

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.10.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P(NPD)Nos.240 and 551 of 2012
and M.P.Nos.1, 1 of 2012 & 1, 1 of 2015

Orders reserved on 12.09.2017	Orders pronounced on 06.10.2017
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C.R.P(NPD) No.240/2012

A.Viswanathan

.. Petitioner

Vs.

1. The Deputy Registrar of
Co-operative Societies
O/o. The Deputy Registrar of
Cooperative Societies,
Thiruchengode Circle,
Sudhakar Complex,
Thiruchengodu
Namakkal District.

2. The Special Officer,
S 909 Anangur Primary Agricultural
Cooperative Bank Ltd., Anangoor,
K.Ayyampalayam Post,
Paramathi Velur Taluk,
Namakkal District.

3. V.Govindasamy
4. P.Raju
5. S.Palanisamy

.. Respondents

C.R.P.(NPD).No.551/2012

P.Raju

.. Petitioner

Vs.

1. The Deputy Registrar of
Co-Operative Societies
Paramathi Road
Thiruchengodu
Namakkal District

2. V.Govindasamy

3. A.Viswanathan

4. S.Palanisamy

5. The Special Officer
S 909 Anangur Primary Agricultural
Cooperative Bank Ltd., Anangoor,
K.Ayyampalayam Post,
Paramathi Velur Taluk,
Namakkal District.

.. Respondents

COMMON PRAYER: Civil Revision Petitions filed under Article 227 of the Constitution of India, against the fair and decretal orders dated 28.10.2011 made in C.M.A CS Nos.17 & 18 of 2010 on the file of the Principal District Judge, Namakkal, confirming the Surcharge Orders passed by the first respondent against the appellant in Na.Ka.1125/2008 Sa.Pa dated 07.10.2008 on the file of the Deputy Registrar of Cooperative Societies, Tiruchengode.

(in C.R.P.No.240/2012)

For Petitioner	: Mr.N.Manokaran
For R1	: Mr.M.Venugopal Special Government Pleader(CS)
For R2	: Mr.C.K.Chandrasekaran for Mr.L.P.Shanmugasundaram
For R3 & R4	: No appearance
For R5	: Not ready in notice

(in C.R.P.No.551/2012)

For Petitioner	: Mr.V.Karthic, Senior Counsel for M/s.Saii Raaj Asso.
For R1	: Mr.M.Venugopal Special Government Pleader(CS)
For R2 & R4	: Not ready in notice
For R3	: Mr.N.Manoharan
For R5	: Mr.C.K.Chandrasekaran for Mr.L.P.Shanmugasundaram

COMMON ORDER

These Civil Revision Petitions have been filed against the fair and decretal orders dated 28.10.2011 made in C.M.A CS Nos.17 & 18 of 2010 on the file of the Principal District Judge, Namakkal, confirming the Surcharge Orders passed by the first respondent against the appellants in Na.Ka.1125/2008 Sa.Pa dated 07.10.2008 on the file of the Deputy Registrar of Cooperative Societies, Tiruchengode.

2. Both the Civil Revision Petitions are arising out of the same Surcharge Proceedings initiated against the petitioner in both the Civil Revision Petitions and two others. In respect of the irregularities committed in the second respondent Co-Operative Bank, an enquiry under Section 81 of the Tamilnadu Cooperative Societies Act (herein after referred to as 'the Act') was conducted. In the said enquiry,

various irregularities by way of fabrication of documents and misappropriation of amounts were found out. Based on the said enquiry, Surcharge proceedings under Section 87(1) of the Act was initiated against one V.Govindasamy, Secretary and A.Viswanathan, Assistant Secretary, petitioner in C.R.P.No.240 of 2012, P.Raju, Cashier, petitioner in C.R.P.No.551 of 2012 and one S.Palanisamy, Clerk in the second respondent Cooperative Bank. Notice of enquiry was issued to all the four persons. V.Govindasamy, Secretary appeared before the Enquiry Officer on various dates and finally admitted his guilt and agreed to pay the amounts of loss caused to the second respondent bank and requested time to pay the amounts. S.Palanisamy, Clerk gave written statement, stating that V.Govindasamy, Secretary and petitioners herein colluded together and forced him to fabricate documents and they misappropriated the funds of the second respondent Bank. The petitioner in C.R.P.No.240 of 2012 refused to receive notices sent by Enquiry Officer. According to the petitioner in C.R.P.No.551 of 2012, he received one notice from the enquiry officer and he did not receive any other notice with regard to the enquiry.

3. The Enquiry Officer conducted enquiry on various dates. The petitioner in both the Civil Revision Petitions did not attend the enquiry.

The Enquiry Officer, considering the charges levelled against the four persons and all the materials on record, held that all the four persons jointly and severally fabricated the documents, misappropriated funds of the second respondent bank to the tune of Rs.48,59,862.15/- and that all the four persons are liable to pay the said sum together with interest of Rs.15,26,256/-, totalling Rs.63,86,118.15/-.

4. Against the said order, the petitioner in C.R.P.No.240 of 2012 filed C.M.A (CS) No.17 of 2010 and petitioner in C.R.P.No.551 of 2012 filed C.M.A (CS).No.18 of 2010 before the Principle District Judge, Namakkal, the Special Tribunal for Cooperative cases. Tribunal, considering the materials on record and surcharge order of the first respondent, dismissed both the appeals filed by the petitioners herein. Against the said orders dated 28.10.2011 made in C.M.A (CS) Nos.17 and 18 of 2010, the present two Civil Revision Petitions are filed by the petitioners.

5. The learned counsel appearing for the petitioner in C.R.P.No.240 of 2012 contended that the petitioner was not given copies of documents relied on by the first respondent and that the impugned orders are passed in violation of principles of natural justice. The second

respondent has not examined any witnesses or marked any documents to prove the alleged liability. The first respondent did not give any opportunity of hearing to test the evidence of second respondent by cross examination. The enquiry under Section 81 of the Act is time barred. The Enquiry Officer did not complete the enquiry within the mandatory time limit of nine months from the date of ordering enquiry. The first respondent issued show cause notice under Section 87 (1) of the Act on 25.01.2008 and passed orders on 07.10.2008. The first respondent failed to complete the enquiry within six months from the date when the enquiry was started. Either in the enquiry under Section 81 or Section 87 of the Act, the second respondent bank has not marked minute book, loan ledgers, cash chitta, day book, general ledger and loan applications to prove the liability under such proceedings. The enquiry report under Section 81 of the Act was not furnished along with the show cause notice under Section 87 (1) of the Act which vitiates entire surcharge proceedings. On five occasions, the petitioner demanded report of the 81 enquiry and the same was not furnished to him. As per Section 87 (4) of the Act, the Deputy Registrar, who conducted the enquiry have all the power of the Civil Court and first respondent Deputy Registrar can act as a Civil Judge. Therefore, enquiry must be conducted like Civil proceedings by a Civil Judge. Even in the

show cause notice, it has been held that the petitioner is not liable for item nos. 11 and 12. The allegations made against the petitioner will not come within the expression 'wilful negligence' and petitioner cannot be held liable unless it is proved that he acted in a deliberate, reckless and callousness manner with supine indifference.

6. The learned counsel appearing for the petitioner in C.R.P.No.240 of 2012 relied on the following judgments in support of his contentions:

(i) 1994 Supp (3) SCC 134 in the case of Pollachi Cooperative Marketing Society Vs. K.N.Valuswami and others:

"3.Respondents 1-14 preferred writ petitions under Article 227 to the High Court. The High Court noted that the decree of negligence which was contemplated under Section 71 of the said Act was wilful negligence. 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 Cooperative Urban Bank Ltd., v. Dy. Registrar of Cooperative Society, 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.....”

(ii) (2009) 4 MLJ 992 in the case of K.Ajay Kumar Gosh and others Vs. Tribunal for Cooperative Cases, (District Judge of Kanyakumari District) Nagercoil and another:

“19. A detailed discussion has been made by making reference to various judgments on this aspect in another judgment reported in Sathyamangalam Cooperative Urban Bank Ltd. v. Deputy Registrar of Cooperative Society and Another, (1980) 2 MLJ 17 it is held thus:

“The degree of negligence that is contemplated under Section 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-mediation 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.""

(iii) 2016-4-L.W. 452 in the case of S.Ramadevi Vs. The Special Officer, Ambur Cooperative Sugar Mills, Vadapudupet, Vellore District & others:

"25.The third and the last plea is actually the most crucial as to whether the appellant could be said to have acted with wilful negligence. In this behalf, the learned counsel for the appellant has relied upon two judgments of this Court in S.Subramanian vs. The Deputy Registrar of Co-operative Societies (Housing), Cuddalore & others, 2002-3-L.W.185, and K.Ajay Kumar Gosh and others vs. Tribunal for Co-operative Cases, (2009) 4 MLJ 992, to contend that when requirements of Section 87 had not been satisfied, which warrants initiation of surcharge proceedings, the liability cannot be fastened. There has to be wilful and wanton premeditation with a view to cause negligence cannot be a ground for surcharge and it must be wilful negligence or intentional negligence and

not mere carelessness or intention or inadvertence or a single lapse by oversight.....”

(iv) 1978 (1) MLJ 284 in the case of S.Venkataraman Vs. The Deputy Registrar of Cooperative Societies and others:

"4. Section 65 of the Act contemplates an enquiry into the affairs of the Society. When an enquiry takes place under that Section, it would reveal the loss sustained by the Society. In order to fix the individual liability to surcharge, Section 71 will have to be resorted to by the departmental officials. Whether a further enquiry under Section 71 will have to be conducted or not is not a point which calls for my decision in view of my following finding about the violation of the principles of natural justice. In the instant case, a show cause notice was issued. No doubt, in reply to the notice, the petitioner contended that statements obtained behind his back should not be used against him without his being given an opportunity to question the correctness of that statement. Nevertheless, it is conceded by the learned counsel appearing for the department that those ex parte statements were used against the petitioner when passing ultimately the order of surcharge. Undoubtedly if a liability is sought to be fastened to the petitioner on the basis of certain statements, he should be given an opportunity to cross-examine those witnesses."

(v) 2013 - 5 - L.W.468 in the case of Chitrakala Vs. P.Mahesh

& others:

"9.The learned Senior Counsel in support of his contention relied on the judgment reported in 2012-3-L.W. 326= (2012) 5 Supreme Court Cases 265 [C.N.Ramappa Gowda versus C.C.Chandregowda (Dead) by Lrs and another] wherein, the Hon'ble Supreme Court held as follows:-

"23.In the light of the rationes decidendi of the cases cited herein above, when we examined the judgment and order of the trial court granting decree of partition in favour of the appellant-plaintiff, we could notice that the appellant-plaintiff has sought to prove his case that the suit property was a joint family property only on the strength of an affidavit which he had filed and has failed to lead any oral or documentary evidence to establish that the property was joint in nature. Even if the case of the appellant-plaintiff was correct, it was of vital importance for the trial court to scrutinise the plaintiff's case by directing him to lead some documentary evidence worthy of credence that the property sought to be partitioned was joint in nature. But the trial court seems to have relied upon the case of the plaintiff merely by placing reliance on the affidavit filed by the plaintiff which was fit to be tested on at least

a shred of some documentary evidence even if it were by way of an ex-parte assertion.””

(vi) (2014) 7 MLJ 850 in the case of D.Sathyamoorthy Vs. Deputy Registrar of Cooperative Societies, Uthakamandalam and others:

"8. Now comes the crucial provision contained in Section 87 of the Act. A plain reading of Section 87 would make it abundantly clear that a surcharge proceeding under Section 87 shall be initiated on the basis of audit under Section 80 or inquiry under Section 81, or inspection or investigation under Section 82, or inspection of books under Section 83 or winding up of the society. Therefore, it is crystal clear that for initiation of a surcharge proceeding under Section 87 of the Act, a report submitted under Section 80 or under Section 81 or under Section 82 or under Section 83 is the foundation. The actual adjudication happens only in the surcharge proceeding under Section 87 of the Act. That is the reason why, Section 87 makes it mandatory that before making an order in the surcharge proceeding a reasonable opportunity should be given to the persons concerned. It is only at this stage, witnesses are examined and documentary evidences are tendered and the persons against whom surcharge proceeding has been initiated is allowed to cross examine the witnesses

if he so wishes and also to lead evidence on his side, both oral and documentary. Section 87(4) of the Act also makes it clear that the officer who conducts surcharge proceeding shall have all the powers of the civil court in respect of matters enumerated therein such as, summoning and enforcing attendance of any person and examine him on oath; requiring the discovery and production of any document; reception of evidence on affidavits; requisitioning any public record from any court or office; and issuing commission for examining of witnesses. Any award passed under Section 87 of the Act is appealable to the Cooperative Tribunal under Section 152 of the Act. The award could be executed like a civil court decree under Chapter XVI of the Act."

(vii) 2012 (1) CWC 794 in the case of M.Karuppannam Vs. The Deputy Registrar (Dairying), office of the Deputy Registrar (Dairying), Erode Taluk and District, Erode-1 and others:

"8.....In this case, as I have, already stated, the conclusion has been arrived on no evidence and, therefore, the award of the 1st Respondent which came to be confirmed by the Cooperative Tribunal/Principal District Court, Erode needs to be interfered with."

(viii) 2016 (1) TNCJ 799 (MAD) in the case of Krishnasamy Vs. The Assistant Director Handloom and Textiles Coimbatore and another:

"19. Section 87 confers powers on the Registrar or any person authorized by him in this regard, to initiate surcharge proceedings against any delinquent for misappropriation, fraudulent retention of money, breach of trust or causing deficiency in the assets of the Society, to frame charges against him and after giving him a reasonable opportunity to answer the charges, make an order requiring him to repay or restore the money or property or pay compensation in respect thereof in accordance with the Act, Rules and By laws."

7. The learned Senior counsel appearing for the petitioner in C.R.P.No.551 of 2012 contended that enquiry conducted by the first respondent is only an eye wash and empty formality. Despite several requests made by the petitioner, the first respondent did not furnish copies of the document for the petitioner to defend the allegations made against him. Had the first respondent furnished the copies, the petitioner would have proved his innocence. The Tribunal failed to appreciate these contentions of petitioner and erroneously dismissed the appeal. The first respondent held that total sum of Rs.63,86,118.55 is payable by four persons and he has not made any

apportionment and did not determine as to what part on whole amount was liable to be surcharged against the appellant. The petitioner raised substantial question of law and fact and learned Appellate Authority has not considered those points. The alleged 15 transactions were supposed to have taken place over a period 2 to 3 years and there is no specific evidence to connect the petitioner with the alleged misappropriation. The enquiry done by the official of the department was conducted behind the back of the petitioner. The petitioner submitted written arguments before the Tribunal and Tribunal did not consider the same, while dismissing the C.M.A (CS) No.18 of 2010 filed by the petitioner. The first respondent relied on the statement made by other two person who are parties to the surcharge proceedings and various witnesses examined under Section 81 enquiry, but did not furnish copies of the same to the petitioner. Not furnishing these copies has caused serious prejudice to the petitioner. The petitioner has not been given any opportunity to examine other persons who gave statement which would enable the petitioner to prove his innocence. The only witness that was available before the first respondent was the statement of S.Palanisamy, one of the respondent in Surcharge proceedings who had admitted of preparing forged

documents and such statement cannot be relied on. The second respondent has realized the sum of Rs.7,00,000/- from V.Govindasamy, the Secretary and terminal benefits of the petitioner to the tune of Rs.37,00,000/- is with held by the second respondent. The learned Senior counsel appearing for the petitioner in C.R.P.No.551 of 2012 relied on the following judgments:

(i) 2002 -3- L.W 185 in the case of S.Subramanian Vs. The Deputy Registrar of Co-operative Societies (Housing), Cuddalore and others:

"12. In the present case it has to be pointed out that no finding has been recorded by the first respondent or by the third respondent to establish that the deficiency had been caused wilfully or deliberately or with a view to cause loss to the assets of the society. Nowhere a finding has been rendered either by the first respondent or by the third respondent in their proceedings that the petitioner is guilty of wilful negligence or wantonness, nor it has been recorded that omission or commission on the part of the petitioner is deliberate, reckless or callous or loss has been caused deliberately to the assets of the society."

(ii) Manu/SC/0285/2017 in the case of Palanisamy and others Vs. K.Dhanpalan:

"4. The moot question is: whether the enquiry conducted by the Disciplinary Committee in the present case can be said to be a fair and proper enquiry? Since the

allegations made against the appellants were serious and the finding of guilt recorded against them inevitably had civil consequences, it is cardinal that they should have been allowed to cross-examine the concerned witnesses. Not granting of such opportunity, entails in infraction of principles of natural justice."

(iii) 1999 (1) MLJ 587 in the case of P.N.Chockappan and others Vs. The Special Tribunal for Cooperative Cases, High Court Campus, Madras and others:

"13..... The above referred conclusion in all the above decisions makes it clear that in order to pass a surcharge order under Sec. 71(1) of the Act against a person entrusted with management of a co-operative 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 precaution 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....."

8. Per contra, the learned counsel appearing for the second respondent contended that petitioners along with other two persons colluded together, fabricated, forged the documents and misappropriated funds of the second respondent bank. The petitioner and two others deliberately and intentionally created bogus documents as though the members who had deposited money in the fixed deposit and some of them who had borrowed money based on the fixed deposit receipts have misappropriated funds as though the members have borrowed monies based on fixed deposit receipts. Notices were issued to the petitioners and two other employees when Surcharge proceedings were initiated. The petitioner in C.R.P.No.240 of 2012 requested the first respondent to furnish the documents relied on by the second respondent bank. The second respondent bank instructed the petitioner to come and collect the copies of the same. The petitioner in C.R.P.No.240 of 2012 did not collect the said document and refused to receive the notice sent to him. He did not submit the explanations and participate in any enquiry. Notice was sent to the petitioner in C.R.P.No.551 of 2012. He received the same and filed his explanation. In the explanation, he has submitted that documents were not furnished to him and out of compulsion, he is submitting his explanation. The first respondent

furnished 81 enquiry report and was instructed to inspect the documents and he perused the documents which amounts to furnishing the documents. In his explanation, the petitioner has stated that his explanation may be treated as his statement and due to his ill health, he cannot participate in the enquiry.

9. Except V.Govindasamy, Secretary and S.Palanisamy, Clerk, who attended the enquiry, the petitioners did not attend the enquiry. Having failed to attend the enquiry, it is not open to the petitioners in both the Civil Revision Petitions to contend that principles of natural justice are violated. All the documents based on which the amount is claimed from the petitioners and others were produced before the Enquiry Officer and only after considering the same on merits, the first respondent passed the Surcharge proceedings. The Tribunal has considered all the materials on record and order of the first respondent and dismissed the appeals filed by the petitioners by giving valid reason. The petitioners having failed to appear before the Enquiry Officer, are not entitled to allege that Enquiry Officer failed to follow procedure contemplated under Section 87(4) of the Act. The petitioners and two others have deliberately and intentionally with a view to misappropriate funds have fabricated the documents. The clerk, S.Palanisamy admitted that documents were

fabricated and forged at the instance of the petitioners and V.Govindasamy, the Secretary. The petitioners did not care to attend the enquiry and challenge the statement of S.Palanisamy. The Secretary admitted his misappropriation and agreed to pay the amounts and requested time for payment of the same. In view of the above facts and the circumstances, both the Civil Revision Petitions are without merits and prayed for dismissal of the same.

10. Heard the learned counsel appearing for the petitioner in the C.R.P.No.240 of 2012, learned Senior Counsel appearing for the petitioner in C.R.P.No.551 of 2012, the learned counsel appearing for the respondents 1 and 2 in C.R.P.No.240/2012 and respondents 1, 3 and 5 in C.R.P.No.551 of 2012 and perused the materials available on record and considered all the judgments relied on by the learned counsel for the petitioners in both the Civil Revision Petitions.

11. The allegation against the petitioners and two others is that they fabricated and forged the documents in respect of fixed deposit receipts as well as savings bank accounts and misappropriated amounts and caused loss to the second respondent bank. The Surcharge proceedings initiated is based on Section 81 enquiry. After receipt of

notice of Surcharge proceedings only, the petitioners sought for report under Section 81 of the Act. They were instructed to collect the same and after some delay they received enquiry report. They sought for the documents relied on by the second respondent. The first respondent instructed them to inspect the documents in the office of the second respondent. The petitioner in C.R.P.No.551 of 2012 inspected the documents. He only submitted his explanation denying the allegation made against him. In the said explanation, he has stated that the same may be treated as his statement in the Surcharge proceedings. He also made it clear that he will not attend the enquiry due to his ill health. The petitioner in C.R.P.No.240 of 2012 did not submit any explanation and did not attend the enquiry. It is not the case of the petitioner in C.R.P.No.240 of 2012 that he did not receive notice of enquiry. Similarly he did not dispute that he was instructed to inspect the documents sought for by him in the office of the second respondent Cooperative bank. Having failed to inspect the documents and filing his explanation and failing to attend the enquiry, the contention of the learned counsel appearing for the petitioners that first respondent has violated the principles of natural justice and has not followed the procedures contemplated under Section 87(4) of the Act is without any merits. The petitioners have not utilised the opportunity afforded to them to put

forth their case and to prove their innocence. Having failed to attend the enquiry, it is not open to them to contend that they were not given an opportunity to cross examine the witnesses. The second respondent has produced all the documents relied on by them in the enquiry and the same were not disputed by the petitioners as well as two other employees of the second respondent bank. In the circumstances, both the first respondent as well as the Tribunal have rightly rejected the contentions of the petitioners. The reasons given by the Tribunal are valid and legal and there is no circumstances warranting interference by this Court to set aside the order. As far as the contention of the petitioners that first respondent and the Tribunal did not hold that petitioners were negligent and deliberately caused loss to the second respondent bank by their supine act is without merits. The allegations against the petitioners is that they fabricated, forged the documents and misappropriated funds. By producing the documents, the second respondent proved the allegation. When second respondent has proved this allegation, they have also proved that petitioners and two others have deliberately knowing fully well caused loss by their action and also they have misappropriated huge amounts of public money by misappropriation of second respondent bank.

12. For the above reasons, I hold that there is no reason or circumstances warranting interference to set aside or modify impugned orders and both the Civil Revision Petitions are dismissed as devoid of merits. No costs.

06.10.2017

Speaking/Non-speaking order
Index : Yes
gsa

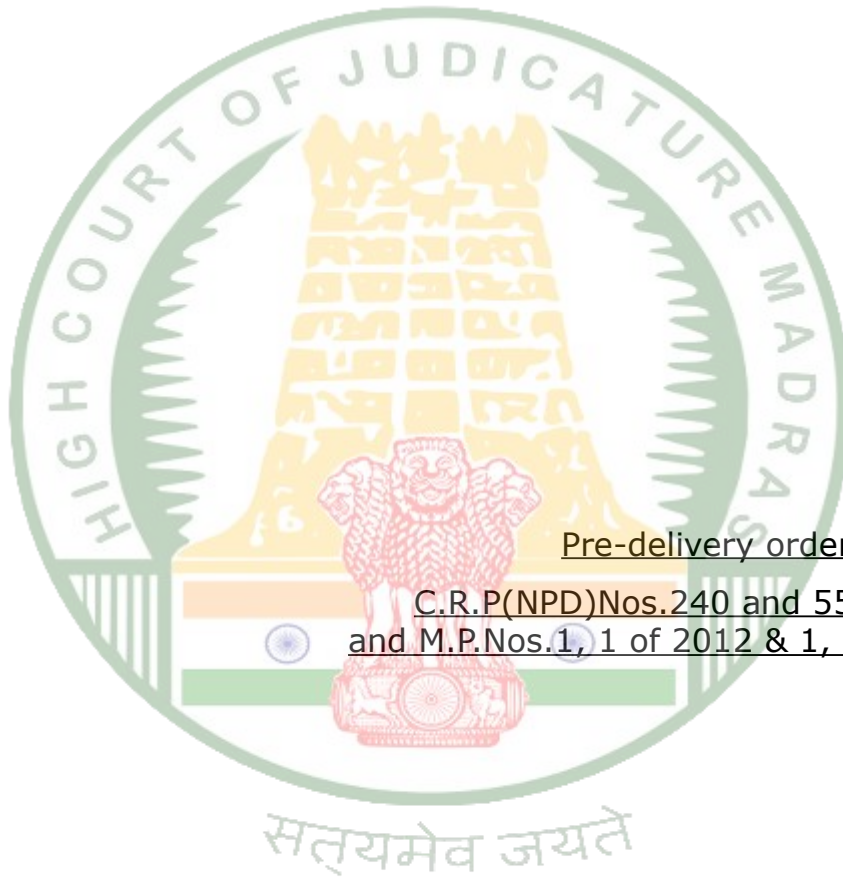
To

1. The Deputy Registrar of
Co-operative Societies
O/o. The Deputy Registrar of
Cooperative Societies,
Thiruchengode Circle,
Sudhakar Complex,
Thiruchengodu
Namakkal District.
2. The Special Officer,
S 909 Anangur Primary Agricultural
Cooperative Bank Ltd., Anangoor,
K.Ayyampalayam Post,
Paramathi Velur Taluk,
Namakkal District.
3. The Principal District Judge,
Namakkal.



V.M.VELUMANI, J.

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Pre-delivery orders made in
C.R.P(NPD)Nos.240 and 551 of 2012
and M.P.Nos.1, 1 of 2012 & 1, 1 of 2015

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06.10.2017