

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.11.2013

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR

Writ Petition No.28488 of 2013

M.P.No.1 of 2013

M.Murugan

... Petitioner

Vs.

1. The Co-operative Sub Registrar/Field Officer cum Surcharge Enquiry Officer, Madhanur, Gudiyatham Taluk, Vellore District.
2. The President, Chinnakallupalli Primary Agricultural Co-operative Bank, Chinnakallupalli Village, Vaniyambadi Taluk, Vellore District.
3. The Deputy Registrar of Co-operative Societies, Tirupattur Circle, Tirupattur, Vellore District. .. Respondents

Writ Petition filed under Article 226 of Constitution of India, praying for a Writ of Certiorari, to call for the records, relating to the surcharge show cause notice, Tha Thi 2/2013-14 Sa.Pa. dated 25.09.2013 of the 1st respondent, issued under Section 87 of the Tamil Nadu Co-operative Societies Act, 1983.

For Petitioner : Mr.S.Venkataraman

For Respondents : Mr.L.P.Shanmughasundaram,
Spl. Govt. Pleader (Co-op.)

ORDER

Being aggrieved by the notice in the surcharge proceedings, made in Tha Thi 2/2013-14 Sa.Pa. Dated 25.09.2013, of the Co-operative Sub Registrar/Field Officer cum Surcharge Enquiry Officer, Madhanur, Gudiyatham Taluk, Vellore District, 1st respondent herein, has issued under Section 87 of the Tamil Nadu Co-operative Societies Act, 1983 (hereinafter referred to as "the Act"), calling upon the petitioner, the erstwhile Sub-Registrar, Chinnakallupalli Primary Agricultural Co-operative Bank, Chinnakallupalli Village, Vaniyambdi Taluk, Vellore, to submit his explanation within 15 days from the date of notice, the present writ petition has been filed.

2. According to the petitioner, he had worked as Sub-Registrar in the abovesaid Bank, for the period between 26.07.2001 and 01.07.2003 and thereafter, between 25.11.2003 and 13.04.2004. An enquiry under Section 81 of the Act came to be ordered by the Deputy

Registrar, Tirupattur Circle, on 25.01.2005 and pursuant to the report, dated 03.08.2005, a show cause notice, dated 18.04.2006, has been issued in the Surcharge Proceedings, by one Mr.M.M.Subramanian, the then Co-operative Sub Registrar/Field Officer, Jolarpet. The petitioners and others were alleged to have failed to carry out proper supervision, which enabled the Secretary of the Society to misappropriate Rs.1,02,980/-.

3. The petitioner has further submitted that he was summoned to appear for an enquiry on 25.05.2006, by a memo, dated 18.05.2006, by the Enquiry Officer. On receipt of the same, the petitioner has sent a representation, seeking production of the supporting materials, to enable him to submit his explanation. He has appeared in the enquiry on 25.05.2006 and submitted a detailed representation, demanding documents.

4. Thereafter, the Enquiry Officer has issued a fresh summons, posting the enquiry on 31.01.2006. According to the petitioner, notice of enquiry was received by the petitioner on 31.05.2006 and hence, he

could not attend the enquiry, on the fixed date. Therefore, he sent a representation on 01.06.2006 and sought for an alternative date of enquiry. Now, after nearly seven years, a fresh show cause notice, dated 25.09.2013, has been issued by the 1st respondent.

5. Assailing the correctness of the impugned notice, Mr.S.Venkataraman, learned counsel for the petitioner submitted that the alleged occurrence was between the period 2001 and 2004, when the petitioner was deputed to work as the Special Officer. According to him, a fresh surcharge proceedings has been initiated only on 25.09.2013, after a lapse of seven years and therefore, no action can be taken, as per the 1st proviso to Section 87 of the Act.

6. Learned counsel for the petitioner further submitted that citing the order of this Court made in W.P.No.15758 of 2006, dated 22.06.2012, surcharge proceedings are now reviewed. The above said writ petition, came to be allowed, setting aside the surcharge proceedings with liberty to hold a fresh enquiry, with a further condition that the petitioner therein, should not raise the plea of limitation.

According to him, the order made in the above writ petition, is not a "judgment in rem" and it should be read as "judgment in personam" and therefore, it can be applied only to the petitioner therein, and should not have been extended to the other delinquents.

7. It is the contention of the learned counsel for the petitioner that the petitioner has not challenged the earlier proceedings, on the grounds, including bias or mala fide, raised by the writ petitioner in W.P.No.15758 of 2006 and that there was no order, preventing the enquiry officer to proceed against the petitioner and other delinquents. In the abovesaid circumstances, 1st proviso to Section 87, is attracted and therefore, the present impugned proceedings have to be set aside. Excepting the above, no other points are urged by the learned counsel for the petitioner.

Heard the learned counsel for the petitioner as well as Mr.L.P.Shanmugasundaram, learned Special Government Pleader (Co-operatives) and perused the materials available on record.

8. Before advertizing the facts of the case, Section 87 of the Tamil Nadu Co-operative Societies Act, 1983, is extracted:

"87. Surcharge--(1) Where in the course of an audit under section 80 or an inquiry under section 81 or an inspection or investigation under section 82 or inspection of books under section 83 or the winding-up of a society, it appears that any person who is or was entrusted with the organisation or management of the society or any past or present officer or servant of the society has misappropriated or fraudulently retained any money or other property or been guilty of breach of trust in relation to the society or has caused any deficiency in the assets of the society by breach of trust or wilful negligence or has made any payment which is not in accordance with this Act, the rules or the by-laws the Registrar himself or any person specially authorised by him in this behalf, of his own motion or on the application of the board, liquidator or any creditor or contributory may frame charges against such person or officer or servant and after giving a reasonable opportunity to the person concerned and in the case of a deceased person, to his representative who inherits his estate, to answer the charges, make an order requiring him to repay or restore the money or property or any part thereof with interest at any such rate as the Registrar or the person authorised as aforesaid thinks just or to contribute such sum to the assets

of the society by way of compensation in respect of the misappropriation, misapplication of funds, fraudulent retainer, breach of trust or wilful negligence or payments which are not in accordance with this Act, the rules or the by-laws as the Registrar or the person authorised as aforesaid thinks just:

Provided that no action shall be commenced under this sub-section after the expiry of seven years from the date of any act or omission referred to in this sub-section.

Provided further that the action commenced under this sub-section shall be completed within a period of six months from the date of such commencement or such further period or periods as the next higher authority may permit but such extended period or periods shall not exceed six months in the aggregate."

9. Materials on record shows that Mr.M.M.Subramanian, the then Co-operative Sub Registrar/Field Officer, Jolarpet, has issued show cause notices, in Surcharge 12/2005-06 Sa.Pa., dated 18.04.2006, under Section 87 of the Act, to seven persons, including the petitioner, who was the then Sub-Registrar, Chinnakallupalli Primary Agricultural Co-operative Bank, Chinnakallupalli Village, Vaniyambdi Taluk, Vellore.

10. Materials on record further discloses that after the receipt of notice, the petitioner seemed to have made representations, dated 20.05.2006 and 25.05.2006 respectively, seeking certain documents. In the said representations, he has also sought for copies of the enquiry report, under Section 81 of the Act and the other documents.

11. Perusal of the order made in W.P.No.15758 of 2006, dated 22.06.2012, shows that one of the co-delinquents, Mr.G.Srinivasan, a former Secretary of the Chinnakallupalli Primary Agricultural Co-operative Bank, Chinnakallupalli Village, Vaniyambdi Taluk, Vellore, had challenged the above show cause notice, issued in Surcharge 12/2005-06 Sa.Pa., dated 18.04.2006, under Section 87 of the Act, on the grounds, inter alia, that surcharge proceedings have been entrusted to a person, who had earlier functioned as a Special Officer of Chinnakallupalli Primary Agricultural Co-operative Bank and requirements of fairness and justice, demand that the surcharge proceedings be conducted by a person, other than the said officer. Bias has been alleged on the then Enquiry Officer, under Section 87 of the Act. Considering the rival submissions, this Court, at Paragraphs 5 to 8, has passed the following

orders,

"5. Considering the rival submissions, this Court is of the view that though it cannot be stated as a general rule that the officer placed in-charge of the surcharge proceedings necessarily would be prejudiced against the petitioner because he happened to be the special officer during the alleged wrong doing of the petitioner, following the principle that justice should not only be done, but also should be seen to be done, this Court would allow this petition.

6. Accordingly, the writ petition stands allowed and the proceedings 12/2005-06 Sa.Pa., dated 18.04.2006 stand quashed. No costs.

7. It is now open to the second respondent to appoint a fresh officer for the purpose of conducting surcharge proceedings under Section 87 of the Tamil Nadu Co-operative Societies Act, 1983. This Court clarifies that since the proceedings stand delayed owing to the interim order passed by this Court in W.P.No.15758 of 2006, the petitioner now cannot raise any plea under first proviso to Section 87 of the Tamil Nadu Co-operative Societies Act, 1983.

8. This Court directs the respondents to initiate surcharge proceedings afresh in keeping with this order and to complete the same as expeditiously as possible."

12. It is the further contention of the learned counsel for the petitioner that even assuming that action has been taken well within the period of limitation, continuation of the said action, so taken, can be only with the permission of the higher authorities and in such circumstances, the extended period or periods shall not exceed six months in the aggregate. According to him, initially, action has been taken in the year 2006 by issuance of a surcharge notice and thereafter, there was no progress. As the order made in W.P.No.15758 of 2006, dated 22.06.2012, filed by Mr.G.Srinivasan, is not applicable to the writ petitioner and in the absence of any permission from the higher authorities to continue with the surcharge proceedings, after six months, from the date of commencement, the impugned show cause, has to be set aside.

13. In the case on hand, an inquiry came to be ordered on 25.01.2005. The Co-operative Sub Registrar/Field Officer has been appointed as the Enquiry Officer to initiate surcharge proceedings under Section 87 of the Act. Following a report, under Section 81 of the Act, which has been drawn on 03.08.2005, the Enquiry Officer, has issued notice, dated 18.05.2006, under Section 87 of the Act. Action initiated

under Section 87 of the Act, is within seven years from the date of any act or omission, referred to in the said Section. When a show cause notice was issued to the petitioner and 6 others, one of them, viz., G.Srinivasan, the then Secretary of the 2nd respondent-Bank, has filed W.P.No.15758 of 2006, alleging bias and prejudice, on the ground that requirements of fairness and justice, demand that the surcharge proceedings be conducted by a person, other than such officer, because he happened to be a special officer, during the alleged wrong doing of the petitioner therein. Therefore, following the principles of law, justice should not only be done, but also should be seen to be done, W.P.No.15758 of 2006, has been allowed, with liberty to the Deputy Registrar of Co-operative Societies, Tirupattur Circle, Vellore District, to appoint a fresh officer for the purpose of conducting surcharge proceedings under Section 87 of the Tamil Nadu Co-operative Societies Act, 1983. While doing so, this Court has observed that proceedings, which stood delayed, owing to the interim order passed by this Court in W.P.No.15758 of 2006 and therefore, the petitioner therein cannot raise any plea, under the first proviso to Section 87 of the Tamil Nadu Co-operative Societies Act, 1983.

14. In the present writ petition, it is the case of the petitioner that as he had not opposed or challenged the surcharge proceedings initiated by the then Co-operative Sub Registrar/Field Officer, Jolarpet, Mr.M.M.Subramanian, the judgment rendered in W.P.No.15758 of 2006, dated 22.06.2012, can be treated only as a "judgment in personam" and not as "judgment in rem". In **C.L.Pasupathy v. Engineer in Chief (WRO)** reported in **2009 (2) MLJ 491**, this Court has considered the expressions, "judgment in 'in rem' or a judgment 'in personam'", as follows:

"27.Historically the term judgement "in rem" was used in Roman law in connection with actio but not in connection with "jus actio in personam". The effect of "actio in rem" was to conclude against all mankind, but the effect of "actio in personam" was to conclude with regard to the individual only. After the Roman forms of procedure had passed away, the term "in rem" survived to express the effect of an action "in rem" and gradually, it came to import "generally".

28. The judgements "in rem" signified as judgements which are good against all mankind and "judgements in personam" signified the judgements which are good only against the individuals who are parties to them and their privies. The point adjudicated upon in a "judgement in rem" is always as to the status of the "res" and is conclusive

against the world as to that status, whereas in a judgement "in personam", the point whatever it may be, which is adjudicated upon, not being as to the status of the "res" is conclusive only between the parties or privies. Reference can be made to Firm of Radhakrishnan Vs. Gangabai, 1928 S 121, Ballantyne vs. Mackinson 1896 2 QB 455.

29. Courts have held that, "Judgement in rem", operates on a thing or status rather than against the person and binds all persons to the extent of their interest in the thing, whether or not they were parties to the proceedings. The judgement "in rem", as distinguished from judgement "in personam" is an adjudication of some particular thing or subject matter, which is the subject of controversy, by a competent Tribunal, and having the binding effect of all persons having interests, whether or not joined as parties to the proceedings, in so far as their interests in the "res" are concerned. In determining whether a judgement is "in rem", the effect of the judgement is to be considered and it is tested by matters of substance, rather than by measure of any particular draft or form.

A final judgement on the merits in a particular proceeding, "in rem" is an absolute bar to subsequent proceedings founded on the same facts and a judgement "in rem" may be pleaded as a bar to another action of the same subject matter, if its effect is to merge a distinct cause of action, but not otherwise. The judgement "in rem" operates

as a bar or estoppel only to the "res" or matter within the jurisdiction of the court and does not prevent a subsequent action for personal relief, which could not be obtained in the first action. Thus with respect to the "res or status", a "judgement in rem" has to be conclusive and binding upon "all the world" that is, on all the persons, who may have or claim any right or interest in the subject matter of litigation, whether or not, they were parties to or participants in the action, atleast to the extent, that it adjudicates or establishes a status, title or res, constituting the subject matter of the action, a "judgement in rem" will operate as a estoppel, in a subsequent action in respect of the points or questions adjudicated."

15. The issue, as to whether, the then Co-operative Sub Registrar/Field Officer, Jolarpet, Mr.M.M.Subramanian, who had earlier functioned as a Special Officer, Chinnakallupalli Primary Agricultural Co-operative Bank, Chinnakallupalli Village, Vaniyambadi Taluk, Vellore District, would be a proper person, to proceed with the enquiry initiated under Section 87 of the Tamil Nadu Co-operative Societies Act, as the requirements of the fairness and justice demand that surcharge proceedings be conducted by a person, other than the said officer and whether continuation of the surcharge proceedings would also prejudice

the petitioner therein, or the other co-delinquents also, in the light of the decision, stated supra, this Court is of the view that when this Court has come to the conclusion, on the requirements of fairness and justice, there is every likelihood of prejudice, the said principle has to be applied to other co-delinquents also, though there is no separate challenge by others.

16. Perusal of the order made in W.P.No.15758 of 2006, dated 22.06.2012, shows that further progress in the surcharge proceedings have been put on hold by an interim order of this Court. The surcharge proceedings have been initiated against seven persons, including the petitioner, the 3rd delinquent, the then Sub-Registrar of the 2nd respondent-Bank. W.P.No.15758 of 2006 filed by the 1st delinquent, Mr.G.Srinivasan, Secretary of the 2nd respondent-Bank, came to be dismissed on 22.06.2012.

17. Charge No.1 is levelled against the delinquents 1, 2, 3, 4 and 5. Charge No.5 is levelled against the delinquents 1, 3 and 4. As stated supra, 1st delinquent, Mr.G.Srinivasan, has filed W.P.No.15758 of 2006,

and obtained an interim order not to conduct surcharge proceedings. When the 1st delinquent is alleged to have committed irregularities, along with others, in respect of certain items and when the role of each co-delinquent, viz., 1, 2, 3, 4 and 5, in respect of Charge No.1 and the delinquents 3 and 4, in respect of Charge No.5, along with the 1st delinquent, Mr.G.Srinivasan, in the surcharge proceedings, have to be fixed, this Court is of the view that certainly, the then Co-operative Sub Registrar/Field Officer, Jolarpet, who had been appointed as Enquiry Officer, in surcharge proceedings and who had issued a show cause notice, dated 18.04.2006, cannot be expected to proceed with the enquiry, independently, against the other co-delinquents, alleged to have committed the irregularities mentioned in Charges 1 and 5. The role of each delinquents in the alleged commission of any acts or omissions, resulting in misappropriation and revenue loss to the society, is inter-linked and certainly, it would not be desirable to conduct an independent enquiry, against the petitioner and other co-delinquents, and fix responsibility and liability.

18. As regards Charge No.1, delinquents 1, 2, 3, 4 and 5 have

been charged for disbursement of a portion of the loan amount and not taken any steps to recover the subscription and that there is also an allegation of misappropriation of funds. In respect of Charge No.5, the allegation against delinquents 1, 3 and 4, is causing loss to the tune of Rs.7,780/-. Allegations of preparation of bogus loan application and loss of the abovesaid amount, are also alleged. It has also been alleged that registers were not properly perused.

19. Therefore, in respect of the abovesaid charges, either a joint or several liability, or both, have to be fixed, against the delinquents, stated supra, for their role in the commission or omission of acts, leading to misappropriation or revenue loss to the 2nd respondent-Bank. In the abovesaid circumstances, when this Court has granted, interim stay of surcharge proceedings in W.P.No.15758 of 2006, it cannot be contended that the 1st respondent ought to have conducted the surcharge proceedings, in respect of other co-delinquents, de hors, the interim stay granted in the above writ petition.

20. In view of the specific charges made against the other

delinquents, including the petitioner, de-linking the enquiry of the surcharge proceedings, under Section 87 of the Tamil Nadu Co-operative Societies Act, insofar as the writ petitioner alone, who had filed W.P.No.15758 of 2006, alone is concerned and to proceed further, in respect of others, is not possible. As stated supra, when the enquiry officer has been restrained by an order of interim stay and ultimately, when this Court, vide order in W.P.No.15758 of 2006, dated 22.06.2012, has set aside the show cause notice, dated 18.04.2006, issued in the surcharge proceedings under Section 87 of the Act, the order made in W.P.No.15758 of 2006, filed by Mr.G.Srinivasan, then Secretary (dismissed) of the 2nd respondent-Society, has to be applied to the other co-delinquents also, no matter, whether, there was any independent challenge by the other co-delinquents, by filing separate writ petitions.

21. Though Mr.S.Venkataraman, learned counsel for the petitioner submitted that at the instance of the present writ petitioner, the surcharge proceedings were not stalled and that the petitioner was willing to extend his co-operation for the continuance of surcharge proceedings No.12/2005-06 Sa.Pa., dated 18.04.2006, no materials have

been placed before this Court to substantiate the averments that the writ petitioner was willing to participate in the surcharge proceedings initiated in the year 2006. Even taking it for granted that the writ petitioner had expressed his willingness to participate in the surcharge proceedings, in view of the interim orders made in W.M.P.No.15536 of 2006 in W.P.No.15758 of 2006, dated 03.04.2008, Mr.M.M.Subramanian, Co-operative Sub Registrar/Field Officer, Jolarpet, cannot proceed with the enquiry, in the surcharge proceedings, wherein, the petitioner and other co-delinquents, have been alleged to have committed certain irregularities, jointly and responsibility or liability cannot be fixed against any individual alone, unless the enquiry is conducted by giving opportunity to all the delinquents, who have been alleged to have committed the irregularities, referred to in Charges 1 to 5. As stated supra, Mr.G.Srinivasan, who filed W.P.No.15758 of 2006, had stalled the whole proceedings, on the ground of likelihood of bias in the enquiry proceedings, which principle of law, equally applies to the case of the petitioner also.

22. The surcharge proceedings had been stayed in

W.M.P.No.15536 of 2006 in W.P.No.15758 of 2006, dated 03.04.2008 and that the main writ petition, came to be disposed of on 22.06.2012, setting aside the proceedings No.12/2005-06 Sa.Pa., dated 18.04.2006. Thereafter, the Deputy Registrar of Co-operative Societies has appointed a Special Officer, to be the Enquiry Officer, under Section 18 of the Tamil Nadu Co-operative Societies Act, to enquire into the charges.

23. The allegation was between the period 2001 and 2004. Enquiry Report under Section 81 of the Act, has been submitted on 03.08.2005. Proceedings have been initiated under Section 81 of the Act and show cause notices, under Section 87 of the Act, have been issued. There is no infringement of the provision under Section 87(1) of the Act. The 2nd proviso to Section 87 of the Act, states that the action commenced under this sub-section shall be completed within a period of six months from the date of such commencement or such further period or periods as the next authority may permit, but such extended period or permits shall not exceed six months in the aggregate. In the case on hand, W.P.No.15758 of 2006, has been disposed of on 22.06.2012. Enquiry Officer has been appointed on 30.07.2013 and as per the

abovesaid provision, the enquiry should be completed within six months. Moreso, in the light of the observations of this Court in W.P.No.15758 of 2006, dated 22.06.2012, that, "since the proceedings stand delayed owing to the interim order passed by this Court in W.P.No.15758 of 2006, the petitioner now cannot raise any plea under first proviso to Section 87 of the Tamil Nadu Co-operative Societies Act, 1983." is equally applies to the writ petitioner herein and other co-delinquents also.

24. As the acts and omissions alleged against the petitioner and other co-delinquents have to be enquired by giving opportunity to all concerned, the enquiry against the writ petitioner alone cannot be dissected or isolated to arrive at any decision, regarding the responsibility or liability, for the act of misappropriation, in causing revenue loss to the tune of Rs.1,75,861.30. In the light of the above discussion, this Court is not inclined to quash the impugned notice. This Court is of the view that whenever there is allegation involving more than one delinquent, involving a chain of events or alleging joint responsibility, it is always desirable to have a common enquiry, so that the evidence adduced could be properly assessed by the enquiry officer

in fixing the responsibility and liability.

25. In the result, the Writ Petition is dismissed. No costs.
Consequently, connected Miscellaneous Petition is also closed.

04.11.2013

Index: Yes

Internet: Yes

Note to Office:

Issue order copy on 13.11.2013

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To

1. The Co-operative Sub Registrar/Field Officer cum Surcharge Enquiry Officer, Madhanur, Gudiyatham Taluk, Vellore District.
2. The President, Chinnakallupalli Primary Agricultural Co-operative Bank, Chinnakallupalli Village, Vaniyambadi Taluk, Vellore District.
3. The Deputy Registrar of Co-operative Societies, Tirupattur Circle, Tirupattur, Vellore District.

S. MANIKUMAR, J.

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