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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.07.2019

PRONOUNCED ON : 05.08.2019

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

Writ Petition No.13358 of 2019 and

W.M.P.No.13473 of 2019

P.Krishnan

... Petitioner

Vs

1.The Deputy Director of Industries
and Commerce (Industrial Co-operatives)/
(District Registrar of Industrial Co-op),
Guindy,
Chennai - 32.

2.Industrial Co-operative Officer,
(Liquidation/Surcharge Officer U/s 87),
Rahumania Auto Drivers Industrial
Co-operative Society Ltd.,
Plot No.52, Vyasarbadi Co-operative
Industrial Estate, E.H.Road,
Chennai.

3. Mrs.N.Shobana
Industrial Co-operative Officer
(Liquidation / Surcharge Officer U/s.87)
Rahumania Auto drivers Industrial Co-operative
Society Ltd.
Plot No.52, Vyasarbadi Co- Operative
Industrial Estate, E.H.Road
Chennai.

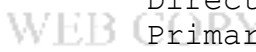
4.IND.No.24/MDS/2009,
Rahumania Auto Drivers Industrial
Co-operative Society Ltd.,
Rep. By its Secretary,
Plot No.52, Vyasarbadi Co-operative
Industrial Estate, E.H.Road,
Chennai.

... Respondents

Prayer :- This Writ Petition is filed under Article 226 of the Constitution of India for a writ of certiorari calling for the records of the Surcharge Order No.2/Rahumania/2019 dated 11.03.2019 on the file of the second respondent quash the same.

For Petitioner
For Respondents

:Mr.M.S.Palaniswamy
:Mr.R.Sivakumar



ORDER

The case of the petitioner is that, he served as Managing Director of TAICO Bank between 06.11.2011 and 31.05.2016. 266 Primary level Co-operative Societies were under his supervision through its Branch Managers. Rahumania Auto Drivers Industrial Co-operative Society Ltd., (4th respondent) is one among such primary level society falling under his control. One of the object of the fourth respondent is to improve the economic condition of the minority community. The members of the fourth respondent society belong to minority community. 87 members of the fourth respondent society were advanced loan for purchase of Auto rickshaws.

2.The THAICO Bank released Rs.19,42,500/- to M/s.Khivraj & Company and Rs.90,00,000/- to M/s.Ramkay TVS on 03.03.2011, much before the petitioner's joined as Managing Director of THAICO Bank. Since, there was default in repayment, enquiry under Section 81 of the Tamil Nadu Co-operative Society Act (hereinafter referred to as "the Act") was initiated. Based on the enquiry report dated 20.03.2015, surcharge proceeding was initiated under Section 87 of the Act. While so, pending surcharge proceedings, another enquiry under Section 81 of the Act was initiated. The third respondent was appointed as the Enquiry Officer. Based on her report dated 16.05.2018, surcharge proceeding under Section 87 of the Act has been initiated against the petitioner by the first respondent vide proceeding No.1385/IC2/2017 dated 22.05.2018. The surcharge proceeding is also been proceeded by the very same officer who conducted the enquiry under Section 81 of the Act and submitted report. Hence, she has been arrayed as third respondent.

3.The contention of the petitioner is that, no opportunity was given to him during the enquiry under Section 81 of the Act. The same officer who has conducted enquiry under Section 81 of the Act is also the officer for the surcharge proceeding under Section 87 of the Act. The same person cannot be a prosecutor as well as a Judge which is against all canons of law.

4. The petitioner is no way connected with the fourth respondent society for the default of loan amount. Arbitration proceeding has already been initiated against the defaulters and the same is pending. For non recovery of the said loan amount, the petitioner cannot be proceeded under Section 87 of the Act. The respondents have already initiated Section 81 enquiry for the default committed by the members of the fourth respondent society and that has culminated in surcharge proceedings as early as on 19.05.2016. While so, the second enquiry under Section 81 of the Act and implicating the petitioner herein in



the surcharge proceeding is bad in law.

5. The prime contention of the learned counsel for the petitioner is that no opportunity was given to him during Section 81 of the Act enquiry. The person who has submitted the report under Section 81 of the Act and the person who is now presiding the surcharge proceeding under Section 87 of the Act are one and the same. This is against the cardinal principle of jurisprudence that, no person who is a complainant shall be the Judge. In this regard, the learned counsel for the petitioner would rely on the following two judgments:-

“(i) In P.Venkatachalam (deceased) vs. The Special Tribunal for Co-operative Cases, (1996 II MLJ 69) and
(ii) In Arjun Chaubey v. Union of India (1984 (2) SCC 578).”

6. Per contra, the learned counsel for the respondents has filed a counter affidavit wherein, he has stated that the writ petition is not maintainable since, the petitioner under Section 152 A of the Act, has a statutory alternate remedy against the impugned surcharge order dated 11.03.2019. The erstwhile Board of Directors of the fourth respondent society as well as officials of THAICO Bank were held responsible for the financial irregularity in the matter of disbursing Auto Rickshaws loans to the members of minority community/fourth respondent society.

7. As per the State Government Policy, financial assistance was given to the minorities under various schemes. One of the scheme envisaged is to provide auto rickshaws to the deserving persons belonging to minority community. The fourth respondent society identified 87 persons as beneficiaries and disbursed loan amount to the tune of Rs.1,24,950/- each. The distribution of auto rickshaws was held on 28.02.2011. Most of the members who availed the loan failed to repay the EMI. On primary enquiry, it was found that the formation of fourth respondent under the presidentship of Jainallabudin itself irregular and illegal. The said founder president was already a member in a society which has similar object and who was not a professional auto driver having appropriate permit. He is ineligible to be member and office bearer of the fourth respondent society. Likewise, without proper identification of the loanee, auto rikshaws were distributed to them and those auto rickshaws had no road permit from RTO Office. Without permit; registration number and appropriate insurance, many auto rickshaws were allowed to ply on the road. After receipt of permit from the transport authority, when attempt was made to distribute the permits to the auto rickshaw loanees, they found that the beneficiaries could not be located; their addresses and



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identities were bogus. Some of the beneficiaries were not able to pay the EMI and returned the auto rickshaws to the fourth respondent society. Thus, a fraud of swindling nearly one crore rupees came to light. Hence, the arbitration proceedings under Section 90 of the Act was initiated against the defaulters for recovery of the loan dues but failed since, many of the beneficiaries could not be identified. The proceedings ended in exparte decree, without any fruitful purpose and scope of recovery.

8. In the said circumstances, the affairs of the fourth respondent society was ordered to be inspected and enquiry under Section 81 of the Act was initiated. As per the enquiry report dated 20.03.2015, surcharge proceeding was also initiated against the office bearers and members of the fourth respondent society. Later, the first respondent herein who took charge of the office found the gravity of the irregularity and ordered a cursory inspection to find out the root for the financial loss. She found that the first respondent's earlier enquiry report submitted under Section 81 of the Act on 20.03.2015 was an incomplete report regarding the major irregularities. Therefore, further enquiry under Section 81 was ordered and the third respondent was appointed as enquiry officer. Who after thorough enquiry submitted report on 16.05.2018.

9. The enquiry report of third respondent consists of two parts. The first part, regarding the various irregularities pertaining to the formation of the fourth respondent society and distribution of Auto Rickshaws on 28.02.2011, without verifying the credence of the borrowers and without even obtaining permit for the auto rickshaws from the Regional Transport Office. The second part of the report pertaining to irregularities noticed in the reallocation of autos seized; auctioning of the seized auto rickshaws and non recovery of loan amount etc.

10. In respect of the first part of the irregularity, the members concerned with fourth respondent were involved; in respect of the second part of the irregularity, the officials of THAICO Bank were involved. The loss incurred under the first part of irregularity was estimated to the tune of Rs.37,42,426/-. The estimated loss incurred during the second part of irregularity was Rs.46,04,510/-. Being satisfied with the finding of the enquiry report, the Industrial Cooperative Officer (Liquidation) (ICO Liquidation) was appointed as surcharge officer to recover the amount jointly and severally from 22 persons, who were part of the said irregularities. She happened to be the officer who conducted 81 enquiry as Industrial Cooperative Officer. The petitioner participated in the surcharge proceeding under Section 87 of the Act, and obtained documents and perused the connected records on various



occasions and also made his written submissions 04.01.2019. After considering his written submissions, the order was passed on 11.03.2019.

11. According to the learned counsel for the respondents, if the petitioner is aggrieved by the surcharge proceedings, passed under Section 87 of the Act, the remedy available for the petitioner is to prefer statutory appeal before the Cooperative Tribunal/Small Causes Court, Chennai and in fact, the other 21 persons who were also held responsible under the surcharge proceeding along with the petitioner have already preferred Civil Miscellaneous Appeals before the Cooperative Tribunal/Small Causes Court, Chennai and the same are pending.

12. The learned counsel for the respondents would further submit that the enquiry officer under Section 81 of the Act is not a Prosecutor, she is only a fact finding officer. Therefore, the contention of the petitioner that the Prosecutor cannot be a Judge, is incorrect. In support of his submission, the learned counsel would rely on the judgment of this Court reported in S.V.K.Sahasramam vs. The Deputy Registrar of Co-op. Societies (W.A.No.949 of 2008 dated 29.08.2008).

13. The contention of the petitioner is on two folds:-

"Firstly, there cannot be two enquiries under Section 81 of the Act, for the same irregularity.

Secondly, the enquiry officer under Section 81 of the Act and the surcharge officer under Section 87 of the Act being one and the same it is, against the principle of natural justice."

14. As far as the first contention is concerned, paragraph No.13 of the counter affidavit clearly indicates that why there were two enquiries under Section 81 of the Act. Section 81 of the Tamil Nadu Co-operative Societies Act, provides for enquiry into irregularity in any co-operative society to find out the fact. There is no limitation to initiate Section 81 enquiry. If the Registrar is of the opinion that certain matter has to be investigated or inspected, he can order so. In V.S.Ramasubramaniam v. The State of Tamil Nadu & 9 others (2004 (2) L.W 776) this Court has clarified the issue in the following words:-

"38. A reading of Sections 81 to 83 of the Act, does disclose that no such limitation as has been argued on behalf of



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the petitioner has been stipulated in the said provisions. In fact, the power of enquiry, inspection or investigation which is vested with the Registrar can be exercised either based on an application of a majority of the Board or of not less than one-third of the members or on the request of the Financing Bank or of the District Collector or of his own motion. If the argument of the learned Senior counsel for the petitioners is to be accepted, then, if based on the request of the Financing Bank or of the District Collector, if some enquiry had been held under Section 81 of the Act and the same came to be closed without taking any action, then suo motu power of the Registrar could never be exercised. The very purport of providing for such an inspection under Section 81 or investigation under Section 82 of the Act, is to ensure that any mismanagement or indulgence of corrupt practice by the persons who are in-charge of the affairs of the society are under the constant surveillance of the statutory authorities so that the funds of the public which led to the formation of the society is not swindled by a few who were allowed to administer the society. Therefore, it would be highly dangerous to suggest that if once enquiry was held on some aspects of misfeasance and in the said enquiry, nothing constructive was brought out, the society or its Office Bearers should not be subjected to any further enquiry, inspection or investigation in future under Sections 81 to 83 of the Act. Looked at from any angle, I am unable to subscribe to the contentions so raised on behalf of the petitioners."

(Emphasis added)

15.The other contention of the learned counsel for the petitioner is that, the third respondent being the enquiry officer under Section 81 of the Act cannot be the surcharge officer under Section 87 of the Act. In this connection, the Division Bench of this Court in S.V.K.Sahasramam vs. The Deputy Registrar of Co-op. Societies (W.A.No.949 of 2008 dated 29.08.2008) has held as follows:-



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"9. It is nobody's case that in the instant case, the proceeding under Section 81 of the said Act amounts to an enquiry which can be called a departmental or disciplinary enquiry. It cannot be disputed that an enquiry under Section 81 of the said Act is an enquiry in public interest in order to find out whether the affairs of a co-operative society are conducted legally and whether there are financial improprieties in the matter of conduct of its affairs. Such an enquiry cannot be prima facie compared to an enquiry against any individual employee. It is obviously true that as a follow up action on such enquiry under Section 81, various other steps may be taken, viz. surcharge proceedings can be initiated under Section 87 and steps can be also taken for initiating criminal proceedings. In the instant case, both these steps have been taken."

16. When Section 81 of the Act, is only a fact finding enquiry, it cannot be equated with the departmental disciplinary enquiry and the Registrar is empowered to initiate as many number of enquiries under Section 81 of the Act, to probe into irregularity, there is no bar for initiating Section 81 enquiry to look into larger aspects of the irregularity and appointing the same person under Section 87 of the Act, to proceed with the surcharge proceedings.

17. The contention of the learned counsel for the petitioner that the prosecutor cannot be a judge, is not the correct analogy, in this case. The judgment relied by the learned counsel for the petitioner in *Arjun Chaubey v. Union of India* (cited supra) is in respect of a departmental enquiry, where the complainant himself was the adjudicating officer.

18. Similarly, the other judgment cited by the learned counsel for the petitioner in *P. Venkatachalam (deceased) vs. The Special Tribunal for Co-operative Cases* (cited supra) the complainant was asked to conduct enquiry. In the said context, this Court has rightly held as follows:-

".....It is one of the cardinal principles of our jurisprudence that no person who is a complainant in the case shall be the adjudicator. Therefore, the entire proceeding has to be held as vitiated by reason of this grave and serious infirmity. A person who had prosecuted the



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petitioner cannot by any stretch of imagination be held to have approached the case dispassionately. Even for the sake of argument, if it is accepted that the second respondent had approached the case dispassionately the principles of natural justice require that such a person should not be an adjudicator of the cause in question. Justice should not only be done, but it must also seem to done."

19.The impugned order passed by the third respondent is based on the power conferred under Section 87 of the Act and it has been passed after examining the witnesses and after affording opportunity to the petitioner. If at all, the petitioner herein is aggrieved, he has the right of appeal under the statute and he has to work out his remedies only as per the statute.

20.In the given facts and circumstances, the writ petition challenging the impugned order is not maintainable. Hence, the writ petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar(CS-III)

True Copy

Sub-Assistant Registrar

jbm
To

1.The Deputy Director of Industries
and Commerce (Industrial Co-operatives)/
(District Registrar of Industrial Co-op),
Guindy,
Chennai - 32.

+1 CC to Mr.M.S.Palaniswamy, Advocate sr 66568.
+1 CC to Mr.R.Sivakumar, Advocate sr 67235

W.P.No.13358 of 2019

PM(CO)
SP(04/09/2019)