BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 12.06.2024

DELIVERED ON : 08.07.2024

CORAM

THE HON'BLE MR.JUSTICE K.MURALI SHANKAR

W.P.(MD)No.2449 of 2021
and
W.M.P.(MD)No.2037 of 2021

R.Selvam ... Petitioner

Vs.

1.The Joint Registrar Co-operative Societies,
Collectorate Campus,
Sethupathi Nagar,
Ramanathapuram.

2.The Deputy Registrar Co-operative Societies,
Madurai Main Road,
Paramakudi,
Ramanathapuram District.

3.Q305 Perunkarai Primary Agricultural
Cooperative Society,
through its Secretary,
Perunkarai Post,
Paramakudi Taluk,
Ramanathapuram District. ... Respondents

PRAYER : Writ Petition filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorari to call for the records from the second respondent pertaining the impugned order in Na.Ka.No. 1837/2019 Sa.Pa. in Tha.The. in No.1/2019-20, dated 24.03.2020 passed by the second respondent and quash the same as illegal.

For Petitioner : Mr.C.G.Pethanaraj

For Respondents : Mr.S.Kameswaran
Government Advocate (Civil Side)

ORDER

The Writ Petition is directed against the order dated 24.03.2020 passed by the second respondent directing the petitioner and another to pay Rs.2,40,230/- with interest at 17.5% p.a., from the date on which loss was caused to the Society til the payment.

2. Admittedly, the writ petitioner was working as Secretary of the third respondent Society. The case of the petitioner is that the third respondent Society used to borrow loan from the Ramanathapuram District Central Co-operative Bank and used to give jewel loans to its

members, that since some of the jewel loan members have not repaid the loan amount, notice was sent by the third respondent directing them to repay the loan amount, failing which the auction sale would be taken, that the President of the Society orally informed the petitioner that the loan members are his relatives and agriculturists and restrained her to take further action, that the jewel auction was conducted on 16.12.2017 and the loan amount with interest was recovered, that a balance of Rs.2,40,203/- is yet to be recovered towards the interest, that the said balance amount can be recovered from the members by way of legal action under Section 90 of the Tamil Nadu Co-operative Societies Act, that the second respondent, on the basis of the special audit report, ordered for Section 82 Inspection regarding the jewel auction, that the Inspection Officer conducted enquiry and submitted a report stating that due to the delayed auction sale in the jewel loans, the Society had suffered a loss of Rs.2,40,203/-, that the alleged loss is neither wilful nor wanton and there is no violation of any Act or Rules by the petitioner, that the auction sale could not be made due to various reasons, that the second respondent, on the basis of the report, has issued surcharge notice under Section 87 of TNCS Act and called for explanation from the petitioner and the President of the Society, that the petitioner has submitted his detailed explanation on 24.03.2020, that the second respondent conducted hearing on 24.03.2020, that the second respondent without giving sufficient opportunity and without considering the petitioner's explanation, has passed an erroneous order on 24.03.2020, that the petitioner has not committed any loss as alleged in the surcharge proceedings and that since it is purely the business loss and the said amount can be recovered from the borrowers, the impugned order which is legally unsustainable, is liable to be set aside.

3. The second respondent has filed counter affidavit denying the petitioner's averments stating that the Cooperative Audit Officer, Madurai, after conducting audit under Section 80 of the Tamil Nadu Cooperative Societies Act submitted a special report pointing out that a sum of Rs.2,40,203/- had occurred as financial deficiency to the Society due to the belated auction of the jewels pledged in the overdue loans, that the second respondent, in order to ascertain the irregularities had ordered for an inspection under Section 82 of the said Act, that the Inspection Officer submitted his report dated 03.03.2019 wherein also he

had stated that the Society was facing a financial loss of Rs.2,40,203/- because of the belated jewel loan auction proceedings for the jewel loans issued during the period from 21.03.2013 to 09.10.2014, that Section 82 Inspection Officer had fixed the joint and several liability upon the petitioner and the President of the Society and recommended for surcharge action under Section 87 of the said Act, that the financial loss was caused by the baleted auction of the pledged jewels in the jewel loans which had become overdue and the delay was caused due to the gross wilfull negligence of the petitioner, that the interest recovered from the borrowers is the only income for the Society, out of which the entire establishment and the contingency charges have to be met and as such, the financial loss caused by the petitioner had damaged the entire financial infrastructure of the Society and that therefore, the petition is liable to be dismissed.

4. The learned Counsel for the respondents has also raised technical objections that the petitioner without complying with all statutory requirements had approached this Court without exhausting the appeal remedy, that the petitioner ought to have approached the District

Court challenging the impugned order passed by the second respondent and that therefore, the writ petition itself is not maintainable.

5. At this juncture, it is necessary to refer the judgment of the Hon'ble Supreme Court in ***Krishan Lal Vs. Food Corporation of India and others*** reported in ***(2012) 4 SCC 786*** and the relevant passage is extracted hereunder;

> *“11. It is true that there was an arbitration clause in the agreement executed between the parties. It is equally true that, keeping in view the nature of the controversy, any claim for refund of the amount deposited by the appellant could be and ought to have been raised before the Arbitrator under the said arbitration. The fact, however, remains that the High Court had entertained the writ petition as early as in the year 2002 and the present appeals have been pending in this Court for the past ten years or so. Relegating the parties to arbitration will not be feasible at this stage especially when the proceedings before the Arbitrator may also drag on for another decade. Availability of an alternative remedy for adjudication of the disputes is, therefore, not a ground that can be pressed into service at this belated stage and is accordingly rejected.”*

6. This Court in ***Jai Enterprises, Chennai Vs. Commissioner of Customs (Appeals), Chennai and others*** reported in ***(2006) 3 MLJ 740*** has held as follows:

> *"8. Since the writ petition had been filed on 13.09.2005 and the same had been admitted and interim order had been passed in favour of the petitioner, in the considered view of this Court, it may not be equitable to reject the writ petition on the ground of availability of alternative remedy by way of an appeal to the Tribunal. Therefore, the contention of the learned ACGSC regarding the maintainability of the writ petition is not acceptable."*

7. In the case on hand also, the writ petition came to be filed as early as in January 2021 and an order of interim stay was also granted while admitting the same. Hence, the present contention of the learned counsel appearing for the respondents regarding the maintainability of the writ petition, at this point of time, cannot be accepted.

8. Now turning to the merits of the case, the main contention of the respondents is that since the petitioner and the President have caused loss to the Society to the tune of Rs.2,40,203/-., the second respondent has rightly passed the impugned order directing them to make the loss good for the third respondent Society.

9. The learned Counsel for the petitioner would submit that the President of the third respondent Society has filed a writ petition in W.P.(MD)No.125 of 2021 challenging the order passed by the second respondent dated 03.12.2020 disqualifying the President under Section 36 of the Tamil Nadu Co-operative Societies Act and that this Court has allowed the writ petition, vide order dated 18.01.2024.

10. It is necessary to refer the following passages in the order dated 18.01.2024, passed in W.P.(MD)No.125 of 2021:(D.Ponselvi, President(Removal/Disqualification), Perungarai Primary Agricultural Cooperative Credit Society, Perungarai, Ramanthapuram District Vs. The Registrar of Co-operative Society, Kelpauk, Chennai and two others)

"The petitioner had not misappropriated or fraudulently retained any money belonging to the society. She cannot also be said to be guilty of breach of trust. Even according to the authority, she was guilty of only gross negligence. It is true that Section 36 of the Act provides for permanent disqualification if the person concerned was guilty of gross or persistent negligence in connection with the conduct and management of the affairs of the society. The expression "gross negligence" has been defined in P.RAMANATHA AIYAR'S ADVANCED LAW LEXICON in the following terms :

"Gross Negligence. Negligence beyond a reasonable degree. Such negligence is comparable to recklessness...

Negligence marked by total or nearly total disregard for the rights of others and by total or nearly total indifference to the consequences of an act. [S.3, Indian Trusts Act (2 of 1882)].

Gross negligence means some culpable default, not arising merely from want of foresight or mistake of judgment. AIR 1970 MP 39.

The expression "gross negligence" denotes a high degree of careless conduct and depends on the particular case. It is not necessary that there should be *a fraud or something denotes a fraud to bring the case within the meaning of the word "gross negligence". [MLJ : FYD (01-50), V.2, p.1022: AIR (Vol.32) 1945 Nag.111]. [CP Local Funds Audit Act (1933), S.10]*

"Gross negligence", "sometimes called "wilful blindness" is the same thing as 'negligence', with the addition of a vituperative epithet"(per ROLFE, B.Wilson V. Brett, 11MW 115, 116)."

*Black's Law Dictionary talks of active negligence, advertent negligence, casual negligence, collateral negligence, comparative negligence, concurrent negligence, contributory negligence, criminal negligence, culpable negligence, gross negligence, hazardous negligence etc., Gross negligence has been defined as "lack of even slight diligence or care". The difference between gross negligence and ordinary negligence is one of degree and not of quality. It is a conscious, voluntary act or omission in reckless disregard of a legal duty. It is also termed wanton or willful negligence.The Madras High Court in the decision reported in **AIR 1977 Mad 92 (Subbammal v. Tenkasi Cooperative Urban Bank)** held that wilful negligence means, intentional and purposeful omission and mere negligence, however gross it may be, may not be sufficient to attract the provision for surcharge. Thus according to the learned Judge (Ramanujam, J.),* *there is a distinction between wilful negligence and gross negligence. The expression "wilful negligence" is found in Section 87 of the Act which provides for taking surcharge proceedings. But the definitions found in standard law lexicons indicate that the distinction between the two is without difference. Though these two expressions, namely, gross negligence and wilful negligence semantically bear the same meaning, I hold that the manner of application of the standard to a given fact situation is bound to vary. A higher standard would be required in a disqualification proceeding under Section 36 of the Act compared to a surcharge proceeding under Section 87 of the Act. The authorities as well as the courts will have to be mindful of the fact that the law-makers have employed different expressions. In other words, the same act or omission, while may not invite the consequence of disqualification, can still attract an order of surcharge. I come to such a conclusion because an order of disqualification has graver consequences compared to an order of surcharge.*

7.In the case on hand, the board had the duty to recover the jewel loans. The Society had passed the resolution in the year 2015 itself directing the Secretary of the Society to bring the jewels to auction. Though the learned Senior Counsel would contend that it was the

Secretary who had failed to take action and that the President cannot be blamed, I cannot endorse the said defence. While it is true that it is the duty of the Secretary to implement the resolution passed by the Board, the Board is equally obliged to ensure that this duty is discharged.

8.Whether the omission on the part of the Board would constitute gross negligence is a point for consideration. The negligence must be comparable to recklessness and the element of culpability must be present. The borrowers were agriculturists. The creditor is a co- operative society. Therefore, the society cannot be blamed for giving some leverage to the borrowers. The auction was held in the year 2017. Even according to the respondents, the Society was able to recover a sum of Rs.9,37,235/-. The entire principal amount had been recovered. The loss of Rs. 2,40,203/- represents the interest component for the period from 2015 to 2017. It is not as if the petitioner was in sole and exclusive management of the society. It is not as if she failed to act even after being reminded of the duty. In these circumstances, the omission would not meet the requirement of "gross negligence" for the purpose of Section 36 of the Act.

11. The above observations and the decision of this Court in the case of ***D.Ponselvi*** above referred are squarely applicable to the case on hand. Admittedly, it is not the case of the respondents that the petitioner had committed any misappropriation or retained any money or property belonging to the Society fraudulently nor committed any breach of trust. Even according to the respondents, the delay for conducting jewel auction was due to the gross negligence of the petitiner.

12. As rightly observed by the learned Judge in the order above referred, the entire principal amount due to the third respondent had already been recovered and the loss now alleged by the Society of Rs.2,40,203/- would only represent the interest component. As already pointed out, the borrowers were agriculturists and the third respondent is a co-operative Society and as such, the action of the Secretary of the Society in conducting jewel auction belatedly cannot be taken as a wilful negligence and they cannot be blamed for giving leverage to the borrowers.

13. Considering the above and also taking note of the order of this Court above referred, this Court has no hesitation to hold that the impugned order cannot be sustained and as such, the same is liable to be set aside.

14. In the result, the Writ Petition is allowed and the impugned order in Na.Ka.No.1837/2019 Sa.Pa. in Tha.The. in No.1/2019-20, dated 24.03.2020 passed by the second respondent is set aside. Consequently, the connected Miscellaneous Petition is closed. There shall be no order as to costs.

08.07.2024

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

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To

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K.MURALI SHANKAR,J.

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PRE-DELIVERY ORDER MADE IN

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