

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)No.654 of 2012
& M.P.No.1 of 2012

K.Rathinam

.. Petitioner

Vs.

1.The Deputy Registrar of
Co-operative Societies,
(Housing) Vellore,
9,4th Street, Gopalapuram,
Gandhi Nagar, Vellore.

2.C.Subramaniam

3.M.Nagulan

.. Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of Constitution of India, against the Judgment and Decree dated 24.11.2010 made in C.M.A.(Co-operative Societies)No.35 of 2001 on the file of the District Co-operative Cases Appellate Tribunal (Principal District Judge) of Krishnagiri, confirming the award dated 31.07.2000 made in Surcharge Case No.Na.Ka.2314/99 E on the file of the Deputy Registrar of Co-operatives Societies (House building), Vellore.

For Petitioner : Mr.J.Hariharan

For R1 : Mr.M.Venugopal
Special Govt.Pleader (CS)

For R2 & 3 : No Appearance

ORDER

This Civil Revision Petition is filed against the Judgment and Decree dated 24.11.2010 made in C.M.A.(Co-operative Societies)No.35 of 2001 on the file of the District Co-operative Cases Appellate Tribunal (Principal District Judge) of Krishnagiri, confirming the award dated 31.07.2000 made in Surcharge Case No.Na.Ka.2314/99 E on the file of the Deputy Registrar of Co-operatives Societies (House building), Vellore.

2. The petitioner was Sub-Registrar of Co-operative Societies (Retd.). Surcharge proceedings under Section 87 of the Tamil Nadu Co-operative Societies Act, 1983 was initiated against the petitioner stating that while he was working as Special Officer in the second respondent Housing Society till 31.05.1999 he has caused loss to the society to the tune of Rs.21,82,292/- on the following averments:

2.1 While he was working as a Special Officer, he made arrangement to purchase land from Sanjaikumar Pakrisha, the partner of Sanjai Enterprises, Bangalore. He and third respondent who was the Secretary of the Societies paid a sum of Rs.21,00,000/- and petitioner issued a cheque for Rs.19,00,000/-. A total amount of Rs.40,00,000/- was paid to Sanjai Enterprises. The interest from 19.05.1995 to 31.05.1997 is Rs.2,98,291.75/-. The petitioner purchased the land to the total value of Rs.18,18,708/-. The balance amount of Rs.21,81,292/- was lying with the said Sanjai Enterprises and petitioner did not take any steps for getting refund of said amount. The petitioner agreed to purchase the property at Rs.12/- per sq.foot., but purchased the property at Rs.13.80 per sq.foot and thus, caused the loss of Rs.48,240/- to the society.

3. As per the circular of the Registrar of Co-operative Societies (Housing), the petitioner was directed to call for the meeting of proposed beneficiaries to decide the purchase price of the property and other explanations and obtain the written consent from them. The purchase price must be paid from the amount received from the

proposed beneficiaries. If fund of the societies is to be used for purchasing the property, the same can be done only after obtaining permission from the Registrar. The amounts can be paid from funds of the society, only if it will not affect the lending to members. The petitioner from and out of the funds of the society paid Rs.40,00,000/- to Sanjai Enterprises, without obtaining permission from the Registrar. After payment of said amount, the society could not pay the instalment to the Tamil Nadu Co-operative Housing Federation and could not get new loans. The Society could not lend money to the members, who approached the society for loans. The petitioner has acted contrary to the circular issued by the Registrar. The cheque can be issued only by joint signature of the petitioner and third respondent. The petitioner has issued a cheque for Rs.19,00,000/- on his own and caused by loss.

4. The petitioner submitted his explanation and also gave a statement. According to the petitioner, permission was granted to purchase the properties at Rs.27/- per sq.feet. The guideline value of the property was only Rs.12/- per sq.feet, at that time, in order to reduce the expenses of the members, the property was purchased at Rs.12/- per sq.feet as per the guideline value of

Rs.12/- per sq.feet and Rs.15 was paid to the vendor towards development charges. The petitioner has purchased the property measuring 1,87,989 sq.feet in 72 plots and an extent of 17,070 sq.feet is still available to the society. Now the guideline value is Rs.75/- per sq.feet and permission was granted by the Registrar of Co-operative Societies, dated 22.07.2008 to sell the property at Rs.75/- per sq.feet and therefore, there is no loss to the society. The petitioner has not mis-appropriated the funds and has not benefited by paying Rs.40,00,000/- to the vendor. The vendor received Rs.31,00,000/- on various dates for carrying out development of the property like laying roads, sewerage pipeline, over head water tanks, parks etc., but he has not completed the development work for which he received money and cheated the society to the tune of Rs.19,06,173/- and a criminal case under Section 420 of I.P.C., is initiated against him.

5. The first respondent considering all the materials available on record, explanation of the petitioner and surcharge proceedings initiated by the second respondent, by order dated 31.07.2000, held that the petitioner has caused loss to the society and directed the petitioner to pay a sum of Rs.20,88,886/- and interest of

Rs.1,47,391.57 together with interest at 18% to the society.

6. Against the said surcharge proceedings dated 31.07.2000, the petitioner filed C.M.A.No. No.35 of 2001 on the file of the District Co-operative Cases Appellate Tribunal (Principal District Judge) of Krishnagiri. By the Judgment and decree dated 24.11.2010, the learned Appellate Tribunal, considering the order of the first respondent and materials available on record, dismissed the appeal.

7. Against the said Judgment and Decree dated 24.11.2010 made in C.M.A.(Co-operative Societies)No.35 of 2001, the present Civil Revision Petition is filed by the petitioner.

8. The learned counsel appearing for the petitioner submitted that the petitioner has not mis-appropriated any money of the society, fraudulently retained any money or other property and has not committed any breach of trust and acted wilfully, negligently or paid any amount in violation of the Act, Rules or By laws. He cannot be held liable for the alleged loss caused to the society. Surcharge proceedings was initiated on 14.04.1999 and first respondent passed order only on 31.07.2000 after 15 months. The surcharge

proceedings must be completed within 6 months i.e on or before 14.10.1999 or within further period of 6 months, after obtaining extension from Higher Authority. The last date of hearing of surcharge proceedings is 31.07.2000 and the impugned order is passed on 31.07.2000. But the same was dispatched and served on the petitioner only on 09.02.2001, nearly after 6 months. In the circumstances, the first respondent could not have passed order on 31.07.2000 in the surcharge proceedings. Only show cause notice dated 14.04.1999 was served on the petitioner on the claim made by the Deputy Registrar and the copy of the enquiry report was not furnished to the petitioner and the same are in violation of the principles of statutory provision and natural justice.

9. The Registrar by the letter in Na.Ka.No.4115/96 dated 12.04.1996 permitted the petitioner to purchase the property at Rs.40/- per sq.ft and the petitioner has not mis-appropriated any funds of the society. The petitioner has power to use the funds of the society for purchase the property, if amounts from the members are not sufficient to pay the purchase amount. The petitioner purchased 72 plots. After selling portion of the property to the members an extent of 37,985 sq.ft. land is still available with the

society. The guideline value of the land now is Rs.75/- per sq.ft. and the Registrar of Co-operative Societies (Housing), Chennai was granted permission to sell the property at Rs.80/- per sq.ft and if said lands of society's are sold, it would fetch Rs.30,38,800/-. The society has already collected Rs.40,69,564/- and there is no loss to the society.

10. The first respondent as well as Tribunal erred in holding that the petitioner has caused loss to the society. The learned counsel appearing for the petitioner further submitted that a person can be held liable for any loss caused to the society, only if he has acted in wilfully, wantonly, negligently and with pre-meditation, with a view to cause loss to the assets of the society. Mere negligence cannot be a ground for surcharge and it must be wilfully negligent and intentional negligent.

11. The learned counsel appearing for the petitioner in support of his contention relied on the following judgments.

**"(i) 2010 (4) CTC 13 (S.Pitchumani Vs.
The Deputy Registrar Cooperative
Societies/Arbitrator, Collector Office**

Complex, Coimbatore-641 018 and another)

29. Section 87 of the Tamil Nadu Cooperative Societies Act, 1983 under which the present surcharge proceedings were initiated, makes a person liable to repay or restore the money or property of a society, if it is found in an inquiry or investigation that he had (i) misappropriated any money or other property of the society (ii) fraudulently retained any money or property of the society (iii) been guilty of breach of trust, or (iv) caused any deficiency in the assets of the society, by breach of trust or wilful negligence, or (v) made any payment not in accordance with the Act, the Rules or Bylaws. Unfortunately for the Second Respondent, none of these ingredients is established in the Arbitration proceedings against the petitioners herein. The entire Surcharge proceedings go on the basis that there was negligence on the part of the petitioners, in the discharge of their duties as Cooperative Sub-Registrars. But from the Flow Chart and the deposition of PW-1, no wilful negligence is made out against the Petitioners herein. If the entire evidence on the side of the Second Respondent is accepted, it follows that the person who was liable to effect actual delivery of the goods at the last point in the chain of transactions, ought to have

effected delivery after verifying the receipt of cheque. Admittedly, the Petitioners were not the persons engaged in the last lap of the transaction. Therefore, the fixing of responsibility on the Petitioners, is neither borne out by evidence nor in tune with the requirements of Section 87 of the Act.

(ii) 2000 (II) CTC 659 (T.V.Ekambaram and two others Vs. The Co-operative Tribunal cum District Judge, Madurai and 2 others)

5. The proviso to Section 87 of the Co-operative Societies Act, 1983 reads as follows:

"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."

6. In this case, show cause notice has been issued on 18.09.1989 and the action should have been completed by 18.03.1990. But the

proceedings have been completed only on 02.05.1990. The impugned order has been translated orally in English. It is clear that the second respondent did not seek the extension of the higher authority, as the period of six months was over by 18.03.1990. In the counter also, it is not mentioned, that the second respondent has sought for the extension of time as the period exceeded six months. Under the circumstances, it has to be held that the second respondent has not sought for the extension of time. Learned counsel for the petitioner has produced as unreported judgment of this Court in N.RAnganathan, v. The Principal District Judge, District Court, VRP District, Villupuram and others, W.P.Nos.4724 and 17955 of 1997 dated 15.12.1998 wherein a learned single Judge of this Court has held that obtaining of permission under Section 173 of the old Act and now Section 87 is mandatory. Learned Judge has held that the action has to be completed within a period as stipulated under the proviso to Section 87. Under the circumstances it has to be held that the second proviso to Section 87 of the present Act of 1983 is mandatory in nature and the proviso also stated that the action "shall be" completed within a period of six months and if it exceeds beyond the period of six months, there must be as

extension from the higher authority. As the second respondent has not obtained the extension from the higher authority, the action initiated has to be held to be non-est in the eye of law. The second respondent has not followed the second proviso to Section 87 (1) of the present Act of 1983 which is mandatory. As the impugned order has been passed without following the second proviso to Section 87 of the Act of 1983, the same is quashed. The writ petition is allowed. No costs. Consequently, W.M.P.No.23641 of 1992 is closed.

(iii) 2003-4-L.W.292 (Gabriel Vs. The Deputy Registrar (Housing), Cuddalore and another)

12. In our case also the respondents had not made out that the petitioner had caused any loss to the society. The petitioner has also given reasons for carrying out the work and the same cannot be rejected on the ground that they are not convincing but on the other hand, the explanation offered by the petitioner appears to be that he had acted only pursuant to the resolution passed in the General body and if there is any further lapses in observing certain procedure, it would not amount to misappropriation of the amount. When there is no misappropriation of amount, then it would only

amounts to mis-application and when the mis-application not having caused any loss to the society, a surcharge proceeding is not justifiable. If any irregularity committed by the petitioner in failing to secure permission from the authorities concerned, it would not result in being surcharged but may result in any disciplinary action being taken as against him.

13. Therefore, it is left open to the authorities, if they consider that it is necessary, to take disciplinary action against the petitioner for failure on his part in not having followed certain procedures, but the order of surcharge is not legal and the same is liable to be set aside, accordingly, it is set aside.

(iv) (1999) 3 MLJ 310 (M.Sambandam Vs. The Deputy Registrar (Credit) Co-operative Societies, Mylapore, Madras and others)

9. Coming to the next aspect, it is stated that except the show-cause notice the petitioner was not provided with the claim made by the first respondent and the report of the enquiry Officer. In this regard, it is relevant to mention that if any surcharge proceedings is initiated under Section 71 of the Act the same has to be done in accordance

with the said provision. The second proviso of Section 71(1) makes it clear that,

"No order shall be passed against any person referred to in this sub-section unless to person concerned has been given an opportunity of making his representations."

The said provision makes it clear that if any proceedings is initiated under Section 71, before passing final order, the person concerned must be given an opportunity to put forth his claim. In our case, even though an enquiry report has not been furnished to the petitioner. The said position is clear even from the order of the third respondent. In the light of second proviso to Section 71(1) in the absence of proof for furnishing copy of the enquiry report further action taken by the first respondent, in pursuance of the enquiry report cannot be sustained on the principles of violation of statutory provision as well as natural justice. Accordingly, I sustain the contention made by the learned counsel appearing for the petitioner.

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

14. In the light of the above decisions of this

Court and having regard to the fact that the first respondent failed to establish that 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.

(vi) (2016) 6 MLJ 485 (S.Ramadevi Vs. Special Officer, Ambur Co-operative Sugar Mills, Vadapudupet, Vellore District and 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 willful negligence. In this behalf, the learned counsel for the appellant has relied upon two judgments of this Court in *S.Subramanian v. Deputy Registrar of Co-operative Societies (Housing), Cuddalore and Others* 2002-3-L.W.185: LNIND 2002 MAD 1671 and *K.Ajay Kumar Gosh and Others v. Tribunal for Co-operative Cases*, LNIND 2009 MAD 986 : (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 loss to

the assets of the Society and "mere negligence cannot be a ground for surcharge and it must be willful negligence or intentional negligence and not mere carelessness or intention or inadvertence or a single lapse by oversight".

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 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."

12. The learned Special Government Pleader appearing for the first respondent submitted that the petitioner contrary to the circular issued by the Registrar of Co-operative Societies (Housing), Chennai, utilized the funds of the society without permission of the Registrar and activities of the society could not be carried out by the petitioner. The petitioner and third respondent paid a sum of

Rs.21,00,000/- and petitioner has paid Rs.19,06,173/- to the Sanjai Enterprises without any permission from the Registrar. The petitioner has purchased the land worth Rs.18,18,708/- only. Thus, caused loss to the society to the extent of Rs.21,81,292/-. The petitioner and third respondent have paid the sum of Rs.40,00,000/- in advance before the purchase of the property and caused loss to the society to the extent of Rs.21,81,292/-. The petitioner acted negligently in not getting refund of balance amount from the vendors. The petitioner himself has admitted that he has paid Rs.31,00,000/- to Sanjai Enterprises for development. The vendor has not done development work to the extent of Rs.19,06,173/-. This has been admitted by the petitioner and he has caused loss to the society by paying amounts without vendor doing any development as agreed by the vendor. The petitioner has paid Rs.15 per sq.ft towards development charges without vendor developing the property. The petitioner has acted with deliberate negligence and caused loss to the society. The Appellate Authority and Tribunal have properly appreciated all the materials available on record and rightly held that the petitioner has caused loss to the society. In support of his contention, the Special Government Pleader relied on the judgments reported in;

(i) (2008) 8 MLJ 231 (S.V.K.Sahasramam Vs. Deputy Registrar of Co-operative Societies, Tiruvannamalai Circle, Tiruvannamalai and others)

"12. We, therefore, affirm the order of the learned single Judge in this case. We are of the view that in a case where there are allegations of embezzlement and misappropriation of public funds, the members of general public who have been cheated have no control over those who hold the enquiry in respect of the time limit. To hold that such an enquiry which has been continued beyond the time limit is bad would cause great injustice.

13. Therefore, if such enquiry is continued beyond the time limit mentioned in the relevant statute, the said time cannot be held to be mandatory in view of the principles laid down in Montreal Street Railway Company v. Normandi (supra), which has been affirmed by the Supreme Court."

13. Heard the learned counsel for the petitioner as well as the learned Special Government Pleader (CS) for the first respondent and perused all the materials available on record.

14. The petitioner is challenging the order passed by the first respondent in surcharge proceedings which was confirmed by Cooperative Tribunal in C.M.A.No.35 of 2001. The first respondent has initiated the proceedings against the petitioner, stating that the petitioner and secretary had acted negligently, contrary to the circular of the Registrar of Cooperative Societies, bylaws, rules and regulations and caused loss to the society. The petitioner and others, without the vendor carrying out and completing the development work, has paid Rs.15/- per sq.ft. towards development charges. The petitioner has purchased the property only for a part of the amounts paid as advance and failed to get refund of the balance amounts. From the charges levelled against the petitioner in the notice issued for initiation of the surcharge proceedings and in the surcharge proceedings, the petitioner is not charged having deliberately, wilfully and knowing fully well that loss would be caused to the society. The charges against the petitioner is that he acted contrary to the circular and bylaws of the society. Further, the charge levelled against the petitioner is that without the vendor carrying out all the development works, the petitioner and others had paid Rs.15/- per sq.ft. towards development charges.

15. On a reading of the agreement entered into between the petitioner and the vendor, it is seen that a clause had been incorporated in the said agreement to the effect that the vendor had completed all development works. The vendor in his explanation to surcharge notice has stated that he has completed all the development works and the society is not the only purchaser. The vendor had sold flats to various third parties and who have built houses and they are residing there. The petitioner in his explanation has stated that in order to enable the vendor to carry out the development works, he has paid the amounts in advance. When there is a statement to the effect that the development work had been completed, the second respondent society or the enquiry officer failed to find out whether the said statement is correct or to what extent the development work had been completed. A charge was levelled against the petitioner that no development work had been done and petitioner caused loss to the society. Claiming total amount paid as development charges, as loss to the society without verifying whether any development works were done or not is devoid of merits.

16. As per the various judgments relied on by the learned

counsel for the petitioner as well as the Special Government Pleader for first respondent, it is seen that a person can be held liable for the loss caused to the society and surcharge proceedings can be initiated against him, only if the said employee had acted with deliberate, supine, negligence, pre-meditated, commission or omission and knowing fully well that his action would cause loss to the society and had embezzled or misappropriated funds of the society and general public.

17. It is also to be seen whether the said official is benefited by his action. Mere negligence will not be the ground for initiating surcharge proceedings or fastening liability on the official by rendering a finding in surcharge proceedings. In the present case, the main charge against the petitioner is that contrary to the circular of the Registrar, he paid Rs.40,00,000/- to the vendor from and out of the fund of the society. For this act, society can initiate disciplinary proceedings against the petitioner if they are so advised and not surcharge proceedings. Further, another charge against the petitioner is having paid Rs.40,00,000/- to the vendor, he did not purchase land to the full amounts and he did not take steps to get refund of the balance amounts. From the charges levelled against

the president of the society, who was elected as the Administrative Head, after the petitioner was transferred, it is seen that the president purchased some more extent of the lands who, without adjusting the balance amount paid for the land by the petitioner, made payments for the lands purchased by him. This would show that the lands were available with the vendors and the person who took charges from the petitioner ought to have taken appropriate steps either for getting refund or purchasing the property, adjusting the value from and out of the balance amount available with the vendor.

18. It is not the case of the second respondent that the petitioner was benefited by his action and caused loss to the society. In such a case, unless the second respondent alleges and proves that the petitioner, deliberately with supine negligence, acted knowing fully well that the society would suffer loss, the petitioner cannot be held liable for any loss that the society would have suffered. It is pertinent to note that the petitioner has purchased land at Rs.12/- per sq.ft. and only certain portions were allotted to the members of the second respondent society and amounts were received from the members. Subsequently, the Registrar has

directed the second respondent society to sell the land to the members at the rate of Rs.75/- per sq.ft. The second respondent society has not furnished any details, as to whether the lands were sold to any members, if so the extent and price to which it was sold. Then only, it can be decided whether the society has suffered any loss.

19. Both the first respondent as well as the Tribunal failed to consider that charges levelled against the petitioner is mere negligence and that is insufficient to fasten the liability on the petitioner. Both the first respondent as well as Tribunal failed to consider all these facts and judgments on this point in proper perspective and on erroneous ground held that the petitioner has caused loss to the second respondent society and is liable to make good to the said loss of the society.

20. I have heard, the similar matter in C.R.P.(MD)Nos.947 and 948 of 2016 (NPD) and by the order dated 06.04.2017, allowed the said Civil Revision Petitions holding that the respondents therein failed to allege and prove wilful negligence on the part of petitioner. In the said order, I considered the following decisions and allowed

the Civil Revision Petitions:

(i) 2002 (3) LW 185 (S.Subramanian Vs. The Deputy Registrar of Co-operative Societies (Housing), Cuddalore and others);

(ii) 2013 (4) MLJ 352 (Deputy Registrar of Co-operatives, Kumbakonam, Thanjavur District Vs. R.Krishnamoorthy);

(iii) 2012 (2) LLN 90 (AP) (k.Kanaka Rao Vs. The Chairman, A.P.Co-operative Tribunal);

(iv) 1999 (3) MLJ 310 (M.Sambandam Vs. The Deputy Registrar (Credit) Co-operative Societies, Mylapore, Madras and Others);

(v) 2009 (4) MLJ 992 (K.Ajay Kumar Gosh and others Vs. Tribunal for Co-operative Cases (District Judge to Kanyakumari District), Nagercoil and another);

(vi) 1980 (2) MLJ 17 (Sathyamangalam Co-operative Urban Bank Limited Vs. The Deputy Registrar of Co-operative Society and another);

(vii) 1994 Supp. (3) SCC 134 (Pollachi Co-operative Marketing Society Vs. K.N.Valuswami and others);

(viii) (1980) II MLJ 17 (Sathyamangalam Co-operative

Urban Bank Limited Vs. The Deputy Registrar of Co-operative Society and another)

The said order is squarely applicable to the facts of the present case.

21. For the above reasons, the Civil Revision Petition is allowed by setting aside the order of the first respondent and judgment of the Tribunal made in C.M.A.No.35 of 2001. No costs. Consequently, connected miscellaneous petition is closed.

20.11.2017

Index : Yes/No

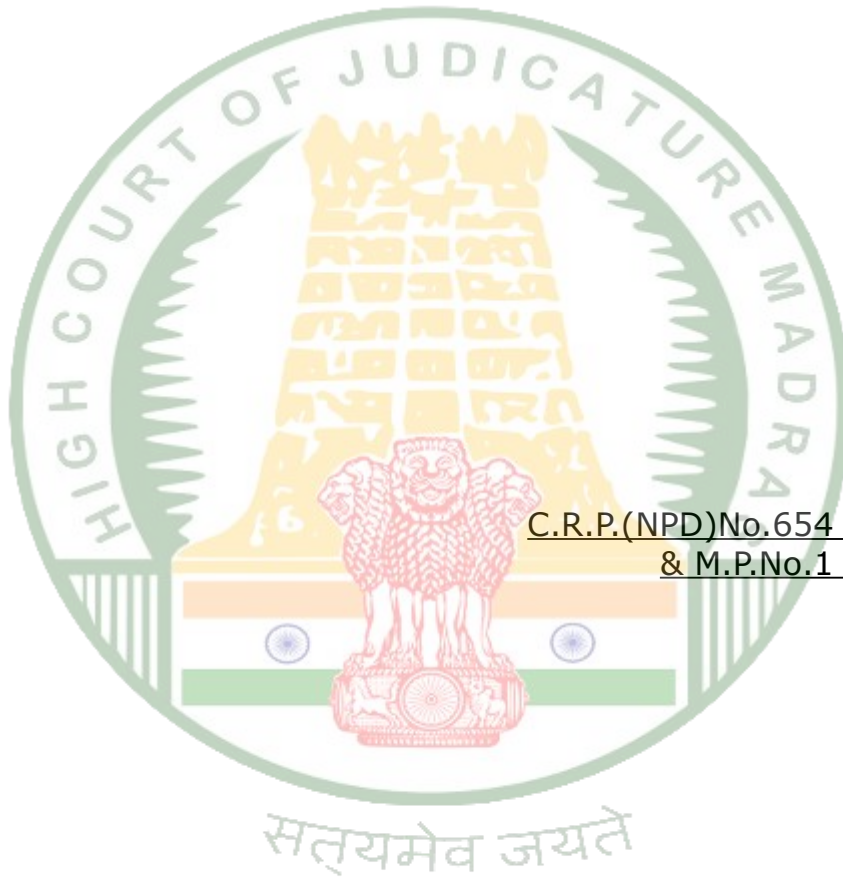
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To

- 1.The District Co-operative Cases Appellate Tribunal (Principal District Judge), Krishnagiri.
- 2.The Deputy Registrar of Co-operative Societies, (Housing), Vellore, 9,4th Street, Gopalapuram, Gandhi Nagar, Vellore.

V.M.VELUMANI, J.

dm



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& M.P.No.1 of 2012

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20.11.2017