BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: **08.12.2020**

CORAM:

THE HONOURABLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.O.P.(MD)Nos.18327 and 18389 of 2016

and

Crl.M.P(MD)Nos.9128 and 9171 of 2016

1.Pandiselvam
2.Malairaj ... Petitioners/Accused Nos.5 & 6 in Crl.O.P(MD)No.18327 of 2016

1.Karthigaisamy
2.Malairaj
3.Saravanarajan ... Petitioners/Accused Nos.3 to 5 in Crl.O.P(MD)No.18389 of 2016

Vs.

1.The State Rep. by
The Inspector of Police,
Commercial Crime Investigation Wing,
Sivagangai District. ...1st Respondent/Complainant

2.A.Sundari ...2nd Respondent/*Defacto* Complainant in both Crl.O.Ps

COMMON PRAYER: Criminal Original Petitions filed under Section 482 Cr.P.C. praying to call for the records relating to the petitioners in final report in C.C.No.142 of 2015 and C.C.No.141 of 2015 respectively on the file of the Judicial Magistrate Court No.II, Sivagangai, Sivagangai District in Cr.No.03 of 2014 on the file of the respondent police and quash the same as illegal.
(Amended as per order of this Court, dated 25.10.2016 made in Crl.M.P.(MD)No.10329 of 2016 in Crl.O.P(MD)No.18389 of 2016)

<u>In Both petitions:</u>

For Petitioners	: Mr.R.Udhayakumar
For R1	: Mr.K.Suyambulinga Bharathi Government Advocate (Crl.side)
For R2	: No Appearance

COMMON ORDER

These petitions have been filed to quash the proceedings in C.C.No.142 of 2015 and C.C.No.141 of 2015 respectively on the file of the Judicial Magistrate Court No.II, Sivagangai, Sivagangai District in Cr.No.03 of 2014 on the file of the respondent police, as against the petitioners.

2.The crux of the complaint is that from 30.06.1991 to 05.12.2013 the first accused Secretary of Primary Agricultural Co-operative Credit Society along with other accused persons misappropriated the amount to the tune of Rs.34,11,652.30/-. On the enquiry filed under Section 81 of the Tamil Nadu Co-operative Societies Act (hereinafter referred to as 'the Act'), the first accused admitted his guilty and repaid the entire amount to the society. On the basis of the enquiry report under Section 81 of the Act, a complaint was lodged and the respondent has registered the case in Crime No.3 of 2017 as against the accused persons.

3.The learned counsel appearing for the petitioners would submit that the petitioners in Crl.O.P.(MD)No.18389 of 2016 are arrayed as A3 to A5, in which, A3/first petitioner died. Insofar as the second and third petitioners are concerned they are arrayed as A4 and A5. They were working as Supervisor of Primary Agricultural Co-operative Society for the short period i.e., 01.12.2011 to 04.06.2012 and 11.06.2012 to 11.09.2012 respectively. On the basis of the enquiry report submitted by the Enquiry Officer, the first respondent has registered the case. In fact, the departmental proceedings also initiated as against them and the petitioners are exonerated from all the charges. The petitioners in Crl.O.P(MD) No.18327 of 2016 are arrayed as A5 & A6. After completion of investigation, the respondent police has filed four charge sheets and the same was taken on file in C.C.Nos.141, 142, 143 and 144 of 2015. The prosecution cannot be initiated for lapse/negligence in supervisory work and such negligence may create only a civil liability and there cannot be any vicarious liability in the criminal law. In fact, in the disciplinary proceedings, the petitioners were exonerated from all the charges. All the charges under departmental proceedings and the present criminal proceedings are one and the same. Therefore, the petitioners were exonerated from the charges levelled against them as not proved in the departmental proceedings. Allowing the criminal proceedings for the very same set of charges to continue, would amount to abuse of process of law. In this regard, the learned counsel appearing for the petitioners in both the petitions relied upon the judgment of this Court passed in similar matter in Crl.O.P.(MD)Nos.8482 to 8498 of 2018, dated 06.11.2019.

4.Per contra, the learned Government Advocate (Crl.side) appearing for the respondent police submitted that all the accused persons conspired together and have committed irregularities by fabricating the documents and false accounts and committed very serious offence and misappropriated the amount to the tune of Rs.34,11,652.30/-. Insofar as the petitioners are concerned, they were working as Supervisors and they have failed to supervise the accounts and notes. Due to dereliction of duties and responsibilities, the petitioners have failed to find out the misappropriation committed by the other accused persons.

5.Heard the learned counsel for the petitioners and the learned Government Advocate (Crl.side) appearing for the first respondent.

6.It is seen that based on the enquiry conducted under Section 81 of the Act, a complaint was lodged and the same was registered in Crime No.3 of 2014 for the offences under Sections 408, 465, 468, 471, 477(A) r/w 109 IPC. After completion of investigation, the respondent has filed four final report for different periods and the same were taken cognizance in C.C.Nos.141, 142, 143 and 144 of 2015. The petitioners in Crl.O.P(MD)No.18389 of 2016 are arrayed as A3 to A5, in C.C.No.141 of 2015, in which A3 already died and the charges are abated as against him. Insofar as the petitioners in Crl.O.P (MD)No.18327 of 2016 are concerned, they are arrayed as A5 and A6 in C.C.No.142 of 2015. Admittedly in both petitions, the petitioners were working as Supervisors for short periods from the year 2011-12, whereas the prosecution has failed to found that from 30.06.1991 to 05.12.2013, the first accused Secretary of the said Society has misappropriated the amount to the tune of Rs.34,11,652.30/-.

7.In this regard 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."*

8. 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 *mala fide* criminal intention committed criminal breach of trust or criminal misappropriation or aided and abetted such criminal offences by the supporting staff.

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

> *"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."*

10. In ***S.Gunasekaran Vs. State represented by the Inspector of Police,*** 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."*

11. In ***N.Baskaran Vs. The State rep. by Inspector of Police, C.C.I.W., CID, Trichy***, after referring to the decision in S.Gunasekaran Vs. State represented by Inspector of Police (supra), the Court 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.*

12.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 petitioners herein.

13. In ***R.Udaiyar Vs. The State of Tamilnadu***, in paragraph No. 10, this court has observed as follows:

> *"10. In the enquiry under Section 81 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 Cr.P.C."*

14. In ***P.Jegadeesan Vs. Inspector of Police***, 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 is clear that the provision of Section 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."*

15. The relevant portion in P.S.Rajya Vs.State of Bihar reported in (1996 (9) SCC 1) (supra) 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.

16.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.

17.In the case on hand the petitioners were already exonerated from all the charges in the departmental proceedings in surcharge Case No.2 of 2014, as there is no *prima facie* case made out as against them. In view of the aforesaid decisions, the criminal proceedings against the petitioners herein have to be quashed.

18. 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.

19.In this case also, the petitioners were 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 petitioners is that they had failed to verify the accounts. So, the aforesaid decision will squarely applicable to the facts of this case.

20. In ***Jethsur Surangbhai Vs. State of Gurjarat, AIR 1984 SC 151***, the Hon'ble 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.

21.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 petitioners for their failure to discharge their duty properly. Such a negligence may create only a civil liability. In this case as already stated that from the departmental proceedings all the petitioners were exonerated, as there is no *prima facie* case as against the petitioners. Further, the first accused alone is responsible for entire misappropriation and he admitted his guilty and also repaid the entire amount to the society. Therefore, for the very same set of charges the criminal proceedings cannot be initiated as against the petitioners.

22. 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 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.”*

23. 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.

24. 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.142 and 141 of 2015 on the file of the Judicial Magistrate Court No.II, Sivagangai, Sivagangai District, are quashed. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

vsd

To
1.The Judicial Magistrate Court No.II,
Sivagangai,
Sivagangai District.

2.The Inspector of Police,
Commercial Crime Investigation Wing,
Sivagangai District.

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

Crl.O.P.(MD)Nos.18327 and 18389 of 2016
and
Crl.M.P(MD)Nos.9128 and 9171 of 2016
08.12.2020

(KMV)CO
AP(18/01/2021) 11P 4C