IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.03.2018

DELIVERED ON : 24.10.2018

CORAM:

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

Crl.R.C.Nos.264 of 2018 and 1626 to 1628 of 2017 &
Crl.M.P.Nos.16735, 16737, 16739/2017 &
Crl.M.P.Nos.2921 & 2922 of 2018

D.Ravichandran ... Petitioner in Crl.RC.264/18

I.Vinayagamurthy ... Petitioner in Crl.RC.1626/17

M.Adaikan ... Petitioner in Crl.RC.1627/17

L.Thirupathy ... Petitioner in Crl.RC.1628/17

Vs

The State, rep. by
Inspector of Police
CCIW-CID, Salem District. ... Respondent in all the Crl.R.C.s

PRAYER in Crl.R.C.Nos.264 of 2018, 1626 and 1628 of 2017 : Criminal Revision Cases are filed under Sections 397 and 401 of Cr.P.C. against the order dated 18.10.2016 made in CRP.No.61 of 2015 by the Principal Sessions Judge, Salem, reversing the order dated 10.3.2015 made in C.M.P.No.6891 of 2013 in C.C.No.239 of 2013 on the file of the learned Judicial Magistrate I, Salem.

PRAYER in Crl.R.C.No.1627 of 2017 : Criminal Revision Case is filed under Sections 397 and 401 of Cr.P.C. against the order dated 18.10.2016 made in CRP.No.58 of 2015 by the Principal Sessions Judge, Salem, reversing the order dated 10.3.2015 made in C.M.P.No.6889 of 2013 in C.C.No.239 of 2013 on the file of the learned Judicial Magistrate I, Salem.

For Petitioners in all :Mr.K.Raja for Mr.N.Kolandaivelu

For Respondent in all : Mr.R.Suriyaprakash
Government Advocate
(Criminal Side)

COMMON ORDER

While Crl.R.C.Nos.264 of 2018, 1626 and 1628 of 2017 are filed under Sections 397 and 401 of the Criminal Procedure Code against the common order dated 18.10.2016 made in C.R.P.No.61 of 2015 by the Principal Sessions Judge, Salem, reversing the order dated 10.3.2015 made in C.M.P.No.6891 of 2013 in C.C.No.239 of 2013 on the file of the learned Judicial Magistrate I, Salem, Crl.R.C.No.1627 of 2017 is filed against the very same common order dated 18.10.2016 made in C.R.P.No.58 of 2015 by the learned Principal Sessions Judge, Salem, reversing the order dated 10.3.2015 made in C.M.P.No.6889 of 2013 in C.C.No.239 of 2013 on the file of the learned Judicial Magistrate I, Salem.

2. Succinctly put, the facts of the case are as under: Palace Nagar Co-operative House Building Society (for brevity, "the Society") started a new scheme called "Palance Nagar Multi Storied Scheme" in the year 1999 with the main object to build residential houses on commercial basis and to sell the same to the needy people at reasonable profit. In furtherance of the said object, the society purchased vacant land measuring 68012 sq.ft. from one Chamraj and 21 others. The society planned and also completed the construction of 119 residential houses, 52 shops and 12 office premises.

3. It is stated that for the purpose of purchasing land and for construction of the buildings, the society borrowed Rs.13.50 Crores from HUDCO through Tamil Nadu Housing Federation. The Society also arranged additional funds from other co-operative societies and individuals in the form of deposits. The loan borrowed from HUDCO had to be repaid in 162 monthly instalments, whereas the deposits received from other sources are returnable on demand.

4. It is further stated that though a sum of Rs.11,50,56,206/- was collected by the society, Rs.1,85,12,060/- was expended towards payment to HUDCO and administrative expenses, and of a sum of Rs.7,98,81,280/- paid to HUDCO, a major chunk of Rs.7,82,13,279/- was adjusted towards interest with the result that as on 12.3.2013, huge arrears of Rs.54,66,32,000/- were due to HUDCO. In such premise, HUDCO alleged that the accused persons instead of giving preference to the HUDCO loan diverted Rs.1,66,62,866/- of the society funds for other purposes, viz, (i) advancing housing loans to new members; (ii) returning deposits from other sources; (iii) disbursing salary to the employees; and (iv) paying interest to

the deposits from the other sources. According to the prosecution, these four expenses are illegal.

5. The petitioners herein were holding the post of the Special Officer during various periods. The petitioner in Crl.R.C.No.1626 of 2017 was the Special Officer during the year 2007-2008 and he has been arrayed as the twelfth accused. The petitioner in Crl.R.C.No.1627 of 2017 was the Special Officer during the years 1998 to 2001 and has been arrayed as fourth accused. The petitioner in Crl.R.C.No.1628 of 2017 was the Special Officer during the year 2002-2003 and was arrayed as sixth accused. The petitioner in Crl.R.C.No.264 of 2018 was the Special Officer during the year 2009 and has been arrayed as fourteenth accused.

6. It is alleged that these petitioners were entrusted with the properties and monies of the society and it was their duty to maintain true and proper accounts and instead of effecting repayment of loan from monies collected from the members, they expended the same for other purposes. It is further alleged that all the accused conspired and indulged in wrong doings. Hence, all the accused with charged under Section 120B of the Indian Penal Code. While accused 1 to 3 were charged for the offence under Section 408 of the Indian Penal Code, accused 4 to 14 were charged for the offence under Section 409 of the Indian Penal Code.

7. The petitioners herein moved discharge petitions before the learned Judicial Magistrate I, Salem and the same were allowed by order dated 10.3.2015 made in C.M.P.Nos.6889 and 6891 of 2013 in C.C.No.239 of 2013.

8. Assailing the said order, the respondent filed C.R.P.Nos.58 and 61 of 2015 and the learned Principal District Judge, Salem, by order dated 18.10.2016, allowed the revision by setting aside the order of discharge and remanded the matter to the learned Judicial Magistrate I, Salem, for fresh consideration.

9. In this backdrop, the present criminal revision cases have been filed by the accused.

10. The learned counsel appearing for the petitioners vehemently contended that:

(i) Neither the Registrars nor the Society lodged any complaint against them for misappropriation till date and no disciplinary proceedings were initiated against the petitioners and merely because they discharged duties as Special Officer, they cannot be made criminally liable;

(ii) In the enquiry conducted under Section 81 of the

Tamil Nadu Co-operative Societies Act, no criminal action was recommended and in fact, the report only states that disciplinary proceedings and surcharge proceedings may be initiated against the petitioners and the fact remains that even in the surcharge proceedings, the authorities did not fix any liability on the petitioners, as they did not cause any loss to the society.

(iii) When the Directorate of Vigilance and Anti Corruption vide G.O.(D) No.158, Co-operation Food and Consumer Protection (CE2) Department, dated 28.2.2011, categorically held that no corruption has taken place, the entire proceedings now initiated are liable to be set aside.

(iv) There are many unsold commercial complexes and residential apartments that would fetch over Rs.100 Crores and, therefore, there is no loss to the society and in fact, the society is running with huge profit.

11. Per contra, the learned Government Advocate (Criminal Side) submitted that in the final report, the respondent police produced 131 witnesses and 35 documents before the trial Court and the case is pending trial and no interference is warranted at this stage.

12. I heard Mr.K.Raja for M/s.N.Kolandaivelu, learned counsel for the petitioners and Mr.R.Suriyaprakash, learned Government Advocate (Criminal Side) for the respondent in all the Criminal Revision Cases and perused the documents available on record.

13. In the case on hand, it is an admitted fact that the accused served during various periods as Special Officers of the Society. It is also a matter of record that the disciplinary proceedings initiated against all the three petitioners (accused 12, 4 and 6) have been ordered to be dropped vide proceedings dated 25.9.2012 and 7.12.2013 and in respect of the fourteenth accused, no disciplinary proceedings was initiated at all.

14. It is to be noted that the Government vide G.O.(D) No.158, Co-operation, Food and Consumer Protection (CE2) Department, dated 28.2.2011, in respect of the very same allegations, held that the same are not substantiated and recommended for dropping of further action against the petitioners.

15. At this juncture, it is apposite to refer to Clause 8 of the Tamil Nadu Co-operative Manual which deals with the prosecution against the Departmental Officers, which reads as infra:

"Prosecution against the Departmental Officers:- Departmental Officers are working on foreign service in Co-operative organisation as Chief Executive Officers or otherwise and at times in additions to their regular government post, they are also holding additional charge of the post of Special Officers in more than one co-operative society and functioning as such. They are holding supervisory posts also over such institution. The Act or the Bylaw of the society do not differentiate a regular or additional charge Chief Executive Officer/Special Officer and both are the same in the eyes of law. These officers either in a regular capacity and more so in the additional capacity or in a supervisory capacity may not have the chance to scruitinise each and every transactions of the society. They would have failed to check and scruitinise the accounts and or excercise effective control over the subordinate staff resulting in the criminal irregularities, frauds and offences under IPC committed by the staff. Failure of such nature i.e., failure to discharge their duties properly or negligence, or omissions, unless the inquiry, inspection or investigation officer finds it prima facie, that such officers with malafide criminal intention committed criminal breach of trust and or criminal misappropriation and or aided and abetted such criminal offences by the subordinate staff, will not fasten criminal liability on such officers. On the other hand, the failure of this nature, will be failure to discharge their duties properly or negligence and this may be dealt with through disciplinary proceedings. Hence the departmental officers who are not directly involved in the frauds or misappropriations need not be included as delinquents, in a routine manner, in the inquiry reports or complaints filed with the police."

(emphasis supplied)

16. The above said clause in unambiguous terms states that if an officer who had been posted to supervise the society fails to discharge his/her duty properly, such officer will not be fastened with criminal liability, unless it is prima facie found that such officer with a mala fide criminal intention committed criminal breach of trust or criminal misappropriation or aided and abetted such criminal offences by the supporting staff.

17. Now, let this Court analyze the true intent behind issuance of the circular in R.C. No. 228696/90/CP1, dated 11.12.1991 by the Registrar of Co-operative Societies, Chennai, the relevant portion of which reads as under:

> "3. Taking criminal action against the departmental officers holding chief executive or administrative and other supervisory posts in the Cooperatives who are involved vicariously has also been examined. The departmental officers, working have no chance to scrutinize each and every transactions of the society. Though they may have an overall control, they cannot be held criminally liable, for all the criminal irregularities committed by the staff working under them. Though they fail to check and scrutinize the accounts etc., or exercise effective control over subordinate staff such failure may not deserve criminal action. On the other hand, the failure of this nature, will be failure to discharge their duties properly or negligence and this may be dealt with through disciplinary proceedings. Hence it is informed that the departmental officers who are not directly involved in the frauds or misappropriations need not be included as delinquents, in a routine manner, in the inquiry reports or complaints filed with the police."

18. A reading of the above said circular only fortifies the content in Clause 8 of the Tamil Nadu Co-operative Manual to the effect that departmental officers who are not directly involved in frauds or misappropriation need not be included as delinquents in a routine manner in the inquiry reports or complaints filed with the police.

19. It is seen that the very basis for initiation of the criminal cases against the petitioners is the statement of Special Officer by name Sivaprakasam. Even in his statement under Section 161(3) of the Criminal Procedure Code, he has only informed about the Special Officers who were working between 1999 and 2007, the number of shops allotted and sold during such period and the various receipts of the society and the payments made. The said statement does not give any sort of particulars of wrong doing of any one of the petitioners herein.

20. In S.Gunasekaran Vs. State rep. by Inspector of Police [2008] 1 Crimes (HC) 681, this Court has quashed the criminal proceedings initiated against the Special Officer stating that criminal prosecution cannot be initiated for lapse/negligence in

supervising work. The relevant portion of the said decision reads as under:

> "In my considered opinion, such a negligence may create only a civil liability and there cannot be any vicarious liability in the criminal law. Even to initiate proceedings against the petitioner under Section 87 of the Tamil Nadu Co-operative Societies Act, the sine quo non is wilful negligence resulting in loss to the society and not a mere negligence. When that be so, a mere negligence to look into the records properly, in my considered opinion, would not satisfy any of the ingredients of the offences alleged against him."

21. In P.Jegadeesan Vs. The Inspector of Police Commercial Crime Investigation Wing, Trichy and another (Crl. O.P. (MD) Nos. 18221 and 18222 of 2013, dated 21.02.2014), the Madurai Bench of this Court relying upon the decision of the Hon'ble Supreme Court in P.S. Rajya Vs. State of Bihar, (1996) 9 SCC 1, has observed as follows:

> "7. From the narration of the events, more particularly, from report of the Deputy Registrar, under Section 81 it is clear that the provision of Sections 477 (a) and 409 of IPC., is not attracted, as there is no iota of evidence under 81 report that there was criminal breach of trust on the part of the petitioner and that there was a fraud committed by him, which helped the other accused to commit the so called falsification of accounts, fabrication of documents, misappropriation of funds etc. The Supreme Court, in a decision in P.S. Rajya Vs. State of Bihar reported in (1996) 9 SCC 1. The relevant portion is extracted hereunder:
>
> '17. At the outset, we may point out that the learned counsel for the respondent could not but accept the position that the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. He also accepted that in the present case, the charge in the departmental proceedings and in the criminal proceedings is one and the same. He did not dispute the findings rendered in the departmental proceedings and the ultimate result of it. On these

premises, if we proceed further then there is no difficulty in accepting the case of the appellant. For if the charge which is identical could not be established in a departmental proceedings and in view of the admitted discrepancies in the reports submitted by the valuers one wonders what is there further to proceed against the appellant in criminal proceedings.'

8. From the above it is clear that the ultimate result of the departmental proceedings has to be accepted, there is no need to proceed further against the accused in the criminal proceedings. Hence, I am of the considered view that the findings of the departmental enquiry may not be admissible cannot be correct and I find much force in the contention of the learned counsel for the petitioner and I allow the criminal Original Petition, as prayed for. This order does not preclude the Judicial Magistrate, Musiri from proceeding with other accused in accordance with law as they are not parties before this court. Consequently, connected miscellaneous petition is closed."

22. In Jethsur Surangbhai Vs. State of Gujarat, AIR 1984 SC 151, the Hon'ble Supreme Court has observed as follows:

"12. In a case of serious charges of defalcation of properties of a society mens rea cannot be excluded. Unless the prosecution proves that there was a close cohesion and collusion between all the accused persons which formed the subject matter of conspiracy, it would be difficult to prove the charges. Once the charge of conspiracy fails, the onus lies on the prosecution to prove affirmatively that the accused was directly and personally connected with the alleged acts or omissions. In absence of such direct evidence, the mere fact that the accused appellant happened to be the Chairman of the Managing Committee of the society would not make him criminally liable in a vicarious sense. It is not possible to accept somewhat broad statement of law that even the negligence on the part of the appellant Chairman would be a positive proof of his intention to commit the offence. On facts and in the circumstances of the case, the case against the appellant cannot be said to have been proved beyond reasonable doubt or at least it cannot be said that two views were not reasonably possible. Thus he was wrongly convicted by the High court."

23. In the case on hand, the prosecution has not produced any material to show that there was a close cohesion and collusion between all the accused persons which formed the subject matter of conspiracy. So, in view of the aforesaid decision, it is clear that the criminal proceedings cannot be initiated against the petitioners for their failure to discharge his duty properly. Such a negligence may create only a civil liability. When the DVAC recommended dropping of all further proceedings and the departmental proceedings were also dropped as against the petitioners, for the very same charges criminal proceedings cannot be initiated.

24. The Hon'ble Supreme Court in Jethsur Surangbhai, supra, held that in a case of serious charges of defalcation of properties of a Society mens rea cannot be excluded. In respect of the offences under Sections 408 and 409 of Indian Penal Code, one of the essential ingredients is that there must be a dishonest misappropriation of property. "Dishonestly" is defined under Section 24 of Indian Penal Code reads as follows:

"24. 'Dishonestly'.--Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

25. In this case, it is not the case of the prosecution that the petitioners herein got any wrongful gain. Therefore, it cannot be said that the petitioners had dishonestly aided the other accused persons for committing misappropriation of the Society's funds. So the petitioners cannot be prosecuted for the aforesaid offences.

26. The above said view of this Court is fortified by a decision of this Court in P.Paramasivam and others v. The State, rep. By Inspector of Police, (Order dated 23.2.2017 made in Crl.R.C.Nos.131 to 133 of 2017), wherein in respect of the very same society and the very same case, being C.C.No.239 of 2013, when accused 5, 7 and 10 prayed for setting aside the order dated 18.10.2016 of the learned Principal Sessions Judge, Salem (which order is also under challenge in these revisions), held as under:

“6. A perusal of the counter filed by respondent reveals that petitioners are sought to be implicated on the basis of Section 161(3) Cr.P.C.

> statement of a Special Officer by name Sivaprakasam, LW-10. Such statement merely informs the various persons who functioned as Special Officers between 29.5.1999 and 9.8.2007, the number of houses and shops allotted and sold during such period, the various receipts of the society, repayments made thereby, that the society incurred liability to the tune of Rs.54,66,32,000/- and such position arose owing to the wrongful conduct of the Secretaries, Project Manager and Special officers. It does not inform any particulars of wrong doings of any one or more of them. Wrong doings alleged against petitioners are of the period 2003 to 2005. LW-10 has functioned as Special officer from 2012 and can have no personal knowledge of the offending transactions. The statement of LW-10 does not carry forward the prosecution case and the possibility of finding of conviction on the basis thereof absolutely is bleak. In the attendant circumstances of the case, this Court is of the view that the principle enunciated in P.S.Rajya case, supra, squarely applies."

and, thereby, allowed the revisions by setting aside the order of the Principal Sessions Judge, Salem.

27. The above proposition applies on all fours to the case on hand and it is beyond any cavil that the said order passed in P.Paramasivam case, supra, had attained finality.

28. For the foregoing reasons, these criminal revision cases are allowed and the order of the learned Principal Sessions Judge, Salem, dated 18.10.2016 passed in C.R.P.Nos.58 and 61 of 2015 reversing the order dated 10.3.2015 passed by the learned Judicial Magistrate I, Salem, in C.M.P.Nos.6889 and 6891 of 2013 in C.C.No.239 of 2013 is set aside. The petitioners shall stand discharged in the case in C.C.No.239 of 2013 on the file of the learned Judicial Magistrate I, Salem. No costs. Consequently, connected miscellaneous petitions are closed.

s/d-
Assistant Registrar(CS VII)

True Copy

Sub-Assistant Registrar

To

1. The Principal Sessions Judge,
   Salem.

2. The Judicial Magistrate I,
   Salem.

3. The Section officer
   Criminal Section, High Court, Madras 104.

4. The Public Prosecutor
   High Court, Madras 104.

+5 Ccs to Mr.N.Kolandaivelu, Advocate sr 72568

Crl.R.C.Nos.264 of 2018 and 1626 to 1628 of 2017 &
Crl.M.P.Nos.16735, 16737, 16739/2017 &
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SP(31/10/2018)