

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.09.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)No.1491 of 2009
and M.P.Nos.1 of 2009 and 1 of 2011

<i>Orders Reserved on</i>	<i>Orders pronounced on</i>
19.07.2017	19.09.2017

M.R.Balashanmugam
 Co-op. Sub-Registrar
 Formerly Special Officer
 Coimbatore Agricultural Producer's
 Co-op. Marketing Society
 P.N.Pudur, Coimbatore.

.. Petitioner

Vs.

1. The Deputy Registrar of Co-op.
 Societies, Coimbatore Circle
 Collectorate complex
 Coimbatore-18.

2.Management
 Coimbatore Agricultural Producers
 Co-operative Marketing Society
 Represented by its President
 Siruvani main road
 Thelungupalayam
 Coimbatore-641 309.
 (Cause title amended vide order
 of Court dated 17.07.2014 made in

.. Respondents

M.P.No.1 of 2014 in C.R.P.No.1491 of 2009)

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the judgment and decree dated 30.01.2009 made in Co-op.C.M.A.No.61 of 2007 on the file of the Principal District Court, Coimbatore, confirming the order dated 16.08.2007 made in Na.Ka.No.2/2006/Sa Pa 1 on the file of the Deputy Registrar of Co-operative Societies, Coimbatore.

For Petitioner : Mr.N.Manokaran
For R1 : Mr.Venugopal
Special Government Pleader
For R2 : Mr.T.P.Prabakaran

ORDER

The Civil Revision Petition is filed against the judgment and decree dated 30.01.2009 made in Co-op.C.M.A.No.61 of 2007 on the file of the Principal District Court, Coimbatore, confirming the order dated 16.08.2007 made in Na.Ka.No.2/2006/Sa Pa 1 on the file of the Deputy Registrar of Co-operative Societies, Coimbatore.

2. The petitioner is the appellant and respondents are the respondents in C.M.A.No.61 of 2007 on the file of the Principal

District Court, Coimbatore. The petitioner is the respondent in surcharge proceedings dated 16.08.2007 made in Na.Ka.No.2/2006/Sa Pa 1 on the file of the Deputy Registrar of Co-operative Societies, Coimbatore. The petitioner was the co-operative Sub-Registrar and he was posted as the Special Officer of the Coimbatore Agricultural Producers Co-operative Marketing Society/second respondent herein. According to the second respondent, certain irregularities have taken place in the society and an enquiry under Section 81 of the Tamil Nadu Co-operative Societies Act, was ordered. Based on the enquiry report, surcharge proceedings was initiated against the petitioner. The following three charges were framed against the petitioner:

(i) The petitioner misused the official vehicle bearing Registration No.TN-U-8856 for his personal use from 02.01.2004 to 25.07.2005 and caused a loss of Rs.12,895/- to the second respondent society.

(ii) The petitioner has purchased excess tamarind to the tune of Rs.9,97,960/- and the same was spoiled and thus, caused loss to the second respondent/society to the tune of Rs.9,87,200/-.

(iii) The petitioner has purchased Barani masala powder from 06.05.2005 to 08.07.2005 to the tune of Rs.7,41,415/- in excess of

required quantity. The said masala powder to the value of Rs.1,50,775.15 was not sold within the time limit and the same is spoiled.

(iv) The petitioner by purchasing excess quantity of tamarind and Barani masala powder caused loss to the extent as mentioned above.

3. The first respondent conducted enquiry in the surcharge proceedings and the petitioner has participated and submitted his explanation. Before the first respondent, the officer, who conducted enquiry against the petitioner and godown keeper of the Head office were examined. The petitioner cross-examined them. The first respondent considering the evidence and materials on record by proceedings dated 16.08.2007, held that the petitioner is liable to pay the following sums:

- (i) Rs.12,895/- for misusing the vehicle;
- (ii) Rs.6,51,571.60 for excess purchase of tamarind;
- (iii) Rs.84,467.15 for excess purchase of Barani masala powder;

Totally, petitioner was held liable to pay a sum of Rs.7,48,933.75/-.

4. Challenging the said proceedings dated 16.08.2007, the petitioner filed C.M.A.No.61 of 2007 on the file of the Principal District Court, Coimbatore.

5. The learned Principal District Judge, Coimbatore, after considering the materials on record by judgment and decree dated 30.01.2009, dismissed the appeal.

6. Against the said judgment and decree dated 30.01.2009 made in C.M.A.No.61 of 2007, the present Civil Revision Petition is filed by the petitioner.

7. The learned counsel for the petitioner made the following submissions:

(i) The charges levelled against the petitioner were not proved before the first respondent and the learned Principal District Judge, Coimbatore, failed to consider that the first respondent did not properly appreciate the evidence on record and erroneously held that the petitioner caused loss to the second respondent society. The reasons given by the learned Principal District Judge,

Coimbatore, for dismissing the appeal are not valid.

(ii) From the evidence of enquiry officer, it is clear that both the drivers of the vehicle belonging to the second respondent society have categorically stated that the petitioner has not used the vehicle for his personal use. The first respondent has held that the petitioner is liable to pay a sum of Rs.12,895/- as he failed to supervise the drivers, who have written the log book. The contention of the learned counsel for the petitioner is that the same is not the charge against the petitioner. The learned Principal District Judge, Coimbatore, having failed to consider that the petitioner did not use the vehicle for his personal use, ought to have held that the said charge is not proved and that the petitioner is not liable to pay the said amount.

(iii) As far as the charge that the petitioner has purchased excess quantity of tamarind is concerned, enquiry officer has admitted that he has not verified all the fair price shops under the second respondent society and he failed to consider the evidence of godown keeper that only tamarind to the extent of Rs.3,98,835/- was not sold. Similarly, the godown keeper before the enquiry officer, stated that Barani masala powder to the value of

Rs.14,425/- alone was in stock and all the quantities were sold and the second respondent society has earned 10% profit to the extent of Rs.70,000/-.

(iv) The first respondent failed to see that the godown keeper in his evidence, he has stated that in the statement dated 13.08.2005, tamarind and Barani masala powder were not shown as spoiled goods.

(v) An employee can be held liable for any alleged loss to the society, only when he was deliberately negligent in performing his duty knowing fully well that the said negligent act would cause loss to the society. In the present case, no allegation that the petitioner deliberately acted in a negligent manner knowing fully well that purchase of tamarind and Barani masala powder would cause loss to the society. It is not the case of the second respondent society that the petitioner was benefited by purchase of above goods.

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(vi) The first respondent and the learned Principal District Judge, Coimbatore, failed to take note that there is no certificate to the effect that tamarind and Barani masala powder purchased were

spoiled during the tenure of the petitioner as Special Officer. A certificate was obtained after the petitioner was transferred from the second respondent society.

(vii) The first respondent and the learned Principal District Judge, Coimbatore, failed to consider that unsold tamarind and Barani masala powder were auctioned and second respondent society failed to produce the details of such auction and amount received in that auction. The learned counsel for the petitioner filed additional typed set of papers and furnished the details with regard to the amount received.

(viii) The first respondent and the learned Principal District Judge, Coimbatore, failed to consider the circulars of the Registrars of Co-operative Societies, Chennai, dated 05.04.1977 and 25.10.1988, wherein the Registrars have instructed that no action is to be taken against the officials for the loss sustained by the societies in the normal course or business, loss sustained by the societies on account of sale of goods by reduction in price and loss due to the destruction of unsalable old stocks etc.

(ix) The learned counsel for the petitioner submitted that the society has to purchase sufficient stocks in order to supply to the

fair price shops to be sold when demanded by consumers.

8. In support of his contentions, the learned counsel for the petitioner relied on the following judgments:

(i) **(2006) 4 M.L.J. 86 (S.Marimuthu and another v. Deputy Registrar of Co-operative Societies (Housing), Madurai Circle and another);**

"12. At the outset, as rightly pointed out by the learned counsel for the petitioners, the law is well settled. In any of the surcharge proceedings, the condition precedent is that the liability can be fixed on the employees of the Co-operative Societies when it is found that they were intentionally committing some mistake and negligence. The judgments referred to by the learned counsel for the petitioners which relate to Section 71 of the Tamil Nadu Co-operative Societies Act, 1961 which is in pari materia, the same as that of Section 87 of the present Tamil Nadu Co-operative Societies Act, 1983, show categorically that in all those proceedings of surcharge, the condition precedent is that, there must be wilful negligence on the part of the co-operative employees. "

(ii) **(2009) 6 MLJ 1051 (A.Janakiraman and another Vs. Deputy Registrar of Co-operative Societies, Kumbakonam**

and another);

"13. In surcharge proceedings, the first respondent is duty bound to prove that there was wilful dereliction of duty like criminal case. The criminal Court having found that the petitioners are not guilty, the said findings are definitely in favour of the petitioners. The words used under Section 87(1) are "wilful negligence". ... "

14. In the light of the above decisions of this Court and having regard to the fact that the first respondent failed to establish the furnishing of copy of Section 81 Enquiry report before initiating surcharge proceedings and the wilful dereliction of duty having not been established, I hold that the recovery proceedings initiated against the petitioners cannot be sustained. "

(iii) **2013 (3) MWN (Civil) 27 (K.Govindasamy v.**

A.Rajamani and others);

"13. In this case, the 6th respondent has found that the respondents 1 and 2 have caused loss to the Bank to the tune of Rs.6.20 lakhs by dealing with inoperative S.B. Accounts. Insofar as the petitioners are concerned, the finding of the 6th respondent is that they have not discharged their duties and made themselves liable for the

monetary loss caused to the Bank as they have not verified the accounts before granting permission for making the payment. Thus, they are negligent in their duties. This finding of the 6th respondent was confirmed by the Tribunal by observing that the petitioners herein were negligent in discharging their duty. Thus, the only question to be decided in these Civil Revision Petitions is as to whether the act of negligence committed by the petitioners would attract surcharge proceedings under Section 87(1) of the Tamil Nadu Co-operative Societies Act or not.

17. Going by the decisions referred to above, it is crystal clear that mere negligence is not sufficient to hold a person responsible to initiate surcharge proceedings under Section 87 of the said Act unless such disobedience is also found to be wilful.

18. No doubt, the petitioners have acted without care and performed their duties in a casual and negligent manner. However, such negligence alone is not sufficient to hold them liable under Section 87 of the said Act, unless the same is coupled with wilful or deliberate intention to commit such negligence. As there is no finding given by the authorities below to that effect, then

the principle that has been laid in the series of decisions, referred to supra, of this Hon'ble Court has to be applied to this case to hold that the proceedings under Section 87 of the said Act cannot be initiated against the petitioners in the absence of any wilful negligence on their part."

(iv) (2012) 4 MLJ 201 (K.Krishnan Vs. Deputy Registrar of Co-operative Societies, Thiruvallur District and Others);

"7. The only question which has to be decided in the instant case is as to whether the petitioner who was the erstwhile President of the third respondent Society was willfully negligent in discharging his duties and whether he had caused any deficiencies in the assets of the society by breach of trust or acting contrary to the Act, rules or the Bylaws. The Hon'ble Supreme Court in State of Orissa v. Md. Illiyas (supra), held that the term willful would mean intentional, conscious and deliberate and such expression, excludes, casual, accidental, bonafide or unintentional act or genuine inability. The Hon'ble Division Bench of this Court in P.Karupiah v. The Deputy Registrar of Co-operative Societies (supra), was dealing with the case of an appellant who was the secretary in-charge of a Co-operative Society and action was initiated under Section 71 against him. The Hon'ble Division Bench

held that it must be first established that there were duties and obligations specifically cast on the appellant of which he committed breach and such acts and omissions should be of willful negligence. It was further held that there should be concrete material and it cannot be on presumptions and assumptions."

(v) **(2009) 4 MLJ 992 (K.Ajay kumar gosh and others v. Tribunal for Co-operative Cases, (District Judge of Kanyakumari District) Nagercoil and another);**

"20. In the light of the decisions referred to above, it is clear that to pass surcharge order under Section 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 a 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."

(vi) **2016-4-L.W. 452 (S.Ramadevi v. The Special Officer, Ambur Co-operative Sugar Mills, Vadapudupet, Vellore District and others);**

"26. We are, thus, of the view that as the legal principles are quite settled, we have to only look into the application of the same in the facts of the present case. We are of the view that the appellate authority was right in coming to the conclusion that there is no willful negligence in the case of the appellant and this aspect has really not even been seriously touched upon by the learned Single Judge. Merely because loss is caused would not suffice. The appellant is not the beneficiary. There is no such willful negligence attributed to her. This is apparent from even the enquiry report, which we have referred to aforesaid. Mere use of the words "negligence and careless with selfish motive for gain" would not suffice when actually the facts do not make out such a case. Thus, the surcharge officer certainly fell into an error in imposing the liability on the appellant. ... "

(vii) **1994 Supp (3) Supreme Court Cases 134 (Pollachi Co-operative Marketing Society Vs. K.N.Valuswami and Others);**

"3. ... The word 'wilfulness', it held, imported premeditation or knowledge and consciousness that an injury or loss was likely to result from the act done or from the omission to

act. It imported a constructive intention as to the consequence. Quoting an earlier judgment, delivered by Pandian, J. (as he then was) in *Sathyamangalam Co-operative Urban Bank Ltd. v. Dy. Registrar of Co-operative Society* (1980) 2 MLJ 17, it held that to constitute wilful negligence, the act done or omitted to be done must involve such reckless disregard of duty as to imply bad faith. The High Court observed that the very approach of the Special Tribunal for Co-operative Cases was wrong as it had posed for answer the following question: "The main point for consideration would be whether the purchases were effected as per the regulation and whether the subsequent series were done in good faith and in the interest of the society." The High Court came to the conclusion that the evidence before the Tribunal and the findings arrived at by it on the basis of such evidence did not justify the legal inference that Respondents 1-14 had been guilty of wilful negligence."

9. Per contra, the learned counsel for the second respondent society submitted that the petitioner had misused the office vehicle belonging to the society and he has not properly supervised the drivers, who maintained the log books. By his negligence, he has

caused loss to the society to the extent of Rs.12,895/- and the same has been proved before the first respondent in surcharge proceedings. Similarly, the petitioner has purchased excess quantities of tamarind and Barani masala powder and thereby, caused loss to the society. The goods purchased by him were spoiled and could not be sold. Further, the petitioner has purchased Barani masala powder from Barani agencies, which is not a recognised agency. Quantity of stock available as mentioned by the petitioner is only with regard to stock available in the godown of the second respondent society and the stocks lying in 85 fair price shops of the society were not taken into account. The enquiry officer inspected the fair price shops and enquired and verified the staff and found that the said goods were spoiled. Action of the petitioner purchasing excess quantities of tamarind and Barani masala powder is deliberately negligent on the part of the petitioner knowing fully well that the same could not be sold before the expiry date. The circulars relied on by the learned counsel for the petitioner are not applicable to the facts of the present case. Both the first respondent as well as the learned Principal District Judge, Coimbatore, considered all the materials on record and have correctly concluded that the petitioner has caused loss to the

second respondent society and prayed for dismissal of the civil revision petition. In support of his contention, he relied on the following judgments:

(i) ***C.Balakrishnan and R.Santhamoorthy Vs. The Principal District Judge (Co-operative Tribuna) and others in the order dated 11.12.2008 made in W.P.Nos.10077, 10078 and 10210 of 2004;***

"5. On behalf of the second and third respondents, counter affidavits have been filed supporting the stand of the Tribunal. As against the order of surcharge proceedings, before the first respondent Tribunal, two principal contentions were raised. The first contention was that while passing the surcharge order (against which the appeals were filed), the second respondent was not satisfied about the petitioners being guilty of willful negligence, wantonness and whether commission or omission on their part was deliberate. Only when reckless and callous actions take place or the loss has been caused deliberately to the assets of the society, action can be taken against them. Reliance was placed upon the Division Bench Judgment of this Court in S.Subramanian v. Deputy Registrar of

Co-operative Societies, Housing, Cuddalore and Ors. reported in 2002 (3) LW 185 and also the judgment in Chokkapan V. Special Tribunal for Co-operative Cases, Madras reported in 1991 (1) MLJ 587.

6. However, the Tribunal was of the view that mens rea is required for certain classes of misdemeanor but the same is not applicable to every misdemeanor pointed out in the said provision. When once the loss has been proved for not following the rules and regulations, certainly, Section 87 will get attracted. The decisions relied on by the petitioner will not apply to the facts of this case.

.....

(ii) 2010 (2) CWC 32 (K.R.Palaniswami Vs. The Co-operative Societies Special Tribunal, Periyar District, Erode (The Principal District Judge-Periyar District, Erode) and others);

"74. On going through the orders passed by the concerned Authorities including the judgments of the Tribunal passed in C.M.A.Nos.4 of 1996 and 146 of 1995, we are of the considered view that the acts of omissions and commissions committed by the Appellant could not be construed by no

stretch of imagination that they would amount to misapplication but on the other hand, this Court is of the considered view that the Appellant/Petitioner had not discharged his duties and obligations in a proper manner and he is squarely responsible for the culpability of breach thereof and in the instant case on hand, there are overwhelming and available concrete materials go to show that the Appellant/Writ Petitioner had not acted honestly, while discharging his functions as the Special Officer of the Society and therefore, by his actions, he had caused a wilful loss to the Society and suffice it for us to make a mention that he had not taken due care and caution ordinarily expected of a sensible and prudent person and consequently, he had committed the actionable wrongs in a callousness manner exhibiting his wilful negligence and supine indifference and therefore, the Appellant cannot escape from the purview of the Surcharge proceedings dated 07.07.1993 and 15.12.1994 initiated against him by the Authority concerned, which are perfectly valid in the eye of law."

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10. Heard the learned counsel for the petitioner, learned

Special Government Pleader (CS) appearing for the first respondent and the learned counsel for the second respondent.

11. First charge against the petitioner is that he used the official vehicle of the second respondent society for his personal use and caused loss to the society to the tune of Rs.12,895/-. Before the first respondent, no evidence was produced to substantiate this charge. On the other hand, the statements of two drivers recorded by the enquiry officer clearly reveal that the petitioner did not use the official vehicle for his personal use. The first respondent then changed the first charge that the petitioner did not verify the log book written by the drivers and did not supervise their action and held that the petitioner is liable for the loss caused to the second respondent society. In my view, it is in violation of principles of natural justice and therefore, such findings of the first respondent as confirmed by the learned Principal District Judge, Coimbatore, is set aside.

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12. As far as purchase of tamarind and Barani masala powder is concerned, according to the petitioner, the quantity purchased by him is the required quantity, as the society is having 85 fair price

shops and only taking into consideration the demand made by the consumers, the said quantities were purchased as per the circular of the Joint Registrar of Co-operative Societies, Coimbatore Zone, in Na.Ka.No.4952/2004, dated 24.09.2004.

13. Before the first respondent, godown keeper was examined and stated that only tamarind to the value of Rs.3,98,700/- was available and tamarind and Barani masala powder were not shown in the stock register as spoiled goods. The enquiry officer has admitted that he inspected 15 fair price shops and has not produced stock statement from 85 fair price shops.

14. The learned counsel for the petitioner has referred to cross-examination of the enquiry officer and a reading of the same shows that enquiry officer has given an evasive replies and has not substantiated this contention that tamarind to the tune of Rs.6,67,225/- was spoiled and could not be used. Similarly, he has not substantiated his contention that by failure to sell Barani masala powder, a sum of Rs.1,50,775.15 was loss to the society. The enquiry officer has not examined the person, who gave complaint against the petitioner. The staff of fair price shops examined by

enquiry officer had not stated that tamarind and Barani masala powder were spoiled and could not be sold to consumers. The first respondent as well as the learned Principal District Judge, Coimbatore, failed to consider the evidence of godown keeper, wherein he has stated that by sale of Barani masala powder, a sum of Rs.70,000/- was profit to the second respondent society. The first respondent and the learned Principal District Judge, Coimbatore, have also failed to consider that unsold goods were auctioned after publication in Daily Thanthi, dated 05.06.2006 and no evidence was produced before the first respondent about the result of such auction. The learned counsel for the petitioner submitted that by auction, 20000 kilo grams of unsold tamarind were sold by public auction on 15.07.2006 and amounts were given credit to the society. Further, the first respondent and the learned Principal District Judge, Coimbatore, failed to consider the circular of the Joint Registrar of Co-operative Societies, Coimbatore Zone, in Na.Ka.No.4952/2004, dated 24.09.2004 and circulars dated 05.04.1977 and 25.10.1988 and they have not even referred the said circulars. The relevant portions of the circulars are extracted herein for better appreciation.

(i) Circular of the Registrar of Co-operative

Societies, Chennai, in Rc.No.158247/76 C3, dated 05.04.1977:

There is a tendency of late on the part of the departmental staff holding enquiry under section 65 of the Tamil Nadu Co-operative Societies Act or conducting inspection under Section 66 of the Act or suggest action under Section 71 of the Act against non-official and departmental officials for the recovery of the following losses:

- (1) Loss sustained by the societies in the normal course or business;
- (2) Loss sustained by the societies on account of sale of goods by reduction in price;
- (3) Loss due to the destruction of unsalable old stocks etc.

(ii) Circular No.79/1988 CL, dated 25.10.1988 of the Registrar of Co-operative Societies, Chepauk, Chennai-5:

"C.The circumstances under which action under Section 87 can be instituted:

.. ..

.. ..

(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 under Section 87 of the Act. Only the deficiency to the assets of the society caused by breach of trust or wilful negligence by will come under the purview of Section 87."

(iii) Circular of the Joint Registrar of Co-operative Societies, Coimbatore Zone, in Na.Ka.No.4952/2004, dated 24.09.2004:

" fl;Lg;ghlw;w bghUl;fs;?
 gjpthsh; mth;fspd; mwpt[iufspd;go
 xt;bthU epahatpiyf; filapYk; U:/1/00 yl;rj;jpw;F
 Fiwahky; fl;Lg;ghlw;w bghUs;fis tpw;gid bra;a
 ntz;Lbkd;Wk;. mnj rkak; FLk;g ml;iljhuh;fis
 fl;Lg;ghlw;w bghUs; th';fntz;Lbkd fl;lhag;gLj;jf; TlhJ
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From the reading of the above circulars, it is clear that an employee cannot be held responsible for the loss occurred during normal business and for fall in price of goods.

15. It is well settled that in surcharge proceedings, it must be proved 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, which a prudent and reasonable man would take in such circumstances.

16. In the present case, the second respondent society has not alleged and proved and the first respondent has not held that by deliberate negligence, the petitioner has caused loss to the second respondent society. Further, it is not proved before the first respondent the actual loss, if any, caused to the second respondent society. In addition to that, the contention of the learned counsel for the petitioner that no allegation was made against the petitioner that he was benefited by purchasing excess quantity of tamarind and Barani masala powder, has considerable force. The first respondent as well as the learned Judge failed to consider and apply the well settled principles for holding an employee responsible for the loss suffered by a society. They failed to appreciate all the facts and law in proper perspective and committed an irregularity in holding the petitioner responsible for the alleged loss suffered by

the second respondent society.

17. In the result, the Civil Revision Petition stands allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

19.09.2017

Index : Yes

Speaking/Non speaking order: Yes/No

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To

1. The Deputy Registrar of Co-operative Societies
Coimbatore.
2. The Principal District Court, Coimbatore.



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V.M.VELUMANI,J.

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Pre-delivery order in
C.R.P.(NPD)No.1491 of 2009
and M.P.Nos.1 of 2009 and 1 of 2011

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19.09.2017