BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED:15.10.2020
CORAM
THE HONOURABLE Mr.JUSTICE **G.K.ILANTHIRAIYAN**
Crl.O.P.(MD).No.18030 of 2016
and
Crl.M.P.(MD).Nos.8973 and 8974 of 2016

C.Shenbagamoorthy ... Petitioner/Accused No.11

Vs

1.State represented by,
The Special Sub-Inspector of Police,
Commercial Crime Investigation Wing,
(CCIW),
Tirunelveli District. ... Respondent/Complainant
(Crime No.2 of 2015)

2.The District Central Co-Operative Bank,
Tirunelveli,
Tirunelveli District-7. ... Respondent/Defacto Complainant

PRAYER: Criminal Original Petitions filed under Section 482 of Cr.P.C, praying to call for the records pursuant to the case in C.C.No.3 of 2016 on the file of the Judicial Magistrate No.II (C.G.I.W. Special Court), Tirunelveli and quash the same as against the petitioner/Accused No.11.

For Petitioner : Mr.Lakshmi Gopinathan
For M/S.Polex Legal Solutions
For R-1 : Mr.K.Suyambulinga Bharathi
Government Advocate (Crl. Side)
For R-2 : Mr.D.Shanmugaraja Sethupathi

ORDER

This petition has been filed to quash the the case in C.C.No.3 of 2016 on the file of the Judicial Magistrate No.II (C.G.I.W. Special Court), Tirunelveli, as against the petitioner.

2.Totally there are 11 accused in this case, in which, the petitioner has been arraigned as A11 and he stood charged for the offences under Sections 408, 468, 477(A) of IPC r/w Sections 109 and 34 of IPC. Now, to quash the above criminal proceedings, the present criminal original petition has been filed.

3.The case of the prosecution is that all the employees of Tirunelveli District Central Cooperative Bank, Pettai Branch manipulated the records and misappropriated a huge amount and had caused loss to the Co-opertive Bank. In connection with the said allegations, an enquiry was conducted under Section 81 of the

Cooperative Societies Act, which revealed that all the accused persons with a bad intention misappropriated huge sum and caused loss to the Bank.

4.The learned counsel appearing for the petitioner submitted that insofar as the petitioner is concerned, he was appointed as a Statutory Auditor/Branch Auditor of the bank for the year 2010-2011 on the terms and conditions, by letter, dated 21.01.2011, whereas, the fraud and misappropriation committed by the accused persons, as according to the prosecution is between the month of the September, 2010 to January 2011. After appointing the petitioner, he has conducted auditing only after end of the financial year viz., after 31.03.2011. Therefore, the petitioner is not an employee in the Cooperative Bank and he did not involve in the day-to-day affairs of the bank. When the bank handed over the account books to the petitioner's firm, by letter, dated 02.05.2011, it is clearly stated as follows:

> *"24.One fraud at out Pettai Branch has been reported and investigation going on. Details of fraud involving misappropriation of funds Rs.10.55 lakhs is enclosed. Since investigation is going on all the records pertaining to the branch is under custody of the investigation officer. "*

5.From the above averments, the petitioner is only as a statutory auditor to audit the accounts of the bank and misappropriation committed by the employees of the bank only and as such no query.

6.The petitioner has challenged the FIR in Crime No.2 of 2015 before this Court in Crl.O.P.(MD).No.7558 of 2016, in which, this Court observed as follows;

> *"5.From the above averments, it prima facie appears that this petitioner cannot be mulcted with criminal liability, inasmuch as he comes into the picture only as a statutory auditor to audit the accounts of the bank and even in the letter dated 02.05.2011 given by the bank, they have stated that the entire records are with the investigating officer.*
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> *6.The learned Government Advocate (Crl. Side) submitted that the police have recorded statement of 19 persons and investigation is almost completed. At this stage, if this Court admits the case and stays the FIR, it will enure to the advantage of the other accused. Hence, this petitioner is closed with a direction to the respondent Police to bear in mind the fact that*

the petitioner was a statutory auditor and even according to the bank records, he came into picture only after 21.01.2011, but whereas, the said offences were committed prior to that. During the course of investigation, if it is found that there are no other materials as against the petitioner, it is needless to say that his name should be dropped in the final report. Consequently, conneced miscellaneous petition is closed. "

Even then the first respondent has charged the petitioner along with other accused persons for the very same offence.

7.It is seen that the audit report for the year ended on 31.03.2011, the petitioner stated as follows:

"The branch has reported misappropriation of cash amounting to Rs.6,17,340/ in the savings bank account and Rs.4,82,850/- in the jewel loan account. Investigation was going on at the time of our visit to the branch and relevant records not produced to us for our perusal."

8.In this regard, the learned counsel appearing for the petitioner has relied upon judgment of this Court in Crl.O.P.(MD). No.13212 of 2017, dated 15.11.2019, in which, Para 15 reads as follows;

"15.At this juncture, it will be relevant to rely upon the judgment that has been cited by the learned counsel for the petitioner in the ase of Anbalagan Vs. State referred supra. That was also a case where the Special Officer was sought to be made as an accused in the very same society. The relevant portions of the judgment is extracted hereunder.

12.Clause 8 of the Tamil Nadu Co-operative Manual deals with the prosecution against the Departmental officers which reads thus:

Prosecution against the Departmental Officers :- 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 that one Co-operative society and functioning as such. They are holding supervisory posts also over such institution. The Act or the Bylaw of the 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 scrutinise each and every transactions of the society. They would have failed to check and scrutinise 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 theinquiry, inspection or investigation officer finds it prima facie, that such officers with mala fide 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 delinquents, in a routine manner, in the inquiry report or complaints filed with the police. From the aforesaid provision, it is clear that if the officers who have been posted to supervise the societies fail to discharge their duty properly such officers will not fasten criminal liability unless prima facie shows that such officer with mala fide criminal intention committed criminal breach of trust or criminal misappropriation or aided and abetted such criminal offences by the supporting staff.

13.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 examines. 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 an 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. "*

9.He also relied upon the judgment of this Court in Crl.O.P (MD).No.1357 of 2015, dated 07.08.2019, in which, paragraph Nos. 10 and 11 read as follows:

> 10.To charge the petition under Section 34 of IPC, there must be materials to show that the criminal active have been done by more than one person, and the criminal act have been done in furtherance of a common intention of all such persons.
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> 11.Likewise, to charge him under Section 109 of IPC, there should be some tangible material to show that, the abetter have intentionally aided for the commission of the crime. To bring home the charge of conspiracy within the ambit of Section 120(b) of IPC., it is necessary to establish that there was an agreement between the parties, for doing the unlawful act. From the materials collected during the investigation, there is no material available on record to prima facie make out an offence under Sections 120(b), 109 and 34 of IPC. The only material available on record is the statement of V.Subramanian/L.W.1, who was the Deputy Registrar of Cooperative societies who has conducted an enquiry under Section 81 of the Tamil Nadu Cooperative Societies Act, 1983. Even in the statement given under Section 161 of Cr.P.C., the only allegation against the petitioner was that without verifying the account properly, in dereliction of his duty, intentionally he has aided and abetted the other accused to commit the offence.

10.Heard the learned Government Advocate (Crl. Side) appearing for the respondent Police.

11.In the case on hand, the petitioner has been implicated as an accused along with others under Sections 109 r/w 34 of IPC. There is absolutely no material to show that the petitioner abetted this crime along with other accused persons. According to the prosecution, the petitioner was appointed as a Statutory auditor only on 21.01.2011 and he has also disclosed the same in his report. So far, absolutely there is no wilful negligence on the part of the petitioner herein for the loss caused to the bank as such no ingredients available in the case on hand to satisfy any of the offence as alleged by the prosecution as against the petitioner.

12.In view of the said discussion, the entire proceedings cannot sustain as against the petitioner and it is an abuse of process of law and hence, the petition is liable to be quashed.

13.Accordingly, this criminal original petition stands allowed and the case in C.C.No.3 of 2016, on the file of the learned Judicial Magistrate No.II (C.G.I.W.Special Court), Tirunelveli, is quashed. Consequently, the connected Criminal Miscellaneous petitions are closed.

Sd/-

Assistant Registrar (co)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

Vsg

Note: In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To:

1.The Judicial Magistrate No.II
(C.G.I.W. Special Court),
Tirunelveli.

2.The Special Sub-Inspector of Police,
Commercial Crime Investigation Wing,
(CCIW),
Tirunelveli District.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to Mr.D. SHANMUGARAJA SETHUPATHI, Advocate (SR-20373[F] dated 16/10/2020)

+1 CC to M/s.POLAX LEGAL SOLUTION, Advocate (SR-20407[F] dated 16/10/2020)

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