

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.07.2021

CORAM

THE HON'BLE Ms. JUSTICE R.N.MANJULA

C.R.P.(NPD).Nos.1073 & 1074 of 2017
and C.M.P.Nos.5147 & 5148 of 2017

N.Vaithiyalingam ... Petitioner/Appellant in *CRP/1073/2017*

T.Selvaganapathy ... Petitioner/Appellant in *CRP/1074/2017*

Vs.

1.The Salem Co-Operative Sugar Mills Ltd.,
Mohanur, Rep. 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,
Kallakurchi – 2
Co-Operative Sugar Mills, Kachirapalayam. ... Respondents in *both CRPs*

Common Prayer: These Civil Revision Petitions are filed under Section 115 of Civil Procedure Code, praying to call for the records pertaining to the Orders and Decretal Order dated 09.12.2016 made in C.M.A.C.S.Nos.36 & 37 of 2010 on the file of the learned Principal District Court, Namakkal and to set aside the same through these Civil Revision Petitions.

For Petitioners : Mr.S.Siva Shanmugam
(*in both CRPs*)

For Respondents : No Appearance
(*in both CRPs*)

COMMON ORDER

(Heard through video conferencing)

These Civil Revision Petitions have been filed against the Orders dated 09.12.2016 made in C.M.A.C.S.Nos.36 & 37 of 2010 passed by the learned Principal District Judge, Namakkal, wherein, the Appeal filed against the surcharge proceedings initiated by the second respondent was dismissed.

2. The learned counsel for the petitioners would submit that the 2nd respondent passed a Surcharge Order for misappropriation of the sale amount done by the Labour Contractor of petrol bunk run by the 1st respondent; it is submitted that the scope of surcharge proceedings under Section 87 of the Tamil Nadu Co-operative Societies Act, 1983, is no way connected with the functions of the petitioners; the surcharge Order has been passed without conducting a detailed enquiry under Section 89 of the Act and there is no application of mind; the loss if any, to the society has not occurred due to any deliberate action on the part of these petitioners; the Labour Contractor of the petrol bunk himself has stated that he alone is responsible for the loss to the society; in fact, the 1st respondent has also filed a suit in O.S.No.5509/2007 for the recovery of a sum of Rs.12,82,770/-

against the Labour Contractor and his partnership firm for the loss caused to the society; while the facts are so, it is wrong on the part of the 1st respondent to issue surcharge proceedings against these petitioners.

3. In support of the contention of the learned counsel for the petitioners, the following decisions have been cited:-

<i>S.No.</i>	<i>Dated</i>	<i>Judgement Cause Title</i>	<i>Citations</i>
1.	14.02.2018	<i>S.Selvaraj and ors Vs. The Deputy Registrar of Co-op Societies and anr.</i>	2018(3)LW 22
2.	04.04.2014	<i>P.Elango Vs. The Administrator, M.R.K.Co-op Sugar Mill and ors.</i>	W.A.No.1686 of 2013

4. The petrol bunk is run by the 1st respondent on labour contract. As per the terms of contract, the contractor will submit the demand for purchase of petrol for the bunk and the sugar mill will supply the stock to the contractor and the petrol will be used by the lorries to transport sugarcane to the mill. It is the contractor who has to procure petrol for the bunk and remit the sale proceeds to the mill thereafter. The Labour Contractor is entitled to commission and that will be paid to him once in a month. In due course, it was found that there is a shortage in the stock and the Labour Contractor has misappropriated the sale proceeds to the tune of Rs.12,82,770/-. On an enquiry conducted under Section 81 of the Tamil

Nadu Co-operative Societies Act, lapse on the part of 13 employees have been found and 6 employees played a key role.

5. On the basis of the report submitted and after conducting an enquiry under Section 81 of the Act, a criminal case has been filed and pending in C.C.No.12 of 2009 on the file of Judicial Magistrate II, Namakkal, for the charges under Sections 406, 409, 407 and 120(b) r/w 34 of IPC. A Suit has also been filed for the recovery of the said amount from the Labour Contractor. These petitioners are among the 6 persons against whom criminal proceedings have been initiated. These petitioners were employed as a Clerk and they were supposed to check the day to day affairs of the petrol bunk. For the misappropriation committed by the Labour Contractor, these petitioners cannot be made liable. Before issuing the surcharge proceedings, it has to be established that the misappropriation had been caused due to the dereliction of duty on the part of these petitioners. The judgements relied on by the petitioners lay down the law on this aspect. Further, the Labour Contractor himself has admitted that he alone is responsible for the misappropriation and the loss caused to the society. Only when there is a finding as to the carelessness or intentional co-operation on the part of these petitioners along with the Labour Contractor, surcharge

proceedings could be initiated against them. In the absence of such finding, no such action can be taken against them. It is appropriate to extract the relevant portion in the judgement of this Court in the case of ***S.Selvaraj and ors Vs. The Deputy Registrar of Co-op Societies and anr.***, reported in **2018**

(3) LW 22.

"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 unestablished 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-sustainable."

6. This Court has held in *P. Elango Vs. The Administrator,*

M.R.K.Co-op Sugar Mill and ors. (WA.No.1686 of 2013), it is held as below:-

"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:-

"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 Cooperative 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 from 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) Coopeartive 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."

7. Hence, no surcharge proceedings can be initiated by invoking Section 87 of the Tamil Nadu Co-operative Societies Act without rendering a finding as the wilful negligence and dereliction of duty committed by the employee. In this case also, the 1st respondent has not established any dereliction of duty on the part of these petitioners and had caused the loss to the society. Further, the 2nd respondent - Surcharge Officer/Joint Registrar has also not rendered any finding that these petitioners are guilty of wilful negligence and only because of that, loss to the society has been caused. For these reasons, I feel that the surcharge proceedings initiated under Section 87 of the Tamil Nadu Co-operative Societies Act, is not correct and hence, it is not assignable.

8. The facts involved in these cases and the point for consideration are similar to the matter in issue covered by the earlier judgement of this Court dated 24.03.2021 passed in CRP.(PD).No.3214 of 2016. In fact, the revision petitioner in the said case is one among the 6 persons against whom surcharge proceedings have been initiated. In the said case also, the Orders of the Principal District Judge and the Order of the 1st respondent were set aside. Hence, the same is applicable to the issues involved in these two

cases also.

In the result, these Civil Revision Petitions are allowed and the Order dated 09.12.2016 passed by the learned Principal District Judge, Namakkal, in C.M.A.C.S.Nos.36 & 37 of 2010, confirming the Order dated 30.04.2010 passed in surcharge proceedings in Na.Ka.5197/2007 by the 2nd respondent, is set aside. No costs. Connected civil miscellaneous petitions are closed.

30.07.2021

Speaking/Non-speaking
Index: Yes/No

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To

1.Principal District Court,
Namakkal.

2.The Section Officer,
V.R.Section,
High Court, Madras.

R.N.MANJULA,J.

Sni



Common Order in
C.R.P.(NPD).Nos.1073 & 1074 of 2017

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