IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.09.2020

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)Nos.4148 and 4149 of 2012

Cuddalore District Saravana Bhava Consumer
Co-operative Wholesale Stores
Represented by its Special Officer
Beach Road, Cuddalore-1. .. Petitioner
(in both CRPs.)

Vs.

1.N.Vinayagam

2.B.Devaraj

3.S.Nagarajan

4.P.Selvanathan

5.A.Vijayan

6.R.Gowri

7.B.Rajalakshmi

8.R.Banumathi

9.R.Mahalingam

10.The Deputy Registrar of
Co-operative Societies
Pudupalayam main road
Cuddalore. .. Respondents in C.R.P.(NPD)No.4148 of 2012

1.N.Vinayagam

2.The Deputy Registrar of
Co-operative Societies
Pudupalayam main road
Cuddalore. .. Respondents in C.R.P.(NPD)No.4149 of 2012

Common Prayer: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the judgment and decree made in C.M.A.(CS)Nos.5 and 6 of 2009 dated 31.10.2011 on the file of the Principal District Court, Cuddalore.

In C.R.P.(NPD)No.4148 of 2012

For Petitioner	: Mr.P.K.Shivakumar for Mr.M.S.Palani Swamy
For R1 to R8	: Mr.T.S.Baskaran
For R9	: Mr.D.Shivakumaran
For R10	: Ms.T.Girija Addl. Govt. Pleader

In C.R.P.(NPD)No.4149 of 2012

For Petitioner : Mr.P.K.Shivakumar
for Mr.M.S.Palani Swamy
For R1 : Mr.T.S.Baskaran
For R2 : Ms.T.Girija
Addl. Govt. Pleader

COMMON ORDER

The matter is heard through "Video-Conferencing".

Both the Civil Revision Petitions are filed by the petitioner challenging the judgment and decree made in C.M.A.(CS)Nos.5 and 6 of 2009 dated 31.10.2011 on the file of the Principal District Court, Cuddalore.

2.The parties referred to as per their respective ranks in C.R.P.(NPD)No.4148 of 2012.

3.The surcharge proceedings were initiated against the respondents 1 to 9 by the 10th respondent, the Deputy Registrar of Co-operative

Societies. Three charges were levelled in the surcharge proceedings. First charge is levelled against all the nine respondents for having caused loss to the petitioner's Co-operative store for not taking refund of Rs.3,59,100/-, the deposited amount with Assistant Commissioner of Excise for opening I.M.F.L. shop. Charges 2 and 3 were levelled against the 1st respondent alone. The 10th respondent held that the charges levelled against the respondents 1 to 9 were proved and directed the respondents 1 to 9 to pay the amount. Against the said order of surcharge proceedings, the respondents 1 to 9 filed C.M.A.No.5 of 2009 and 1st respondent alone filed C.M.A.No.6 of 2009 on the file of the Principal District Court, Cuddalore. The learned Judge allowed both the C.M.As. setting aside the order of the 10th respondent in surcharge proceedings.

4.Against the said judgment and decree dated 31.10.2011 made in C.M.A.(CS)Nos.5 and 6 of 2009, the petitioner's Co-operative store has come out with the present two Civil Revision Petitions.

5.Mr.P.K.Shivakumar, the learned counsel appearing for the petitioner contended that the learned Judge allowed both the C.M.As. on illegal arguments**.** The respondents 1 to 9 failed to take steps to recover the deposited amount, when they came to know that I.M.F.L. shop could not be established and run in that place. The respondents 1 to 9 failed to take steps to recover the deposited amount during their tenure and caused loss to the petitioner's Co-operative store. The learned Judge failed to see that a person who caused loss initially is responsible for the same and the same cannot be fastened on the successor. The learned counsel appearing for the petitioner further contended that 1st respondent did not inspect all the fair price shops alleged by him and there is no evidence available to certify the inspection done by the 1st respondent. Except oral evidence of 1st respondent, no other evidence is available. The respondents 1 to 9 have not made any objection before the 10th respondent and they cannot raise any objection in the appeals filed by them. The 1st respondent did not plead in the surcharge proceedings that one R.Devanathan, driver should be examined and prayed for setting aside the judgment passed in C.M.A.(CS)Nos.5 and 6 of 2009.

6.Mr.T.S.Baskaran, the learned counsel appearing for the respondents 1 to 8 and Mr.D.Shivakumaran, the learned counsel appearing for the 9th respondent separately submitted that there is no wilful negligence on the part of the respondents 1 to 9 and they have not caused any deficiency in the assets of petitioner's Co-operative Society, a wholesale store or any breach of trust. The amounts were deposited with the Assistant Commissioner of Excise as per the Rule and payment was not made in violation of any Rule or by-laws of the petitioner's Co-operative store. The 10th respondent Deputy Registrar, without properly appreciating the scope of Section 87(1) of the Tamil Nadu Co-operative Societies Act, 1983 (hereinafter referred to as "Act 1983") had erroneously fastened the liability on the respondents 1 to 9. The learned Principal District Judge has considered the contention of the respondents 1 to 9 raised in two C.M.As. and has rightly allowed both the appeals.

There is no reason to interfere with the judgments passed in the appeals and prayed for dismissal of the Civil Revision Petitions.

7. Ms.T.Girija, the learned Additional Government Pleader appearing for the 10th respondent submitted that the 10th respondent considering the entire materials on record, passed the surcharge order against the respondents 1 to 9, which is valid.

8.Heard the learned counsel appearing for the petitioner as well as the learned counsel appearing for the respondents 1 to 8 and 9th respondent and the learned Additional Government Pleader appearing for the 10th respondent and perused the entire materials available on record.

9. The issue involved in both the Civil Revision Petitions are whether the respondents 1 to 9 are liable to pay the amounts as stated in the three charges levelled against them in the surcharge proceedings initiated by the 10th respondent against the respondents 1 to 9.

10. The surcharge proceedings were initiated and conducted under Section 87(1) of the Act, 1983. The said Section reads as follows:

> *"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 or any past or present officer or servant of the society has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation 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 authorized 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 his 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 any such rate as the Registrar or the person authorized as aforesaid thinks just or to contribute such sum to the assets of the society by way of compensation respect of the misappropriation, misapplication of funds, fraudulent retainer, breach of trust or willful negligence or payments which are not accordance with this Act, the rules or the by-laws as the Registrar or the person authorized 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:

Provided further that the action commenced under this sub-section shall be completed within a period of six months from the date of such commencement or such further period or periods as a the next higher authority may permit but such extended period or periods shall not exceed six months in the aggregate. "

As per this Section, the surcharge proceedings can be initiated against any past or present officer or servant of the organisation or management of the society. The first type of charge is misappropriation or fraudulently retaining any money or other property or guilt of breach of trust in relation to the society. The second type of charge is when the said person 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 the Act, 1983, the rules or by-laws, the Registrar or the person authorised. In the present case, three charges are mentioned in the surcharge proceedings, which fall under the second type.

11.**First charge:**

(i) The respondents 1 to 9 are President and Board of Directors of the Petitioner's Co-operative Store. The first charge has been levelled against the respondents 1 to 9 alleging that they have not taken any steps to get refund of Rs.3,59,100/- deposited with the Government for establishing and running I.M.F.L. shop at Pudupalayam Village. The said I.M.F.L. shop could not be established and run by the petitioner as the public in that locality protested in establishing I.M.F.L. shop. A reading of the said charge shows that the charges levelled against the respondents 1 to 9 is not that they caused deficiency in the assets of the petitioner by breach of trust or wilful negligence or has made any payment, which is not in accordance with the Act, 1983 as contemplated under Section 87(1) of the Act, 1983. It has been simply stated that the respondents 1 to 9 did not take any steps to get refund of the amount deposited with the Government. No allegations of wilful negligence or breach of trust has been alleged against the respondents 1 to 9. Only when the petitioner alleges and proves the wilful negligence on the part of the respondents 1 to 9, the liability of Rs.3,59,100/- can be fastened on the respondents 1 to 9.

(ii) It is well settled in number of judgments of this Court as well as the Hon'ble Apex Court that mere negligence on the part of the employee of the society is not sufficient to fasten liability on them. The judgment relied on by the learned counsel appearing for the respondents 1 to 8 before the learned Judge is squarely applicable to the facts of the present case. The learned Judge has properly considered all the materials placed before him as well as the judgment relied on by the parties has allowed C.M.A.(CS)Nos.5 and 6 of 2009 challenging the liability fastened on the respondents 1 to 9 and set aside the order of the surcharge proceedings in respect of first charge.

12.**Charges 2 and 3:**

(i) The charges 2 and 3 levelled only against the 1st respondent: Second charge is that 1st respondent claimed a sum of Rs.1,82,010/- being the expenses incurred by him in engaging private taxi to inspect the fair price shop run by the petitioner's Co-operative store. According to the petitioner, without inspecting fair price shop as alleged by the 1st respondent, 1st respondent has claimed the amounts. The learned counsel appearing for the petitioner contended that the learned Judge, based on the oral contention of the 1st respondent which is not substantiated by any document, set aside the order of the surcharge proceedings in respect of second charge. This contention is without merits. When the petitioner has taken a stand that the 1st respondent did not inspect the fair price shop, ought to have examined the employees of the fair price shop or mark the report based on which the said charge is levelled against the 1st respondent to prove that the 1st respondent did not inspect the fair price shop as alleged by the 1st respondent. It is for the petitioner to prove the stand taken by them and cannot contend that the 1st respondent failed to prove that he has spent the amount as claimed by him. When the charge is levelled against the 1st respondent based on any audit under Section 80 or enquiry under Section 81 or inspection or investigation under Section 82 of the Act, 1983, it is for the petitioner to prove the said charge. The learned Judge has set aside the surcharge proceedings as the petitioner failed to prove the said charge. There is no error inn the said finding.

(ii) Third charge is that the 1st respondent utilised the service of one Devanathan, cleaner of the lorry belonging to the petitioner's Wholesale store as his personal driver and paid a sum of Rs.46,134/- from the funds of the petitioner's co-operative store. Again the petitioner failed to prove the said charge against the 1st respondent. The petitioner has not examined the said Devanathan before the 10th respondent in surcharge proceedings or atleast filed an affidavit sworn by the said Devanathan in any surcharge proceedings as stated by the learned Judge in the judgment. Except alleging that the 1st respondent utilised the said Devanathan as his personal driver, no material evidence was produced before the 10th respondent during surcharge proceedings. The learned Judge has considered all the materials placed before him properly and giving cogent and valid reason, allowed both the appeals in C.M.A.(CS)Nos.5 and 6 of 2009. There is no irregularity or illegality in the judgment passed by the learned Principal District Judge warranting interference by this Court.

13.In the result, both the Civil Revision Petitions stand dismissed. No costs.

17.09.2020

Index : Yes/No

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V.M.VELUMANI, J.

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To

The Principal District Judge,
Cuddalore.

C.R.P.(NPD)Nos.4148 and 4149 of 2012

17.09.2020