IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2019

CORAM

THE HON'BLE MR.JUSTICE N.ANAND VENKATESH

Crl.O.P.No.27616 of 2016
and
Crl.M.P.No.14116 of 2016

1.E.Kalpana
2.P.Jwalarani
3.R.Ganesh
4.R.Mathivanan ...Petitioners

-Vs-

State by
The Inspector of Police,
CCIW CID, Vellore,
Vellore District.
... Respondent

Prayer: Criminal Original petition filed under Section 482 of Code of Criminal Procedure, to call for the entire records concerned in C.C.No.453 of 2016 on the file of the Judicial Magistrate-II, Vellore, Vellore District and quash the same in so far as the petitioners are concerned.

For Petitioner : Mr.C.Prakasam

For Respondent : Mr.M.Mohamed Riyaz
Additional Public Prosecutor

ORDER

This Criminal Original Petition has been filed seeking to quash the proceedings in C.C.No.453 of 2016 pending on the file of the Judicial Magistrate No.II, Vellore.

2. The respondent police filed a final report as against 10 accused persons and the petitioners have been arrayed as A5, A6, A7 and A9.

3. The case of the prosecution is that Vellore Thiruvannamalai Milk Producers Co-operative Union purchased milk from the producers and caused sale through different outlets in and around Vellore District through their nominated agents. The payments were also made in advance. A1 to A3, employees of the

Union and A4 an agent, used to collect amounts from the respective agents and remit the same into the bank account. The employees of the union collected the amounts from the agents but failed to remit the same into the bank account. It is further alleged that they have forged the bank challans and caused supply of milk unauthorizedly and thereby caused wrongful loss to the society.

4. The first petitioner who is arrayed as A5 was working as a Senior Receptionist, the second petitioner/A6 was working as Manager, the third petitioner/A7 was also working as Assistant General Manager and the fourth petitioner/A9 was working as Manager(accounts).

5. The learned counsel for the petitioners submitted that the statement made by the witnesses and the materials collected by the prosecution points to the fact that the actual offence was committed by A1 to A4. The petitioners who had dealt with the challans, have performed their duty in the normal course of business and at the best they can be held responsible for dereliction of duty. The learned counsel further submitted that surcharge proceedings were initiated against the petitioners under the Co-operative Societies Act and the same came to be quashed by the Co-operative Tribunal in C.T.A.No.14 of 2015 by an order dated 26.04.2017.

6. The learned counsel for the petitioners further submitted that A8 who was working as an Accounts Assistant in the same department, approached this Court against the dismissal of her discharge petition and this Court by an order dated 11.01.2018 made in Crl.R.C.No.1002 of 2017 was pleased to discharge A8 from the case. The learned counsel submitted that the reasoning given in the said Judgment will equally apply for the petitioners also.

7. The learned Government Advocate appearing on behalf of the respondent police submitted that the accused persons conspired together and caused a wrongful loss to the society to the tune of Rs.54,39,289/-. The learned counsel further submitted that even though A1 to A4 were directly involved in the offence, the petitioners who had the responsibility to scrutinize the challans received from the accused persons before clearing the same, failed to discharge their duties and thereby they are liable for criminal negligence. The learned counsel submitted that there are no grounds to interfere with the proceedings at this stage and the petitioners can raise all the grounds before the Court below during the course of trial.

8. It will be useful to refer to the order passed by this Court in Crl.R.C.No.1002 of 2017, dated 11.01.2018 wherein this Court discharged A8 from the proceedings.

> “5.In dismissing the petition in CMP.No.936/2017, Court below has reasoned that it was the duty of the petitioner/A8, a staff at the Accounts Section to compare the Challan and Bank statements with the entries in the computer and that she had failed to do so. Such position finds support in the statements of L.Ws.2 and 3. Court below informed that the question of whether the petitioner has acted in collusion with the other accused, could be decided only at the trial, after examination of witnesses. The petitioner having been charged under section 109 IPC would have to face the trial.
> 6. Learned counsel for the petitioner submitted that in an enquiry conducted in keeping section 81 of the Tamil Nadu Co-operative Societies Act, It was A1 to A4 whose activities were probed. However, surcharge proceedings came to be initiated against the petitioner also and challenging the same, petitioner has moved the Tribunal which even while holding that A1 was the only person responsible, though it appropriate to impose a fine of Rs.100000/- on the petitioner for negligence. Learned counsel submits that such order of the Tribunal has been independently challenged.
> 7. Be that as it may, towards allowing this revision, this Court merely would refer to the judgment of the apex court in Kulwant Singh@ Kulbansh Singh V.State of Bihar reported in 2007[15] SCC 670, wherein the Apex Court has observed in paragraph No.12 as follows:-
>
>> “....
>> 12 Where a person aids and abets the perpetrator of a crime at the very time the crime is committed, he is a principal of the second degree and section 109 applies. But mere failure to prevent the commission of an offence is not by itself an abetment of that offence. Considering the definition in Section 109 strictly, the instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Section 109 is attracted even if the abettor is not present when

> the offence abetted is committed provided that he had instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to the induced the commission of an offence by an act or illegal omission. In the absence of direct involvement, conviction for abetment is not sustainable.[see joseph Kurian V. State of Kerala [1994[6] SCC 535:1995 SCC [Cri]20]."

That in departmental proceedings, wherein the degree of proof is mere preponderance of probabilities as against proof beyond all reasonable doubt in criminal proceedings, the first accused alone was found responsible only strengthens the case of petitioner for discharge.

8. In the result the criminal revision stands allowed and the order under challenge dated 26.05.2010 in CMP.No.936/2017 in CC.No.453/2016 on the file of the Judicial Magistrate No.II, Vellore is hereby set aside and the petitioner shall stand discharged in the case. Consequently, the connected miscellaneous petitions are closed."

The above findings given for A8 will also equally apply to the petitioners herein. The petitioners have been roped in as an accused only on the ground of abetment. In order to constitute an offence of abetment, mere failure to prevent a commission of an offence will not amount to an offence of abetment. There are no materials to show the direct involvement of the petitioners and at the best the petitioners can only be held liable for their dereliction of duty. This Court is not able to find even a strong suspicion as against the petitioners and there are no materials to sustain the same.

9. It is now a well settled law that a mere dereliction of duty or gross negligence in performing the duty by itself will not constitute an offence and it is important that there should be an element of criminal intent and the same is totally absent in the present case. The reasoning given by this Court to discharge A8 from this case, will equally apply to the petitioners also. The continuation of the proceedings as against the petitioners will amount to an abuse of process of Court.

10. In the result, the proceedings in CC.No.453 of 2016 on the file of Judicial Magistrate No.II, Vellore is hereby quashed insofar as the petitioners are concerned. Accordingly, this Criminal Original Petition is allowed and there will be a

direction to the Court below to continue the proceedings insofar as other accused persons are concerned and complete the proceedings within a period of four months from the date of receipt of copy of this order. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

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To

1. The Judicial Magistrate No.II,
   Vellore.

2. - do - Through The Chief Judicial Magistrate,
   Vellore.

3. The Inspector of Police,
   CCIW CID, Vellore,
   Vellore District.

4. The Public Prosecutor
   High Court, Madras.

+1 cc to Mr.C.Prakasam, Advocate, S.R.No.63485

Crl.O.P.No.27616 of 2016
and
Crl.M.P.No.14116 of 2016

GJ-II(CO)
SSM(31/07/2019)