



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.04.2017

CORAM:

THE HONOURABLE MS.JUSTICE **V.M.VELUMANI**

C.R.P.(MD)Nos.947 and 948 of 2016 (NPD)

M.Anbalagan

.. Petitioner in both the C.R.Ps.

Vs.

1. Enquiry Officer,
Office of the Co-op. Deputy Registrar,
Musiri.
2. The Deputy Registrar of Co-Operative Societies,
Elango Nagar,
Vadugapatti College Road,
Musiri, Trichy District.
3. The Co-Operative Sub Registrar/
Administrator,
R.963, Thulayanatham Primary
Agricultural Co-operative Credit Society Ltd.,
Thulayanatham Post,
Musiri Taluk,
Trichirappalli District.

.. Respondents
in both the C.R.Ps.

[3rd Respondent impleaded vide Court order
dated 08.09.2016, made in C.M.P.(MD)
Nos.5669 & 5670 of 2016 in C.R.P.(MD)
Nos.947 & 948 of 2016]

COMMON PRAYER:

Civil Revision Petitions filed under Article 227 of the Constitution of India, against the judgment and decree, dated 07.04.2016, passed in C.M.A.(CS)Nos.12 and 13 of 2015 by the learned Principal District Judge, Trichirappalli.

For Petitioner
(in C.R.P.(MD)No.947/2016)
For Petitioner
(in C.R.P.(MD)No.948/2016)
For Respondents

: Mr.D.Selvam
for Mr.G.Thalaimutharasu
: Mr.Nirajan S.Kumar
for Mr.G.Thalaimutharasu
: Mr.B.Pugalendhi

<https://hcservices.ecourts.gov.in/hcservices/> (in both the C.R.Ps.)

Additional Advocate General
Assisted by



Mr.G.Muthukannan
Government Advocate

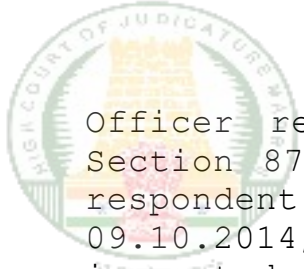
COMMON ORDER

These Civil Revision Petitions have been filed by the petitioner against the judgment and decree, dated 07.04.2016, passed in C.M.A.(CS)Nos.12 and 13 of 2015 by the learned Principal District Judge, Trichirappalli.

2.Since the issues involved in both the Civil Revision Petitions and the parties are one and the same, they are heard together and disposed of by this common order.

3.The petitioner in both the cases is 9th respondent in surcharge proceedings initiated by the second respondent in Na.Ka.No.2460/2014 Sa.Pa., dated 29.05.2015 and Na.Ka.No.2462/2014 Sa.Pa., dated 27.05.2015, under Section 87 of the Tamil Nadu Co-operative Societies Act, 1983 [hereinafter referred to as 'the Act'] and appellant in C.M.A.(CS)Nos.12 and 13 of 2015 on the file of the Principal District Court, Tiruchirappalli.

4.The petitioner was working as Sub-Registrar of Co-operative Societies. He was appointed as Special Officer in R.963 Thulayanatham Primary Agricultural Co-operative Credit Society Limited, Thulayanatham Post, Musiri Taluk, Trichirappalli District, from 14.01.2010 to 20.05.2010 and from 14.10.2011 to 08.05.2013. He was functioning as Field Officer from 11.12.2009 to 30.11.2013 in the said Society. Allegations were made that serious financial irregularities and misappropriation were committed during the period from 01.04.2011 to 15.10.2013. One Vanathan working in the said Society gave complaint to the President of the Society. The same was forwarded to the Registrar, who ordered enquiry under Section 81 of the Act. In the enquiry, it was found that the Secretary one Pandian and subsequent Secretary S.Murugesan were found to have committed irregularities in respect of 112 items and misappropriated totally Rs.1,01,06,400/- and another sum of Rs.5,81,10,505/-. The enquiry officer submitted report on 02.05.2014. In the said report, it was stated that the Secretaries, viz., M.Pandian and S.Murugesan created bogus documents, as though the members, who have deposited monies in fixed deposits, availed loan and misappropriated the amounts. According to the report, K.V.Selvaraj, the Senior Clerk and K.Sivalingam, Clerk, N.Vanathan, Clerk, K.Pushpavalli, Sales-woman, M.Nalini, Computer Typist on daily wages, colluded together with the Secretaries and misappropriated such huge amounts. K.Mohan, President, the Secretary one Pandian and K.Mathivanan, another Special Officer, did not properly verify the records and due to their negligence, the Secretaries and others, misappropriated the amounts. The Enquiry



Officer recommended initiation of surcharge proceedings as per Section 87 of the Act. Based on the Enquiry Report, the second respondent was appointed as Surcharge Proceeding Officer. On 09.10.2014, the petitioner requested copies of documents and inspected the documents and received copies of enquiry report and statements of employees of Societies. The petitioner appeared before the Enquiry Officer on 20.01.2015 and 16.02.2015 in person and gave statement and received copies of documents. He submitted his explanation, dated 09.02.2015. Similarly, the respondents in the surcharge proceedings appeared before the second respondent and gave statements. The second respondent had examined the members, who have deposited the amounts in fixed deposit and who alleged to have availed loans based on the fixed deposit receipts. After enquiry, the second respondent passed an order holding that the Secretaries, viz., Pandian and Murugesan have committed irregularities and misappropriated funds and other employees, who were arrayed as respondents, colluded with them in the irregularities committed by the above two persons. The second respondent held that the petitioner was negligent in discharging his duties as he failed to verify the records of the Societies and thereby, due to his negligence, allowed the Secretaries to commit irregularities and caused loss to the Society. The second respondent passed orders dated 27.05.2015 and 29.05.2015 holding that all the respondents are totally and severally liable for loss caused to the Society. The second respondent held that the petitioner was negligent and failed to discharge his duties and due to his negligence, the irregularities and misappropriation had happened and the petitioner is jointly liable due to his negligence. Against the said two orders, the petitioner filed C.M.A.(CS)Nos.12 and 13 of 2015.

5.The petitioner contended in the appeals that the second respondent did not give ample opportunity to the petitioner in surcharge proceedings. Section 81 enquiry report was given to the petitioner only after five months. The second respondent examined 71 witnesses behind the back of the petitioner without notice to him and did not give any opportunity to cross-examine those witnesses. The second respondent did not issue any notice to the petitioner with regard to enquiry conducted by him from 23.03.2015 to 23.04.2015, when he examined 71 witnesses. The second respondent did not examine Thiru.A.Arockiya Nathan Fernandez, who conducted the enquiry under Section 81 of the Act. The second respondent on 08.04.2015 rejected the request of the petitioner, dated 16.03.2015 to engage an Advocate to cross-examine the Enquiry Officer and other witnesses. The second respondent failed to see that as per Section 87(1) of the Act, surcharge proceedings are in the nature of civil proceedings and has to be conducted as per C.P.C. The second respondent has violated the principles of natural justice, which resulted in miscarriage of justice.



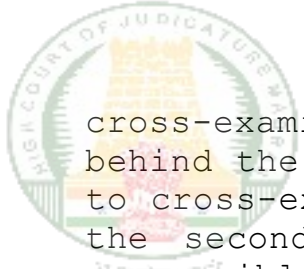
6.The petitioner was appointed as Special Officer for 14 Co-operative Societies and had to inspect 58 ration shops attached to the said Societies. The petitioner could not participate and verify day-to-day affairs of all the Co-operative Societies and it is an admitted fact that Staff of the Societies used to bring the Register, where the petitioner is in the Camp for getting his signature. The cash and properties were entrusted to Secretary Pandian and Murugesan and not to the petitioner. There is no allegation of misappropriation by the petitioner and it is stated that the petitioner was negligent. Even with regard to negligence, it is not the case of the enquiry officer, under Section 81 of the Act as well as the second respondent, the alleged negligence is wilful, deliberate and wanton.

7.The respondents filed counter and denied various averments made by the petitioner and contended that only due to negligence of the petitioner/appellant, the irregularities and misappropriation had happened and therefore, the petitioner is also liable. The petitioner has not verified all the records as per the duties entrusted to him as Special Officer. He verified only deposit register and he did not verify loan register. His duty is to check all the ledgers and books daily. The petitioner had full knowledge about the misdeeds committed by other staff, but failed to monitor the staff and sign the Registers after verification. Due to the omission and commission of the petitioner in discharging his duties, such a huge monetary loss had occurred. The contention of the petitioner that due to burden of heavy work that as a Special Officer of 14 Societies, he could not verify all the documents and registers daily, is not an excuse for his negligence.

8.The learned Principal District Judge dismissed both the appeals holding that the petitioner is also liable for the loss caused to the Society due to his negligence in discharging his duties.

9.Against the said order dated 07.04.2016, made in C.M.A.(CS) Nos.12 and 13 of 2015, the petitioner has come out with the present Civil Revision Petitions.

10.The learned counsel for the petitioner has submitted that an Officer of the Society can be held liable under Section 87(1) of the Act only, if it is proved due to his wilful negligence, the loss has occurred. The enquiry officer, who conducted the enquiry under Section 81 of the Act has not given a finding that the appellant has committed wilful negligence in causing loss to the Society or misappropriated funds. The petitioner was in-charge of 14 Co-operative Societies and therefore, he can have only minimal services from the Society in question. The second respondent did not examine the Officer, who conducted the enquiry under Section 81 of the Act and did not give opportunity to the petitioner to



cross-examine him. The second respondent examined 71 witnesses behind the back of the petitioner and did not give any opportunity to cross-examine the witnesses. None of the witnesses examined by the second respondent had stated that the petitioner also was responsible for the irregularities and for the loss caused to the Society. On the other hand, the staff of the Society, who gave evidence before the second respondent has stated that the Secretary Murugesan and Sales-woman Pushpavalli used to prepare all the documents till 9.30 p.m. in the night and forced the staff to sign the documents and keep all the documents in their custody. The power to sanction loan based on the fixed deposit receipt is with the Secretary. It is an admitted case that it is the Secretary, who sanctioned the loan, did not produce the documents to the petitioner for verification. In addition to that, being in-charge of 14 Societies, the petitioner has to discharge following duties also.

"(i)He has to inspect 58 Ration Shops which are within his jurisdiction.

(ii)He has to attend Collector Meeting on every Monday without fail.

(iii)He has to attend Deputy Registrar Weekly & Monthly Meeting.

(iv)He has to attend Joint Registrar Weekly & Monthly Meeting.

(v)He has to conduct Detailed Inspection - at least 2 Societies per month.

(vi)He has to conduct Cursory Inspection - at least 4 Societies per month.

(vii)He has to compulsorily attend Mass Conduct Program.

(viii)He has to conduct regular Interview.

(ix)He has to follow up Co-operative Cases in District Court (Co-operative Cases)

(x)He has to follow up Co-operative Cases in High Court (Co-operative Cases)

(xi)He has to send Status Report regarding pending cases.

(xii)Apart for all the above his regular office work."

11.The second respondent had initiated proceedings under Section 90 of the Act against the Secretary Pandian and Murugesan and obtained decree for the loss caused by them to the Society. He also attached the properties belonging to Murugesan as per Section 167(2) of the Act. The second respondent also filed E.P.No.1 of 2013 - 14 against Murugesan and also initiated proceedings against Pandian, Ex-Secretary for the loss caused to the Society. The second respondent cannot initiate surcharge proceedings against the petitioner based on the very same set of facts, when already the loss alleged to have caused is secured.



12. In support of his submissions, the learned counsel for the petitioner relied on the following judgments:

(i) 2002 (3) LW 185 [S. Subramanian Vs. The Deputy Registrar of Co-operative Societies (Housing), Cuddalore and others], wherein at paragraphs 12 to 14, it has been held as follows:

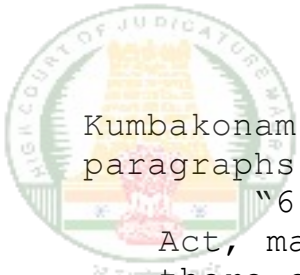
"12. In the present case it has to be pointed out that no finding has been recorded by the first respondent or by the third respondent to establish that the deficiency had been caused wilfully or deliberately or with a view to cause loss to the assets of the society. Nowhere a finding has been rendered either by the first respondent or by the third respondent in their proceedings that the petitioner is guilty of wilful negligence or wantonness, nor it has been recorded that omission or commission on the part of the petitioner is deliberate, reckless or callous or loss has been caused deliberately to the assets of the society.

13. In the absence of such a finding, as has been consistently held by this Court, that the petitioner is guilty of wilful or deliberate negligence or there is intention to cause loss to the assets of the society, it follows that the impugned surcharge proceedings in so far as the petitioner is concerned are liable to be quashed.

14. In our considered view, the learned single Judge had dismissed the writ petition in limine as set out above without reference to the statutory provisions of the Co-operative Societies Act and the pronouncements and the view of the learned single Judge runs counter to the earlier Division Bench as well as pronouncements of two other learned Single Judges of this Court. It is not mere negligence, it must be wilful negligence. Further it is not a case of misappropriation even according to the respondents. When the requirements of Section 87 had not been satisfied and when the basic requirement of Section 87 which warrants initiation of surcharge proceedings is not satisfied or established on mere assumptions the appellant cannot be fastened with the liability. It has to be pointed out that neither in the show cause notice, nor in the proceedings of the first or third respondent, it has been held that the appellant has acted wilfully or wantonly with premeditation with a view to cause loss to the assets of the society. Mere negligence cannot be a ground of surcharge and it must be a wilful negligence or intentional negligence and not mere carelessness or intention or

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(ii) 2013 (4) MLJ 352 [Deputy Registrar of Co-operatives,



Kumbakonam, Thanjavur District Vs. R.Krishnamoorthy], wherein at paragraphs 6 and 9, it has been held as follows:

"6. Section 87 of the Tamil Nadu Co-operative Societies Act, makes it clear that for issuing surcharge proceedings, there should be a definite finding that the loss was caused due to wilful negligence of the concerned employee. I have perused the surcharge proceedings enclosed in the typed set of papers. Nowhere it is stated that it was due to his wilful negligence, the loss was caused. Just because he was the Manager, he cannot simply be fastened with the liability for the shortage caused by the employees, who are employed under him.

9. The Appellate Court has found that the respondent did not involve in the handling of the stock. The Appellate Court also found that it was not the case that the respondent was the beneficiary in the financial loss. The following passage in page 11 of the order of the Appellate Court is extracted in this regard.

"மேலும் மேற்படி கூட்டுறவு பண்டகசாலைக்கு ஏற்பட்டதாக கூறப்படும் பிரச்சனை நிதியிழப்பு நடவடிக்கையில் இந்த மேல்முறையீட்டாளர் நேரடியாக சம்பந்தப்பட்டார், அல்லது அவர் அந்த தொகையில் தவறான பலன் அடைந்தார் அல்லது அப்படி நிதியிழப்பு ஏற்பட அவர் வேண்டுமென்றே கவனக்குறைவாக இருந்தார் என்பதாக மேல்முறையீட்டாளருக்கு எதிராக அந்த பிரச்சனை உத்தரவில் விபரம் ஏதும் குறிப்பிட்டிருக்கவில்லை, மேலும் விசாரணை அறிக்கை மற்றும் தண்ட தீர்வை உத்தரவு விவரத்தில் கூட மேல்முறையீட்டாளர் அவருடைய பணியை சரிவர பார்க்காததன் காரணமாகவே கூறப்படும் நிதியிழப்பு ஏற்பட்டதாக கூறப்படுகிறதே தவிர மேல்முறையீட்டாளர் வேண்டுமென்றே அம்மாதிரி பணியை சரிவர பார்க்கவில்லை என்பதாக குறிப்பிட்டு அவர் மீது புகார் ஏதும் இல்லை."



committed wilful negligence leading to the loss to the Society."

(iii) 2012 (2) LLN 90 (AP) [K.Kanaka Rao Vs. The Chairman, A.P. Co-operative Tribunal], wherein at paragraphs 10 and 11, it has been held as follows:

"10. In view of the above judgments of this Court, I am of the view that the impugned orders fastening the liability on the Petitioner without conducting an independent enquiry by recording the evidence and without giving the opportunity to the Petitioner to cross-examine them, amounts to violation of the principles of natural justice and hence the same cannot be sustained.

11. The Division Bench judgment of this Court in Kolluri Bhaskara Rao v. Dy. Registrar Of Co-Operative Societies, Gudivada, Rksihan Dist (6 supra) is concerned, the same is not applicable to the facts of the present case, since aspects with regard to bar of jurisdiction of the civil court under Section 121 of the Act and the earlier judgments of the Division Bench which held that conducting of independent enquiry before passing the surcharge proceedings under Section 60 of the Act is mandatory, were not discussed. Further, the judgment relied on by the Tribunal below in Borusu Nageshwara Rao's case (1 supra), was dealing with the proceedings passed under Section 51 of the Act, which are administrative in nature and since in the present case, the surcharge proceedings are passed under Section 60 of the Act, the decision cannot be made applicable."

(iv) 1999 (3) MLJ 310 [M.Sambandam Vs. The Deputy Registrar (Credit) Co-operative Societies, Mylapore, Madras and others], wherein at paragraphs 10 and 11, it has been held as follows:

"10. Regarding the merits of the charges levelled against him, the perusal of the charges, order passed by the first respondent clearly show that the first respondent failed to establish the conditions or ingredients adumbrated in Section 71 of the Act. As rightly argued by the learned Counsel appearing for the petitioner, there is no allegation or charge against the petitioner that he had misappropriated the funds of the Society. As stated earlier, the analysis of the charges and the conclusion arrived by the Enquiry Officer reveal that it would only be a negligence and not a wilful negligence. It is also clear from the records that, most of the debt transactions are taken place prior to the assumption of the office by the petitioner. Further, the main allegation was that the petitioner and other Directors fail to take steps to recover the amounts payable to the Society.



11. Taking note of all the materials as well as the conditions prescribed in Section 71 of the Act, I am of the view that there is no finding that the action of the petitioner would come within the mischief of that section.

.....

Having regard to the interpretations and discussions in respect of the term 'wilful' appearing in various enactments, as found in the case-law decided by the learned English and Indian Judges which serve as a guide to the construction of the term 'wilful' used in Section 71(1) of the Act. I am of the view that in order to pass a surcharge order under that section against a person entrusted with the organisation and management of a co-operative society or an officer or servant thereof, such person 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 (but not by accident or inadvertence), without taking due care and precaution ordinarily expected from a reasonable and prudent man under those existing circumstances, that is to say, not caring what the result of his carelessness would be."

(v) 2009 (4) MLJ 992 [K. Ajay Kumar Gosh and others Vs. Tribunal for Co-operative Cases [District Judge of Kanyakumari District], Nagercoil and another], wherein at paragraph 20, it has been held as follows:

"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 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."

(vi) 1980 (2) MLJ 17 [Sathyamangalam Co-operative Urban Bank Limited Vs. The Deputy Registrar of Co-operative Society and another], wherein at paragraph 19, it has been held as follows:

"19. The degree of negligence that is contemplated under Section 71(1) of the Act is not a mere negligence, but wilful negligence. The word 'wilful' has not been defined 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. Thus, the term 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. In other words, the conduct of a person, to amount to 'wilful negligence', must be something more than ordinary negligence. To constitute wilful negligence, 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. The wilful or intentional negligence is something distinct from mere carelessness or inattention, however gross, and consists of a wilful and intentional failure or neglect to perform a duty necessary to protect from harm or loss to any person or property of another. 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 that negligence is wilful and secondly, whether the said wilful negligence is the proximate cause of the injury or loss sustained."

13. Per contra, the learned Additional Advocate General appearing for the respondents contended that the petitioner was appointed as Special Officer of the Society. The duties of the Special Officer were fixed by the Registrar of Co-operative Societies, by his Letter No.Rc.79650/2001, SF-4, dated 04.06.2001. As per the said Letter, the Special Officer shall discharge all the duties of the Board of Society. As per Bye-Law No.25(B), the Board should ensure that the funds and assets of the Society are not mis-utilized by the Officers, Employees of the Society and others. The petitioner as a Special Officer ought to have verified the funds and assets of the Society once in a month without fail and ought to have discharged the duties as per the Letter of the Registrar, dated 04.06.2001. The petitioner, who verified the fixed deposit receipts ought to have verified the loan register also. The failure on the part of the petitioner to verify the loan register clearly shows his wilful and wanton negligence, which allowed the irregularities committed by the Secretaries and other Staff. Further, due to wilful and wanton negligence on the part of the petitioner, the amounts covered by fixed deposits were paid to depositors without collecting the loan amounts. More than one loan was granted on the same fixed deposit receipts more than the eligible limit of 80% of fixed deposit amounts. This clearly shows wilful and wanton negligence on the part of the petitioner. The second respondent has given ample opportunity to the petitioner to put forth his case and the second respondent considered the submissions of the petitioner on merits the same. Similarly, the contention of the petitioner made in the Civil Miscellaneous Appeals were also considered by the Principal District Judge on merits and by



elaborate order, dismissed the Civil Miscellaneous Appeals.

14. The learned Additional Advocate General relied on the following judgments and prayed for dismissal of the Civil Revision Petitions.

(i) 1994 Supp. (3) SCC 134 [Pollachi Cooperative Marketing Society Vs. K.N. Valuswami and others], wherein at paragraphs 3 and 4, it has been held as follows:

"3. Respondents 1-14 thereupon preferred writ petitions under Article 227 to the High Court. The High Court noted that the decree of negligence which was contemplated under Section 71 of the said Act was wilful negligence. The word 'wilfulness', it held, imported premeditation or knowledge and consciousness that an injury or loss was likely to result from the act done or from the omission to act. It imported a constructive intention as to the consequence. Quoting an earlier judgment, delivered by Pandian, J. (as he then was) in Sathyamangalam Cooperative Urban Bank Ltd. v. Dy. Registrar of Cooperative Society [1980 (2) MLJ 17], it held that to constitute wilful negligence, the act done or omitted to be done must involve such reckless disregard of duty as to imply bad faith. The High Court observed that the very approach of the Special Tribunal for Cooperative Cases was wrong as it had posed for answer the following question: "The main point for consideration would be whether the purchases were effected as per the regulation and whether the subsequent series were done in good faith and in the interest of the society." The High Court came to the conclusion that the evidence before the Tribunal and the findings arrived at by it on the basis of such evidence did not justify the legal inference that Respondents 1-14 had been guilty of wilful negligence.

4. 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 wilful negligence and that this imported a consciousness that injury or loss was likely to arise from an act of commission or omission. The basis upon which the Tribunal considered the matter was, therefore, erroneous. Once we come to the conclusion that the test applied by the High Court was the right test, we must concur with the High Court in its finding that the evidence did not disclose the legal inference that Respondents 1-14 had been guilty of wilful negligence."

(ii) In (1980) II MLJ 17 [Sathyamangalam Co-operative Urban Bank Limited Vs. The Deputy Registrar of Co-operative Society and another] relied on by the learned counsel for the petitioner, in it has been held as follows:

<https://hccservicescourts.gov.in/case218/>

"19. Already extracted supra.



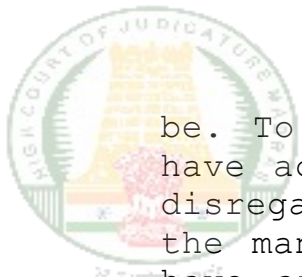
28. Anantanarayanan, C.J.. in Durairaj. v. Rathnabai (1967) 1 M.L.J. 324, pointing out that there is a sharp distinction between 'default' and 'wilful default' quoted with approval the following observation made by Ramamurti, J, in Khivraj Chordia v. Maniklal Bhattad MANU/TN/0208/1966 : AIR 1966 Mad. 67 .

"The principle that emerges from the several decisions is that for default to be regarded as wilful default, the conduct of the tenant should be such as to lead to the inference that his omission was a conscious violation of his obligation to pay the rents or a reckless indifference."

Ramaprasada Rao, J., as he then was. in Rajagopal v. Saraswathi Ammal MANU/TN/0295/1976 : (1977) 2 MLJ 8, explained the above words 'wilful default' occurring in the said Act, as follows:

"Repeatedly the Courts here and elsewhere have taken the view that the expression 'wilful default' is not an expression of art but a meaningful phraseology used by the statute with a definite purpose. The default committed by a tenant should be so telling and conspicuous that any reasonable person apprised of such circumstances and having the occasion to adjudicate upon such facts should come to the conclusion that the tenant was recalcitrant and supremely indifferent and purposely evading the performance of his legitimate obligation of sending the rents to the landlady in time, ... The wilfulness should be the result of recalcitrancy and deliberateness."

Having regard to the interpretations and discussions in respect of the term 'wilful' appearing in various enactments, as found in the case-law decided by the learned English and Indian Judges which serve as a guide to the construction of the term 'wilful' used in Section 71(1) of the Act, I am of the view that in order to pass a surcharge order under that section against a person entrusted with the organisation and management of a cooperative society or an officer or servant thereof, such person 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 (but not by accident or inadvertence), without taking due care and ordinarily expected from a reasonable and prudent man under those existing circumstances, that is to say, not caring what the result of his carelessness would



be. To make it explicit, it may be stated that he should have acted in breach of legal obligations or in conscious disregard of duty or with an intentional failure to perform the manifest duty, in the performance of which the public have an interest, and that such commission should be the proximate cause of the loss or deficiency in question."

15. I have heard the learned counsel for the parties and perused materials available on record and also considered the Judgments relied on by them.

16. From the materials on record, the following are admitted facts:

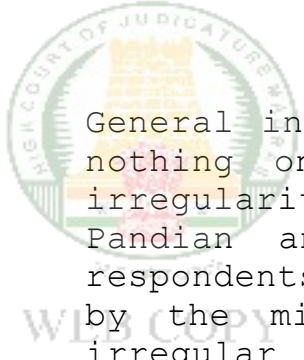
(a) The petitioner was appointed as Special Officer for the Society in question and he worked as such from 14.01.2010 to 20.05.2010 and from 14.10.2011 to 08.05.2013. He also worked as Field Officer from 11.12.2009 to 30.11.2013.

(b) The petitioner was also appointed as Special Officer for 14 Co-operative Societies and 58 ration shops attached to the said Societies.

(c) The power to sanction loan on fixed deposits is with the Secretary of the Society. The Board has to subsequently, ratify the same, when the same is placed before the Board.

(d) Due to the fact that the petitioner was appointed as Special Officer for 14 Societies, he could not attend the day-to-day affairs of each and every Society and by rotation, he used to inspect the documents of the Society. Most of the time, the officials of the Society used to meet him, when he is on Camp and used to get his signature.

17. The contention of the respondent is that large scale misappropriation had been committed in the Society to the tune of more than six crores, over a period of time. The Secretary Pandian and subsequent Secretary Murugesan have created documents as though the members, who deposited the amounts in Fixed Deposits have borrowed monies on the security of said receipts. In most of the cases, original Fixed Deposit receipts were with the members only. It is the case of the respondents that the petitioner, as a Special Officer was authorised to discharge the duties of Board. In addition to that, the Registrar by Letter dated 04.06.2001 had fixed the duties of Special Officer, which also specifically states that the Special Officer must exercise all the functions of the Board, any Officer of the Society and take such action as may be required in the interest of the Society. The petitioner as Sub-Registrar of the Society knew the duties of the Board and as per Bye-Law No.25(B)(9) and (B)(10), he has to verify the receipts and charges of the Society every month and ensure that the funds and assets of the Society are not mis-utilised by the officers, employees and others. In spite of his specific duty, the petitioner failed to discharge his duties and caused heavy loss to the Society. The contention of the learned Additional Advocate

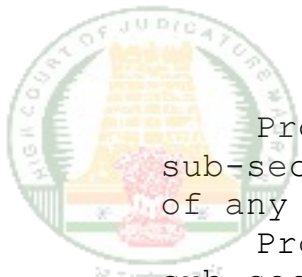


General in this regard is untenable and unsustainable. There is nothing on record to show that the petitioner was aware of irregularities and misappropriation committed by the Secretaries Pandian and Murugesan. It is pertinent to note that the respondents do not allege that the petitioner also was benefitted by the misappropriation and he also received amounts by the irregular and illegal acts of the Secretaries. Once it is not alleged that the petitioner had misappropriated the funds, then, the burden is heavily on the respondents to prove that the negligence on the part of the petitioner in discharging his duties is wilful, wanton and deliberate and his deliberate negligence is directly responsible for the irregularities and misappropriation of the amounts.

18.As per Section 87(1) of the Act, surcharge proceedings can be initiated against a person only among other grounds, when wilfully negligent to act or omitted to act in discharging his duties.

19.In this connection, it is useful to refer Section 87(1) of the Act, which reads 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 in respect of the misappropriation, mis-application of funds, fraudulent retainer, breach of trust or wilful negligence or payments which are not in accordance with this Act, the Rules or the bye-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 the next higher authority may permit but such extended period or periods shall not exceed six months in the aggregate."

20. It is an admitted fact that the petitioner was in-charge of 14 Societies to manage the affairs of the Societies as well as 58 Fair Price Shops attached to the Societies and it is humanly impossible for the petitioner to inspect each and every Society and 58 ration shops attached to the said Societies daily and inspect all the documents and registers daily. It is not in dispute that Secretary has power to sanction loan on Fixed Deposit and the loan sanctioned in the month has to be ratified at the end of the month. It is also not in dispute that the Secretaries did not place the details of the loan before the petitioner as a Special Officer for passing resolution ratifying the same. 71 depositors, who were examined by the second respondent did not make any allegation against the petitioner. On the other hand, they have only stated that they have not taken any loan on their Fixed Deposit. At this point of time, it is relevant to note the statement of K.V.Selvaraj, Senior Clerk, who has stated that it is the duty of Secretary Murugesan to get the deposits and maintain the register. He used to keep all the documents under his lock and key. He has stated that the said Murugesan and Sales-woman Pushpavalli used to stay in the Society till 9.30 p.m., in the night and prepare the entries in the Register. Next day, the Secretary Murugesan used to pressurise him (K.V.Selvaraj) to sign in the Register. Even though he refused to sign, the said Murugesan forced him to sign the Register. He also stated that the Secretary Murugesan never consulted anybody in granting loan on Fixed Deposits. None of the employees gave statement that the petitioner also colluded with Pandian and Murugesan in committing irregularities and misappropriated funds. The respondents have also not disputed that the petitioner was discharging the duties as mentioned in Para 10 of this order. In this background of facts, it has to be seen whether the alleged negligence on the part of the petitioner is wilful, deliberate and wanton. The negligence or wilful negligence is not defined in the Act. But, Courts have considered this aspect in the judgments relied on by both the learned counsel for the petitioner and the learned Additional Advocate General. In the judgment reported in 1994 Supp. (3) SCC 134 [cited supra], it has been held that wilfulness is premeditation or knowledge and consciousness that an injury or damage will result from the act done or from the omission to act. In the judgment reported in 1980 (2) MLJ 17 [cited supra], which is followed in subsequent judgments, the meaning of word



'wilful negligence' was elaborately considered and also the various judgments, including the judgments, which dealt with 'default' and 'wilful default'. Considering all these judgments, the learned Judge [Ratnavel Pandian, J., as he then was] has held in paragraphs 28 and 32, as follows:

"28. Anantanarayanan, C.J.. in Durairaj. v. Rathnabai (1967) 1 M.L.J. 324, pointing out that there is a sharp distinction between 'default' and 'wilful default' quoted with approval the following observation made by Ramamurti, J, in Khivraj Chordia v. Maniklal Bhattad MANU/TN/0208/1966 : AIR 1966 Mad. 67 .

"The principle that emerges from the several decisions is that for default to be regarded as wilful default, the conduct of the tenant should be such as to lead to the inference that his omission was a conscious violation of his obligation to pay the rents or a reckless indifference."

Ramaprasada Rao, J., as he then was. in Rajagopal v. Saraswathi Ammal MANU/TN/0295/1976 : (1977) 2 MLJ 8, explained the above words 'wilful default' occurring in the said Act, as follows:

"Repeatedly the Courts here and elsewhere have taken the view that the expression 'wilful default' is not an expression of art but a meaningful phraseology used by the statute with a definite purpose. The default committed by a tenant should be so telling and conspicuous that any reasonable person apprised of such circumstances and having the occasion to adjudicate upon such facts should come to the conclusion that the tenant was recalcitrant and supremely indifferent and purposely evading the performance of his legitimate obligation of sending the rents to the landlady in time, ... The wilfulness should be the result of recalcitrancy and deliberateness."

Having regard to the interpretations and discussions in respect of the term 'wilful' appearing in various enactments, as found in the case-law decided by the learned English and Indian Judges which serve as a guide to the construction of the term 'wilful' used in Section 71(1) of the Act, I am of the view that in order to pass a surcharge order under that section against a person entrusted with the organisation and management of a cooperative society or an officer or servant thereof, such person should have done wrong, either by commission or omission, in a deliberate and reprehensible manner, with reckless callousness and with a supine indifference (but not by



accident or inadvertence), without taking due care and precaution ordinarily expected from a reasonable and prudent man under those existing circumstances, that is to say, not caring what the result of his carelessness would be. To make it explicit, it may be stated that he should have acted in breach of legal obligations or in conscious disregard of duty or with an intentional failure to perform the manifest duty, in the performance of which the public have an interest, and that such commission should be the proximate cause of the loss or deficiency in question.

32. The Auditor checked the accounts and detected the deficiency in the month of October, 1969. The President and the authorized members were at liberty to verify the accounts even after October, 1969 and therefore, we cannot impute any wilful negligence on the part of the President and the board of Directors. What can be said is that the auditor had detected the deficiency before it could have been detected by the President and other directors. It is true that the President is in over-all control of the affairs of the society. But, it does not mean that on each and every day, the President ought to have verified the accounts, cash balance etc., as the bye-law does not impose such kind of duty, but only says that it is for the Treasurer to verify the cash balance at the close of every day. At any rate, the Court would not be justified in drawing an inference that there was a wilful negligence within the meaning of Section 71(1) of the Act on the part of the President or the directors."

21. In 2009 (4) MLJ 992 [cited supra], a Division Bench of this Court held that to pass a surcharge order under Section 87 of the Act, the employees of the Society 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 the existing circumstances.

22. The judgments relied on by the learned Additional Advocate General are also decided in the same manner. In the judgment reported in 2002 (3) LW 185 [cited supra], a Division Bench of this Court has held that it is not a mere negligent, but, it must be wilful negligent. Further, when it is not a case of misappropriation by petitioner, the respondents must prove wilful negligence. Even according to the respondent, neither in the show case notice, nor in the proceedings of the second respondent, it has been held that the petitioner had acted wilfully or wantonly with a view to cause loss to the assets of the Society. Mere negligence cannot be a ground for surcharge proceedings and it must be wilful negligence or intentional



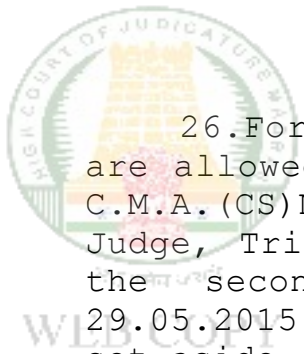
negligence.

23. In the judgment reported in 1999 (3) MLJ 310 [cited supra] also, the Court has decided that mere negligence is not a ground for initiating surcharge proceedings.

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24. In the present case, a reading of the report of the enquiry officer under Section 81 of the Act as well as the order of the second respondent in surcharge proceedings clearly shows that both the Officers have not stated that the petitioner has intentionally deliberately and wilfully omitted to discharge his duties as Special Officer, when he failed to verify the loan register with deliberate intention to permit the Secretaries to commit irregularity and misappropriate funds. The enquiry officer in his report under Section 81 of the Act recommended for surcharge proceedings against the petitioner on his mere negligence in his discharging duties. The second respondent, in his surcharge order, had repeatedly stated that the petitioner had acted negligently and caused loss to the Society. Nowhere in the order, he has stated that the petitioner was wilfully negligent in discharging his duties. The second respondent also failed to consider the statement of K.V.Selvaraj, Senior Clerk, who has stated on oath that (1) Secretary Murugesan and Sales-woman Pushpavalli used to prepare the documents staying in the Society till 9.30 p.m. in the night and forced to obtain the signature from him in the morning; (2) that all the acts were done by the Secretary without consulting others and without the knowledge of other Staff; and (3) that all the members used to meet the Secretary to transact all the business only with him. The learned District Judge as a Presiding Officer of the Co-operative Tribunal also failed to consider that the enquiry officer under Section 81 of the Act and the second respondent have not alleged that the petitioner by his wilful negligence permitted the irregularities and misappropriation. The learned District Judge was carried by the quantum of alleged misappropriation and failed to consider whether alleged negligence on the part of the petitioner is wilful negligence as contemplated in Section 87(1) of the Act.

25. In view of the various judgments relied on by the learned counsel for the petitioner as well as the learned Additional Advocate General and the facts and circumstances in which the petitioner was placed, the allegation against the petitioner in surcharge proceedings and impugned orders, I hold that the respondents have failed to allege and prove the wilful negligence on the part of the petitioner. In view of the fact that the second respondent has not alleged the wilful negligence in his proceedings that the petitioner has acted in a wilful negligent manner, the ratio in the judgment reported in 2002 (3) LW 185 <https://hccservicescourts.gov.in/hccservices> is squarely applicable to the facts of the present cases.



26. For the above reasons, both the Civil Revision Petitions are allowed. The judgment and decree dated 07.04.2016, passed in C.M.A.(CS)Nos.12 and 13 of 2015 by the learned Principal District Judge, Trichirappalli, and the surcharge proceedings initiated by the second respondent in Na.Ka.No.2460/2014 Sa.Pa., dated 29.05.2015 and Na.Ka.No.2462/2014 Sa.Pa., dated 27.05.2015, are set aside. No costs.

Sd/-
Assistant Registrar(RTI)

/True Copy/

Sub Assistant Registrar

To

1. The Principal District Judge,
Trichirappalli.
2. The Enquiry Officer,
Office of the Co-operative Deputy Registrar,
Musiri.
3. The Deputy Registrar of Co-operative Societies,
Elango Nagar,
Vadugapatti College Road,
Musiri, Trichy District.
4. The Co-operative Sub Registrar/
Administrator,
R.963, Thulayanatham Primary
Agricultural Co-operative
Credit Society Ltd.,
Thulayanatham Post,
Musiri Taluk, Trichirappalli District.

+2cc to M/S.G.THALAIMUTHARASU, Advocate SR.No. 50766
+1cc to Special Government Pleader, SR.No.50967

Common order in
C.R.P. (MD) Nos.947 and 948 of 2016 (NPD)
06.04.2017

JM/SV MMS/SAR 2/25.04.2017/19P/8C