

(2011) 06 MAD CK 0426

In the Madras High Court

Case No : Writ Petition No. 47776 of 2006

A.R. Shanmugha Murthy

APPELLANT

Vs

The Principal District Judge/ Co-operative Tribunal and Others

RESPONDENT

Date of Decision : 06-06-2011

Acts Referred:

Tamil Nadu Civil Services (Discipline and Appeal) Rules, 1955 — Rule 17, 80

Citation : (2011) 06 MAD CK 0426

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : M.S. Palaniswamy, for the Appellant; D. Geetha, Additional Government Pleader for 2nd Respondent, K. Balu, for 3rd Respondent in WP Nos. 49118 and 47776/2006, G. Sankaran, for 3rd Respondent in WP 50020/2006 and D. Seenivasan, for 3rd Respondent in WP 7764 of 2007, for the Respondent

Final Decision : Allowed

Judgement

P. Jyothimani, J.—These writ petitions arise from the orders passed by the Co-operative Tribunal u/s 152 of the Tamil Nadu Co-operative Societies Act, 1983 (for brevity, "the Act") confirming the orders of the Deputy Registrar of Co-operative Societies (Housing) passed in the surcharge proceedings initiated u/s 87 of the Act.

2.1. The Petitioner in W.P. Nos. 47776 and 50020 of 2006 and 7764 of 2007, who is one and the same, was in additional charge as Co-operative Sub Registrar/ Special Officer of the Tittakudi Taluk Co-operative Housing Society between 4.10.1995 and 14.7.1996, and from 1.11.1996 to 17.4.1997. Between 15.7.1996 and 31.10.1996, M. Jayaraman (Petitioner in W.P. No. 49118 of 2006) was in additional charge of the Tittakudi Taluk Co-operative Housing Society as Special Officer.

2.2. The Tittakudi Taluk Co-operative Housing Society was constituted for purchasing lands, forming house sites and selling the plots to its members. Insofar as W.P. No. 47776 of 2006 is concerned, according to the Petitioner

therein, as the said Housing Society was inactive, as per the direction of the Deputy Registrar of Co-operative Societies (Housing), Cuddalore, he has identified 95200 Sq. Ft. of gramanatham lands in Perangiam Village belonging to one R. Krishnasamy Padayachi and as per the advice of the second Respondent, he proceeded to negotiate with the owner for purchase and the price was fixed at Rs. 17.50 per Sq. Ft..

2.3. It is stated that since the Tittakudi Taluk Co-operative Housing Society was not having sufficient funds, the second Respondent has advised the Petitioner (AR. Shanmugamurthy) to borrow money from the Tamil Nadu Electricity Board Employees Co-operative Building Society, Swami Sagachananda Co-operative House Sites Society, Gingee Co-operative Housing Society, Tindivanam Co-operative House Building Society, Vanur Taluk Co-operative Housing Society, and Padaleeswarar Co-operative Building Society on interest basis. Based on the advise, it is stated that he has placed the matter before the general body of the Tittakudi Taluk Co-operative Housing Society, which has passed an unanimous resolution to purchase lands from R. Krishnasamy Padayachi and form layout, authorizing him to get permission from the Registrar of Co-operative Societies (Housing), Chennai.

2.4. In W.P. No. 47776 of 2006, the Petitioner has sent a letter to the Registrar of Co-operative Societies (Housing), Chennai on 1.12.1995 through the second Respondent seeking permission, which was accorded on 4.1.1996 with various conditions, namely:

- (i)that the general fund of the society should not be utilised for the purchase of land;
- (ii)that the vendor should get permission from Director, Urban Development to form house sites;
- (iii)that the guideline value and the market value should be furnished;
- (iv)that the engineer's certificate should be obtained; and (v)that the legal opinion with regard to the marketable title of the land should be obtained from the local Government Pleader.

2.5. It is stated that in W.P. No. 47776 of 2006, the Petitioner has obtained loan from Tindivanam Co-operative Building Society and the said society has paid the vendor directly a sum of Rs. 4 Lakhs as advance and an agreement was entered into with the vendor. The time for completing the contract was one year. It is stated that in W.P. No. 47776 of 2006, the Petitioner himself has entered into a contract, as there will be delay in getting permission from the Registrar and by that time the price will be increased. According to him, there was no material loss to the society because of the contract of sale and it was conducted in the best interest of the Tittakudi Taluk Co-operative Housing Society and the conditions imposed by the Registrar of Co-operative Societies (Housing), Chennai were strictly adhered to.

2.6. It is stated that, in the meantime, R. Krishnasamy Padayachi died and therefore, the consent had to be obtained from his legal heirs and funds had to be mobilized for payment of balance of purchase money and hence, there was delay in the execution of the sale deed. It is stated that as per the direction of the second Respondent, the Petitioner has also borrowed amount from the said six societies and completed the sale transactions on 12.3.1997, 19.3.1997, 4.4.1997 and 9.4.1997. According to him, the permission was granted by the second Respondent for forming house sites on 27.11.1995.

2.7. It is stated that the Petitioner was however suspended from service on 18.4.1997 on the ground that there is technical irregularity committed by the Petitioner in W.P. No. 47776 of 2006 by utilizing the general fund of the Tittakudi Taluk Co-operative Housing Society for purchasing the land in contravention of the permission granted by the Registrar.

2.8. The second Respondent who has granted permission for forming house sites, according to the Petitioner, has directed an enquiry to be conducted u/s 81 of the Act and the main charge in W.P. No. 47776 of 2006 was that the Petitioner has utilized the general fund of the society to purchase the property and caused loss to the interest of the society. The Enquiry Officer appointed by the second Respondent is stated to have found that there was no general fund available with the Tittakudi Taluk Co-operative Housing Society, however he has stated that the general fund has been utilized by the Petitioner in W.P. No. 47776 of 2006, even though the entire sale consideration was paid through the borrowing from other co-operative societies, as per the direction of the second Respondent.

2.9. In W.P. No. 47776 of 2006, the Petitioner was placed under suspension and a charge was framed against him on 31.1.2001 and enquiry was conducted by the Joint Registrar of Co-operative Societies, Villupuram. The charges were that (i) as a Special Officer, the Petitioner in W.P. No. 47776 of 2006 has given wrong information to his superiors and formed house sites, and (ii) the Petitioner in W.P. No. 47776 of 2006 has utilized the general fund of the society and purchased the property, apart from seven more charges. It is stated that the Joint Registrar of Co-operative Societies has found that the Petitioner in W.P. No. 47776 of 2006 was not guilty of the charges and exonerated him. However, the second Respondent, on receiving the report of enquiry conducted u/s 81 of the Act, ignored the same and passed a surcharge order directing the Petitioner in W.P. No. 47776 of 2006 to pay a sum of Rs. 3,32,074/-.

2.10. Aggrieved by the said order, the Petitioner in W.P. No. 47776 of 2006 has filed an appeal u/s 152 of the Act in C.M.A. No. 7 of 2000 before the first Respondent and the said appeal was dismissed on 31.7.2006. Exasperated by the said order of the Tribunal, W.P. No. 47776 of 2006 has been filed.

3.1. Likewise, in respect of the Vanur Taluk Co-operative House Building Society, which is the third Respondent in W.P. No. 50020 of 2006, the Petitioner (AR. Shanmugha Murthy) is stated to have taken additional charge on 19.6.1996. The

Petitioner in W.P. No. 49118 of 2006 (M. Jayaraman), the Co-operative Sub Registrar, Cuddalore Housing Society was in additional charge of the Vanur Taluk Co-operative House Building Society between 27.3.1995 and 18.6.1996 and during that time, he has identified 7 Acres of land in Survey Nos. 118/1A, 116/4A, 116/1 and 43/1A2 at Tiruchitrambalam Kottu Road and proposed for purchase of the land and division of the same into house sites for sale to its members, after obtaining approval from the general body of the Vanur Taluk Co-operative House Building Society and placing it before the Registrar of Co-operative Societies (Housing) and getting his permission.

3.2. After obtaining permission, the Petitioner in W.P. No. 49118 of 2006 (M. Jayaraman) entered into an agreement with the owners of the land on 13.1.1996 and paid advance of Rs. 1 Lakh and subsequently paid Rs. 10,81,000/- as part payment of purchase money to the vendors and the said money was borrowed by M. Jayaraman from various housing societies as per the direction of the second Respondent.

3.3. The Petitioner in W.P. No. 49118 of 2006 (M. Jayaraman) was relieved of his additional charge and the Petitioner (AR. Shanmugha Murthy) took additional charge on 19.6.1996 and afterwards, the Petitioner on coming to know about the agreement dated 13.1.1996 took further steps to pay the balance purchase money. There was pressure since, as per the agreement, the contract has to conclude by 13.1.1997 and out of the total sale consideration of Rs. 26,04,013/-, the Petitioner in W.P. No. 49118 of 2006 (M. Jayaraman) has paid Rs. 11,81,000/- and the Petitioner, on the direction of the second Respondent, has borrowed Rs. 1 Lakh from Tindivanam Co-operative House Building Society and paid the same to the vendors. He has also used some of the fixed deposits and share capital to pay the vendors. The elected Board thereafter paid the balance sale consideration being Rs. 9,34,013/- to the vendors during February-March, 1999 and got the sale deeds registered in the name of Vanur Taluk Co-operative Housing Society on 9.2.1999, 5.3.1999 and 10.3.1999.

3.4. It is stated that as per the letter of the Registrar of Co-operative Societies, the general fund of the society should not be utilized for the purchase of land, even though there was no mention about the source from which the money has to be obtained. The term "general fund" has not been defined under the Act or the Rules framed there under or in the bye-laws of the society and no authority has defined and stated as to what constitutes a general fund.

3.5. An enquiry under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules was initiated by the Joint Registrar of Co-operative Societies, Villupuram. Even though the Enquiry Officer found the Petitioner in W.P. No. 50020 of 2006 not guilty of the charges levelled against him, the Joint Registrar of Co-operative Societies has held the Petitioner in W.P. No. 50020 of 2006 guilty of contravention of the directions of the Registrar. Though the Joint Registrar has found that there was no loss to the Vanur Taluk Co-operative Housing Society because of the said transaction, the Joint Registrar has found that the land was

purchased for Rs. 26,40,013/-and admittedly it will fetch a price of Rs. 28,14,000/-and therefore, there was no loss to the society and the society has in fact enjoyed a profit of Rs. 9,42,119/-. However, it was found that there was disobedience of the orders of the higher authorities.

3.6. An enquiry was ordered by the second Respondent u/s 81 of the Act and the Enquiry Officer has submitted report on 10.9.1997 more than four months after the order, even though the limitation under the Act for filing the report is three months. Therefore, according to the Petitioner in W.P. No. 50020 of 2006, based on the time barred report no action can be taken. Even though the Enquiry Officer in the report has stated that he has completed the enquiry on 31.8.1997, the report was actually submitted after the expiry of the period of limitation.

3.7. As against the finding given against the Petitioner in W.P. No. 50020 of 2006 u/s 87 of the Act, he has filed C.M.A. No. 39 of 2000 before the first Respondent and the same was dismissed on 31.7.2006.

4.1. In respect of the third Respondent in W.P. No. 49118 of 2006, viz., Tittakudi Taluk Co-operative Housing Society, which is the third Respondent in W.P. No. 47776 of 2006, the Petitioner in W.P. No. 49118 of 2006 (M. Jayaraman) was in additional charge as Special Officer between 15.7.1996 and 31.10.1996 and prior to him, the Petitioner in other writ petitions (AR. Shanmugha Murthy) was holding the additional charge as Special Officer and he initiated steps to purchase lands from Ramasamy Padayachi and entered into agreement with the permission of the second Respondent and under his guidance. In the meantime, AR. Shanmugha Murthy was transferred and the Petitioner in W.P. No. 49118 of 2006 (M. Jayaraman) was given additional charge and he continued the proceedings and paid the land owner a sum of Rs. 5 Lakhs and that amount was paid from the fixed deposits made by various persons. The balance amount of Rs. 1,80,000/-was paid from previously existing fixed deposits.

4.2. It is stated that as per the bye-laws of the Tittakudi Taluk Co-operative Housing Society, he was authorised to raise the funds from share subscriptions, loans from government or other financial agencies approved by the Registrar of Co-operative Society (Housing), fixed deposits with the bank, and donation, etc. received by the bank. Therefore, according to him, the payment has been made in accordance with the bye-laws of the Tittakudi Taluk Co-operative Housing Society by utilizing the amount in the fixed deposits. It is also stated that the term "general fund" has not been defined.

4.3. An enquiry u/s 81 of the Act was conducted and surcharge order u/s 87 of the act was passed against the Petitioner for using the general fund. It is stated that in the enquiry under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules with respect to the same set of charges, the Joint Registrar of Co-operative Societies, Cuddalore, a superior officer to the second Respondent, has found that the Petitioner was not guilty and discharged him. In the proceedings of the Joint Registrar, there was a finding that the second

Respondent has inspected the Tittakudi Taluk Co-operative Housing Society and gave permission to the previous Special Officer, AR. Shanmugha Murthy, for formation of housing sites. The Joint Registrar has also found that there was no monetary loss caused and on the other hand, there has been gain to the Tittakudi Taluk Co-operative Housing Society.

4.4. However, in the surcharge proceedings, the Petitioner in W.P. No. 49118 of 2006 was held responsible for the loss of Rs. 66,666.65. Against the same, the Petitioner filed C.M.A. No. 7 of 2000 before the first Respondent, who has dismissed the appeal on 31.7.2006.

5.1. Similarly, during the tenure of the Petitioner in W.P. No. 7764 of 2007 (AR. Shanmugha Murthy) as Special Officer of the Tindivanam Co-operative Housing Society between 8.6.1995 and 31.10.1996, he has taken steps to purchase lands for the purpose of the benefit of the members and he has identified the properties adjacent to G.S.T. Road and contacted the owners Safiyulla Basha and Malliga Begam and offered to purchase the property for Rs. 17,29,073/-with the approval of the General Body of the Tindivanam Co-operative Housing Society. He sought permission of the Registrar and the same was granted on 21.8.1995. He has paid Rs. 3,10,000/-to vendors and entered into an agreement with them on 14.8.1995. He purchased the properties from the vendors under two sale deeds on 15.3.1996 and under various sale deeds on 11.4.1996, 26.7.1996 and 18.9.1996. He has also sold various plots and the last plot was sold on 21.3.1997 and a total sale consideration of Rs. 19,09,305/-was collected by the Tindivanam Co-operative Housing Society and he has submitted the account to show that the society earned a profit of Rs. 1,79,332/-from the sale of house sites and there was no loss to the Tindivanam Co-operative Housing Society.

5.2. However, the second Respondent ordered enquiry u/s 81 of the Act and there was no mention about the date of the order either in the enquiry report or in the surcharge order. It is mandatory that the enquiry should be completed within three months from the date of order for enquiry and without stating the date of ordering enquiry, the enquiry report was signed on 29.5.1998. The surcharge enquiry was taken up by the second Respondent and an order was passed on 13.12.1999 imposing a surcharge of Rs. 2,81,284/-. The main ground for levying surcharge being that the general fund of the society has been used and as per bye-law 45(1)(2) of the Tindivanam Co-operative Housing Society, the land must be purchased only out of the funds generated by the advance payment by members/prospective buyers. It is stated that the term "general fund" has not been defined.

5.3. It is stated that the society can raise funds from the share subscriptions, loans from Government/Federation/Housing and Urban Development Corporation/ any other financial corporation approved by the Registrar, etc. and therefore, the Petitioner in W.P. No. 7764 of 2007 is not liable for any surcharge.

5.4. As against the surcharge proceedings passed against the Petitioner in W.P.

No. 7764 of 2997, the Petitioner has filed appeal in C.M.A. No. 33 of 2000 to the first Respondent and the appeal was dismissed on 31.7.2006. Aggrieved by the same, W.P. No. 7764 of 2007 is filed.

6. These writ petitions are filed on the grounds that in spite of the fact that no actionable wrong has been committed by the Petitioners, there has been a finding as if the Petitioners are liable for surcharge u/s 87 of the Act; that in spite of the finding that there is no loss to the societies, the surcharge has been imposed on the Petitioners, which is against the decision of this Court in *Gabriel v. The Deputy Registrar (Housing), Cuddalore, 2003 (3) CTC 23*; that there is no bar for the purpose of diverting the amount from the fixed deposits, since the bye-laws of the societies enable the same; that in the absence of any definition of the term "general fund" anywhere in the Act, surcharge proceedings cannot be initiated against the Petitioners; and that there is no finding that the Petitioners were negligent in respect of the activities of the societies.

7.1. In the counter affidavit filed by the third Respondents, it is stated that even though the second Respondent has recommended the proposals for formation of housing sites and the Registrar has accorded permission subject to the condition that the general fund of the society should not be utilised for the purchase of land, the Petitioners have utilised the general fund and the same amounts to wilful negligence of duty causing loss to the assets of the societies. It is stated that the writ Petitioners have intentionally violated the directions given by the Registrar of Co-operative Societies.

7.2. It is stated that on the enquiry conducted u/s 81 of the Act, there was a finding that the Petitioners have committed wilful negligence and caused loss to the assets of the societies and therefore, they are liable for surcharge proceedings u/s 87 of the Act.

7.3. It is stated that even if the term "general fund" is not defined, when there is a specific direction by the first Respondent not to use the general fund, it is the duty of the Petitioners to obey the same and according to the third Respondents, the same has been considered by the first Respondent in proper perspective and there is no reason to interfere with the said orders. It is further stated that the first Respondent has heard the appeals in accordance with the provisions of the CPC and elaborate orders have been passed and no interference is warranted.

8.1. The main contention of the learned Counsel for the Petitioners is that in respect of the Petitioner in W.P. No. 7764 of 2007, even though there are many charges levelled, it is the sixth charge which relates to interest loss that has been proceeded against and other charges are not proceeded with and as per the sixth charge, in respect of the purchase of the plot, there is a loss of interest to the tune of Rs. 2,79,370/-. According to the learned Counsel, there was actually no interest loss as on 23.9.2005.

8.2. It is also submitted that in respect of the third Respondents/ societies, there was no general fund as such in existence and therefore, the finding as if there is

a violation of the direction of the Registrar of Co-operative Societies has no meaning.

8.3. It is his submission that in respect of the Petitioner in W.P. No. 49118 of 2006, the charges framed under Rule 17(b) of the Tamil Nadu Civil Services (Discipline and Appeal) Rules have been dropped and the Joint Registrar has found that there is no substance in the charges.

8.4. Mr.M.S. Palaniswamy, learned Counsel appearing for the Petitioners would submit by placing reliance on the decisions in K. Ajay Kumar Gosh and Ors. v. Tribunal for Co-operative Cases (District Judge of Kanyakumari District), Nagercoil and another, 2009 4 MLJ 992 and S. Pitchumani v. The Deputy Registrar, Co-operative Societies and Ors., 2010 (4) CTC 13 that unless there is an actionable wrong done by a reprehensible or reckless or callous conduct, surcharge order cannot be passed u/s 87 of the Act and therefore, it is his submission that the first Respondent/Tribunal has failed to consider the same.

9. In W.P. No. 7764 of 2007, it is seen that there has been a specific finding in the enquiry conducted u/s 81 of the Act that the Petitioner being a Special Officer has facilitated payment of more salary to one Sekar, who was admittedly in service, and there is also a finding that the amount has been paid based on the resolution of the General Body.

However, the first Respondent/Tribunal, in the impugned order, has found that the Petitioner cannot take shelter under the resolution passed by the General Body, which is not valid in law.

10. The first Respondent has also relied upon Bye-Law Nos. 45(1) and 45(2) of the third Respondent/society, which are as follows:

45(1). The Board may undertake the work of buying or acquiring land either from or through Government or otherwise for formation of housing colony by allotting house sites to the members within the area of operations of the society, if the Board is satisfied that such a scheme will facilitate the development of the society and that sufficient number of members are coming forward to secure house sites so as to make the scheme economical and advantageous to the members and to the society by incurring such expenditure as may be necessary or pay advance for the purchase of land, within the approval of the general body and with prior permission of the Registrar.

(2) The Board shall arrange for collection of the probable cost of a house site in advance from every one of the members intending to join the scheme before embarking upon it. The land should be purchased only from the advance amount so collected. The Board shall also obtain a written undertaking from such members agreeing to pay to the society any further cost that may arise while fixing the price of the whose land or while acquiring land under the Land Acquisition Act as also the cost of forming lay outs after providing for roads and other amenities.

and held that as per the bye-laws, the amount should have been obtained from the members in advance and in such circumstances, the purchase of the lands not from the advance amounts collected from the members, but otherwise, is against law, especially when the first Respondent has imposed a condition that from the general fund no purchase should be effected.

11. The Tribunal has also found that some of the plots were not sold on the ground that there was no demand. However, since there were no particulars available, the Tribunal has come to a conclusion that loss has been caused to the society. The Tribunal has also found that Section 87 of the Act is having wider amplitude and came to a conclusion that any amount spent against the Act, Rules or the Bye-Laws should be considered as wilful negligence and misappropriation.

12. The Tribunal has also referred to the circular issued by the Registrar of Co-operative Societies which states "causing any deficiency in the assets of the society by breach of trust or wilful negligence" and held that the conduct of the Petitioners is against the law.

13. By relying upon the judgment of the Supreme Court in P.N. Chockappan and Others Vs. The Special Tribunal for Co-operative Cases, High Court Campus and Others, , which was as per Section 71(1) of the Old Act, the Tribunal has found that the Petitioners were negligent. The Tribunal has also held that the decision in Gabriel v. The Deputy Registrar (Housing), Cuddalore, 2003 (3) CTC 23 is not applicable, since there was no finding by the Tribunal in that case about the loss caused to the society, but in the case on hand, there has been a specific finding that loss has been caused to the society and therefore, factually it is different.

14. In respect of W.P. No. 47776 of 2006, the Tribunal has given an additional finding relating to the case of the Petitioner that every sale has been effected at the advice of the second Respondent saying that if at all any officials of the department connived, it is for the department to take action as against them and the Petitioners cannot put forth the same as a ground to wriggle out of their liability u/s 87 of the Act.

15. In fact, the Tribunal has found that in respect of these cases additional documents were filed to show that the second Respondent/ Deputy Registrar of Co-operative Societies has been advising about the sale of the lands. However, the Tribunal has rejected the receipt of the additional documents on the basis that they are photocopies and such documents must be furnished from the side of the Respondents.

16. While considering the case of the Petitioners that there has been no loss and on the other hand, there has been gain to the third Respondents/societies, the Tribunal has come to a conclusion that there was no comparative calculation with interest loss incurred by the societies and therefore, it was held that the Petitioners are liable.

17. It is relevant to note at this stage that as per the circular issued by the Registrar of Co-operative Societies regarding disposal of surcharge proceedings u/s 87 of the Act, while defining about the causing any deficiency in the assets of the society by breach of trust or wilful negligence, it is specifically stated as follows:

(iv) Causing any deficiency in the assets of the society by breach of trust or wilful negligence:

The general loss sustained in the normal course of business of the society or the loss suffered on account of sale of goods in good faith by reduction in price to avoid further loss may not come under the purview of Section 87. The fact that an institution has incurred business loss by itself cannot form the basis for initiating action u/s 87 of the Act. Only the deficiency to the assets of the society caused by breach of trust or wilful negligence by the member of the board, officer or servant of the society will come under the purview of Section 87.

18. It is admitted that in all these cases the third Respondent societies concerned have passed resolutions for the purpose of purchasing the lands. However, in the proceedings of the Registrar of Co-operative societies dated 4.1.1996, there is one condition which is as follows:

1. nkW;go epyj;jpid fpuak; bra;a r";fg; bghJepjpapid ve;jbthU neh;tpYk; gad;gLj;jf;TlhJ/

19. It is not in dispute that the term "general fund" has not been defined anywhere. It is the case of the Petitioners in these cases that the third Respondent societies are not having any general fund and in some of the cases, the sale consideration has been paid from and out of the deposits in the bank accounts. The charge against the Petitioners nowhere relates to misappropriation or breach of trust. The question to be decided is as to whether under the surcharge proceedings wilful negligence is a prima facie requirement. In this regard, it is relevant to extract Section 87(1) of the Act, which is as follows:

Section 87. Surcharge: (1) Where in the course of an audit u/s 80 or an inquiry u/s 81 or an inspection or investigation u/s 82 or inspection of books u/s 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 bye-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, liquidatory 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 the 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 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, mis-application of funds, fraudulent retainer, breach of trust or wilful negligence or payments which are not in accordance with this Act, the Rules or the bye-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.

20. The Bye-Laws of the Tindivanam Co-operative Housing Society Limited, the third Respondent in W.P. No. 7764 of 2007, while defining about the source of funds, states as follows:

19. (A) Sources of funds: The society may raise funds from the following sources:

(1) Share subscriptions

(2)(a) Loans from Government,

(b) Loans from Federation,

(c) Loan from Housing and Urban Development Corporation either directly or through the Federation,

(d) Loans from any other financing agency approved by the Registrar.

(3) Fixed Deposits, Recurring Deposits or Provident Deposits from members, as per the regulations framed for that purpose by the Board with the approval of the Registrar.

(4) Entrance Fees and other fees, as approved by the Registrar.

(5) Donations, gifts, grants subsidies or any benefactions as approved by the Registrar. Note: The society should maintain fluid resources according to the standard and form laid down in Rule 80, if the society accepts deposits.

Therefore, it is the case of the Petitioners that since the source of the funds includes the fixed deposit, with a bona fide intention, the fixed deposit amount has been utilized for the purpose of purchase of lands based on the resolutions passed by the societies.

21. That apart, as stated above, it is reiterated that it is not even the charge levelled against the Petitioners that they have committed misappropriation with

guilty intention. In the surcharge proceedings u/s 87 of the Act, there must be a categoric finding that there is wilful and deliberate misconduct on the part of the officer and in the absence of such a finding, it is not possible to mulct any monetary responsibility even if the loss has been caused to the co-operative society and that has been the judicial precedent throughout.

22. A Division Bench of this Court, to which I am a party, in *K. Ajay Kumar Gosh and Ors. v. Tribunal for Co-operative Cases (District Judge of Kanyakumari District), Nagercoil and Anr.*, 2009 4 MLJ 992, while referring to the plethora of decisions on this issue, held that to pass surcharge order u/s 87 of the Act, the officer 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. It is useful to extract paragraphs [18] to [20] of the said judgment, which are as follows:

18. Reliance was also placed on *P.N. Chockappan and Others Vs. The Special Tribunal for Co-operative Cases, High Court Campus and Others*, wherein it is held thus at p. 593 of MLJ:

13. In order to pass a surcharge order u/s 71(1) of the Act against a person entrusted with management of a cooperative society or an officer or a servant thereof, such person 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 second Respondent, it is not possible to mulct the Petitioners with the loss caused to the society

19. A detailed discussion has been made by making reference to various judgments on this aspect in another judgment reported in *Sathyamangalam Co-operative Urban Bank, Limited Vs. The Deputy Registrar of Co-operative Society and Another*, . It is held thus:

The degree of negligence that is contemplated u/s 71(1) of the Tamil Nadu Cooperative Societies Act is not mere negligence, but wilful negligence. The word "wilful" has not been defined in the Act. "Wilfulness" or "wantonness" imports pre-meditation or knowledge and consciousness that an injury or loss is likely to result from the act done or from the omission to act. It imports a constructive intention as to the consequences which, entering into the wilful act, the law imputes to the offender and in this way a charge, which otherwise would be mere negligence, becomes by reason of a reckless disregard of probable consequences, a wilful wrong. The act done or omitted to be done must be intended or must involve such reckless disregard of security and right as to imply bad faith. In examining whether there is wilful negligence, it has to be seen first whether the person concerned is guilty of negligence and if so, whether the said wilful negligence is the proximate cause of the injury or loss sustained.

20. In the light of the decisions referred to above, it is clear that to pass surcharge order u/s 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.

23. In such view of the matter, I have no hesitation to hold that in the absence of any finding by the authority having jurisdiction u/s 87 of the Act that there has been a reckless or callous attitude on the part of the Petitioners, it cannot be held that the Petitioners are liable to the surcharge proceedings. In many of the cases, there has been a finding that there is no loss caused, which is admitted, and the plots have been sold not only as per the resolutions of the societies, but also as per the advice of the second Respondent, who is a responsible official. In such circumstances, even if the act is a mistake, the same can at the most be held to be not a negligent one, but a bona fide act following the directions of the higher officials.

24. Whether action is taken against the official or not is not the material fact for deciding the liability u/s 87 of the Act, as the finding that has to be rendered is whether the official is liable for the wilful misconduct and in the absence of wilful misconduct, which is a question of mens rea, about which there is no finding anywhere by any of the authorities, including the first Respondent, I am of the view that the Petitioners are entitled to succeed.

For all the reasons aforesaid, these writ petitions stand allowed and the orders passed by the first Respondent stand set aside. No costs. Consequently, M.P. No. 1 of 2006 in W.P. No. 47776 of 2006, M.P. No. 2 of 2006 in W.P. No. 49118 of 2006, M.P. No. 1 of 2006 in W.P. No. 50020 of 2006, and M.P. No. 2 of 2007 in W.P. No. 7764 of 2007 are closed.