



HIGH COURT OF JUDICATURE AT MADRAS

ORDERS RESERVED ON	ORDERS PRONOUNCED ON
16.04.2019	18.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

W.P.No.22593 of 2018
and
W.M.P.No.26442 of 2018

S.Thamilarasan

... Petitioner

Vs.

1.The Deputy Registrar of Co-operative
Societies/Surcharge Officer,
Tiruvarur Circle,
Tiruvarur (Po) & District.

2.Management,
Tiruvarur Consumers Cooperative
Wholesale Stores Ltd.,
Tiruvarur (Po) & (Dist.)

3.The Principal District Judge/Tribunal
for Cooperative cases,
Tiruvarur (Po) & Dist.)

...Respondents

Prayer: Writ petition filed under Article 226 of the Constitution of India, praying for the issuance of a Writ of Certiorari, calling for the records of the first respondent relating to his order in Rc.No.5529/ 2002 Ku.Na dated 10.5.2004 and the records of the third respondent relating to judgment and decree in Coop. C.M.A.No.12/2008 dated 27.4.2018 and quash both the orders.

For Petitioner : Mr.C.Mohan for
M/s.P.Anbarasan

For Respondent No.1 : Mr.Vijaynarayanan,
Advocate General
Assisted by
Ms.T.Girija, G.A.

For Respondent No.2 : Mr.L.P.Shanmugasundaram
Spl. Govt. Pleader



O R D E R

The writ petition is arising out of the Surcharge proceedings initiated by the first respondent in Rc.No.5529/2002 against the petitioner, stating that the petitioner while working as Branch Manager in the second respondent Cooperative Stores at Velankanni branch 1 and 2, has neither regularly remitted the sale proceeds to the accounts of the stores or Head office nor deposited in the Cooperative Central Bank and misappropriated stocks and cash and thereby caused financial loss to the second respondent Stores to the tune of Rs.17,37,574.52. The petitioner was directed to pay the aforesaid amount along with interest at the rate of 19% p.a. from 1.5.2004 till payment. Aggrieved by the said order, the petitioner preferred an appeal in Cooperative C.M.A.No.12 of 2008 before the third respondent Tribunal. The appeal was dismissed by the tribunal by confirming the order passed by the first respondent. Challenging the Surcharge order passed by the first respondent in Rc.No.5529/2002 as well as the order passed by the tribunal, dated 27.4.2018 in C.M.A.No.12 of 2018, the petitioner has filed the present writ petition before this Court.

2. The petitioner raised the following grounds against the order passed by the first respondent and Tribunal:

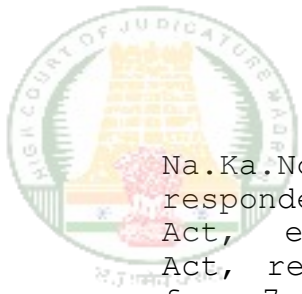
According to the petitioner, he was not provided with any documents for perusal as sought for by him in the list of documents. The petitioner was not given an opportunity to contest the case. The enquiry was conducted without observing the principles of natural justice. No document was marked and the Management of the Stores produced no evidence to prove the charge. The respondent after service of surcharge notice, dated 12.5.2003, but before issuing the impugned order, lodged a criminal complaint against the petitioner with the Inspector of Police, CCIW of C.I.D. which resulted in registration of an F.I.R. in Cr.No.5 of 2003 on 17.9.2003 on the very same allegations. The said complaint was closed on 14.2.2011 by the Judicial Magistrate No.1, Nagapattinam.

3 The case of the petitioner in brief is as follows: The petitioner was working as Salesman in Velanganni branch of the Tiruvarur Cooperative Wholesale Stores Ltd., Tiruvarur. The petitioner and a Packer were managing two branches at Velanganni. There would be heavy transactions in the branches, especially when the festival is organised at Madhakoil and therefore, it would take several weeks to complete the maintenance of accounts. According to the petitioner, the Managing Director took charge of the accounts and stocks of the branch in the absence of the petitioner and in that process, certain books and accounts were not located in the branch but they were removed surreptitiously by vested interest, for which,



blame was also thrown to the petitioner. The first respondent let off seven staffs of the Head office, who were implicated by Section 81 enquiry, without assigning any valid reason. The recovery of Rs.10,88,187.53 has been ordered against the petitioner and 3 others with interest @ 19% p.a. upto 30.4.2004 to a total extent of Rs.17,37,574.52. Challenging the order passed by the tribunal in Cooperative C.M.A.No.12 of 2008, the petitioner has filed a writ petition in W.P.No.44144 of 2016 and this Court by an order, dated 19.7.2017 remitted back the matter to the tribunal, to consider the appeal afresh after furnishing copy of the documents. But, the tribunal without furnishing the documents, passed an erroneous order, dated 27.4.2018, which is impugned in the present writ petition.

4. Counter affidavit has been filed by the first respondent, wherein it is stated as under:
The petitioner was appointed as a Salesman of Velankanni Sales branch I & II between the period from 7.8.2000 and 6.4.2001. During the said period, the petitioner was entrusted with consumer goods for sale to the consumers. The petitioner and Packer Thiru P.Nagooran were selling the goods at the time of Velankanni Madha festival. The petitioner did not update the accounts during the festival. The petitioner made local purchase of goods, which were not accounted for in the books of accounts. The Managing Director of the Tiruvarur Co-operative Wholesale Stores addressed the Circle Deputy Registrar, Tiruvarur to institute an inquiry under Sec.81 of the Tamilnadu Cooperative Societies Act, 1983 to probe into the irregularities committed in the second respondent Stores. The Surcharge officer issued summons to the petitioner to appear before him and participate in the surcharge inquiry. The petitioner, though received summons on 17.6.2003, 1.8.2003, 12.9.2003, 29.9.2003, 29.11.2003, 21.1.2004, 4.2.2004, 10.3.2004, 8.4.2004 and 26.4.2004, failed to appear before the Surcharge authority. The petitioner has not given any written explanation till finalisation of surcharge proceedings. The branch sales and other vital records pertaining to Velankanni branch are maintained by the petitioner and the books as well as the accounts of the branch were in the custody of the petitioner. The petitioner availed medical leave on 4.4.2001, he closed the sales depot I and II and had kept the keys with him till 5.4.2001. Only thereafter, he sent the shop keys to the branch through his friend Thiru Durai who is not connected to the Wholesale Stores. The officials of the Head office broke-open the branch in the presence of packer P.Nagooran of Velankanni branch. The Head office conducted physical verification of the stocks and recorded the actual stocks. The books and accounts were not found in the sales depots. Despite several letters sent to the petitioner to handover the records, he kept silent and did not send any information. The petitioner is liable for missing of accounts and books. Pursuant to the proceedings in



Na.Ka.No.2715/ 2001/CC, dated 15.5.2001, issued by the first respondent to hold statutory enquiry under section 81 of the Act, enquiry officer conducted enquiry under Section 81 of the Act, relating to accounts of Velankanni branch for the period from 7.8.2000 to 6.4.2001. The petitioner has not produced the branch accounts for enquiry and evaded his responsibility. Though the enquiry officer issued summons to the petitioner to personally appear before him, the petitioner did not give his explanation for the stock deficit and financial irregularities. The stock deficit and financial irregularities were detected during the enquiry with the help of head office records. The enquiry officer submitted his report holding that the petitioner and 3 others were responsible for the loss of Rs.17.37,574.52 sustained by the Stores and recommended that recovery of Rs.17,37,574.52 with interest @ 19% p.a. to be made from the petitioner and 3 others by initiating surcharge proceedings. On receipt of the enquiry report, the first respondent passed the surcharge award in RC.No.5529/2002, dated 10.5.2004 for Rs.15,53,749.91 against the petitioner and three others. Besides Surcharge order, the first respondent filed a police complaint before the CCIW (CID) Nagapattinam at Tiruvarur on 17.9.2003 against the petitioner for commitment of fraud and tampering of records and the complaint was registered in Cr.No.5/2003, dated 17.9.2003. Based on the report filed by the Inspector of Police, CCIW, the Judicial Magistrate No.I, Nagapattinam dropped the charges vide order in RCS No.82/2011, dated 14.2.2011. On the appeal preferred by the petitioner under Sec.152(1) of the Act, against the surcharge order passed by the first respondent, the tribunal passed an award in C.M.A. No.12 of 2008 by confirming the award of Rs.17,37,574.52 passed against the petitioner and others and dismissed the appeal. The Deputy Registrar has empowered to initiate surcharge proceedings against the petitioner and other employees who were responsible for the loss inflicted to the Velankanni sales branch. In support of his contention, the first respondent relied on the decision of this Court in the case of Registrar of Co-operative Societies Vs. G.Manoharan [2010(2) CTC 234 Madras].

5. Heard the learned counsel appearing for the petitioner, the learned Advocate General appearing for the first respondent, the learned counsel appearing for the second respondent and perused the materials available on record.

6. The writ petitioner was working as a Manager in the second respondent Society during the year 2000-2001. The petitioner and other employees have not updated the accounts for the purchase of goods in the books of accounts. The Deputy Registrar conducted an enquiry under Sec.81 of the Co-operative Society Act, 1983 to probe into the irregularities committed in the second respondent Stores. Though the summons issued by the enquiry officer has been received by the petitioner, he has not



appeared before the enquiry officer and consequently, Surcharge order was passed against the petitioner. Challenging the said order, the petitioner had preferred an appeal in C.M.A.No.12 of 2008 before the Tribunal and the same was dismissed by confirming the recovery order directing to recover a sum of Rs.17,37,574.52. Challenging the aforesaid order, the petitioner has filed a writ petition in W.P.No.44144 of 2016 before this Court. By an order, dated 9.7.2017, this Court quashed the order by holding that notice was not served to the petitioner's new address, therefore, the respondent violated the principles of natural justice and remitted back to the appellate tribunal to consider the appeal afresh and pass orders after furnishing the copies of the documents to the petitioner. Again, the appeal proceedings was conducted without furnishing documents sought for by the petitioner and the same was dismissed on 27.4.2018. Challenging the said order, the petitioner has filed the present writ petition raising a ground that based on the complaint filed against the petitioner before the CCIW - CID, a criminal case has been registered in Cr.No.5 of 2003 in respect of the alleged financial loss. Subsequently, the aforesaid complaint was closed on 14.2.2011. The Deputy Registrar who lodged a criminal complaint against the petitioner has adjudicated the enquiry proceedings conducted against the petitioner. Thus, according to the learned counsel for the petitioner, no person who lodged a complaint, shall be an adjudicator also. In case on hand, a person who prosecuted the appellant before the criminal Court, has conducted enquiry proceedings under Sec.87 of the Tamil Nadu Cooperative Societies Act. In an identical issue, the power of the adjudicator have been discussed in detail by the Division Bench of this Court in P.Venkatachalam (Deceased) Vs. The Special Tribunal reported in (1996) 2 MLJ 69, wherein it is held that the Deputy Registrar who prosecuted the petitioner therein for breach of trust and misappropriation, cannot adjudicate the dispute on the same set of facts. According to the learned counsel appearing for the petitioner, the very same Deputy Registrar was appointed to adjudicate the dispute on same set of facts. Further, according to the learned counsel appearing for the petitioner, the aforesaid fact came to light only at the time of furnishing report. Pursuant to the order passed by this Court in W.P.No.44144 of 2016 by remitting the matter back to the tribunal to consider the appeal afresh after furnishing the documents to the petitioner, no documents were served. Further, it is submitted that criminal complaint lodged before the CCIW - CID which was taken on the file of Judicial Magistrate No.I, Nagapattinam in C.C.No.5 of 2003 on the very same allegations, was dropped subsequently, vide order No.RC.No.82/1 dated 14.2.2011 by the Judicial Magistrate No.I, Nagapattinam.

7. The learned Special Government Pleader appearing for the second respondent would submit that enquiry was conducted



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and summons were served to the petitioner on various dates, but the petitioner failed to appear before the enquiry officer. Thereafter, enquiry was concluded and an order was passed against the petitioner. According to the learned Special Government Pleader, the ground raised by the petitioner, that an officer who prosecuted the criminal case cannot be an adjudicator in the enquiry proceedings is an afterthought. The petitioner is estopped from taking such a stand before this Court, when sufficient opportunity was granted to the petitioner to appear before the enquiry officer. However, the petitioner has not availed the opportunity to appear before the enquiry officer to raise such ground before the enquiry officer or in the earlier proceedings before the tribunal. Now, such a stand cannot be taken by the petitioner to quash the entire proceedings due to lapse of time and the petitioner is estopped from raising such ground at this stage. Further, the petitioner has also submitted that the Deputy Registrar had no occasion to appear before the Judicial Magistrate Court to give evidence in a criminal case in C.C.No.5 of 2003. The Deputy Registrar being a complainant in the aforesaid criminal case did not depose before the Sessions Court in Nagapattinam. Therefore, the decision relied upon by the petitioner will not apply to the facts of the present case.

8. The first respondent also filed an additional counter affidavit contending that the records were not seized by the Inspector. Therefore, the Inspector could not proceed to investigate the case and consequently, the criminal case has been dropped for non availability of records. In the additional counter affidavit, the respondent has not responded to the specific ground raised by the petitioner that the same Officer who preferred a criminal complaint cannot adjudicate the enquiry proceedings as per the decision reported in Venatachalam case (supra). On the earlier round also, it is the case of the petitioner that he was set exparte without following the principles of natural justice. On the said ground, the Award passed by the tribunal was set aside and remitted back to the appellate Court to decide the appeal afresh after furnishing copies of documents. Now, the petitioner has raised the very same ground in the present writ petition also. Further, according to the learned counsel appearing for the petitioner, it came to light that the same officer who lodged a criminal complaint before the police, adjudicated the enquiry proceedings under Sec.87 of the Tamil Nadu Cooperative Societies Act, only at the time of furnishing the report and the same was raised before the tribunal. Hence, there is no delay on the part of the petitioner.

9. In P.Venkatachalam (Deceased) Vs. The Special Tribunal reported in (1996) 2 MLJ 69, the decision relied upon by the learned counsel appearing for the petitioner, this Court held as



follows:

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"1.....It is also not necessary to go into the merits of the several other contentions having regard to the one grave infirmity in the proceeding which was pointed out by the learned Counsel appearing for the petitioner that the second respondent to whom the dispute was referred for adjudication was none other than the officer who filed the complaint against the petitioner before the criminal court on the very same set of facts and he was also examined as one of the prosecution witnesses. It happened before the dispute was referred and adjudicated by him. 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 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."

10. The learned Special Government Pleader appearing for the second respondent relied upon decision of the Hon'ble Supreme Court in P.D.DINAKARAN (1) Vs. JUDGES INQUIRY COMMITTEE AND OTHERS reported in (2011) 8 SCC 380 wherein the Hon'ble Supreme Court held as under:

'71. The principles which emerge from the aforesaid decisions are that no man can be a judge in his own cause and justice should not only be done, but manifestly be seen to be done. Scales should not only be held even but they must not be seen to be inclined. A person having interest in the subject-matter of cause is precluded from acting as a Judge. To disqualify a person from adjudicating on the ground of interest in the subject-matter of lis, the test of real likelihood of the bias is to be applied. In other words, one has to enquire as to



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eminent advocates including two former Attorneys General and in which Respondent 3 made a speech opposing his elevation to this Court and also drafted a resolution for the said purpose. The proceedings of the seminar received wide publicity in the print and electronic media. Therefore, it can be said that much before the constitution of the Committee, the petitioner had become aware of the fact that Respondent 3, who, as per the petitioner's own version, had appreciated his work on the Bench and had sent a congratulatory message when his name was cleared by the collegium for elevation to this Court, had participated in the seminar and made a speech opposing his elevation and also drafted resolution for the said purpose. The Chairman had appointed Respondent 3 as a member of the Committee keeping in view his long experience as an eminent advocate and expertise in the field of constitutional law. The constitution of the Committee was notified in the Official Gazette dated 15-1-2010 and was widely publicised by almost all the newspapers. Therefore, it can reasonably be presumed that the petitioner had become aware about the constitution of the Committee, which included Respondent 3, in the month of January 2010.

79. It is also significant to note that Respondent 3 had nothing personal against the petitioner. He had taken part in the seminar as Vice-President of the Association. The concern shown by senior members of the Bar including Respondent 3 in the matter of elevation of the petitioner, who is alleged to have misused his position as a Judge and as Chief Justice of the High Court for material gains was not actuated by ulterior motive. They genuinely felt that the allegations made against the petitioner need investigation. After the seminar, Respondent 3 is not shown to have done anything which may give the slightest impression to any person of reasonable prudence that he was ill-disposed against the petitioner. Rather, as per the petitioner's own statement, he had met Respondent 3 at the latter's residence on 6-12-2009 and was convinced that the latter had nothing against him. This being the position, it is not possible to entertain the



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petitioner's plea that constitution of the Committee should be declared a nullity on the ground that Respondent 3 is biased against him and the order dated 24-4-2011 be quashed.

85. The same rule is restated in "Craies on Statute Law", 6th Edn., at p. 269, thus:

As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to giving the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court."

11. The aforesaid decision is not applicable to the facts on hand. The Division Bench of this Court in Venkatachalam case held that no person who is a complainant shall be an adjudicator. Therefore, considering the aforesaid judgement of the Division Bench of this Court, this Court concurs with the contention of the learned counsel appearing for the petitioner that the first respondent who made a complaint before the Police, cannot act as an Adjudicator in the enquiry proceedings. The respondent has not sufficiently placed the materials before this court that the petitioner had the knowledge of complaint preferred by the first respondent before the police, who has adjudicated the enquiry proceedings, at the time of filing the appeal. Therefore, pursuant to the order passed by this Court remitting the case before the tribunal, the petitioner had the knowledge of complaint before the police preferred by the first respondent. This Court granted sufficient opportunity to the respondent to furnish particulars with regard to the fact that the petitioner had knowledge about the criminal complaint made by the first respondent during the course of filing the appeal, but no particulars were furnished in the additional affidavit. Therefore, the facts of this case is covered by the decision rendered by the Division Bench of this court in Venkatachalam case. The enquiry proceedings is vitiated on account of the first respondent being a complainant, having acted as an Adjudicator in the enquiry proceedings. Therefore, the impugned order is liable to be set aside on the sole ground.

12. Considering the decisions cited supra and the facts and circumstances of the case, the impugned order passed in C.M.A.No.12 of 2008 by the third respondent tribunal is set



aside. Accordingly, the writ petition is allowed. This order will not stand in the way of the respondent to conduct fresh enquiry and it is open to the respondent to conduct enquiry afresh, if it is permissible under law. No order as to cost. Consequently, connected miscellaneous petition is closed.

13. Before parting with the order, this Court is inclined to express its views as follows:

It is evident that in several cases, the award passed by the Deputy Registrar, has been set aside on technical ground viz., without following the legal procedure as contemplated under the Act or Rules and passing the award mechanically without following the procedure as contemplated under the Act and Rules, by not taking note of the judgments of this Court as well as the Hon'ble Supreme Court. The learned Advocate General, on notice, appeared before this Court and assured that necessary suggestions will be made to the Government, to issue appropriate instructions or directions or amending the Rules for appointing an enquiry officer or Arbitrator who had sufficient legal knowledge and experience in adjudicating the process under Sections 87, 90 and other relevant provisions of the Tamil Nadu Cooperative Societies Act, in order to ensure that the cases are not unnecessarily dragged on for several years, which also causes financial loss to the Societies as well as to the aggrieved persons.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

vaan

To

1. The Deputy Registrar of
Co-operative Societies/Surcharge Officer,
Tiruvarur Circle,
Tiruvarur (Po) & District.
2. The Principal District Judge/
Tribunal for Cooperative cases,
Tiruvarur (Po) & Dist.)

Copy To:

The Advocate General,
High Court, Madras.



+1cc to Mr.L.P.Shanmuga Sundaram, Advocate, S.R.No.61608
+1cc to the Government Pleader (Co-op), S.R.No.61868

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W.P.No.22593 of 2018
and W.M.P.No.26442 of 2018

BS (CO)

RRS (29/08/2019)