BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:06.04.2023

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THE HON'BLE MR.JUSTICE G.K.ILANTHIRAIYAN

Crl.R.C.(MD)Nos.736 & 826 of 2017

Crl.R.C.(MD)No.736 of 2017

Michael Raj ... Petitioner

Vs.

The State through
Sub Inspector of Police,
District Crime Branch,
Dindigul District. ... Respondent

PRAYER : Criminal Revision Case filed under Sections 397 & 401 of the Code of Criminal Procedure, to call for the records and to set aside the judgment dated 18.08.2017 in C.A.No.25 of 2015 passed by the Additional Sessions Court, Dindigul District, confirming the judgment dated 11.06.2015 in C.C.No.15 of 2014 by the Chief Judicial Magistrate, Dindigul and acquit the second accused / revision petitioner by allowing the present revision petition.

For Petitioner : Mr.G.Prabhu Rajadurai

For Respondent : Mr.T.Senthil Kumar,
Additional Public Prosecutor.

Crl.R.C.(MD)No.826 of 2017

Arulgana Prakasam ... Petitioner

Vs.

The State through
The Inspector of Police,
District Crime Branch,
Dindigul District.
(Crime No.3 of 2003) ... Respondent

PRAYER : Criminal Revision Case filed under Sections 397 r/w 401 of the Code of Criminal Procedure, to call for the records relating to the judgment in C.A.No.27 of 2015 dated 18.08.2017 on the file of the learned Additional Sessions Court, Dindigul and confirming the judgment in C.C.No.15 of 2014 dated 11.06.2015 on the file of the Chief Judicial Magistrate Court, Dindigul set aside the same and allow this criminal revision petition.

For Respondent : Mr.T.Senthil Kumar,
Additional Public Prosecutor.

COMMON ORDER

These criminal revision cases have been filed to set aside the judgment in C.A.Nos.25 & 27 of 2015 dated 18.08.2017 on the file of the learned Additional Sessions Court, Dindigul and confirming the judgment in C.C.No.15 of 2014 dated 11.06.2015 on the file of the Chief Judicial Magistrate Court, Dindigul.

2.The case of the prosecution is that the accused persons failed to disburse the amount to the milk suppliers from September 1997 to March 1998 to the tune of Rs.55,557/-. They also without disbursing pongal bonus to the suppliers, falsified the records and forged their signature as if they were disbursed and thereby misappropriated pongal bonus amount of the Society and the first accused failed to hand over the Society's fund as on 31.03.1998 to the tune of Rs.26,277.47/-.

3.On the complaint, the respondent registered FIR in Cr.No.3 of 2003 for the offence punishable under Sections 408, 409 and 477(A) IPC. After completion of investigation, the respondent filed final report and the same has been taken cognizance by the trial Court in C.C.No.15 of 2014. The Prosecution had examined P.W.1 to P.W.27 and marked Ex.P.1 to Ex.P.17. On the side of the accused no one was examined and marked Ex.D.1 and Ex.D.2.

4.On perusal of oral and documentary evidence, the trial Court found A1 guilty for the offence punishable under Sections 408 and 477(A) IPC and found guilty A2 for the offence punishable under Section 409 IPC and acquitted from charge under Section 477(A) IPC. The first accused was sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs.1,000/- in default to undergo three months simple imprisonment for the offence punishable under Section 408 IPC and he was also sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs.1,000/- in default to undergo three months simple imprisonment for the offence punishable under Section 477(A) IPC. The second accused was sentenced to undergo two years rigorous imprisonment and to pay a fine of Rs.1,000/- in default to undergo three months simple imprisonment for the offence punishable under Section 409 IPC. Aggrieved by the same, both the accused filed separate appeal and both appeals were dismissed by the appellate Court. Hence, these revisions.

5.The learned counsel on record in Crl.R.C.(MD)No.826 of 2017, which was filed by the first accused, reported no instructions and also filed memo to withdraw his appearance in this revision case.

6.The learned counsel appearing for the petitioner in Crl.R.C.(MD)No.736 of 2017 would submit that the petitioner is not public servant. He was elected President and he had taken charge from March 1997 and he is not public servant. Therefore, charge under Section 409 IPC would not attract as against the petitioner. In order to attract the charge under Section 409 IPC, there is absolutely no *mens rea* in order to commit offence. In fact, the prosecution also did not charge the petitioner for conspiracy, abatement. An enquiry was conducted under Section 81 of the Co-Operatives Act. On the basis of the enquiry report, complaint was lodged and the same has been registered in Cr.No.3 of 2003 as against the two accused, in which, the petitioner is arrayed as A2. Though both the accused persons charged for these offences, no SURCHARGE proceedings were initiated as against the accused persons. No one has spoken about the violation in order to attract the offence under Section 409 IPC. Even according to the case of the prosecution, the petitioner also signed in the ledger made by A1without verifying the account and misappropriated a sum of Rs.55,557/- by falsifying the records as if, milk vendors were duly paid and without disbursing pongal bonus to the employees of the co-operative societies, made entry as if the pongal bonus was given and misappropriated the pongal bonus amount. Further A1 failed to hand over a sum of Rs.26,277.47/- to the petitioner herein while closing account on 31.03.1998. Therefore, even according to the case of the prosecution, A1 only misappropriated those amount. Only allegation as against the petitioner was that he signed the ledger without verifying the account. He would further submit that the petitioner was being President, after verifying the disbursement, signed the ledger. He cannot go into verify the signature found in the ledgers were forged one or genuine one. However, the petitioner, who is hailing from the same village, paid the milk suppliers and maintained his goodwill in the village. Once the petitioner is not a public servant, no charge was made out under Section 409 IPC. In support of his contention, he relied upon the decision of this Court reported in ***2006 SCC Online Mad 1623: (2007) 1 LW (Cri)238*** in a case of ***Arunachalam Vs. State Rep by the Inspector of Police, Vigilance and***

Anti Corruption, Vellore District wherein it was held as follows:

> *Learned counsel for the revision petitioner also submitted that the petitioner being the Ex-officio President of the Cooperative Society and with respect to the Cooperative Society the petitioner is not a "Public Servant" within the meaning of Section 2 of the Penal Code, 1860, therefore, the petitioner cannot be convicted for an offence under Section 409 IPC. Even if the case of the prosecution is accepted regarding entries of the petitioner in Ex.P.5 and P.6, the same would only got to show that the petitioner had at best negligently signed in Ex.P.5 and P.6 and therefore, cannot be convicted for an offence under Section 408 IPC along with A.1. It is further submitted that as the Board of Directors had ratified the expenditure in Exs.P5 and P.6 the prosecution will have to necessarily fail. There is also no evidence to show that the petitioner had signed in Ex.P.12 and P.13. In support of his contention, learned counsel relied on the decision of this Court in K.Somasundaram V State rep.by Inspector of Police, reported in 1990 LW (Cri) 172 wherein this Court held as thus:-*
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> > *"To find the petitioner guilty of the offence under S.409 IPC, he must be a public servant, banker, merchant or agent. There is plethora of authorities that the President of a Cooperative*

Society will not be a public servant as defined in S.21 IPC.

The Supreme Court has held that a Cooperative Society is not a statutory body because it is not created by a statute. It is a body created by an act of a group of individuals in accordance with the provisions of a statute. A Cooperative Society is, therefore, not a Corporation established by or under an Act of the Central or State Legislature. Therefore, on the enunciation of law detailed, the petitioner cannot be deemed to be a public servant. It that be so, it is not possible to affirm his conviction for the offence under S.409 IPC"

*7.*The learned counsel appearing for the petitioner also relied upon the decision of the Hon'ble Supreme Court reported in ***(1981) 3 SCC 431*** in a case of ***S.S.Dhanoa Vs. Municipal Corporation, Delhi and others,*** wherein it was held as follows:

10-A.The Super Bazaar at Connaught Place together with its 12 branches in Delhi, is not an instrumentality of the State. In a welfare State like ours, there is greater participation by Government in various commercial *activities. Some times the Government directly engages itself in such commercial activities by acquiring a monopoly in trade in the public interest. Or it may, by an Act of Legislature, establish statutory corporations like the State Trading Corporation, Life Insurance Corporation of India, the Industrial Finance Corporation, the Oil and Natural Gas Commission etc., or it may set up Government companies under s. 617 of the Companies Act, 1956, like the Hindustan Steel Limited etc. By no stretch of imagination, could it be said that the appellant was employed in connection with the affairs of the Union within the meaning of s. 197 of the Code of Criminal Procedure, 1973. The Super Bazaars are not owned by the Central Government. They are owned and managed by the Cooperative Store Limited. Pursuant to an agreement executed between the Cooperative Store Limited and the Union of India, the Central Government has advanced a loan of Rs. 40,00,000/- to the Society for establishment and management of the Super Bazaars, and the Central Government also holds more than 97% shares in the total share-holding of the Society. Clause 6 of the Agreement provides:*

> *That the incumbents of supervisory and other key posts including those of General Manager, Deputy General Manager, Finance*

> *Manager, Asst. General Manager, Purchase Manager, Sales Manager and Accounts Manager, by whatever other designation they may be known shall not be appointed or removed from their posts by the Debtor except with the prior approval of the Creditor in writing.*

The Super Bazaar at Connaught Place and at various other places are run by the Cooperative Store Limited under the control of the Ministry of Agriculture (Department of Cooperation). The incumbents of supervisory and other key posts including that of the General Manager cannot be appointed or removed without the prior approval of the Central Government. The whole purpose of cl. 6 of the Agreement in the matter of appointment of General Manager and other incumbents holding key posts is to safeguard interests of the Central Government. Legally speaking, the Super Bazaars are owned and managed by the Society and not by the Central Government and, therefore, the appellant was not employed in connection with the affairs of the Union within the meaning of s. 197of the Code of Criminal Procedure, 1973.

11.Explanation to r. 2 (a) of the All India Services (Conduct) Rules, 1968 and r. 2 (c) of the All India Services (Discipline and Appeal) Rules, 1969, on which reliance *was placed, can be of no avail. Explanation to r. 2 (a) enlarges the meaning of the expression "serving in connection with the affairs of the Union or in connection with the affairs of the State". It provides that a member of the Service whose services are placed at the disposal of a company, corporation or other organisation or a local authority by the Central Government or the Government of a State. shall. for the purpose of those rules, be deemed to be a member of the Service serving in connection with the affairs of the Union or in connection with the affairs of the State, as the case may be, notwithstanding that his salary is drawn from the sources other than the Consolidated Fund of India or the Consolidated Fund of that State. The legal fiction contained in Explanation to r. 2 (a), is for a limited purpose. This is evident by the use of the words "for purposes of these rules". Rule 2 (c) of the All India Services (Discipline and Appeal) Rules, 1969 defines Government to mean (i) in the case of a member of the Service serving in connection with the affairs of a State, or who is deputed for service in any company, association or body of individuals whether incorporated or not, which is wholly or substantially owned or controlled by the Government of a State, or in a local authority set up by an Act of Legislature of a State, the Government of that State; and (ii) in any other case, the Central Government. That again is for purposes of these rules. These provisions cannot be pressed* *into service for improving upon the language of cl. Twelfth of s. 21 of the Indian Penal Code, 1860.*

8.The learned counsel would further submit that the petitioner had no mens rea in order to attract any offence as such, he was only elected President and he was not paid any salary and because of his action no loss caused to the Society. The entire amount was misappropriated byA1. In support of his contention he relied upon the decision of this Court reported in ***2015 SCC Online Mad 14180 : (2015) 2 LW (Cri) 310*** in a case of ***R.Renu Vs. State by Inspector of Police CCIW CID, Vellore,*** wherein it was held as follows:

> *Mr. Karthick, learned counsel appearing for the petitioners would vehemently contend that the petitioners were employees of Central Cooperative Bank and they have nothing to do with the offence complained of. The petitioner in Crl.R.C. No. 555 of 2010 was employed as Circle Supervisor and the other two petitioners were employed as Field Managers. According to the counsel for the petitioners, the petitioners are not responsible for sanctioning the jewel loan but they are responsible for verifying only 25% of the jewel loan and to submit a report thereof and it is not possible to verify the genuineness or otherwise of all the transactions of the bank. The petitioners cannot be made responsible for the misappropriation*

of amount of the society especially when they are working in the Central Cooperative Bank. In the statement made under Section 161 of Code of Criminal Procedure, none of the witnesses have stated anything against the petitioners. In any event, there is no evidence made available to even suggest that the petitioners, who are employees of the Cooperative Bank, have colluded or hatched a criminal conspiracy with the other accused, who are Secretary and President of the Cooperative Society, to cause loss to the society. In the absence of any evidence to prove the mensrea or ill-intention on the part of the revision petitioners to cause loss to the society, they are entitled for discharge. The trial court failed to consider that if at all, the petitioners can be held to be guilty of negligence or slackness in discharge of their duty without any criminal intention to cause wrongful loss to the society for which criminal prosecution need not be launched against them. The petitioners are not directly involved in the transaction which resulted in causing loss to the society. In support of this contention, the learned counsel for the petitioners relied on the decision reported in the case of (C. Selvakumar vs. State through Inspector of Police, C.C.I.W. CID, Tirunelveli) 2011 1 Law Weekly 314 in which this Court had an occasion to consider that for committing an offence, two basic elements are required (i) actus reus and (ii) Mensrea. It was further held that misbehaviour or misconduct leads to disciplinary proceedings, which would not be sufficient to be construed as guilty mind or mens rea to initiate criminal proceedings. By relying on the *aforesaid decision, the learned counsel for the petitioners would contend that improper discharge of duty on the part of the petitioners cannot be a ground to launch of criminal prosecution against the petitioners and he prayed for allowing the Criminal Revision Cases.*

11.On careful perusal of the statements made under Section 161 of Cr.P.C. it is clear that no where the witnesses have implicated the petitioners or anything has been stated about their involvement in the offence. It is also not indicated in any one of the statements that the petitioners were aware of the misdeeds committed by the other accused or they involved themselves in the offence complained of. Admittedly, the petitioners are employees of the Central Cooperative Bank and their responsibility is to ensure whether sanction was accorded for disbursing jewel loan and they ae not the authority to sanction the jewel loan. The case of the prosecution is that loans have been given in fictitious name or to persons who are ineligible by the Secretary of the Society, which resulted in causing loss to the society. In such view of the matter, it has to be said that the petitioners have failed to discharge their duty in verifying the loan transactions and mechanically submitted a report to the Central Bank stating that the loan was issued in a proper manner. Therefore, as rightly pointed out by the learned counsel for the petitioners, at best, the petitioners can be fastened with liability towards improper discharge of duty and *they cannot be implicated in the criminal prosecution. It is to be mentioned that mere failure to properly discharge one's duty will not constitute a criminal offence. However, if such failure to discharge one's duty is coupled with mens rea or ill-intention to gain unlawfully, then it will constitute an offence and the offender has to be prosecuted by launching criminal prosecution. In the present case, as mentioned above, the improper discharge of duty by the petitioners is without any mens rea and therefore the petitioners are entitled for discharge. In fact, surcharge proceedings have been taken against the petitioners for the improper discharge of the duty on their part. However, that will not be a ground for proceeding against the petitioners with criminal prosecution. Therefore, as rightly pointed out by the learned counsel for the petitioners, at best, the irregular or improper discharge of duty by the petitioner will not constitute any offence as contemplated under the Indian Penal Code and criminal prosecution against them is not warranted. This is more so that none of the statement given by the witnesses implicated the petitioners with the offence complained of. At least there is no evidence to suggest that the petitioners were aware of the misdeeds committed by the Secretary and others of the society.*

12. In this background, it is worthwhile to refer to the decision relied on by the learned counsel for the petitioners in the case of (C. Selvakumar vs. State through Inspector of Police, *C.C.I.W. CID, Tirunelveli) 2011 1 Law Weekly 314 wherein this Court had an occasion to consider an identical case wherein enquiry was ordered under Section 81 of the Tamil Nadu Cooperative Societies Act against the petitioners therein, who were employed in Cooperative Bank for tthe offence of misappropriation of the funds of the society and for causing loss thereof. The petitioners therein contended that their responsibility is to supervise the work done by other officials and when discrepencies were noted, it could at best be construed as an improper discharge of work and it does not warrant initiation of criminal prosecution. This Court, following the decision of the Honourable Supreme Court in Union of India and others vs. J. Ahmed, AIR 1979 SC 1022, held that misbehaviour or misconduct leads to disciplinary proceedings and it would not be sufficient to be construed as guilty mind or mens rea to initiate a criminal proceedings. In Para Nos. 16 to 18, this Court held as follows:-*

> *"16. In Union of India and others vs. J. Ahmed reported in AIR 1979 SC 1022, the Honourable Supreme Court held as follows:-*
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> *"The High Court was of the opinion that misconduct in the context of disciplinary proceedings means misbehaviour involving some form of guilty mind, mens rea. We find it difficult to subscribe to this view because gross or habitual negligence in performance of duty may not involve*

mens rea but may still constitute misconduct for disciplinary proceedings.

17. It is a settled proposition of law that to constitute an offence, two basic elements are required 1. 'acus reus' and 2. 'mens rea'. In the abovesaid decision of the Hon'ble Supreme Court, it is made clear that misbehaviour or misconduct leads to disciplinary proceedings which would not be sufficient to be considered as guilty mind or mens rea to initiate a criminal proceeding. It is an admitted fact the petitioner herein was working in a supervisory capacity as Field Manager of Central Co-operative Bank, hence, in the absence of conspiracy or any favour relating to conspiracy between the petitioner and the accused/A1 to A3, who subsequently paid the amount, it cannot be decided that there was mens rea to initiate criminal proceeding against the petitioner/A8, apart from the findings of the departmental proceeding.

9.That apart, the petitioner was only President and he was never disbursed any amount to the milk vendors. In support of his contention he relied upon the decision of this Court reported in ***2020 SCC Online Mad 21124*** in a case of ***S.Renganathan Vs. State by the Inspector of***

Police and another, wherein it was held as follows:

7.After registration of FIR, the first respondent completed the *investigation and filed final reports and the same have been taken cognizance and pending for trial. The only ground raised by the learned counsel appearing for the petitioner before this Court is that, once the surcharge proceeding initiated by the second respondent is set aside by the Cooperative Tribunal/District Court, Cuddalore, the criminal proceedings cannot be proceeded further as against the petitioner. In this regard, he relied upon the order passed by this Court in the similar issue in Crl.O.P.No.13330 of 2017 dated 05.11.2019, in the case of P.Parimaladevan Vs. State by The Inspector of Police, which reads as follows :-*

"5. In the case of T.Elengo vs. State represented by the Inspector of Police, Commercial Crime Investigation Wing-CID, Cuddalore and another [Crl.O.P.Nos.1734 to 1737 and 19846 of 2017, dated 15.11.2017], this Court has held that an employee in a Supervisory capacity cannot be held responsible for criminal action. Relevant portion of the order reads as follows: '7.The main ground on which the petitioner is implicated is that he had not properly supervised and administered the entire collection and therefore, he is liable for the criminal offences. It is not in

dispute that the amounts alleged to have been misappropriated were collected from the depositors by the first accused and the same was remitted to the society even before the FIR was filed. It is further not in dispute that the period of misappropriation as per the investigation is between 1998 and 2008, during which period the petitioner herein was in-charge as a Supervisor of the society between 10.10.2002 and 31.10.2004. Even during the relevant period, the petitioner was also working as Special Officer of 8 societies and was the supervising Cooperative Sub Registrar of 7 other societies. Insofar as the Nevyali Co-operaitve HousingSociety is concernd, the petitioner was employed as a Supervisor during the relevant period and deputed as in- charge of the Society as additional charge. On a perusal of the FIR and charge sheet, it is seen that the basic ingredients for the alleged offences are conspicuously absent. Apart from that I am unable to comprehend as to how any loss could have occurred to the Society, in view of the fact ath the first accused had remitted the entire amount to the society even before the FIR came to be registered.

At the most, the petitioner can be implicated for negligence and as such, it cannot be said that the petitioner had conspired for the purpose of misappropriating the money or that he had the mens-rea to commit any of the other offences.

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9.The same proposition has beentaken by another judgment in G.Selvakumar v. State through Inspector of Police, C.C.I.W.CID, Tirunelveli reported in 2011 (2) MLJ (Crl.) 608. Following is the extract of the said proposition:- 7.It is a settled proportion of law that to constitute an offence, two basic elements are required, 1.'actus reus' and

2.'mens rea'. In the aforesaid decision of the Hon'ble Supreme Court, it is made clear that misbehaviour or misconduct leads to disciplinary proceedings, which would not be sufficient to be construed as guilty mind or 'mens rea' to initiate a criminal proceeding. It is an admitted fact that the petitioner herein was working in a supervising capacity as Field Manager of Central Cooperative Bank, hence, in the absence of conspiracy or any factor relating to conspiracy between the petitioner and the accused A1 to A3, who subsequently, paid the amount, it cannot be decided that there were mens rea to initiate criminal proceeding against the petitioner/A8, apart from the findings of the departmental proceeding.

10.In the light of the aforesaid judgments and by correlating the case of the second respondent that there was lapses on the part of the petitioner in his capacity as a supervisor, I am constrained to hold that there could be no conspiracy between the petitioner and the other accused or mens-rea to commit the offences.'

6. Likewise, this Court, in a batch of cases, in the case of Anbalagan vs. State represented by the Inspector of Police, C.C.I.W., CID., Thiruchirappalli and another, [Crl.O.P.(MD)Nos.20309 to 20320 of 2016 and 20309 to 20320 of 2016, dated 20.07.2018] held so in the following manner: '12. Clause 8 of the Tamil Nadu Cooperative 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 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 excercise 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." From the aforesaid provision, it is 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 malafide 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 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."*

14. In S.Gunasekaran Vs. State represented by the Inspector of Police (supra), 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."

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16. 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 petitioner herein.'

7. The aforesaid decisions are self explanatory and the same principle has been reiterated in various other decisions of this Court as well. As such, the over all legal *position is that when an employee of the Society is found liable for Supervisory lapse, the same will not constitute any criminal action against him. Likewise, if such an employee has been exonerated in the proceedings under Section 87 of the said Act, it has to necessarily be implied that he had neither misappropriated nor fraudulently retained the money or other property, nor is guilty of breach of trust or willful negligence. The offences for which the petitioner has now been charged with, are in effect, the very same overt acts for which he has been exonerated in the enquiry under Section 87 of the said Act."*

10.The learned Additional Public Prosecutor appearing for the respondent would submit that there are totally two accused in this case, in which, petitioner is arrayed as A2. A1 war serving as Secretary of the Society and the petitioner was serving as President of the Society. Admittedly, the second accused without verifying the records, colluded with A1, signed the ledger and thereby misappropriated amount, which was to be paid to the milk vendors. In fact, the second accused admitted his liabilities and paid the entire amount to the milk vendors. Insofar as A1 is concerned, who was working as Secretary, he only falsified the records by forging the signature of the employees, as if the entire amount was disbursed to them and thereby, misappropriated to the tune of Rs. 55,557/-. He also misappropriated pongal bonus as if the same was disbursed to the employees and he also failed to hand over a sum of Rs. 26,277.47/- to A1 while closing the account as on 31.03.1998. Therefore, enquiry was conducted under Section 81 of the Cooperatives Societies Act and found they misappropriated those amount. Hence, complaint was lodged and they were charged for the offence punishable under Section 408, 409 and 477(A) IPC. Therefore, both the Courts below rightly convicted and sentenced the accused and it does not warrant any interference by this Court.

11.Heard both sides and perused the materials available in the records.

12.It is seen that there are totally two accused in this case and both were charged for the offence punishable under Sections 408, 409 and 477(A) IPC. According to the case of the prosecution, A1 and A2 were working as Secretary and President to the Society, there was misappropriation by forging signature of the milk vendors and by falsifying the records. On the complaint, enquiry was conducted and as per the enquiry report, they were held liability for the misappropriation of the amount from the Society. On the basis of the enquiry report, complaint was lodged and the same was registered in Cr.No.3 of 2003 and final report also filed.

13.As far as A1 is concerned, admittedly he was working as Secretary to the Society and failed to disburse any amount to the milk vendors, who supplied milk to the Society. That apart, he forged their signature and falsified the records as if they were paid, which was endorsed by the second accused, who is the President of the Society. Further, A1 also forged the signature of the employees and falsified the records as if the pongal bonus were disbursed to the employees on 02.02.1998. He also failed to hand over balance amount of Rs. 26,477.47/- while closing the account on 31.03.1998 to the second accused. The prosecution had examined the Deputy Registrar, who ordered for enquiry, as P.W.1. As per direction of P.W.1, P.W.2 conducted enquiry under Section 81 of the Cooperatives Society Act. The enquiry report revealed that A1 misappropriated the Society's amount and falsified the records as if the amounts were already disbursed to the employees. As far as A1 is concerned, he signed the ledgers without verifying the records and signatures found in the ledgers, which were produced by A1. The milk vendors were examined and they were categorically deposed that they were not paid after supplying milk to the Society. However, thereafter, they were paid by the second accused. Hence, charges under Section 408, 477(A) are clearly proved by the prosecution and both the Courts below rightly convicted the first accused and it does not warrant any interference by this Court. Accordingly, Crl.R.C.(MD)No.826 of 2017, which was filed by the first accused, is dismissed.

14.Insofar as petitioner/A2 in Crl.R.C.(MD)No.736 of 2017 is concerned, he was elected President of the Society. He was acted as honorary President and he was not paid any salary. In this regard, the learned counsel for the petitioner relied upon the decision of this Court reported in ***2006 SCC Online Mad 1623: (2007) 1 LW (Cri)238*** in a case of ***Arunachalam Vs. State Rep by the Inspector of Police, Vigilance and Anti Corruption, Vellore District***, in which this Court held that the

Co-operative Society is not statutory body because it is not created by a statute. It is a body created by an act of a group of individuals in accordance with the provisions of a statute. A Cooperative Society is, therefore, not a Corporation established by or under an Act of the Central or State Legislature. Therefore, on the enunciation of law detailed, the petitioner cannot be deemed to be a public servant. If that be so, it is not possible to affirm his conviction for the offence under Section 409 IPC. This Court also held that the Vice President of the Cooperative Society is not a public servant as defined under Section 21 IPC and he cannot be held guilty for offence under Section 409 IPC. This Court further held that the prosecution cannot be allowed to shift their stand from stage to stage to sustain the conviction on the accused by treating him as an agent of the Society. In the case on hand, the petitioner being Ex-Officio President of the Cooperative Society and not being public servant, who countersigned the vouchers, there is no material to show that the petitioner either directly or indirectly involved himself in being a party to the offence of criminal breach of trust or criminal misappropriation. That apart, the role of the petitioner either directly or indirectly in misappropriating the amount is not established by the prosecution. The entire conviction imposed on the petitioner only based on the resolution. The resolution cannot be a basis for the conviction under Section 409 IPC. Therefore, the prosecution failed to prove that the petitioner either directly or indirectly interfere in the misappropriation. It is relevant to extract Section 409 IPC, which read as follows:

> 409. Criminal breach of trust by public servant, or by banker, merchant or agent.— *Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

15.The prosecution also failed to prove that the petitioner had *mens rea* in order to misappropriate the funds of the Society. Admittedly, the petitioner was elected President of the Society. In the absence of any evidence to prove *mens rea* or ill-intention on the part of the petitioner to cause loss to the Society, he is entitled for discharge. Both the Court below failed to consider that if at all, the petitioner can be held to be guilty of negligence or slackness in discharge of his duty without any criminal intention to cause wrongful loss to the Society for which criminal prosecution need not be launched against him. The petitioner is not directly involved in the transaction which resulted in causing loss to the milk vendors.

16.Therefore, in view of the above, the conviction as against the second accused/petitioner in Crl.R.C.(MD)No.736 of 2017 for the offence punishable under Section 409 IPC cannot be sustained and it is liable to be set aside. Accordingly, the conviction and sentence imposed for the offence punishable under Section 409 IPC is hereby set aside and the petitioner is acquitted from all the charges and the petition in Crl.R.C.(MD)No.736 of 2017 is allowed.

06.04.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
gns

G.K.ILANTHIRAIYAN,J.

gns

To

1.The Additional Sessions Court,
Dindigul District.

2.The Chief Judicial Magistrate,
Dindigul.

3.The Sub Inspector of Police,
District Crime Branch,
Dindigul District.

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

Crl.R.C.(MD)Nos.736 & 826 of 2017

06.04.2023