BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **18.11.2019**

CORAM :

THE HONOURABLE MS.JUSTICE **P.T.ASHA**

C.R.P.(MD) No.1214 of 2013
and
M.P.(MD) No.1 of 2013

S.Saranyadevi ... Petitioner / Appellant

vs.

1.The Special Officer,
Pallappatti Town,
Co-operative Housing Society,
Pallappatti,
Karur.

2.Regional Deputy Director of Co-operative Society (Housing),
Housing Unit,
Trichy. ... Respondents

Prayer:- This Petition is filed under Article 227 of the Constitution of India, to set aside the order passed by the learned Principal District Judge, Tiruchirappalli in CMA.(CS) No.60 of 2010 dated 05.03.2013.

For Petitioner : Mr.K.Gurunathan
For Respondents : Mr.A.Gunaseelanmuthiah
Additional Government Pleader

ORDER

The above Civil Revision Petition is filed challenging the order passed in CMA.(CS) No.60 of 2010 by the learned Principal District Judge, Tiruchirappalli dated 05.03.2013.

2.The revision petition arose from a surcharge proceedings and the brief facts, which are necessary for disposing of the above revision, are as follows:

3.The revision petitioner was working as a Record Clerk in the Pallapatti Town Co-operative Housing Society, Karur. Some irregularities in the management of the Society were noticed and under Section 81 of the Tamilnadu Co-operative Societies Act, 1983, an enquiry was ordered and the Enquiry Officer had submitted his report on 12.04.2009 holding that the revision petitioner, Special

Officer, R.Ganesan and the Secretary, R.Suriyakumar, have committed breach of trust and wilful negligence and thus misappropriated a sum of Rs.19,27,397/-. Thereafter, the surcharge notice dated 03.07.2009 was served on the petitioner. Though the surcharge notice contained 7 charges, the revision petitioner was implicated only for 4 charges.

4.The first charge against the revision petitioner was that the entries had not been properly made regarding the arrears of loan amount that had been repaid by the borrowers to the Society. It was stated that the Secretary, R.Suriyakumar, had issued bogus receipts which had been initialed by the revision petitioner and the amounts received from the consumer had not been accounted for. Therefore, the revision petitioner was found to be guilty.

5.The second charge against the revision petitioner, which is the third charge in the charge notice, was that she had received enhanced salary of Rs.500/- from the period 24.11.2001 to 30.06.2002, without the same being approved by the Registrar (Housing).

6.The next charge against the revision petitioner was that she had received a consumer loan for a sum of Rs.15,000/- signed by the Secretary, R.Suriyakumar, without getting prior permission of the Registrar (Housing).

7.The last charge against the revision petitioner, which is the 7th charge in the charge notice, was that she has wrongfully received arrears of Dearness Allowance, which was signed by the Special Officer, R.Ganesan, knowing fully well that she was not entitled to the same.

8.Thereafter, an explanation was called for from the revision petitioner by the Regional Deputy Registrar (Housing) vide letter dated 17.02.2010 and 01.03.2010. The Regional Deputy Registrar (Housing) there passed orders under Section 87 of the Tamilnadu Co-operative Societies Act, 1983, (herein after referred to Act) dated 31.03.2010 holding the petitioner, the Secretary, R.Suriyakumar and the Special Officer, R.Ganesan, responsible for the total loss of Rs.20,23,460/- to the Co-operative Society.

9.Challenging the said surcharge order issued under Section 87 of the Act, the petitioner had filed CMA.(CS) No.60 of 2010 before the Co-operative Tribunal (Principal District Judge) Thiruchirapalli. The learned Principal District Judge, by order dated 05.03.2013, was pleased to dismiss the appeal filed by the revision petitioner and challenging the said order, the revision petitioner is before this Court.

10.Mr.K.Gurunathan, learned counsel appearing for the revision petitioner would contend that the very initiation of the surcharge proceedings was not maintainable and the orders thereafter passed by the Regional Deputy Registrar (Housing) as well as the Co-operative Tribunal was perverse and suffered from a total non-application of mind for the following reasons:

a) The revision petitioner was not provided a copy of the Section 81 report, which formed the genesis for the initiation of the surcharge proceedings. This according to him, is in violation of Rule 104 (1) (a) of the Tamilnadu Co-operative Societies Rules, 1988 (herein after referred to Rule).

b) The surcharge proceedings were barred by limitation since under the first proviso to Section 87 of the Act, there is a clear bar in initiating any action after expiry of 7 years from the date of any act of omission. The learned counsel would contend that from a reading of the above charges framed against the revision petitioner, it is clearly evident that the Act relates to the period of 2001-2002, whereas, the initiation of surcharge proceedings was only much beyond 7 years.

c) The learned counsel would further argue that Section 84 of the Act mandates that the Chief Executive of every Registered Society, who may be the President or Special Officer is bound to keep and maintain the accounts and books relating to the Society. Section 84 (A) further enjoins the Registrar to conduct an audit within 6 months from the close of every Co-operative year and in view of this mandatory requirements, the Registrar ought to have noticed the alleged misappropriation and should have immediately taken action particularly with reference to the charges 3, 4 and 7. Having failed to do so and after a silence for 7 years, the surcharge proceeding initiated is clearly bad in law.

d) The learned counsel would further contend that the charges 3, 4 and 7 will not come within the ambit of surcharge proceedings and the settlement arrived at with reference to the salary and other emoluments cannot be questioned in a surcharge proceedings. He would further argue that neither the initial enquiry nor the surcharge order would spell out that the revision petitioner has been willfully negligent.

e) The learned counsel would further argue that the scope of work allotted to the petitioner has not been proved by the Society and therefore, the petitioner cannot be held guilty of wilful negligence.

11.In support of his argument that failure to submit the enquiry report was fatal to the enquiry, the learned counsel has relied on the judgments of this Court in the case of ***S.Kumarasamy Vs. The Deputy Registrar of Co-operative Societies, Kovilpatti*** reported in ***2013 (1) CTC 367*** and in the case of ***M.Sambandam Vs. The Deputy Registrar (Credit) Co-operative Societies, Mylapore, Madras and others*** reported in ***1999 (3) LW 310***. With reference to the scope of allotment of work to held the petitioner guilty of wilful negligence, the learned counsel has also relied on the judgments of this Court in the case of ***A.Janakiraman and another Vs. Deputy Registrar of Co-operative Societies, Kumbakonam and another*** reported in ***2009 (6) MLJ 1051*** and in the case of ***P.Karuppiah Vs. The Deputy Registrar of Co-operative Societies, Periyakulam and others*** reported in ***1989 (2) LW 330*** and also the unreported judgment of this Court in the case of ***K.Rathinam Vs. The Deputy Registrar of Co-operative Societies and others*** in ***CRP.(NPD) No.654 of 2012*** dated 20.11.2017.

12.With reference to the ground of limitation, the learned counsel would rely on the judgments of this Court in the case of ***Tamilnadu Co-operative Marketing Federation Limited represented by its Secretary, Vs. M.Krishnasamy and another*** reported in ***2012 WLR 934*** and in the case of ***R.Nanjundan Vs. District Judge-cum-Tribunal for co-operative Cases of the Nilgiris District, Udhagamandalam and others*** reported in ***2010 (4) MLJ 1027*** to substantiate his argument that the Tribunal ought to have addressed all the grounds that had been raised by the petitioner and having failed to do so, the order is vitiated.

13.The learned Additional Government Pleader appearing for the respondents would refute the statement made by the revision petitioner and would contend that the petitioner was held liable only after a detailed enquiry had been conducted and the Enquiry Officer had found her guilty of misappropriation and that no exception can be taken to this finding.

14.Heard the learned counsel on either side and perused the records.

15.Before appreciating and analyzing the issue on hand, it is necessary to extract few provisions of the Act, which have baring the issue on hand.

> ***Section 80 of the Act, Audit:- (1) (a)*** *Every registered society shall maintain the accounts and such accounts shall cause to be audited at least once in each financial year by auditors of the Government, or by the auditing firms in respect of such class or classes or category or categories of registered societies as may be prescribed, within the time limit specified in clause (e).....*
>
> ***(1) (e)*** *The accounts of every registered society shall be audited within six months from the close of the financial year to which such accounts relate.*
>
> ***80.(5)*** *The Registrar may, by order in writing, direct any officer of the society to take such action as may be specified*

in the order to remedy within such time as may be specified therein the defects, if any, disclosed as a result of the audit.

80.(7) *If the result of the audit discloses any defect, the registered society shall, within three months from the date of communication of the result of the audit, take steps to remedy the defects disclosed as a result of the audit, and report to the Registrar of the action taken by it hereon.*

81.Inquiry:- *(1) The Registrar may, of his own motion and shall, on the 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, hold an inquiry, or direct some person authorised by him by order in writing in this behalf to hold an inquiry into the constitution, working and financial condition of a registered society or any alleged misappropriation, fraudulent retention of any money or property, breach of trust, corrupt practice, or mismanagement in relating to that society or into any particular aspect of the working of that society.*

84.Maintenance of accounts and books by registered society:- *The chief executive that is, the principal paid officer of every registered society by whatsoever designation he is called, or the president of that society, if there is no such chief executive in that society, shall be bound to keep and maintain such accounts and books relating to that society in such manner as may be prescribed. He shall be responsible for the correct and up to date maintenance of such accounts and books and for producing them when alled for in connection with audit under Section 80 or inquiry under Section 81 or inspection or investigation under Section 82 or Inspection of books under Section 83.*

84.(A) Returns to be filed to the Registrar:- *Every registered society shall file returns, within six months from the close of every Co-operative year, to the Registrar, including the following matters, namely,*

(a) *annual report of its activities;*

(b) *its audited statement of accounts;*

(c) *plan for surplus disposal as approved by the general body of the Co-operative Society;*

(d) *list of amendments to the by-laws of the Co-operative society, if any,*

(e) *declaration regarding date of holding of its general body meeting and conduct of elections when due; and* *__(f)__ any other information required by the Registrar in pursuance of any of the provisions of this Act or the rules.*

87.Surcharge:- (1) *Where in the course of an audit under Section 80 or an inquiry under Section 81 or an inspection or investigation under Section 82 or inspection of books under Section 83 or the winding-up of a society, it appears that any person who is or was entrusted with the organization or management of the society has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relating to the society or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has made any payment which is not in accordance with this Act, the rules or the by-laws, the Registrar himself or any person specially authorised by him in this behalf, of his own motion or on the application of the board, Liquidator or any creditor or contributory may frame charges against such person or officer or servant and after giving a reasonable opportunity to the person concerned and in the case of a deceased person, to the representative who inherits his estate, to answer the charges, make an order requiring him to repay or restore the money or property or any part thereof with interest at such rate as the Registrar or the person authorised as aforesaid thinks just or to contribute such sum to the assets of the society by way of compensation in respect of the misappropriation, misapplication of funds, fraudulent retainer, breach of trust or wilful negligence or payment which are not in accordance with this Act, the rules or the by-laws as the Registrar or the person authorised as aforesaid thinks just:*

Provided that no action shall be commenced under this Sub-section after the expiry of seven years from the date of any act or omission referred to in this Sub-section.

Rule 102.(5) of the Rule:- *The audit memorandum shall contain schedules with full particulars of-*

__i)__ all transactions which appear to be contrary to the provisions of the Act and Rules or the by-laws of the society;

__ii)__ all sums which ought to have been but have not been brought into account by the society;

__iii)__ any material impropriety or irregularity in the expenditure or in te realization of moneys due to the society;

__iv)__ any money or property belonging to the society which appears to the auditor or auditing firm who or which does the audit to be bad or doubtful debts; and

v) *any other information as may be required by the Registrar (Audit) in this behalf;*

102.(8) *After every audit, the Registrar (Audit) shall communicate the result of audit and grant an audit certificate and a copy of the audit memorandum specified in sub-rule (2) duly signed by him to the society concerned under copy to the federal society concerned and the officer in charge of administration of the society. While communicating the audit memorandum, the Registrar (Audit) may modify or expunge any portion thereof which appears to him to be objectionable or not justified by facts.*

104.Procedure regarding inquiry, inspection or investigation:- (1) (a) *The application made under sub-section (1) of Section 81 or of Section 82 shall state whether the inquiry or inspection or investigation is required into any specified alleged misappropriation, fraudulent retention of any any money or property, breach of trust, corrupt practice, or mismanagement in relation to the society or into any particular aspect of the working of that society or whether the inquiry or inspection or investigation is required into the affairs of the society in general.*

(b) *the application shall state the reason for requesting the inquiry or inspection or investigation;*

104.(3) (a) *on receipt of an application or before ordering an inquiry or inspection or investigation, the Registrar shall examine whether there is any need to hold an inquiry or make an inspection or investigation as the case may be.*

104.(8) *The Enquiry Officer or Inspecting Officer or Investigating Officer shall send a separate report pointing out the lapses of the part of any officer or servant of a society or of the Government responsible for administration or supervision or audit or an officer or servant of any other organization noticed, if any, during such inquiry, inspection or, investigation and suggesting suitable action against him.*

16.The arguments made by the learned counsel appearing for the revision petitioner can be broadly classified under the following heads:

a) The surcharge proceeding is time barred.
b) Procedure contemplated under the Act has not been followed.
c) No charge made out against the revision petitioner.

A) THE SURCHARGE PROCEEDING IS TIME BARRED:

17.The proviso to Section 87 of the Act mandates that no action shall be commenced under the Sub Section namely, 87 (1) of the Act, after the expiry of 7 years from the date of any act of omission. The surcharge notice and the surcharge order would clearly indicate that the revision petitioner was charged with reference to the alleged misappropriation which had taken place for the period 2001 and 2002. The surcharge notice has been issued only on 03.07.2009, which was beyond the period of 7 years. Therefore, the proceedings that have been initiated are clearly beyond the time specified under the proviso to Section 87 (1) of the Act.

B) PROCEDURE CONTEMPLATED UNDER THE ACT HAS NOT BEEN FOLLOWED:

18.The principles of natural justice provide that a person charged must be given a copy of the enquiry report so as to offer an opportunity to peruse the report. In the instant case, despite the request had been made by the petitioner for a copy of Section 81 report, the same was not given to her. In the case of ***S.Kumarasamy Vs. The Deputy Registrar of Co-operative Societies*** reported in ***2013 (1) CTC 367,*** this Court has held as follows:

> *4....... While they sent the notices under Section 87, the Report under Section 81 of the Act should also accompany. But only on 17.04.2007, the Enquiry Report under Section 81 of the Act was sent to the petitioner along the covering letter which was served upon the petitioner on 20.04.2007. It shows that long after the issue of the notice under Section 87, the report under Section 81 was served upon the petitioner. Since the petitioner was not afforded with ample opportunities at the time of receipt of notice under Section 87 it has to be observed that the principles of natural justice have been violated which would vitiate the entire proceedings.*

19.In the above judgment, this Court was considering the award passed against the Secretary and President of the Co-operative Society who had been charged with misappropriation. One of the grounds for challenge was that they have not been served with a copy of the enquiry report. The learned Judge has held that since they were not provided ample opportunity at the time of receiving the notice under Section 87 of the Act, principles of natural justice had not been followed. In this case also, the petitioner had raised this defense even before the Regional Deputy Registrar (Housing Unit).
However, a copy of the enquiry report was not made available and thereafter, she had examined the Enquiry Officer.

20.Further, as per Section 84 of the Act, the Co-operative Societies were bound to maintain accounts and books of the Society and it is the Chief Executive who may be the President or Special Officer who are bound to keep and maintain the accounts and books relating to the Society.

21.Section 84 (A) also provides that the Registered Society should file its returns within 6 months from the close of every Co-operative year to the Registrar. Rule 102 (5) of the Rule would further provide the details of the contents of the audit memorandum and Rule 102 (8) would state that after every Audit, the Registrar (Audit) shall communicate the result of audit and also grant an audit certificate and a copy of the audit memorandum duly signed by him to the Society concerned and also this details have to be published by the Society in the manner as specified by the Registrar (Audit) and also keep them open for inspection by any member of the Society. Rule 104 (3) (a) contemplates that after a receipt of the application prior to the holding of an inquiry or inspection or investigation, the Registrar should first examine as to whether there is a prima facie case requiring an investigation and only if he is convinced that there exists a prima facie case, the Registrar shall proceed to hold the enquiry. The Enquiry Officer under Rule 104 (8) was required to send a report pointing out the lapses on the part of the Officers or Servant of the Society. In the case on hand, the respondents have not been able to establish that they have followed the above procedures.

22.Under these circumstances, the contention of the learned counsel appearing for the revision petitioner that the allegation contained in charge numbers 3, 4 and 7 is baseless, appears to be justifiable. If the Society had followed the procedure and conducted the audit, the payment of enhanced salary and Dearness Allowance to the petitioner would have been detected and this could have been questioned at the very beginning by the Registrar instead of waiting for a period exceeding 7 years. Further, the charges contained in charge numbers 3, 4 and 7 would not come within the purview of Section 87 of the Act as the petitioner has been charged for receiving the enhanced salary, enhanced Dearness Allowance and obtaining a consumer loan.

23.The surcharge proceedings are contemplated only in the cases of misappropriation of funds, fraudulent retainer and breach of trust or wilful negligence or payments being made not according to the Act that would come within the definition of surcharge proceedings. In the instant case, there is nothing on record to show that there has been audit report as contemplated under the Act and that the alleged misappropriation had been noted during such audit. The enhanced salary and the enhanced Dearness Allowance had been signed by the said R.Ganesan, Special Officer and considering the fact that he was her Superior Officer, the petitioner had not deemed it fit to question him on the enhancement. Further, if the payment was against the Rule, the same should have been noted during audit and taking into account the fact that there has been no action taken from the year 2001 to 2009 and the respondents have not proved the charges, the same should fail.

24.In order to hold the petitioner guilty of negligence, there must be evidence to show that the nature of duties assigned to the petitioner and the failure to discharge these duties. Unfortunately, the respondents have not been able to come forward to show some proof with regard to the nature of duties assigned to the petitioner which she had lawfully included to perform. In the judgment of the Division Bench of this Court reported in ***1989 (2) LW 380***, the Division Bench had observed as follows:

> *The appellant has been mulcted with the liability only on the basis that he has by acts and omissions of wilful negligence caused loss to the bank. For this action, it must be first established that there were duties and obligations specifically cast upon the appellant, of which he committed breach. If there is no clarity as to the specific duties and obligations cast upon the appellant with regard to remittances and withdrawals, then the very basis of the charges must be held to the lacking. That is the position here. Negligence in this context presupposes existence of specific duties and obligations and breach thereof. If the duties and obligations are not specifically defined and delineated, one could not pin down the culpability of breach thereof on the person concerned. This aspect could not be a matter of presumptions and assumptions but necessarily must be a matter of concrete materials.*

25.During the cross examination of Enquiry Officer, a question had been put on him which has not been satisfactorily answered by the witness. This was relied in the later judgment of this Court reported in ***2009 (6) MLJ 1051,*** where the learned single Judge had observed as follows:

> *14.In the light of the above decisions of this Court and having regard to the fact that the first respondent failed to establish the furnishing of copy of Section 81 Enquiry Report before initiating surcharge proceedings and the wilful dereliction of duty having not been established, I hold that the recovery proceedings initiated against the petitioners cannot be sustained.*

C) NO CHARGE MADE OUT AGAINST THE REVISION PETITIONER:

26.The first charge that has been mulcted on the petitioner is that the Special Officer and the Secretary had not accounted for the loan which had been returned to the Co-operative Society and during the enquiry, the petitioner is made liable only on the ground that some of the receipts have her initial and ultimately, in the surcharge notice as well as in the surcharge order, the authorities have only observed that it was the Secretary and the Special Officer who had been guilty of the offence. Further, the Enquiry Officer appointed under section 80 of the Act cannot recommend for initiation of surcharge proceedings, it is only for the Registrar to the Society who has power to recommend any such action.

27.On a conspectus of the above discussion and the orders put forward, this Court is of the view that the authorities below and the Tribunal have not considered the issue within the frame work of the Co-operative Societies Act, 1983, its Rules as well as the judgments therein and this failure has led to the erroneous order.

28.In the result, this Civil Revision Petition is allowed and the order passed by the learned Principal District Judge, Tiruchirappalli in CMA.(CS) No.60 of 2010 dated 05.03.2013, is hereby set aside. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar(CS)

To

The Principal District Judge,
Tiruchirappalli.

+1 CC to M/s.G. THALAI MUTHUARASU, Advocate (SR-99671[F] 20/11/2019)

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18.11.2019

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