IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.03.2021

PRONOUNCED ON : 24.03.2021

CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.(PD)No.3214 of 2016
and C.M.P.No.16299 of 2016

R.Thangamani ... Petitioner

Vs.

1. The Salem co-operative Sugar Mills Ltd.,
   Mohanur, represented by its
   Special Officer, Mohanur Post,
   Namakkal Taluk and District.

2. Surcharge Officer/Joint Registrar,
   Salem Co-operative Sugar Mills Ltd.,
   Mohanur/Joint Registrar/Administrator,
   Kallakurichi -2,
   Co-operative Sugar Mills,
   Kanchirapalayam. ... Respondents

Prayer :- Civil Revision Petitions are filed under Article 227 of the Constitution of India, to set aside the judgment and decree dated 21.06.2016 passed in C.M.A.(CS)No.39 of 2010 on the file of the learned Principal District Judge, Namakkal.

For Petitioner : Ms.J.Anandhavalli

For Respondents : Mr.R.Bala Ramesh

ORDER

This Civil Revision Petitions is directed as against the fair and decreetal order dated 21.06.2016 passed by the learned Principal District Judge, Namakkal, in C.M.A.(CS)No.39 of 2010, thereby dismissing the appeal filed as against the surcharge proceedings initiated by the second respondent herein.

2. The learned counsel appearing for the petitioner would submit that the second respondent passed surcharge order relates to the act of misappropriation of the sale amount by the labour contractor of the petrol bunk run by the first respondent herein. Therefore, it is no way connected with the management or touched the business of the second respondent and it completely outside the scope of the surcharge proceedings under Section 87 of the Tamil Nadu Co-operative Societies Act. The second respondent passed impugned surcharge order without even conducting detailed enquiry as contemplated under Section 87 of the Tamil Nadu Co-operative Societies

Act and simply accepting the enquiry report submitted by the first respondent and without applying his mind passed the impugned order.

2.1. She further submitted that even assuming that there is loss to the society, it has to be proved that it happened only because of the deliberate wrong committed by the petitioner herein. There is no findings in respect of the dereliction of duty and the surcharge proceedings cannot be sustained as against the petitioner and it is liable to be set aside. There is no finding in respect of the willful dereliction of duty on the part of the petitioner and mere alleged the carelessness and dereliction of duty are not sufficient to issue surcharge order under Section 87 of the Tamil Nadu Co-operative Societies Act, as against the petitioner.

2.2. Admittedly, the labour contractor of the petrol bunk had misappropriation the amount and caused loss to the society. When it being so, the surcharge proceedings itself is vitiated as against the petitioner, since he is working as Chief Accountant of the society. In fact, the first respondent already filed suit in O.S.No.5509 of 2009 on the file of the City

Civil Court, Chennai as against the labour contractor and his partnership firm, in respect of the loss caused to the society and for recovery of loss. Therefore, the surcharge proceedings initiated as against the petitioner cannot be sustained, when there is no findings as against the petitioner that the loss caused only due to the dereliction of duty by the petitioner. In support of her contention, she relied upon the following judgments :-

(i) 2018(3)LW 22 - S.Selvaraj and ors Vs. The Deputy Registrar of Co-op Societies and anr.

(ii) The judgment dated 04.04.2014 passed by this Court in W.A.No.1686 of 2013 - P.Elango Vs. The Administrator, M.R.K.Co-op Sugar Mill and ors.

3. Per contra, the learned counsel appearing for the respondent would submit that the petitioner was working as Chief Accountant of the Society and he along with others misappropriated amount to the tune of Rs.12,82,770/- There was a special note to the petitioner as Chief Accountant that the petrol and diesel stock available with the bunk was taken on charge from the labour contractor viz., Kuppannan and the first

respondent have been purchasing diesel, petrol, oils etc., with effect from that date onwards. Further, it directs to verify the stock of petrol at the level of Senior Manager and Accounts Officer. G5 Assistant is responsible for the preparation of MIS report and also physically ensuring the stock and also in getting the petrol and diesel load in time thereby avoiding driage of the pumps.

3.1. It is also directed by the Special Officer in his office note as the statement of accounts submitted by the labour contractor should be thoroughly checked by the petitioner and the Account officer and the daily statement should be carefully checked. Further the prime duty of the petitioner herein, who is hold the post of Chief Accountant that he should be ensure that there is no variation of stock of petrol, diesel, oil etc. Therefore, there is willful dereliction of duty on the part of the petitioner herein and he colluded with others misappropriated the society funds. After conducting detail enquiry under Section 81 of the Tamil Nadu Co-operative Societies Act, the first respondent filed his report. On the basis of the said report, complaint was also lodged and the same was registered in Crime No.11 of

2005. Now it was charge sheeted and the petitioner and others are facing criminal proceedings. Therefore, he prayed for dismissal of this present petition.

4. Heard, Ms.J.Anandhavalli, learned counsel appearing for the petitioner and Mr.R.Bala Ramesh, learned counsel appearing for the respondents.

5. The first respondent is running a petrol bunk on labour contract basis to cater the needs of local public. The sugar cane are transported through lorries to the mill. As per the contract, the contractor will submit demand for the purchase of petrol for the bunk and the mills will supply the stock to the contractor. The contractor will arrange to procure petrol for the bunk and remit the sale proceedings to the mill and the commission for the labour contractor will be paid once in a month. While being so, there was shortage of physical stock against the stock book. On verification it was found that the labour contractor had misappropriated the sale proceeds from the petrol bunk to the tune of Rs.12,82,770/- and he failed to remit the same

to the mill. On that basis, enquiry was conducted under Section 81 of Tamil Nadu Co-operative Societies Act and found that 13 employees were found to have committed fault and the then Special Officer of the first respondent herein also found to be responsible. On the basis of the said report, FIR was registered in Crime No.11 of 2005 for the offences under Sections 406 & 420 of IPC in which the petitioner was also one of the accused and now he is facing the trial.

6. It has to be seen that what is the role of the petitioner in the transaction related to maintaining the stock. The duty of verification of stock is vested at the level of Senior Manager of the mill. As far as the Chief Accountant is concerned, he has to inspect the purchase of the petrol for the bunk and to give consent for the business from the other officers. Admittedly, the labour contractor viz., Palanisamy is agreed that he is responsible for the deficiency of stock and undertook to pay the amount.

7. In fact, the first respondent herein filed suit in O.S.No.5509 of 2007 for recovery of the said amount as against the contractor viz.,

Palanisamy and others on the file of the City Civil Court, Chennai and it is pending. Therefore without the statement of Account Officer of the mill and chellan submitted by the contractor and also the Special officer who issued final orders for purchase, the purchase would not have been made. Admittedly they have not impleded as parties to the surcharge proceeding.

8. That apart, the Co-operative Auditor, who conducted stock audit, verified and also certified that the stock which was more than the bunk capacity during previous audits. The sales officer of the Indian Oil Corporation also made periodical inspection and certified that the stock of the bunk is more than its capacity. Therefore the petitioner was being the Chief Accountant had given his consent for further purchase, only on the report submitted by the other employees in MIS. Further, the labour contractor himself admitted that the shortage was caused by himself and he is the responsible for the loss to the society.

9. On perusal of the order passed by the second respondent, there is no findings about the reckless or careless attitude on the part of the

petitioner and as such he is not liable to the surcharge proceeding. To pass surcharge order under Section 87 of the Tamil Nadu Co-operative Societies Act Act, the petitioner should have done the actionable wrong either by commission or omission in a deliberate and reprehensible manner with reckless callousness and with a supine indifference, without taking due care and caution ordinarily expected from a reasonable and prudent man under those existing circumstances. In the absence of such categorical finding by the second respondent, it is not possible to mulct the petitioner with the loss caused to the society.

10. The learned counsel appearing for the petitioner relied upon the judgment reported in ***2018 (3) LW 22*** in the case of ***S.Selvaraj and ors Vs. The Deputy Registrar of Co-op Societies and anr.,*** in which the Hon'ble Divison Bench of this Court held as follows :-

> *"16.The inspection report dated 08.06.2009, submitted by the Cooperative Sub-Registrar (Inspection) / enquiry officer, based on which the impugned notice came to be issued would also disclose that there is no finding that the petitioners*

while discharging the duties, willfully and deliberately caused loss to the said society and in fact, in the inspection report, the role played by Mr.Ganagaraj, the then General Manager is projected as a prominent one.

17.Incidentally, a question arose for consideration in this writ appeal that in the absence of any finding with regard to the willful dereliction of duty on the part of the concerned officials, whether proceedings under Section 87 under the Act can be initiated?

18.In S.Subramanian Vs. The Deputy Registrar of Cooperative Societies (Housing), Cuddalore and others (Division Bench) reported in 2002 (3) L.W. 185, the said issue arose for consideration and a Division Bench of this Court after placing reliance upon three decisions in paragraph No.12 and 13 observed as follows:

"12.In the present case it has to be pointed out that no finding has been recorded by the first respondent or by the third respondent to establish that the deficiency had been caused wilfully or deliberately or with a view to cause loss to the assets of the society. Nowhere a finding has been

rendered either by the first respondent or by the third respondent in their proceedings that the petitioner is guilty of wilful negligence or wantonness, nor it has been recorded that omission or commission on the part of the petitioner is deliberate, reckless or callous or loss has been caused deliberately to the assets of the society.

13.In the absence of such finding, as has been consistently held by this Court, that the petitioner is guilty of wilful or deliberate negligence or there is intention to cause loss to the assets of the society, it follows that the impugned surcharge proceedings in so far as the petitioner is concerned are liable to be quashed."

19.In A.Janakiraman and another Vs. Deputy Registrar of Cooperative Societies, Kumbakonam and another reported in (2009) 6 MLJ 1051, a Single Bench of this Court after taking note of the various decisions, dealt that the willful dereliction of duty having been un-established against the petitioner, the recovery proceedings initiated against the petitioner cannot be maintainable. In the considered opinion of this

Court, the said decision would fully apply to the facts of this case.

20.As already pointed out, the enquiry report of the Cooperative Sub-Registrar (Inspection) dated 08.06.2009, did not indicate that the appellants / writ petitioners were willfully negligent or guilty of dereliction of duty and even as per the counter affidavit of respondents 1 and 2, it was Mr.Ganagaraj, the then General Manager of the second respondent Bank in One Time Settlement (OTS) scheme has waived the interests of the above said four loanees and they have also settled the entire amount.

21.In the absence of any specific finding as to the willful dereliction of duty on the part of the respondents, initiation of the proceedings under Section 87 of the Tamil Nadu Cooperative Societies Act, 1983, in the considered opinion of this Court is un-sustainanble."

11. She also relied upon the judgment dated 04.04.2014 passed by this Court in ***W.A.No.1686 of 2013*** in the case of ***P.Elango Vs. The***

Administrator, M.R.K.Co-op Sugar Mill and ors., as follows :-

> *"12.Similar issue arose for consideration in the decision rendered by a learned single Judge of this Court (N.Paul Vasanthakumar, J.) reported in **(2009) 6 MLJ 1051 [A.Janakiraman and another -vs- Deputy Registrar of Cooperative Societies and another),** wherein the learned single Judge has referred to all the earlier decisions on that point and held as follows:-*
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> *"In surcharge proceedings, the first respondent is duty bound to prove that there was wilful dereliction of duty like criminal case. The criminal Court having found that the petitioners are not guilty, the said findings are definitely in favour of the petitioners. The words used under Section 87(1) are "wilful negligence". The said issue was considered in series of decisions of this Court (a)In **Sathyamangalam Co-operative Urban Bank Limited v. Deputy Registrar of Co-operative Society and Another (1980) 2 MLJ 17,** this Court considered the scope of earlier Section viz., Section 71 of the Tamil Nadu Co-operative Societies Act, 1961, which is analogous to Section 87 of the Act, 1983 and held that mere negligence*

is not sufficient to initiate surcharge proceedings. (b)A Division Bench of this Court in ***P.Karuppiah v. Deputy Registrar of Co-operative Societies (1989) WLR 272*** *considered the very same aspect and in paragraph 3 held as follows: "3.The second aspect canvassed by the learned counsel for the appellant is that, assuming that the petitioner was cast with specific responsibility or obligation or duty with reference to the remittances and withdrawals yet, the alleged acts and omissions with which the appellant was charged could not be said to have been tainted with 'wilful negligence' which has been construed by pronouncements of the Court as meaning something done either by commission or omission, in a deliberate and reprehensible manner, with reckless callousness and with a supine indifference, and not by accident or inadvertence without taking due care and precaution ordinarily expected form a reasonable and prudent man under the existing circumstances. Learned counsel for the appellant took the trouble of citing before us pronouncements of a number of single Judges of this Court. Learned counsel for the appellant* *would submit that even in the field of inference, there is no possibility of characterising the alleged acts and omissions on the part of the appellant as tainted with 'wilful negligence'. We would have gone into this question, but we find that the answer given by us with regard to the first contention in favour of the appellant has served his purpose and we are of the view that for the present case we need not trouble ourselves with regard to this aspect. The learned single Judge, we find, has omitted to take note of the crucial aspect with regard to the casting of specific responsibility or duty or obligation on the appellant with regard to remittances and withdrawals. As we have already pointed out, there is no material evidence exposed in this case, showing that position. In the absence of the said position being made out against the appellant it is not possible to sustain the proceedings which culminated in the mulcting of the liability on the appellant. Taking note of this feature, we are obliged to interfere in writ appeal and accordingly, the writ appeal is allowed, the order of the learned single Judge is set aside and the* *writ petition W.P.No.1955 of 1978 is allowed. We make no order as to costs both in the writ petition and in the writ appeal."*

(c)The above decision was followed in the decisions ***Chockappan v. Special Tribunal for Co-operative Cases (1999) 1 MLJ 587*** *and* ***M.Sambandam v. Deputy Registrar (Credit) Co-opeartive Societies, Mylapore, Madras.*** *(d)In* ***M.Chella Nadar v. Deputy Registrar of Cooperative Societies, Thuckalai and post, K.K.District (2002) WLR 198,*** *the very same issue of scope of Section 87 (1) was considered and similar surcharge proceedings was quashed. (e)The above decisions are followed in the decision in* ***S.Marimuthu v. Deputy Registrar of Co-operative Societies (Housing), Madurai Circle (2006) 4 MLJ 86.*** *(f)Recently, a Division Bench of this Court in the decision in* ***K.Ajay Kumar Gosh v. Tribunal for Cooperative Cases, Nagercoil (2009) 4 MLJ 992, set aside the order of surcharge and in paragraph 20 held thus at p.996 of MLJ:*** *"20.In the light of the decisions referred to above, it is clear that, to pass surcharge order under Section 87 of the Act,*

appellants should have done an actionable wrong either by commission or omission in a deliberate and reprehensible manner with reckless callousness and with a supine indifference, without taking due care and caution ordinarily expected from a reasonable and prudent man under those existing circumstances. In the absence of such categorical finding by the respondents, it is not possible to mulct the appellants with the loss caused to the society".

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.

13.Though the above said decision was rendered by one of us (N.Paul Vasanthakumar, J.), the learned Judge has referred to and followed the judgment rendered by the Division Bench and in the considered opinion of this Court, the ratio laid down is squarely applicable to the *facts of this case.*

14.This Court has also gone through the order passed by the Original Authority and there was no finding that there was wilful negligence on the part of the appellant herein and even as per the stand taken by the Administrator/writ petitioner in the writ petition that the appellant has failed to exercise due diligence and caution, there was no allegation that he has wilfully negligent to perform his duty."

The Hon'ble Supreme Court of India and this Court repeatedly held that in the absence of any finding of willful dereliction of duty on the part of the concerned official, the surcharge proceedings cannot be initiated under Section 87 of the Tamil Nadu Co-operative Societies Act Act.

12. In the case on hand, the respondents failed to establish that the deficiency had been caused willfully or deliberately or with a view to cause loss to the assets of the society. That apart, no finding has been rendered either by the first respondent or by the second respondent in their proceedings that the petitioner is guilty of willful negligence or wantonness

nor it has been recorded that omission or commission on the part of the petitioner is deliberate, reckless or callous or loss has been caused deliberately to the assets of the society. Therefore, the impugned proceedings initiating under Section 87 of the Tamil Nadu Co-operative Societies Act Act is not sustainable as against the petitioner.

13. In view of the above discussion, the order dated 21.06.2016 passed by the learned Principal District Judge, Namakkal, in C.M.A.(CS)No.39 of 2010, thereby confirming the order dated 30.04.2010 passed in surcharge proceedings in Na.Ka.5197/2007 by the first respondent is hereby set aside. Accordingly, this Civil Revision petition is allowed. There shall be no order as to costs. Consequently, connected miscellaneous petition is also closed.

24.03.2021

Internet : Yes
Index : Yes/No
Speaking order/Non-speaking order

rts

G.K.ILANTHIRAIYAN, J.

rts

To

1. The Principal District Judge,
   Namakkal

2. The Special Officer
   Salem co-operative Sugar Mills Ltd.,
   Mohanur, Mohanur Post,
   Namakkal Taluk and District.

3. The Surcharge Officer/Joint Registrar,
   Salem Co-operative Sugar Mills Ltd.,
   Mohanur/Joint Registrar/Administrator,
   Kallakurichi -2, Co-operative Sugar Mills,
   Kanchirapalayam.

4. The Section Officer,
   V.R. Section,
   Madras High Court,
   Chennai.

order in
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