

(2014) 04 MAD CK 0097

In the Madras High Court

Case No : W.P. No. 5750 of 2011, M.P. Nos. 1 and 2 of 2011

B. Sethuramalingam

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 25-04-2014

Acts Referred:

Tamil Nadu Co-operative Societies Act, 1983 — Section 71, 87

Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 — Section 116(2)
(x), 116(2)(xiii), 89(1), 90, 90(1)

Citation : (2014) WritLR 493

Hon'ble Judges : N. Paul Vasantha Kumar, J

Bench : Single Bench

Final Decision : Allowed

Judgement

N. Paul Vasanthakumar, J.—By consent the writ petition is taken up for final disposal.

2. This writ petition is filed to quash the order of the third respondent dated 29.6.2009 imposing surcharge of Rs. 10,46,067/-, which was confirmed in the order of the first respondent in G.O. Ms. No. 649 dated 3.12.2010.

3. The facts necessary for disposal of this writ petition are as follows:

(a) Petitioner has joined in the services of HR & CE Department in the year 1985 as an Executive Officer Grade-III and he was promoted as Executive Officer Grade-II in the year 2000, and he retired as such on attaining the age of superannuation on 31.1.2008. During his tenure, he served in various Temples in the Districts of Cuddalore, Tanjore, Nagapattinam, Virudhunagar and finally at Salem.

(b) In Salem District he served as Executive Officer in Arulmigu Mariamman Temple, Sanjeevirayanpettai, Salem Taluk. The said Temple was administered by the Fit Person, the 8th respondent herein. The predominant income to the Temple is by way of collection of toll in the Temple market.

(c) According to the petitioner, for conducting auction pertaining to collection of toll in the Temple property, a resolution has to be passed by the Trustees of the Temple (Fit Person in this case) and based on the directions/resolution, the Executive Officer shall send proposal to the Joint Commissioner to conduct auction and it is the general practice to request the presence of the Department officials viz., the concerned Inspector of the Temple and the Assistant Commissioner of HR & CE. The Joint Commissioner will permit the Executive Officer to conduct auction in the presence of the Inspector and Assistant Commissioner at the time of auction. The said two authorities shall independently send a detailed report confirming the conduct of auction. The auction papers will be placed before the Board of Trustees (Fit Person in this case) for confirmation and resolution will be passed.

(d) During the tenure of the petitioner as Executive Officer in the Arulmigu Mariamman Temple, Salem, he had conducted three auctions to collect toll for the periods from 1.7.2005 to 30.6.2006 (Fasli 1415); 1.7.2006 to 30.6.2007 (Fasli 1416); and 1.7.2007 to 30.6.2008 (Fasli 1417) respectively. Petitioner conducted auction for the above three periods by following the procedures stated above. For Fasli 1414 i.e., from 1.7.2004 to 30.6.2005, auction was conducted by the then Executive Officer.

(e) The auctions conducted by the petitioner for the above periods were also confirmed by the Fit Person, 8th respondent herein. One of the condition to the bidders participated in the auction was that the Auction Purchaser should make payment in one lumpsum. However, considering the ground realities, the officials in whose presence auctions were conducted, directed the petitioner to collect the auction amount in installments. The 8th respondent also passed resolution to collect the auction amount in installments. Petitioner implemented the said directions.

(f) Auction for Fasli 1417 was conducted on 17.6.2007 and confirmation was granted for a sum of Rs. 16,09,999/- and the senior officials present at the time of auction permitted the petitioner to collect the amount in installments as per the practice in vogue for long time.

(g) On 31.1.2008 petitioner retired on attaining the age of superannuation and at that time, five months were remaining for expiry of the auction period i.e. 30.6.2008. Even prior to his retirement the petitioner sent several reminders to the Auction Purchaser to remit the amount payable for five months. After his retirement he could not collect the balance amount.

(h) A show cause notice was issued by the third respondent on 18.11.2008 asking as to why surcharge of Rs. 28,23,347/- should not be imposed on the petitioner. Petitioner gave a reply on 1.12.2008 and without verifying any records an order was passed on 29.6.2009 by the third respondent to pay a sum of Rs. 10,46,067/- by way of surcharge and directed the petitioner to remit the said amount within 30 days. According to the petitioner, only from the surcharge

order dated 29.6.2009 petitioner came to know that surcharge proceedings were initiated based on three charges. The show cause notice nowhere mention the three charges. There is no correlation between the show cause notice and the order of the third respondent and no actual loss occurred to the Temple.

(i) The allegations against the petitioner are that the petitioner had not taken any steps to recover the outstanding amount of Rs. 4,45,499/- for Fasli 1385 to 1414 (1977 to 2005); the earnest money of Rs. 5 lakhs was not deposited even after expiry of six months from the date of auction; and due to non-renewal of matured fixed deposits, there has been interest loss of Rs. 10,569/- to the Temple.

(j) Petitioner sent his reply stating that regarding the first allegation, the Officer in charge can take diligent efforts to collect the same and the period of auction were over even before he assumed charge and therefore he could not cancel the auction. An advocate notice was issued to the defaulters and the present Executive Officer has to set the law in motion to recover the amount due. After issuing counsel notice for realisation of the amount petitioner retired, and hence he cannot be proceeded with. Regarding the second charge was concerned, even 2/3rd of the amount was collected even prior to his retirement and there were five months left after his retirement for collecting the amount payable by the Auction Purchaser and hence he cannot be saddled with non-collection of the installments for five months. Moreover, as per the order of the third respondent itself a sum of Rs. 3 lakhs has been received as earnest money deposit, which is contrary to the statement that no EMD was collected. With regard to the third charge i.e., renewal of fixed deposit was concerned, only after specific instruction of the Joint Commissioner, it could be made and considering the rate of interest given by the REPCO Bank, there is no loss to the Temple, which is on the higher side than the interest being paid by other banks. Thus, on facts no loss was sustained to the Temple.

(k) As per Section 90(1) of the HR & CE Act, 1959, the Executive Officer has to send the audit report prepared as per Section 89(1) of the Act to the Fit person, 8th respondent, to make good any defects or irregularities pointed out by the Auditor and the petitioner having acted based on the resolution passed by the 8th respondent and the specific instructions of his higher officials, by giving installments to the Auction Purchasers, he cannot be held liable as per Proviso to Section 90 of the Act. As the petitioner retired from service on 31.1.2008 the successor in office alone is bound to collect the remaining installments of auction amount (5 months) or to take steps to cancel the auction.

(l) Petitioner having aggrieved over the order, preferred an appeal before the first respondent, which was also rejected by G.O. Ms. No. 649 dated 3.10.2012. The said order is challenged in this writ petition contending that the order of surcharge was issued on presumption and assumptions; that the petitioner having acted based on the directions of the respondents 4, 5, 7 and 8, he alone cannot be proceeded and proviso to Section 90(2) of the Act has not been

considered while passing the order of surcharge by the third respondent and the first respondent while confirming the order; that the loss of a sum of Rs. 8,72,779/- said to have been sustained by the Temple for non-collection of auction amount was prior to the petitioner joining in the Temple; that the petitioner was prudent enough to issue advocate notice which shows the initiation of process to set the law in motion; that the initiation of surcharge proceedings to the tune of Rs. 10,46,067/- and imposing a huge amount as liability on the petitioner is illegal; and that due to the surcharge order the leave salary CPF amount payable to the petitioner to the tune of Rs. 4,12,000/- has been withheld. Ultimately petitioner prayed to quash the order and to allow the writ petition.

4. The third respondent has filed counter affidavit on behalf of the respondents 1 to 4, 6, and 7. It is stated in the counter affidavit that the petitioner worked as Executive Officer of Arulmigu Mariamman Temple, Sanjeevirayanpettai, Salem from 3.8.2004 to 31.1.2008. Even though a fit person was discharging the functions of the Trustees of the Temple as a temporary measure till the constitution of the regular Board of Trustees, no policy decision can be taken by the 8th respondent as Fit Person. It is the bounden duty of the Executive Officer to collect income regularly as per the Collection of Income and Incurring of Expenditure Rules, 1961 framed u/s 116(2)(x) of the Act to augment the income of the religious institution. It is also the duty of the Executive Officer to lease out the immovable property and rights of the Temple by following the procedures laid down in "The Religious Institution (Lease of Immovable Property) Rules, 1963" framed u/s 116(2)(xiii) of the Act to derive more income to the Temple. Circulars were issued by the Commissioner of HR & CE prescribing conditions to conduct auction under which the successful bidder should make payment in lumpsum immediately. Neither the Fit person nor the Inspector has got any authority or competency to give any other direction as alleged by the petitioner granting permission to collect the auction amount in installments. Hence the surcharge proceeding was initiated for non-collection of amount relating to Fasli 1417 i.e. out of Rs. 16,09,999/- a sum of Rs. 10,20,000/- alone was collected and the petitioner failed to recover balance of Rs. 5,89,999/- during his tenure. Mere sending of notice to the auction bidder is not sufficient and if the bid amount has not been paid in full immediately, the Executive Officer has authority to cancel the auction and conduct re-auction. The petitioner failed to take positive steps to collect the balance amount or to conduct fresh auction. A sum of Rs. 5 lakhs has to be collected as EMD however, petitioner has collected and accepted only Rs. 3 lakhs, and thus there is balance of Rs. 2 lakhs payable by the bidder. Even though show cause notice was issued for a sum of Rs. 28,23,347/- as surcharge, after considering the explanation submitted by the petitioner and as per the report of the present Executive Officer as well as the remarks of the Regional Audit Officer a sum of Rs. 10,46,067/- was found as actual loss to the Temple. Therefore, surcharge order was issued for the said sum against the petitioner. The petitioner having committed loss to the temple surcharge proceeding

initiated and the orders passed are valid and requires no interference.

5. Mr. T.S. Vijaya Raghavan, learned counsel appearing for the petitioner submitted that no motive is attributed against the petitioner and he discharged his duties without any blemish. The petitioner acted with bona fide and without any evil motive to help anybody in strict compliance of the past practice, and as per the directions of the 8th respondent and therefore initiation of surcharge proceedings against the petitioner is illegal. The learned counsel also relied on the judgment of this Court reported in R.V.E. Venkatachala Gounder Vs. The Deputy Commissioner, Hindu Religious and Charitable Endowments (Admn.) Department, and submitted that liability for surcharge under the statute viz., Section 90(2) of the HR & CE Act, 1959 can be initiated only if there is a clear proof of guilt with direct evidence. Learned counsel also cited the judgment of this Court reported in M. Thangarajan Vs. Deputy Commissioner, Hindu Religion and Charitable Endowment Board, in support of his contentions and contended that surcharge proceedings is maintainable u/s 90(2) only if it is established that a person willfully making loss to the Temple or its property, and if a person acts with bona fide belief, no proceeding can be initiated. It is also contended that even if there is dereliction of duty without willful act of misconduct, departmental proceedings alone can be initiated. The learned counsel therefore submitted that even as per the show cause notice issued on 18.11.2008 u/s 90(2), the alleged loss said to have been committed by the petitioner, was not willful. Similarly in the order passed by the third respondent, the dishonest intention to commit loss for any pecuniary advantage has not been mentioned. Therefore, the order of surcharge confirmed by the Government by the impugned Government Order are not sustainable. The learned counsel also submitted that for the Fasli 1386 to 1417 the amount payable to the Temple was sought for under RTI Act and a reply was given stating that from 1976 to 1984 there was no due; for the year 1985-1988 full amount not collected and suit was filed for recovery. For 1989-1990 full amounts were collected; for 1990-1991 for recovery of Rs. 1,23,125/- suit was initiated; for 1992 to 2003 full amounts were collected; for the period from 1.7.2003 to 30.6.2004 a sum of Rs. 4,45,999/- was due for which steps were taken to file suit; for the period from 1.7.2004 to 30.6.2006 no amount is due; for the period from 1.7.2006 to 30.6.2007 no amount is due; for the period from 1.7.2007 to 31.1.2008 Rs. 5,89,999/- is due for which steps are taken to file suit; and therefore petitioner cannot be saddled with surcharge order.

6. Mr. S. Kandaswamy, learned Special Government Pleader (HR & CE) on the other hand submitted that the petitioner having not followed the mandatory directions for conducting auction and for collection of bid amounts, committed loss to the Temple, and therefore the initiation of surcharge proceedings and the order passed are valid.

7. I have considered the rival submissions of the learned counsel for the petitioner as well as the learned Special Government Pleader (HR & CE).

8. The issue arises in this writ petition is as to whether the respondents are

entitled to initiate surcharge proceedings u/s 90(2) of the HR & CE Act, 1959 for a sum of Rs. 10,46,067/- based on the audit objection for alleged non-collection of bid amount of the leased market of the Arulmigu Mariamman Temple, Sanjeevirayanpettai, Salem Taluk, Salem District.

9. A show cause notice was issued to the petitioner on 18.11.2008 by the third respondent based on audit report dated 30.6.2008. In the said show cause notice three items were mentioned as alleged loss to the tune of Rs. 28,23,347/-, for which the petitioner gave his reply on 1.12.2008 stating that for the alleged loss of Rs. 8,72,779/- suit was already pending to recover a sum of Rs. 4,27,280/- for Fasli 1413 and out of Rs. 14,40,999/- for the Fasli 1414 Rs. 9,95,500/- was received by the Temple and balance of Rs. 4,45,499/- was due, for which action was initiated by sending lawyer's notice and therefore it is possible to recover the said amount and during his term as Executive Officer in the Temple for the Fasli 1415 entire amount of Rs. 16,02,301/- was already collected and for Fasli 1416 entire amount of Rs. 15,32,301/- was collected. In respect of non-collection of Rs. 11,39,999/- for Fasli 1417, out of the bid amount of Rs. 16,09,999/- a sum of Rs. 10,20,000/- was collected and for collecting the balance, the auction bidder viz., K. Srinivasan was approached in person and through post requesting to pay and the Executive Officer issued notice of demand on 25.5.2007, 4.6.2007, 10.6.2007, 22.12.2007, 28.12.2007, 1.4.2008, 5.5.2008, 12.5.2008 and 18.6.2008 and the requests having not been complied with, counsel notice was issued on 12.8.2008 and permission to file a suit was sought and he obtained sanction of Rs. 55,600/- to meet the expenditures to file suit from the third respondent and further approval is sought for from the Commissioner by communication dated 1.12.2008 and only after getting the approval from the Commissioner suit could be filed. Regarding the third item, viz., non-renewal of fixed deposits, already the fixed deposits were renewed including the period for which the amount was renewable and as such there is no loss of income to the Temple by way of interest and even if there is loss, it was due to reduction of interest rate announced by the Reserve Bank of India.

10. The third respondent simply rejected the explanation submitted by the petitioner and passed the order to recover a sum of Rs. 10,46,067/- merely stating that the explanation is not found acceptance and the amount being due to the Temple, the petitioner is responsible. No enquiry or personal hearing was given by the third respondent to record the guilt of the petitioner while ordering the huge amount of recovery. The appeal preferred by the petitioner was also dismissed by the first respondent without considering the defence put up by the petitioner.

11. The surcharge proceeding was initiated under the Statutory provision viz., Section 90(2) of the HR & CE Act, 1959, which reads as follows:

Sec. 90(2). If on a consideration of the audit report and the report of the trustees and after such inquiry as may be necessary, the Commissioner, the Joint Commissioner, Deputy Commissioner of Assistant Commissioner, as the case may

be, thinks that the trustee or any other person was guilty or irregular, illegal or improper expenditure, or of loss or waste of money or other property thereof caused by failure to recovery moneys due to other property belonging to the religious institution or by neglect or misconduct or misapplication or collusion or fraudulent transactions or breach of trust, the Commissioner, the Joint Commissioner, Deputy Commissioner or Assistant Commissioner, as the case may be, after giving notice to the trustee or such person to show cause why an order of surcharge should not be passed against him and after considering his explanation, if any, by order certify the amount so spend or the amount or value of the property so lost or wasted, and direct the trustee or such person to pay within a specified time such amount or value personally.

Provided that if, in respect of any expenditure or dealing with the property of the institution, the trustee or such person had obtained the directions of the Commissioner, Joint Commissioner, Deputy Commissioner or Assistant Commissioner, as the case may be, and had acted in accordance with such directions, he shall not be held liable.

On perusal of the said statutory provision it is evident that for demanding any amount from the Temple servant by way of surcharge, a finding of guilt has to be recorded and if the Trustee or any other person acted in accordance with the directions of the authorities, he shall not be held liable.

12. In the case on hand, the petitioner has specifically stated in the affidavit filed in support of the writ petition that the bid amount was permitted to be collected by installments as per the orders of 8th respondent viz., the Fit Person, who represent the Temple Board and the same was the practice followed. Therefore as per the said proviso to Section 90(2) petitioner having acted based on the past practice, which was also ratified by 8th respondent, petitioner cannot be proceeded u/s 90(2) of the Act. Further, finding of guilt has not been recorded by the third respondent as well as the first respondent to make the petitioner personally liable. Non collection of bid amount in spite of taking effective steps by the petitioner cannot be treated as willful guilt and the petitioner has explained that he has taken active steps by issuing notice of demand followed with counsel notice, obtained permission to file civil suit, etc. If enquiry was conducted after the denial of liability by the petitioner, the petitioner could have established the facts pleaded in the explanation. Thus, the third respondent has violated the principles of natural justice and the petitioner is put to serious prejudice. Hence petitioner cannot be made liable vicariously.

13. The issue as to whether a temple servant can be proceeded on vicarious liability was considered in the decision reported in R.V.E. Venkatachala Gounder Vs. The Deputy Commissioner, Hindu Religious and Charitable Endowments (Admn.) Department, . In paragraphs 10 to 13 it is held thus,

10. It remains to examine the last contention of Mr. Venkatarama Iyer, which raises the point of vicarious liability. As I earlier mentioned, the petitioner was

rendered liable to make good Rs. 63,764 solely on the score that he was the Secretary of the Committee and was liable to surcharge even if he were innocent of the irregularities in the functioning of the Committee. Learned Counsel said that liability for surcharge under the statute does not include vicarious liability. This contention bears examination on a construction of Section 90(2) of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959...

11. Mr. Venkatarama Iyer's point was that the liability imposed on a trustee or other person by way of an order of surcharge was in the nature of a penalty, and the award of such penalty and the charging of such liability must be on the ground that the trustee or other person proceeded against, was "guilty" of the acts or omissions set out in the provision. Learned Counsel submitted that the very nature of the acts or omissions which formed the basis of surcharge and the very nature of surcharge itself as a form of penalty, clearly showed that the trustee or other person proceeded against must be, found to have been directly involved in the kind of act or omission dealt with by the Legislature as a fit subject for surcharge proceedings. In short, the argument was that the liability for surcharge under the section had to be made out and established with reference to the acts or omissions of the trustee himself, and it did not include vicarious liability.

12...I have no doubt whatever that Section 90(2) is a penal provision. The proceedings which the section contemplates are in the nature of criminal proceedings or quasi-criminal proceedings. I am not impressed merely by the presence, in the section, of the expression "guilty". Any trustee, in order to be found guilty, must be found to have incurred irregular, illegal, or improper expenditure or caused waste of money, or other property, arising by failure to recover the money due by neglect or misconduct or misapplication or collusion or fraudulent transactions or breach of trust. The very array of epithets in the section shows that they relate to criminal or quasi-criminal matters. The burden of making good the charge is also quite clearly on the Deputy Commissioner or the Assistant Commissioner, as the case may be. The quantification of the surcharge u/s 90(2) also gives a further indication that the surcharge is in the nature of a penalty. It is quite possible that a surcharge can also be a measure of recompense, but the additional attribute does not alter its essential character as a penalty or fine.

13. Section 90(2) no doubt, refers to a trustee by name, as one of those who can be proceeded against, but the section, as I read it, insists that the trustee must himself be guilty of the irregularities described in the provision as actionable, against him. There is nothing, either express or implicit, in the section which would enable the Deputy Commissioner or the Assistant Commissioner to impose a penalty by way of surcharge on a trustee or other person on the basis of vicarious liability. It might well be that a trustee might be answerable for the tortuous acts of his employees or agents through whom, he discharges his functions as trustee. But on the language of Section 90(2), I am satisfied that a

trustee cannot be surcharged by way of vicarious liability. There must be direct proof of guilt against him.

(Emphasis Supplied)

The said position was again reiterated in the judgment of this Court reported in *M. Thangarajan Vs. Deputy Commissioner, Hindu Religion and Charitable Endowment Board*, . In paragraphs 11 and 12 this Court held thus,

11. Even as seen from the counter, it is not the case, of H.R. & C.E. that the revision petitioner though obtained a loan of Rs. 10000 had not spent the entire amount for the purpose of the festival in the temple or he misappropriated or retained any amount. It is also not the case of H.R. & C.E., as seen from the counter, that the loan obtained by the revision petitioner was spent illegally or he had incurred improper expenditure. Having the above admitted facts in mind, we have to see whether the surcharge proceedings shall lie against the Executive Officer of the temple.

12...if a person had misappropriated the amount or incurred expenses not authorised or incurred expenses under the guise of spending the same to the temple for his personal benefits or something like that willfully, making loss to the temple or its property, then alone he is to be burdened with surcharge order or penalty.

In the above Judgment another decision of this Court reported in 1987 TNLJ 244 (*R. Sethumahdevan v. The Deputy Commissioner, HR & CE*) was followed and held that mere omission of the Temple Servant can at best be a reason to proceed departmentally, and not to initiate surcharge proceedings.

14. At this juncture it is relevant to point out that an identical provision empowering to initiate surcharge proceedings u/s 87 of the Tamil Nadu Co-Operative Societies Act, 1983 came up for consideration before this Court in various decisions.

(a) The Division Bench of this Court in W.A. No. 1686 of 2013 dated 4.4.2014 considered the issue regarding proof of willful negligence for initiating surcharge proceeding for the loss to the Society.

(b) In the decision reported in *Sathyamangalam Co-operative Urban Bank, Limited Vs. The Deputy Registrar of Co-operative Society and Another*, this Court held that mere negligence is not sufficient to initiate surcharge proceedings u/s 71 of the Tamil Nadu Co-Operative Societies Act, 1961, which is analogous to Section 87 of 1983 Act.

(c) The Division Bench of this court in the decision reported in *P. Karuppiah Vs. The Deputy Registrar of Co-operative Societies, Periyakulam and The Special Tribunal for Co-operative Societies, Madurai*, emphasised the need to have a finding regarding deliberate and reprehensible manner with reckless callousness and with a supine indifference as proof for making a person liable u/s 87 of the

Act and in fact in the said case the order of the learned single Judge taking contra view was set aside. The said decision was followed in the decisions reported in P.N. Chockappan and Others Vs. The Special Tribunal for Co-operative Cases, High Court Campus and Others, ; M. Chella Nadar Vs. The Deputy Registrar of Co-operative Societies, The Presiding Officer/District Judge, Special Tribunal for Co-operative Society Cases and The Kurunthancode Agricultural Service Co-operative Society ; (2006) 4 MLJ 86 (S. Marimuthu v. Deputy Registrar of Co-Operative Societies (Housing), Madurai Circle; (2009) 4 MLJ 992 (K. Ajay Kumar Gosh v. Tribunal for Co-Operative Cases, Nagercoil) and (2009) 6 MLJ 1051 (A. Janakiraman and Another v. Deputy Registrar of Co-Operative Societies and Another).

15. The statutory provisions viz., Section 90(2) of the HR & CE Act 1959 and Section 87 of the Tamil Nadu Co-Operative Societies Act, 1983 are dealing with initiation of surcharge proceedings against the Temple Servant and Co-Operative Society Servant respectively and similar wordings are used in both the statutory provisions. The principle applied in the above referred judgments while interpreting Section 87 of the Tamil Nadu Co-Operative Societies Act, 1983 can be applied to the surcharge proceedings initiated u/s 90(2) of the HR & CE Act, 1959.

16. In the light of the above findings it is clear that for initiating/ordering recovery under surcharge proceedings against a Temple servant u/s 90(2) of the HR & CE Act, the authority concerned is bound to conduct enquiry and prove willful or mala fide act of the Temple servant due to which loss was caused to the Temple and in the absence of any such positive proof recorded by conducting enquiry (if the allegation is denied), the Temple servant cannot be saddled with surcharge order for the notional loss/non-recovery of dues to the Temple.

17. In fine, the surcharge proceedings dated 29.6.2009 initiated by the third respondent and confirmed by the first respondent by order dated 3.12.2010 are liable to be set aside and accordingly they are set aside. The writ petition is allowed. No costs. Connected miscellaneous petitions are closed.