Thereafter the first respondent initiated surcharge proceedings under Section 87 of the Act. The appellant did not offer any explanation for such malpractice to the first respondent, nor did he appear before the first respondent and confront the claim of the society. The first respondent also shown much indulgence by granting several adjournments on the request made by the appellant. In spite of that the appellant did not offer any explanation for the show-cause memo nor appeared before the first respondent and confront the claim of the society. The first respondent after scanning the available records came to a conclusion that the appellant is liable to pay a sum of Rs.96,413.19 with 18% interest till the date of payment, and ordered accordingly. I do not find any infirmity in the findings of the first respondent."

More or less identical reasons were given in other appeals also. The Tribunal, as per the notings made in the Court record, had received the records from the department on 26.3.98 itself and thereafter, conducted the hearing for more than two years by frequently adjourning the matter from time to time. No records were marked as part of the appeal proceedings.

15. In the writ petitions, the petitioners have raised the following grounds:-

- a. The Tribunal did not keep in mind the parameters for deciding the legality of an order passed under section 87.
- b. The Tribunal did not see that the enquiry under section 87 cannot exceed beyond six months unless extension is obtained.
- c. The Tribunal did not pass a speaking order.
- d. The Tribunal failed to see that the copy of the enquiry report under section 81 was not furnished.
- e. The Tribunal failed to note the authority which issued a surcharge order did not find that there was loss to the society and deficiency due to routine business cannot be brought under section 87.

16. In the counter affidavit filed on behalf of the 2nd Respondent co-operative society, it was contended that the petitioner was solely responsible for receiving stock and preserving, maintaining and disbursing for 189 shops. He was responsible for the deficiency in service along with the then Special Officer. The Petitioner did not produce sufficient documentary oral evidence before the surcharge officer. In para no.12, curiously, the 2nd Respondent stated as follows:-

"It is respectfully submitted that after the petitioner herein and the then Special Officer, recording the oral evidence adduced by both the parties, affording sufficient opportunity to hearing and the evidence adduced by the petitioner in writing and after perusing the entire documentary evidences such as Stock Register, availability of Stocks, etc., and the evidence adduced by the witnesses therein, orders in the surcharge proceedings were passed on the basis of the report of the Enquiry Officer."

17. It is not clear as to where the 1st Respondent chose to find that there were opportunities given to the petitioner to put forth his case. Firstly, though his request for furnishing the copy of the report was denied and he was asked to peruse the record in the office on the appointed date, he could not make it due to some personal circumstances. His further request for another date was declined. So, the petitioner was denied the benefit of replying to the charges leveled against him based upon that report. There was no explanation of the petitioner available. He was only given one date for appearance for an enquiry and on that date, in the absence of the petitioner, the enquiry was closed. Thereafter the 1st Respondent, based upon the enquiry report only, concluded his findings. When these

facts were brought to the notice of the Tribunal which is an appellate authority constituted under section 152, the Tribunal also passed cryptic orders without even referring to any of the records allegedly received by it.

18. Before proceeding to decide the legality of the orders of the Tribunal under challenge since the original order emanated under section 87, it is necessary to refer to the said provision which is 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 organization 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 by-laws the Registrar himself or any person specially authorized 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 and after giving a reasonable opportunity to the person concerned and in the case of a deceased person, to his 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 any 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 respect of the misappropriation, misapplication of funds, fraudulent retainer, breach of trust or willful negligence or payments which are not accordance with this Act, the rules or the by-laws as the Registrar or the person authorized 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 a 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 arrear 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 authorized 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."

19. The first contention of the petitioner was that inasmuch as the proceedings under section 87 did not conclude within 6 months, the final order must be necessarily set aside and in this respect, the petitioner had placed strong reliance upon the earlier decision of this Court in T.V.Ekambaram v. Cooperative Tribunal-cum-District Judge, Madurai [2000 (2) CTC 659]. However, subsequently, it was held that the said decision had not rendered correct finding on law. R.Banumathi, J (as she then was), in the decision of G.Panneerselvam and others vs. Deputy Registrar of Cooperative Societies, Dharmapuri and others [(2009) 2 MLJ 901] held that the proceedings under section 87 of the Act prescribing a period of 6 months for conclusion is not mandatory. The said view taken by the learned Judge was found acceptance by a subsequent Division Bench in A.Balaraman and others vs. Deputy Registrar of Cooperative Societies, Cheyyar,

Thiruvannamalai District and others [(2009) 3 MLJ 1032]. Hence, the contention based on limitation must fail.

20. The scope of section 87 proceedings came to be considered by this Court and by the Supreme Court in respect of the earlier provision of law under the old Act (Section 71 of the Tamil Nadu Co-operative Societies Act, 1961) and it is necessary to refer to those decisions. The Supreme Court, while dealing with section 71 of the Old Act in its decision in Pollachi Co-operative Marketing Society Vs. K.N.Valuswami and Others, held as follows:-

"Quoting an earlier judgment, delivered by Pandian J. (as he then was) in Sathyamangalam Cooperative Urban Ltd v. Dy.Registrar of Cooperative Society (1980(2) MLJ 17), it held that to constitute willful negligence, the act done or omitted to be done must involve such reckless disregard of duty as to imply bad faith.

The High Court was, in our view, right in emphasising that the degree of negligence that had to be established under Section 71 was not mere negligence but willful negligence and that this imported a consciousness that injury or loss was like to arise from an act of commission or omission"

21. The said principle evolved under the old Act also came to be followed in respect of Section 87 of the new Act. The learned counsel for the petitioner relied upon the following judgments rendered by three Division Benches of this Court.

- (i) K.Ajay Kumar Gosh & Ors. Vs. Tribunal for Co-operative Cases [2009 (4) MLJ 992]
- (ii) P.Elango, IAS., (Retd.) Vs. Administrator, M.R.K. Co-operative Sugar Mills, Sethiathope [2014 (3) MLJ 575]
- (i) S.Ramadevi Vs. Special Officer, Ambur CO-operative Sugar Mills, Vadapudupet [2016 (6) MLJ 485]

22. In the third decision referred to above rendered very recently by the Division Bench headed by the Hon'ble Chief Justice, once again, the stated principles were reiterated and in para 25, it was observed as follows:-

"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.''

23. If it is seen in the above light, then, certainly it can be held that neither the 1st Respondent (Surcharge Officer) nor the Co-operative Tribunal held in mind these principles when they held against the petitioner. There was no finding regarding the negligence part by both the authorities. Further, the Tribunal did not look into the records to find out whether minimum principles of natural justice were followed before the surcharge order was passed. On the other hand, though the petitioner was denied the supply of copy of report under section 81, he was permitted to peruse the records. But, permission was not given for an alternative date sought for by the petitioner. Similarly, on the same day, on which the hearing was notified, the authority (R1) did not adjourn the enquiry even after finding that the notice of enquiry was not received by the petitioner but by his wife. No doubt, any attempt to delay the proceedings should be thwarted but in the name of avoiding delay, one cannot foreclose the opportunities to be given to an aggrieved party. No useful purpose will be served by sending the matter back to the co-operative Tribunal since the original authority i.e. the 1st Respondent himself had not discharged his functions properly.

Under the above circumstances, all the writ petitions are allowed and the orders made in C.M.A.No.53/1997, C.M.A.No.3/1998, C.M.A.No.54/1997 and C.M.A.No.51/1997 dated 13.6.2000 confirming the orders of surcharge passed by the 1st respondent in Na.Ka.No.16052/95-J dated 30.11.1996 are set aside. All the four matters are remanded back to the 1st Respondent for considering the same afresh and in accordance with law. The contesting respondent can adduce evidence before the first respondent. If in accordance with the interim orders passed by this Court, the petitioner had deposited any amount and if any amounts have been recovered from him in the absence of interim orders in two cases, those amounts will be kept with

the society pending disposal of the outcome of the decision of the 1st Respondent. Since the matter is already 20 years old, the 1st Respondent shall dispose of the surcharge proceedings within 6 months from the date of receipt of a copy of this order. No costs.

s/d-
Assistant Registrar(CCC)

//True Copy//

Sub-Assistant Registrar

To:

1. The Deputy Registrar of
Co.op.Societies,
Erode Circle,
Veerappan Chattram,
Erode - 4.
 2. The Principal District Judge
And Special Tribunal
for Co.op.Cases
Erode District,
Erode - 11.
 3. The Special Officer,
K1114 Dhanapuram
Agricultural Producers Co.Op Marketing Society
Dhanapuram.
- +1 CC to Mr. C. Prabakaran, Advocate sr 4530
+1 CC to The Govt. Pleader, High Court, Madras-104, sr 4908

सत्यमेव जयते

Common Pre-delivery order in
W.P. Nos.9024, 9025,9026 and 9027 of 2001

NMI (CO)
sp/8/2

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