

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Writ Petition No.32350 of 2016

ORDER:

This writ petition, under Article 226 of the Constitution of India, is filed by the petitioners requesting to issue a Writ of Mandamus or any other writ or order declaring the action of the 3rd respondent in issuing three surcharge notices, dated 24.08.2016, *vide* Rc.No.625/2016-B to the petitioners 2 to 13 under Section 60(1) of AAPCS Act demanding recovery of the amount along with interest at 13% per annum without considering the resolution, dated 30.03.2016, of the general body of the 1st petitioner society as illegal, arbitrary, against the principles of natural justice and violative of rules and regulations under the Co-operative Societies Act in the light of the Constitution (Ninety-seventh Amendment) Act, 2011. In this writ petition, a consequential relief to set aside the said surcharge notices issued by the 3rd respondent is also sought.

2. I have heard the submissions of Sri *S.S. Prakash*, learned counsel appearing for the writ petitioners, of the learned Government Pleader for Co-operation (AP) appearing for the respondents 1 to 3 and 6; and of Sri *N. Jaya Surya*, learned counsel appearing for the respondents 4 & 5. I have perused the material record.

3. The case of the petitioners, as stated by the 2nd petitioner in the affidavit filed in support of the writ petition, in brief, is this: -

The 1st petitioner is a Co-operative Society of the employees of the Visakhapatnam Port Trust. The petitioners 2 to 13 are its members and Directors of its managing committee and were, therefore, in the management

of the Society at the relevant time. After the Constitution (Ninety-Seventh Amendment) Act, 2011 (w.e.f 15.02.2012), in view of insertion of the words 'or co-operative societies' in Article 19(1)(c), and insertion of Article 43(b) which deals with promotion of co-operative societies, all citizens shall have the right to form associations or unions or co-operative societies. The said amendment of the Indian Constitution is intended to ensure promotion of voluntary formation of Co-operative societies, their autonomous functioning, their democratic control as well as professional management of co-operative societies. In view of the said amendments to the Constitution of India and the autonomous status conferred on the Societies and the elevation of the societies to a constitutionally consecrated position, the role of the State and its officers has become merely supervisory in matters of surveillance and making sure of statutory compliances under the A.P. Co-operative Societies Act, 1964 [the Act', for short]. One Srinivasa Rao and another Ch. Sathibabu, who are members and ex-directors of the 1st petitioner society, that is, respondents 4 & 5 herein, made allegations against the then management of society at the 90th general body meeting, which was held, on 20.08.2015. The allegations made by them related to lavish spending of the amount of Rs.7.00 lakhs against budget allocation of Rs.4.00 lakhs resulting in gross misuse of public funds etcetera. On the said and other various other allegations related to irregularities in the conduct of the affairs of the society, which were made in the complaints of the said respondents, a statutory enquiry under Section 51 of the Act was ordered by the 1st respondent – Joint Registrar, District Co-operative Officer, Visakhapatnam *vide* proceedings, dated 28.08.2015, in Memo in R.C.No.2245/2015- C (Coop). Pursuant thereto, the Divisional Co-operative

Officer, Visakhapatnam – 2nd respondent conducted a detailed enquiry and submitted a report, dated 29.03.2016, *inter alia*, holding that the petitioners 2 to 13 herein and others have indulged in irregularities and recommended for further action in the matter. As a consequence thereof, three impugned surcharge notices, dated 24.08.2016, in terms of Section 60(1) of the Act were issued to the petitioners 2 to 13 by the Deputy Registrar of Co-operative Societies, Yelamanchili – 3rd respondent, who is the authority concerned. The petitioners, who are aggrieved of the said surcharge notices, filed this writ petition, *inter alia*, disputing the various findings in the enquiry report of the 2nd respondent. On submission of the enquiry report by the 2nd respondent to the 1st respondent, on 29.03.2016, a direction was given to the 1st petitioner society to place the said enquiry report in a meeting of the General Body and send compliance report. Accordingly, the 1st petitioner society called for a General Body meeting and the said meeting was held, on 30.03.2016, at Visakhapatnam. The enquiry report was placed before the General Body at the said meeting. The General Body has not considered the findings in the said enquiry report and took a practical view in the matter and ratified and approved the excess expenditures, which were referred to in the said report and which were against the budget allocations; and the General Body further resolved to request the authority concerned to withdraw the enquiry report and issue consequential proceedings. The General Body expressed a strong intention in that regard and approved and ratified the excess expenditures incurred by the management. But the official respondents further proceeded in the matter and issued the three surcharge notices, which are impugned in the writ petition. The said notices were issued under Section 60(1) of the Act, on 24.08.2016. Thus, there

is a clash between the view of the society and the view of the official respondents. In-fact, the 1st petitioner society placed the resolutions of the General Body before the 2nd respondent and informed that its majority members opined and intended to withdraw the report and the consequential proceedings and intended action, if any. However, the official respondents have not considered the same and did not honour the collective wisdom of the members of the society. The 1st respondent directed the 3rd respondent to take further steps. Therefore, the 3rd respondent has issued the three surcharge notices. The three surcharge notices relate respectively to the following items 1 to 3: (1) recovery of amount of Rs.2,45,494/- with interest @ 13% per annum from the date of commitment of fraud till date of full realization without further notice; (2) recovery of Rs.1,34,011/- with interest @ 13% per annum from the date of commitment of fraud till date of full realization without further notice; and, (3) recovery of Rs.7,39,218.86 ps with interest @ 13% per annum from the date of commitment of fraud till date of full realization without further notice. The incurring of excess expenditure is a matter of civil nature and is not of criminal nature. The 1st petitioner society is not getting funds or subsidy or financial assistance from the Government. The 1st petitioner society proposes and estimates its budget for every activity as a part of its exercise of budgetary allocation. Sometimes, the expenditure incurred may be in excess of or below the allotted budget. The excess expenditure against the budgetary allocation cannot be termed as misappropriation or misuse of the funds of the society. The action of the official respondents in considering the excess expenditure as a misappropriation despite the resolution of the General Body of the society is unwarranted and it amounts to attack on

the very foundation of the co-operative society. The Society is entitled to its self governance. In view of the aforesaid amendment to the Constitution, by virtue of the Constitution (Ninety-seventh Amendment) Act, 2011, the surcharge notices, which are impugned, are inoperative as the view and the decision of the General Body will have a precedence and primacy. The petitioners are entitled to seek protection for the autonomy of the society from the actions of the official respondents. Hence, the writ petition is filed.

4. The case of the non official respondents 4 & 5 is this:

On the complaints made by these respondents alleging irregularities in the affairs of the society, a statutory enquiry under Section 51 of the Act was ordered by the 1st respondent *vide* proceedings, dated 28.08.2015. Pursuant thereto, the 2nd respondent conducted a detailed enquiry and submitted a report, on 27.02.2016, holding that the petitioners 2 to 13 indulged in financial and other irregularities; and the said authority recommended for further action. As a consequence thereof, the impugned surcharge notices under Section 60 of the Act were issued to the petitioners 2 to 13 by the competent authority. The petitioners are required to issue a reply notice. However, they approached this Court by filing this writ petition. The enquiry report has not been placed before the General Body, on 30.03.2016, as being sought to be canvassed by the petitioners. To the knowledge of these respondents, the report was received by the society on 29.03.2016. Therefore, it would not have been possible or feasible to place the said report before the General Body, on 30.03.2016, that is, on the very next day. For the reasons best known, the petitioners have not placed the said report for discussion before the General

Body. The averments to the contra in the writ petition are false. Even assuming for a moment that such a resolution was passed, such resolution is invalid as it runs contra to specific provisions of the Act. The *proviso* to Section 51 of the Act contemplates further action irrespective of resolutions of the general body of the society negating the findings in the inquiry report. Hence, the resolution of the society does not preclude the official respondents/competent authority concerned from exercising statutory powers conferred upon the said authority/authorities. The contentions based on the Constitution (Ninety-seventh Amendment) Act, 2011, are misconceived. Under the cover of the constitutional provisions, the petitioners are trying to cover up their misdeeds. There is no illegality or arbitrariness in the action taken by the official respondents and the said action is not against the principles of natural justice. There is no inconsistency between the provisions of the Act and the provisions of the relevant Articles of the Constitution of India.

5. The learned Government pleader while contending that the writ petition filed challenging the surcharge notices is not maintainable highlighted the misdeeds and irregularities of the petitioners 2 to 13 and also the findings based on record and enquiry which are recorded in the enquiry report and prayed for the dismissal of the writ petition.

6. I have given earnest consideration to the facts and the submissions made in line with the pleadings of the parties.

7. The principal contentions of the writ petitioners are based on the Constitution (Ninety-seventh Amendment) Act, 2011, and the relevant

amended provisions of Article 19(1)(c) and Article 43(b) of the Indian Constitution. The relevant portion of Article 19(1)(c) reads as follows:

19. Protection of certain rights regarding freedom of speech, etc. – (1) All citizens shall have the right –

(a)...

(b)...

(c) to form associations or unions or co-operative societies.

(d)....

(e)...

(f)...

(g)....

Article 43(b) reads as under:

43B. Promotion of co-operative societies: - The State shall endeavour to promote voluntary formation, autonomous functioning, democratic control and professional management of co-operative societies.

It is profitable to refer to Section 51 of the Act which reads as under:

51. Inquiry - The Registrar, may of his own motion and shall, on the application of a society to which the society concerned is affiliated, or of not less than one third of the members of the Committee, or of not less than one fifth of the total number of members of the society, hold an inquiry or direct some person authorized by him by an order in this behalf to hold an inquiry into the constitution, working and financial condition of a society. Such inquiry shall be completed within a period of four months and the report of inquiry along with the findings of the registrar thereon shall be communicated to the managing committee of the society. It shall be the responsibility of the managing committee to place the inquiry report before the General Body or Special General Body convened for the purpose for its information, within a period of one month from the communication of the inquiry report by the Registrar. The Registrar shall be competent to initiate action under the provisions of this Act, if the committee fails to take action as aforesaid:

Provided that notwithstanding anything contained in this Act and the Rules made thereunder, the bye laws of a society and the action of the society in placing the inquiry report along with the findings of the Registrar, the Registrar shall not be precluded from taking follow up action as may be required on the basis of inquiry report:

Provided further that such action shall not be nullified even if the General Body of the Society passes a resolution negating the findings of the inquiry:

Provided also that the Registrar may for reasons to be recorded in writing extend the period of four months for completion of inquiry for a further period not exceeding two months.

8. Though the second *proviso* to Section 51 of the Act postulates that further action shall not be nullified even if general body of the society passes a resolution negating the findings of the inquiry, the writ petitioners contend that in view of the avowed objectives with which the above said amendment was made to the Constitution of India and as the society is an autonomous society, it is entitled to function autonomously and that it has democratic self control over its affairs and management and that, therefore, once the General Body passes a resolution negating the findings of the inquiry, the view of the general body shall have precedence & primacy and that the decision of the General Body shall prevail.

9. Nevertheless, during the course of hearing, it was brought to the notice of this Court by the learned counsel and the learned Government pleader appearing for the respondents that the High Court of Gujarat in **Rajendra N. Shah v. Union of India**¹ has declared that the Constitution (97th Amendment) Act, 2011, inserting part IXB containing Articles 243ZH to 243ZT is *ultra vires* the Constitution of India for not taking recourse to Article 368(2) of the Constitution providing for ratification by the majority of the State Legislatures. In the cited decision the facts and contentions urged are as follows: ‘By way of Public Interest Litigation, the writ petitioner therein has prayed for quashing of the Constitution (97th Amendment) Act, 2011 introducing Part IXB, as *ultra vires* the Constitution of India. The petitioner contended that the Constitution (97th Amendment) Act, 2011 was passed by the Lok Sabha, on 22nd December,

¹ (2013)2GLR1698

2011, and that the same was passed by the Rajya Sabha, on 28th December, 2011, and that the President of India bestowed assent to that amendment, on 12th January, 2012, and the said notification was published in the Gazette of India of 13th January, 2012, and that the amendment came into force, on 15th February, 2012, and that the power under Article 368 of the Constitution of India itself is the basic structure of the Constitution of India and that the procedure prescribed in the Article 368(2) of the Constitution, which recognizes the federal structure of the Constitution which is one of the basic structures has not been followed while making the impugned constitutional amendments and that therefore, the Constitution (97th Amendment) Act, 2011 introducing Part IXB, is *ultra vires* the Constitution of India. The petitioner also contended before the High Court of Gujarat that the subject-matter 'co-operative societies' does not fall in the 7th Schedule Entry 45 of List I of the Constitution and those are specifically excluded from Entry No. 43 of List 1 and that, therefore, the State legislature is the only competent authority in law to enact the laws for the co-operative societies and on that ground, the proposed amendment should be set aside as violative of the Constitution of India as the consent of the majority of the State Legislatures was not received before presenting the Bill proposing the amendment to the President of India.'

10. It is also submitted that a Division Bench of this Court in W.P.No.18600 of 2003 having taken note of the afore-stated judgment of the High Court of Gujarat followed the said judgment.

11. In view of the above said legal position, it is fairly conceded before this Court that the contentions of the writ petitioners based on the Constitution

(Ninety-seventh Amendment) Act, 2011, need no countenance. The only contention of the writ petitioners before this Court is that in view of the General Body negating the findings in the inquiry report no further action shall be taken pursuant to the enquiry report of the 2nd respondent. However, as already noted, second *proviso* to Section 51 of the Act clearly postulates that further statutory action shall not be nullified even if the General Body passes resolution negating the findings of the inquiry.

12. On the above analysis, this Court finds that there is no merit in the contention of the writ petitioners. Accordingly, this Court holds that the writ petition is devoid of merit and is hence, liable to be dismissed.

13. In the result, the Writ Petition is dismissed. As a sequel to this order, the Deputy Registrar, Co-operative Societies, is directed to fix a fresh date and intimate the same to the petitioners to enable the petitioners to attend and file their written statements with supporting evidences, if any, before proceeding further in the matter in strict accordance with the procedure established by law.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

M.SEETHARAMA MURTI, J

07.09.2018
Vjl