IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.17955 of 2012
Date of Decision: May 26, 2017

Radhey Sham

...Petitioner

Versus

Financial Commissioner and Principal Secretary to Government of Haryana & others

...Respondents

**CORAM: HON'BLE MR.JUSTICE AMIT RAWAL, JUDGE**

Present: Mr.Puneet Bali, Senior Advocate with
Mr.Vaibhav Jain, Advocate &
Ms.Monica Thakur, Advocate,
for the petitioner.

Mr.Rajbir Singh, AAG, Haryana,
for the State.

Mr.S.S.Dalal, Advocate,
for respondent No.3.

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**AMIT RAWAL, J.**

The short point involved in the present writ petition is whether the Society, by initiation of the proceedings under Section 102 of the Haryana Co-operative Societies Act, 1984 (for short "Haryana Act"), recovered the amount from the petitioner, who was working as a Cashier regarding alleged misappropriation and embezzlement of the amount of Rs.7,05,000/-. In other words, whether such dispute would fall within the mischief of Sections 102 or 103 of the Haryana Act.

Mr.Puneet Bali, learned Senior Counsel assisted by Vaibhav Jain, representing the petitioner submitted that the petitioner was appointed as a Clerk and subsequently on 10.1.1989 promoted as Cashier and while working as a Cashier with the Bank, he was sent by the Branch Manager to bring a cash amount of Rs.5.00 lacs from the Oriental Bank of Commerce. As a result thereof, the petitioner had gone to the aforementioned Bank along with one security guard and came back with the cash amount, which was duly accounted for. The cash transactions continued during the absence of the petitioner. While checking the cash in hand on 12.3.1994 at 5.15 PM, a sum of Rs.7,05,000/- was found less. On this account, following three actions were initiated against the petitioner:-

a) FIR No.76 dated 12.3.1994 was registered;

b) Departmental enquiry was initiated; and

c) Arbitration proceedings were initiated.

He further submitted that the petitioner requested not to continue with the aforementioned departmental enquiry and arbitration proceedings till adjudication of the criminal case, but the same was not accepted by the Bank, which constrained him to file a Civil Suit bearing No.942 of 1994 seeking restraint. However, the temporary injunction was declined, but the appeal preferred against the aforementioned order was accepted. The order of the Appellate Court was challenged by the Society in this Court by filing Civil Revision No.548 of 1995 and this Court, vide order dated 23.6.1995, dismissed the same with a direction to the trial Court to expedite the disposal of the suit, but as submitted above, the Bank had already initiated proceedings under Sections 102 and 103 of the Haryana Act for seeking recovery of the amount of Rs.7, 05,000/- along with interest. At one point of time, the petitioner was proceeded ex-parte, but thereafter the ex-parte proceedings were set-aside. However, in the meanwhile, criminal proceedings initiated against the petitioner pursuant to the registration of the FIR resulted into acquittal by the Chief Judicial Magistrate vide judgment dated 13.1.1997 (Annexure P-6). The aforementioned judgment was assailed by the State of Haryana by filing Criminal Appeal No.558-DBA of 1997 titled as "State of Haryana Versus Radhey Shyam" and by the respondent-Bank by filing Criminal Revision No.923 of 1997 titled as "The Bhiwani Cooperative Bank Limited, Bhiwani Versus Radhey Shyam and another" and this Court, vide order dated 21.8.2009 (Annexure P-7), convicted the petitioner of charges under Section 408 IPC and sentenced him to undergo rigorous imprisonment for three years and to pay a fine of Rs.50,000/-. The petitioner had approached the Hon'ble Supreme Court by filing SLP (Crl.) No.3807 of 2010, which was registered as Criminal Appeal No.1331 of 2010 and the Hon'ble Supreme Court, vide judgment dated 26.7.2010, remanded the matter back to this Court and on remand, vide order dated 10.2.2016, passed on during the course of the hearing, this Court acquitted the petitioner.

By giving the aforementioned fact, he raised the question of maintainability of the arbitration proceedings initiated by referring the provisions of Section 102, much less sub-section (2) thereof to contend that expression "constitution, management or the business of a co-operative society" would not include a dispute of recovery of the amount by a co-operative bank against its employee as the claim has expressly been defined under clause (a) of sub-section (2) of Section 102 of the Haryana Act to be due from a member, or nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not or a claim by a surety against the principal debtor and, therefore, entire arbitration proceedings and the appeal preferred against thereof were without jurisdiction.

He further submitted that moreover the Society has not been able to bring any documentary evidence on record of the alleged shortage, except, the alleged admission dated 12.3.1994 (Annexure P-10) as the petitioner was compelled and coerced/forcibly implode to suffer the same owing to the threat of registration of the FIR, but yet the FIR No.76 of 1994 was registered. The alleged admission is not as per the provisions of Sections 21 and 23 of the Indian Evidence Act. In support of his contention, relied upon the ratio decidendi culled out in **Roop Singh Negi Versus Punjab National Bank and others, (2009) 2 Supreme Court Cases 570** to contend that even in the departmental proceedings, mere production of documentary evidence is not enough as they have to be proved by examining the witnesses and in the arbitration proceedings, the respondent-Bank has not examined the Manager or the officer before whom the alleged admission (Annexure P-10) was made, much less the same has been proved in accordance with law. All these factors were raised before the Arbitrator, much less the authorities below, i.e., the Financial Commissioner and Commissioner, Cooperative Societies, resulting into passing of the award dated 1.2.2011 (Annexure P-11) and the order dated 26.4.2012 (Annexure P-12) of the Financial Commissioner dismissing the appeal preferred under Section 114 of the Haryana Act.

Per contra, Mr.S.S.Dalal, learned counsel for respondent No.3 submitted that the question of maintainability of the arbitration proceedings has already been debated upon by the Division Bench of this Court in **Angoori Lal Sharma Versus The State of Haryana and others, 1980**

**PLJ 86,** wherein, while interpreting the provisions of Sections 54 and 55 of the Punjab Co-operative Societies Act, 1961, which are pari materia to the Haryana Act, it has been held that the Arbitrator would have the jurisdiction in respect of the disputes regarding the liability of a person managing the affairs of the Cooperative Society.

He further submitted that in view of the admission, no piece of evidence was required to be proved. The petitioner has not denied the aforementioned admission. Even the pendency of the criminal proceedings did not debar the Bank to initiate proceedings as departmental enquiry is for dismissal of the employee, arbitration proceedings are for recovery and criminal proceedings are for punishing the erring official.

The question of non-maintainability of the petition has also been dealt by the authorities and rejected and, therefore, the petitioner cannot be permitted to raise the aforementioned plea. The expression "management of the society" would also include fraudulent retention of money or other property of the Society. This is what has been interpreted by the Hon'ble Supreme Court in **Pentakota Sriramula Versus Co-operative Marketing Society Ltd., Anakapalli and another, 1965 AIR SC 621.** Thus, the contention of Mr.Bali is based upon the wrong facts and liable to be rejected.

I have heard the learned counsel for the parties, appraised the paper book and of the view that there is force and merit in the submissions of Mr.Bali.

In order to appreciate the controversy, it would be apt to reproduce Section 102 of the Haryana Act, which reads thus:-

*"102. Disputes for arbitration :- (1) Notwithstanding anything contained in any law for the time being in force, if any dispute*

*touching the constitution, **[…] management or the business of a co-operative society ***[other than a dispute of disciplinary action or dispute relating to service matters in respect of a paid servant of a society] arises –*

*(a) among members, past members and persons claiming through a member, past member or deceased members; or*

*(b) between a member, past member or persons claiming through a member, past member or deceased member and the society, its committee or any officer, agent or employee of the society or liquidator, past or present; or*

*(c) between the society or its committee and any past committee, any officer, agent or employee or any past officer, agent or employee or the nominee, heirs or legal representatives of any deceased officer, agent or employee of the society; or*

*(d) between the society and any other society, between a society and liquidator of another society or between the liquidator of one society and the liquidator of another society;*

*such disputes shall be referred to the arbitration of the Registrar for decision and no court shall have jurisdiction to entertain any suit or other proceedings in respect of such dispute. ****

*Provided that any proceedings pending or concluded under section 101 shall not constitute a dispute touching the constitution, management or the business of the society.*

*(2) For the purpose of sub-section (1) the following shall be deemed to be disputes touching the constitution, management or the business of a co-operative society, namely:-*

*(a) a claim by the society for any debt or demand due to it from a member, or nominee, heirs or legal representatives of a deceased member, whether such debt or demand be admitted or not;*

*(b) a claim by a surety against the principle debtor where the society has recovered from the surety any amount in respect of any debt or demand due to it from the principle debtor as a result of the default of the principle debtor, whether such debt or demand is admitted or not;*

*(c) any dispute arising in connection with the election of any officer of the society.*

*(3) If any question arises whether a dispute referred to the Registrar under this section is or is not a dispute touching the constitution, management or the business of co-operative society, the decision thereon of the Registrar shall be final and shall not be called in question in any court.*

*(4) No dispute arising in connection with the election of committee member or officer of the society shall be entertained by the Registrar unless it is referred to him within thirty days from the date of the declaration of the result of election."*

In the first blush, the argument of Mr.Bali qua non-maintainability of the arbitration case before the Registrar appeared to be attractive, particularly by referring the provisions of Section 102 of the Haryana Act regarding non-maintainability, but the expression "managing of the affairs" has already been debated by the Hon'ble Supreme Court in **Pentakota Sriramulu's case (supra)**, the relevant portion reads as under:-

"*In this connection learned counsel relied on a decision of the Madras High Court in Sundaram Uyer v. Deputy Registrar of Co-operative Societies, ILR 1957 Madras 371. There it was held that it was only in case where the provisions of Section 49 were inapplicable that recourse could be had to Section 51. In cases where a matter fell both with in Sections 49 and 51, the two provisions were not intended to operate on parallel lines. As Section 51 excluded the jurisdiction of Civil Courts, it must be strictly construed and for that reason, in cases where Section 49 was applicable, Section 51 would be excluded.*

*Further, it was held Section 51 was of a general nature providing for a variety of matters and was almost exhaustive of the parties between whom as well as the disputes that could arise in co-operative societies. Section 49 on the other hand dealt with special types of disputes which arise in exceptional circumstances, segregated out of the larger group dealt with under Section 51. When there was thus on overlapping of the terms of both the Sections the provisions of Section 49 alone it was held would be applicable. Based on this line of reasoning, the submission of leaned counsel was that the claim in the present case was one "against a person in management of the Society' and "for the fraudulent retention of money or other property of the Society" and, therefore, it was completely covered by Section 49 and that in consequence the Registrar had no jurisdiction to direct an enquiry by the Deputy Registrar under Section 51 of the Act. This argument, however, proceeds on ignoring one further essential requisite for the application of Section 49(1). Besides the two factors to which learned counsel referred and which we have just set out, there is also another condition which has to be satisfied before Section 49(1) could be attracted. The facts giving rise to the charge have to be disclosed in the course of an audit under Section 37 or an enquiry under Section 38 or an inspection under Section 39, or on the winding up of the Society. Mr.Ram Reddy while not disputing that unless this condition is also satisfied Section 49 would not be attracted, however submitted that there was an enquiry under Section 38 preceding the suppression and that in consequence the condition was fulfilled. It is true that there was an enquiry conducted into the affairs of the Society under Section 38, but that by itself is not sufficient. It has further to be proved that the facts alleged in the claim, and on which it is based, were disclosed at that enquiry. This can be proved or established only if the enquiry report which was submitted to the Registrar was placed before the Court and the facts disclosed therein corresponded with the* *facts alleged in the statement of claim. Mr.Ram Reddy admitted that the enquiry report was not before the Court and is not in the record of these proceedings. It is not, therefore, possible to say that there is correspondence between the facts disclosed in that report as a result of the enquiry under Section 38 and those found in the statement of claim, which was referred by the Registrar to the Deputy Registrar for arbitration under Section 51. The case must, therefore, be held not to fall under Section 49 of the Act. There can be no doubt that if Section 49 does not apply, subject to the other argument about illegality to which we shall advert, the order of the Registrar proceeding under Section 51 is not open to objection. This first point, therefore, has to be rejected."*

The same has been held to be of wider amplitude by taking into consideration the fraudulent retention of money, therefore, the question with regard to maintainability of the petition, the answer is in favour of the respondent-Bank and against the petitioner, in essence the contention of Mr.Bali with regard to the maintainability is hereby rejected.

Now as on merits, whether the respondent-Bank has discharged the liability which has a trapping of a civil dispute by examining the evidence on the alleged admission of the petitioner, in essence there has been compliance of the provisions of Section 21 of the Indian Evidence Act, the answer is `No'. It would be apt to reproduce the provisions of Section 21 of the Indian Evidence Act, which reads as under:-

*"21. Proof of admissions against persons making them, and by or on their behalf.-Admissions are relevant and may be proved as against the person who makes them, or his representative in interest; but they cannot be proved by or on behalf of the person who makes them or by his representative in interest, except in the following cases:-*

*(1) An admission may be proved by or on behalf of the person*

*making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32.*

*(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable.*

*(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission."*

From the perusal of the award of the Registrar and the order of the Financial Commissioner, nowhere it has come on record that the Bank has, at any point of time, examined the manager before whom the admission has been made by the petitioner, much less the petitioner has not been confronted in order to recover the amount. The alleged admission could not have been read against the petitioner. Thus, the Bank was required to prove on record the material, i.e., the cash book of alleged short fall.

No doubt, the petitioner has been acquitted of the criminal charges and the findings of the criminal court would not have binding effect on the civil dispute, therefore, I would be refraining myself by taking the aid of findings of acquittal rendered by this Court, but the fact remains that the Bank has actually not discharged the onus. Reference of a record by the Registrar having the role of Arbitrator is also, in my view, erroneous and fallacious as no documents other than the alleged admission has been brought on record. All these factors were required to be pondered upon and noticed by the authorities, when specifically urged and raised. Having failed to advert to such points, I am of the view that the findings are not sustainable in the eyes of law.



The aforementioned view of mine is also reiterated from the judgment cited as **Roop Singh Negi**, wherein the Hon'ble Supreme Court, while dealing with the procedure of departmental proceedings, had an occasion to hold that the production of the documents is not sufficient compliance of discharge. Those have to be proved by examining the witnesses. Paragraphs 14 and 25 of the said judgment are reproduced as under:-

> "14. Indisputably, a departmental proceeding is a quasi judicial proceeding. The Enquiry Officer performs a quasi judicial function. The charges levelled against the delinquent officer must be found to have been proved. The enquiry officer has a duty to arrive at a finding upon taking into consideration the materials brought on record by the parties. The purported evidence collected during investigation by the Investigating Officer against all the accused by itself could not be treated to be evidence in the disciplinary proceeding. No witness was examined to prove the said documents. The management witnesses merely tendered the documents and did not prove the contents thereof. Reliance, inter alia, was placed by the Enquiry Officer on the FIR which could not have been treated as evidence.
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> 25. We have noticed hereinbefore that the only basic evidence whereupon reliance has been placed by the Enquiry Officer was the purported confession made by the appellant before the police. According to the appellant, he was forced to sign on the said confession, as he was tortured in the police station. Appellant being an employee of the bank, the said confession should have been proved. Some evidence should have been brought on record to show that he had indulged in stealing the bank draft book. Admittedly, there was no direct evidence. Even there was no indirect evidence. The tenor of the report demonstrates that the Enquiry Officer had

made up his mind to find him guilty as otherwise he would not have proceeded on the basis that the offence was committed in such a manner that no evidence was left.

It was a very simple case for the Bank to discharge the onus by leading the evidence as indicated above and having failed to do so, I am of the view that the liability of Rs.7,05,000/- along with interest @ 10% could not have been fastened upon the petitioner.

Resultantly, order dated 1.2.2011 (Annexure P-11) rendered by the Arbitrator and the order dated 26.4.2012 (Annexure P-12) passed by the Financial Commissioner are not sustainable being not in consonance with the provisions of Section 21 of the Indian Evidence Act.

Civil Writ Petition is allowed.

**May 26, 2017** **( AMIT RAWAL )**
**ramesh** **JUDGE**

**Whether speaking/reasoned** **Yes/No**

**Whether Reportable:** **Yes/No**