BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: **06.11.2019**
CORAM:

THE HONOURABLE Mrs. JUSTICE G.K.ILANTHIRAIYAN

Crl.O.P.(MD)Nos.8482 to 8494 of 2018
and
Crl.M.P(MD)Nos.3787 to 3812 of 2018

M.Soundarajan
V.Sudhanthiramani .. Petitioners/10th & 11th Accused in Crl OP(MD) No.8482 of 2018

V.Sudhanthiramani .. Petitioner/9th Accused in Crl OP(MD) No.8483 of 2018

V.Sudhanthiramani .. Petitioner/8th Accused in Crl OP(MD) No.8484 of 2018

M.Soundarajan .. Petitioner/6th Accused in Crl OP(MD) No.8485 of 2018

M.Soundarajan .. Petitioner/7th Accused in Crl OP(MD) No.8486 of 2018

V.Sudhanthiramani .. Petitioner/6th Accused in Crl OP(MD) No.8487 of 2018

V.Sudhanthiramani .. Petitioner/7th Accused in Crl OP(MD) No.8488 of 2018

M.Soundarajan .. Petitioner/5th Accused in Crl OP(MD) No.8489 of 2018

V.Sudhanthiramani .. Petitioner/5th Accused in Crl OP(MD) No.8490 of 2018

V.Sudhanthiramani .. Petitioner/6th Accused in Crl OP(MD) No.8491 of 2018

M.Soundarajan .. Petitioner/9th Accused in Crl OP(MD) No.8492 of 2018

M.Soundarajan
V.Sudhanthiramani .. Petitioners/9th & 10thAccused in Crl OP(MD) No.8493 of 2018

V.Sudhanthiramani .. Petitioner/9thAccused in Crl OP(MD) No.8494 of 2018 vs

1. The Deputy Superintendent of Police,
Commercial Crime Investigation Wing,
Vilupuram (In Charge), Thanjavur Sub Division.

2. The Inspector of Police,
Commercial Crime Investigation Wing,
Trichirappalli
Ref: Crime No.1/2014 .. 1st & 2nd Respondents /Complainant (in all Cases)

3. K.Athmanathan,
The Deputy Registrar of Cooperative Societies,
Musiri Circle,
Trichirappalli District .. 3nd Respondent/ Defacto Complainant (in all Cases)

Common Prayer in CRL OP(MD) Nos. 8482 to 8494 of 2018 :

This Criminal Original Petition filed under Section 482 of Code of Criminal Procedure, to call for the records pertaining to the Charge Sheet in C.C.Nos.98, 99, 102, 105, 106, 107, 108, 110, 111, 112, 113, 114 and 115 of 2016 respectively, on the file of the Judicial Magistrate, Musiri and quash the charge sheet and consequental all further proceedings as against the petitioners.

For Petitioners	..	Mr.Shanmugaraja Sethupathi (in all Cases) for Mr.D.Senthil
For Respondents 1 & 2	..	Mr.K.Suyambulinga Bharathi Government Advocate (Crl Side)
For Respondent No.3	..	No Appearance

COMMON ORDER

These petitions have been filed to quash the proceedings in C.C.Nos.98, 99, 102, 105, 106, 107, 108, 110, 111, 112, 113, 114, 115 of 2016 on the file of the learned Judicial Magistrate, Musiri and consequential all further proceedings as against the petitioner.

2. The crux of the complaint is that the first accused was the President of the Thulaiyanatham Primary Agricultural Co-operative Credit Society and the second accused was the Secretary of the said Society, the third accused was working as Senior Clerk in the above society and the accused 4 to 6 are other employees of the said society. While the seventh accused was working as Circle Supervisor of the Tiruchirappalli District Central Co-operative Bank the other two accused were working as Special Officer in the said society during the relevant period. The petitioners herein was working as

Co-operative Audit Officers. It is further alleged that the first and second accused, while they were working in the society, abused their official position, have fabricated documents as if loan was given to 20 members of the said society. They have also committed falsification of accounts and fabrication documents as if loan was granted to two members by pledging the Fixed Deposit Receipts and thereby misappropriated the funds of the society. The Deputy Registrar of the Co-operative Societies had directed the Co-operative Sub-Registrar, who is an official of the Co-operative Department, conducted statutory enquiry under Section 81 of the Tamil Nadu Co-operative Societies Act. The Enquiry Officer had elaborately conducted the enquiry and submitted his report holding that all the irregularities and misappropriation of the Society's fund were committed by the then Secretary and other employees of the Society.

3.On the basis of the enquiry report submitted under Section 81 of the Act, the Deputy Registrar of the Co-operative Societies, the third respondent herein, had lodged a complaint to the respondent police, viz., the Inspector of Police, Commercial Crime Investigation Wing, Trichy and the case was registered as against the then Secretary and other employees. As many as 11 persons have been arrayed as accused in the First Information Report. It is pertinent to note at this juncture that neither the name of the petitioners is found place in the First Information Report nor any allegation was made against him. During the investigation, number of witnesses were enquired including the members of the Cooperative Bank to whose accounts the misappropriation was alleged to have been committed and their statements were recorded under Section 161 Cr.P.C. After completion of investigation, the respondent police filed the charge sheet before the learned Judicial Magistrate, Musiri. To the shock and surprise of the petitioners, they were arrayed as 10^{th} and 11^{th} accused in the charge sheet. The learned Judicial Magistrate has taken cognizance of the offence not only against the main offender, but also against the petitioners. Being aggrieved over the order of taking cognizance, the petitioners have come forward with these petitions.

4. The learned counsel for the petitioners would submit that the petitioners were Co-operative Audit Officers in the Co-operative Audit Department from 01.07.2013 onwards. They have conducted statutory audit in the above said society for the period from 01.04.2012 to 31.04.2012. The allegations as against the petitioners are concerned, they were conducted statutory audit and failed to find out the misappropriate committed by the first and second accused and thereby, they were negligent on the part of their duties and responsibilities. The Enquiry Officer categorically stated in the enquiry report as well as in his statement recorded under Section 161(3) of Cr.P.C. that the petitioners committed dereliction of their duty and responsibilities. As a result, they

failed to find out the misappropriation committed by the other accused persons in the Audit Report.

5.He further submitted that the main accused persons have committed irregularities and fabricated false documents and false accounts. The petitioners being Co-operative Audit Officers can only verify the accounts and records and they could not found out as to whether the documents produced by the society are genuine or not. He further submitted that the petitioners were issued charge memo for the very same offence, wherein they were charged for dereliction of their duty. They also failed to find out irregularities while conducting audit. In the above said charge sheet, they were imposed with punishment in pursuant of the disciplinary proceedings and as such no offence is made out as against the petitioners. Without any material to attract the offence as against the petitioners, the first respondent simply added the petitioners as an accused. Except adding the petitioners as an accused, there is absolutely no material evidence to include them with charges by the prosecution. He further submitted that the enquiry officer issued the statutory notice under Section 81 of the Tamil Nadu Co-operative Society Act and there is no allegation levelled as against the petitioners in enquiry report. In fact, no one has whispered about the petitioners overtact in the crime committed by the other accused persons. The learned Judicial Magistrate before taking cognizance, ought to have seen the charges and other statements whether those charges attracted as against the petitioners or not? Therefore, the first respondent without application of mind, simply added the petitioners as an accused in this case.

6. Per contra, the learned Government Advocate (Crl.side) submitted that when the main accused persons have committed irregularities by fabricating documents and false accounts, the petitioners, being Co-operative Audit Officers has to look into the accounts and records and they ought to have find out as to whether the documents produced by the society are genuine or not. He also submitted that due to the dereliction of the duties and responsibilities, the petitioners failed to find out the misappropriation committed by the other accused persons in the Audit Report.

7. Heard the learned counsel for the petitioners and the learned Government Advocate (Crl.side) appearing for the first and second respondents.

8. There are totally eleven accused persons, in which, the petitioners are arrayed as A10 and A11. The petitioners are being the Co-operative Audit Officers in the Co-operative Audit Department, have conducted statutory Audit in the Thulaiyanatham Primary Agricultural Co-operative Credit Society for the period from 01.04.2012 to 31.04.2012. The President and the Secretary of the society along with their employees abused their official possession

and fabricated documents as if, loans were disbursed to twenty members of the society by fabricating documents and thereby misappropriated the funds of the society. In this regard, the department of Co-operative Societies directed to issue statutory notice under Section 81 of the Tamil Nadu Co-operative Act. After conducting enquiry, submitted a report holding that all the irregularities and mis-appropriation of the funds of the society were committed by the President and Secretary and other employees of the society. On the basis of the enquiry report submitted under Section 81 of the Act the third respondent herein lodged the complaint. Based on the complaint, the police registered the FIR in which, the petitioners name were not found in the FIR. The report reads as under -

> *"9. The officer who conducted the enquiry u/s.81 of the Act has stated in the statement recorded under Section 161 (3 Cr.P.C.) that as per the Bye-laws of the Society, it is the duty of the Secretary to sanction the loan. After sanctioning the loan, he has to submit the records before the Board and in the absence of the Board before the Special Officer. Nowhere he has stated that the Secretaries (accused Nos. 1 and 2) have submitted the loan proceedings for perusal of the petitioner herein. He has stated that the petitioner has made inspections on various dates and during such inspections if he had verified the accounts, the malpractices done by the other accused persons would have been come to his knowledge. He further stated that the petitioner has wilfully failed to take any steps to prevent such malpractices. From the aforesaid statement it is clear that the allegation against the petitioner is that if he had verified the accounts, the malpractice committed by the accused persons would have been come to his knowledge. It is not his case that the petitioner had verified the accounts and found that the other accused persons committed malpractices, but he did not take any action against them. The statement of the Enquiry Officer would suggest that the petitioner has failed to discharge his duties properly and such failure may amount to dereliction of duty.*
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> *10. It is to be pointed out that based on the enquiry report submitted under Section 81 of the Act, surcharge proceedings were initiated against the petitioner herein. Challenging the same, the petitioner has filed an appeal in C.M.A(CS) Nos.12 and 13 of 2015 on the file of the learned Principal District Judge, Thiruchirappalli. The*

learned Principal District Judge by the judgment and decree dated 07.04.2016 has dismissed the said appeals. Aggrieved by the same, the petitioner herein has filed C.R.P(MD)Nos.947 and 948 of 2016 before the Madurai Bench of this Court. This Court, by the common order dated 06.04.2017 has allowed the said appeals and set-aside the surcharge proceedings initiated against the petitioner herein."

9. It is also seen that on the strength of the enquiry report submitted under Section 81 of the Tamil Nadu Cooperative Societies Act disciplinary proceedings have been initiated by issuing charge memo and the same was challenged before this Court and by order dated 01.03.2018 the charge memo itself was quashed by this Court. In these circumstances, it is relevant to extract the Tamil Nadu Co-operation Manual with regards to prosecution as against the departmental officer, which reads as follows:-

''Departmental Officers are working on foreign service in Co-operative organisation as Chief Executive Officers or otherwise and at times in additions to their regular government post, they are also holding additional charge of the post of Special Officers in more than one co-operative society and functioning as such. They are holding supervisory posts also over such institution. The Act or the Bylaw of the society do not differentiate a regular or additional charge Chief Executive Officer / Special Officer and both are the same in the eyes of law. These officers either in a regular capacity and more so in the additional capacity or in a supervisory capacity may not have the chance to scruitinise each and every transactions of the society. They would have failed to check and scruitinise the accounts and or exercise effective control over the subordinate staff resulting in the criminal irregularities, frauds and offences under IPC committed by the staff. Failure of such nature ie., failure to discharge their duties properly or negligence, or omissions, unless the inquiry, inspection or investigation officer finds it prima facie, that such officers with malafide criminal intention committed criminal breach of trust and or criminal misappropriation and or aided and abetted such criminal offences by the subordinate staff, will not fasten criminal liability on such officers. On the other

hand, the failure of this nature, will be failure to discharge their duties properly or negligence and this may be dealt with through disciplinary proceedings. Hence the departmental officers who are not directly involved in the frauds or misappropriations need not be included as deliquents, in a routine manner, in the inquiry reports or complaints filed with the police."

10. From the aforesaid provision, it is made clear that if the officers, who have been posted to supervise the societies failed to discharge their duty properly such officers will not fasten criminal liability unless prima facie shows that such officers with malafide criminal intention committed criminal breach of trust or criminal misappropriation or aided and abetted such criminal offences by the supporting staff.

11. In the circular issued by the Registrar of Co-operative Societies, Chennai in R.C.No.228696/19/CP1 dated 11.12.1991 also, the same thing reiterated. For proper appreciation, the relevant portions of the said letter are extracted here under:

> *"3.Taking criminal action against the departmental officers holding chief executive or administrative and other supervisory posts in the Cooperatives who are involved vicariously has also been examined. The departmental officers, working have no chance to scrutinize each and every transactions of the society. Though they may have an overall control, they cannot be held criminally liable, for all the criminal irregularities committed by the staff working under them. Though they fail to check and scrutinize the accounts etc., or exercise effective control over subordinate staff such failure may not deserve criminal action. On the other hand, the failure of this nature, will be failure to discharge their duties properly or negligence and this may be dealt with through disciplinary proceedings. Hence it is informed that the departmental officers who are not directly involved in the frauds or misappropriations need not be included as delinquents, in a routine manner, in the inquiry reports or complaints filed with the police."*

12. In S.Gunasekaran Vs. State represented by the Inspector of Police (supra), this Court has quashed the Criminal proceedings against the Special Officer stating that the Criminal prosecution

cannot be initiated for lapse / negligence in supervising work, which is extracted below:-

> *"8. The learned Government Advocate (Crl.Side) would submit that as per a resolution passed in the society the petitioner was responsible for the day- to-day affairs of the society and to supervise the records and the transactions of the society. The learned Government Advocate (Crl.side) would further submit that as per the materials available on record it is clear that he has failed to discharge his duties properly and the said acts of the accused would amount to offences as enumerated in the charge sheet.*
>
> *9.In my considered opinion, such a negligence may create only a civil liability and there cannot be any vicarious liability in the criminal law. Even to initiate proceedings against the petitioner under Section 87 of the Tamil Nadu Co-operative Societies Act, the sine quo non is wilful negligence resulting in loss to the society and not a mere negligence. When that be so, a mere negligence to look into the records properly, in my considered opinion, would not satisfy any of the ingredients of the offences alleged against him."*

13. In N.Baskaran Vs. The State rep. by Inspector of Police, C.C.I.W., CID, Trichy (supra), after referring to the decision in S.Gunasekaran Vs. State represented by Inspector of Police (supra), has observed in paragraph Nos. 5 and 6 as follows:

> *''5. It is further submitted that in similar facts, this court in 2008 (1) Crimes 681 (Mad.) (S.Gunasekaran Vs. State rep. By Inspector of police), quashed the charge laid against the Special Officer categorically stating that criminal prosecution cannot be initiated for lapse/negligence in supervisory work, which is extracted below:-*
>
> *8. The learned Government Advocate (Crl.Side) would submit that as per a resolution passed in the society the petitioner was responsible for the day-to-day affairs of the society and to supervise the records and the transactions of the society. The learned Government Advocate (Crl.Side) would further submit that as per the materials available on*

record it is clear that he has failed to discharge his duties properly and the said acts of the accused would amount to offences as enumerated in the charge-sheet.

9.This Court is of the considered opinion, such a negligence may create only a civil liability and there cannot be any vicarious liability in the criminal law. Even to initiate proceedings against the petitioner under Section 87 of the Tamil Nadu Co-operative Societies Act, the sine quo non is wilful negligence resulting in loss to the society and not a mere negligence. When that be so, a mere negligence to look into the records properly, in my considered opinion, would not satisfy any of the ingredient of the offences alleged against him.

This Court is of the considered opinion that the judgment cited supra squarely applies to the case on hand. In such view of the matter, this petition is allowed and the entire proceedings in C.C.No.124 of 2013 on the file of the Judicial Magistrate No.III, Trichy, is quashed as against the petitioner alone. Consequently, connected Miscellaneous petition is closed.

From the aforesaid decisions, it is clear that negligence may create only the civil liability and there cannot be any vicarious liability in the criminal law. Further, mere negligence to look into the records properly would not satisfy any of the ingredient of the offences alleged against the petitioner herein.

14. In R.Udaiyar Vs. The State of Tamilnadu (supra), in paragraph No. 10, this court has observed as follows:

"10. In the enquiry under section 81 of the said Act, the Petitioner has been exonerated. In the disciplinary proceedings also he has been exonerated. The charges in the criminal proceedings and in the departmental proceeding are one and the same. When the Petitioner has been exonerated from the charges levelled against him as not proved in the departmental proceedings, allowing the criminal proceedings for the same charges to continue, would amount to abuse of process of law. Therefore in my considered view, it is a fit case to exercise the powers under section 482 of Cr.P.C."

15. In P.Jegadeesan Vs. Inspector of Police (supra), this Court relying upon the decision of the Honble Supreme Court in P.S.Rajya Vs. State of Bihar reported in (1996 (9) SCC 1) has observed as follows:-

> "7.*From the narration of the events, more particularly, from report of the Deputy Registrar, under Section 81 it is clear that the provision of Sections 477 (a) and 409 of IPC., is not attracted, as there is no iota of evidence under 81 report that there was criminal breach of trust on the part of the petitioner and that there was a fraud committed by him, which helped the other accused to commit the so called falsification of accounts, fabrication of documents, misapporopriation of funds etc."*

16. The Supreme Court, in a decision in P.S.Rajya Vs.State of Bihar reported in (1996 (9) SCC 1). The relevant portion is extracted hereunder:

> *17. At the outset, we may point out that the learned counsel for the respondent could not but accept the position that the standard of proof required to establish the guilt in a criminal case is far higher than the standard of proof required to establish the guilt in the departmental proceedings. He also accepted that in the present case, the charge in the departmental proceedings and in the criminal proceedings is one and the same. He did not dispute the findings rendered in the departmental proceedings and the ultimate result of it. On these premises, if we proceed further then there is no difficulty in accepting the case of the appellant. For if the charge which is identical could not be established in a departmental proceedings and in view of the admitted discrepancies in the reports submitted by the valuers one wonders what is there further to proceed against the appellant in criminal proceedings.*
>
> *8. From the above it is clear that the ultimate result of the departmental proceedings has to be accepted, there is no need to proceed further against the accused in the criminal proceedings. Hence, I am of the considered view that the findings of the departmental enquiry may*

not be admissible cannot be correct and I find much force in the contention of the learned counsel for the petitioner and I allow the criminal Original Petition, as prayed for. This order does not preclude the Judicial Magistrate, Musiri from proceeding with other accused in accordance with law as they are not parties before this court. Consequently, connected miscellaneous petition is closed.

From the abovesaid decisions, it is clear that when the charges in the criminal proceedings and in the departmental proceedings are one and the same, and if the accused has been exonerated from the charges levelled against him, there is no need to proceed further against the accused in the criminal proceedings. In this case, as already stated that the charge memo issued in the departmental proceedings has been quashed by this court in W.P.(MD)No.13818 of 2017. In view of the aforesaid decisions, the criminal proceedings against the petitioner herein has to be quashed.

17. With regard to the abetment of a thing, this Court in R.Gangatharan Vs. The State etc., and Ors. has observed as follows:-

"According to Section 107 I.P.C. A person abets the doing of a thing, who intentionally aids, by any act or illegal omission, the doing of that thing, will attract Clause No.3 intentional aiding and active complicity is the gist of the offence of abetment. If the act of the petitioner comes within Clause 3 of Section 107 IPC, then only it can be said that there is material to proceed further in the case. Petitioner is working as an Extension Officer and he has been deputed to check the jewel items on a particular date viz., 15.12.1988. It is not the case that the petitioner was also working along with the other accused involved in the case and therefore, it can be presumed that there must be conspiracy. The only allegation is that he had actually failed to physically verify some of the items of jewellery. This would only indicate the carelessness and negligence on his part and apart from that material, there is nothing to infer that he has got any mens rea to commit the offence. The statements recorded during the investigation and other materials did not indicate that there was any intentional aiding or abetting on the part of the petitioner.

> *Furthermore, the enquiry conducted under the Co-operative Societies Act, gave a finding only in respect of the other accused. Under the circumstances, I am of the vies that there is no prima facie material to proceed further against the petitioner and even assuming that the entire averments are taken into consideration, there is remote possibility of the case ending in conviction against the petitioner and in my view, it is only an exercise in futility and as such, the proceedings has to be quashed.*

In this case also, it is not the case of the prosecution that the petitioner was also working along with the other accused involved in the case and hence, it has to be presumed that there must be conspiracy. The only allegation against the petitioner is that he had failed to verify the accounts. So, the aforesaid decision will squarely apply to the facts of this case.

18. In Jethsur Surangbhai Vs. State of Gurjarat, AIR 1984 SC 151, the Honble Supreme Court has observed as follows:

> *''12. In a case of serious charges of defalcation of properties of a society mens rea cannot be excluded. Unless the prosecution proves that there was a close cohesion and collusion between all the accused persons which formed the subject matter of conspiracy, it would be difficult to prove the charges. Once the charge of conspiracy fails, the onus lies on the prosecution to prove affirmatively that the accused was directly and personally connected with the alleged acts or omissions. In absence of such direct evidence, the mere fact that the accused appellant happened to be the Chairman of the Managing Committee of the society would not make him criminally liable in a vicarious sense. It is not possible to accept somewhat broad statement of law that even the negligence on the part of the appellant Chairman would be a positive proof of his intention to commit the offence. On facts and in the circumstances of the case, the case against the appellant cannot be said to have been proved beyond reasonable doubt or at least it cannot be said that two views were not reasonably possible. Thus he was wrongly convicted by the High court.*

In this case also, the prosecution has not produced any material to show that there was a close cohesion and collusion between all the accused persons which formed the subject matter of conspiracy. So, in view of the aforesaid decision, it is clear that the criminal proceedings cannot be initiated against the petitioner for his failure to discharge his duty properly. Such a negligence may create only a civil liability. In this case as already stated that the surcharge proceedings were set aside by this court. The charge memo issued in the disciplinary proceedings also quashed by this court. Therefore, for the same charges criminal proceedings cannot be initiated.

19. As observed by the Hon'ble Supreme Court in Jethsur Surangbhai Vs. State of Gurjarat (supra), in a case of serious charges of defalcation of properties of a Society mens rea cannot be excluded. In respect of the offences under Sections 408 and 409 of IPC., one of the essential ingredients is that there must be a dishonest misappropriation of property. Dishonestly is defined under Section 24 of IPC., which reads as follows:

> *''24. Dishonestly Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing dishonestly."*

20. In the case on hand, it is not the case of the prosecution that the petitioners herein got any wrongful gain. Therefore, it cannot be said that the petitioners have dishonestly aided the other accused persons for committing misappropriation of the Society's funds. So the petitioners cannot be prosecuted for the aforesaid offences.

21. For the aforesaid reasons, this Court is inclined to allow these petitions. Accordingly, these petitions are allowed and the proceedings against the petitioners herein in C.C.Nos.98, 99, 102, 105, 106, 107, 108, 110, 111, 112, 113, 114 and 115 of 2016 on the file of the learned Judicial Magistrate, Musiri, are quashed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

Sub Assistant Registrar(CS)

Vsd

To

1.The Deputy Superintendent of Police,
Commercial Crime Investigation Wing,
Vilupuram (In Charge),
Thanjavur Sub Division.

2.The Inspector of Police,
Commercial Crime Investigation Wing,
Tiruchirappalli.

Copy to:

1. The Judicial Magistrate,
Musiri
2. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.D.SENTHIL, Advocate (SR-96522[F] dated 06/11/2019)

Crl.O.P.(MD)Nos.8482 to 8494 of 2018
and
Crl.M.P(MD)Nos.3787 to 3812 of 2018
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MK (20.12.2019) 13P 6C