(2021) 07 KL CK 0315

In the High Court Of Kerala

Case No : Writ Petition (C) No. 10982 Of 2020

T. H.Musthaffa APPELLANT

Vs

State Of Kerala RESPONDENT

Date of Decision : 27-07-2021

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Kerala Cooperative Societites Act, 1969 — Section 32, 32(1), 63, 66, 66(2), 68, 68(1), 68(2), 71, 79, 83
Negotiable Instruments Act, 1881 — Section 5, 6, 118(a), 138

Citation : (2021) 07 KL CK 0315

Hon'ble Judges : P.V.Kunhikrishnan, J

Bench : Single Bench

Advocate : George Poonthottam, Arun Chandran, Nisha George, .P.V.Baby

Final Decision : Allowed

Judgement

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P.V.Kunhikrishnan, J",,

1. These two writ petitions are connected and therefore, I am disposing of these two writ petitions by a common judgment.",,

2. The petitioners herein are the members of Alwaye-Kunnathunad Co-operative Rubber Marketing Society Limited No.E-221, Perumbavoor of Ernakulam district (for short 'society').",,

The main business of the society is procurement and sale of latex and rubber produces such as rubber sheets. The bye-law of the society is produced as Ext P16 in WP(C)No.13951 of,,

2018. Clause 27 of the bye-law of the society deals with the sale of rubber. The Board of directors can frame a subsidiary bye-law for the business as per this clause. As per clause 21 of,, the bye-law, the decisions in connection with the purchasing and marketing duty of the society are done by a purchasing and marketing committee which consists, four members of the",,

Managing Committee. Following clause 27 in the bye-law, the Managing Committee by way of resolution bearing No.95 dated 18.12.1995 framed a subsidiary bye-law, regarding the",,

manner in which the purchasing and marketing committee should function. Ext P2 in WP(C)No.10982 of 2020 is Resolution No.95 dated 18.12.1995. The entire purchase and marketing,,

of the rubber and latex during the period of 2008-2013 is conducted by the purchasing and marketing committee of the society in which petitioners 2, 3, and 5 in WP(C) No.13951 of 2018",,

were members.,,

3. The Joint Registrar of Co-operative Societies (General), Ernakulam ordered an inspection u/s.66 of the Kerala Co-operative Society Act (for short KCS Act) in the society alleging that",,

latex had been sold to a dealer by the purchase and marketing committee without approval of the Managing Committee so also without securing sufficient and adequate security. The,,

report says that there was a credit sale, which is not in accordance with the bye-law. Ext P4 in WP(C) No.10982 of 2020 is the report of the Assistant Registrar(General) Aluva under",,

Section 66 of the KCS Act. In the above report, the officer found that the committee members, as well as the secretary, are liable for causing a loss of Rs.50,40,028/- to the society in the",,

rubber trading transaction with M/s.Kallada Rubber Traders. Accordingly, liability was fixed on the petitioners in these writ petitions. Meanwhile, the Joint Registrar concerned issued a",,

notice under Section 32(1) of the KCS Act seeking an explanation as to why the Managing Committee of the respondent society shall not be superseded. A reply was given to the notice,,

under Section 32(1) of the KCS Act. After accepting the explanation from the Managing Committee, the proceedings under Section 32 of the KCS Act were dropped.",,

4. Even though the proceedings under Section 32 of the KCS Act were dropped, an inquiry u/s.68 (1) KCS Act was ordered and proceedings were issued to that effect by the Joint",,

Registrar. Ext P5(a) in WP(C) No.10982 of 2020 is the proceedings by which the inquiry u/s.68(1) KCS Act was ordered. The petitioners submitted an explanation to Section 68(1) KCS,,

Act notice. But the same was rejected and an order u/s.68(2) of the KCS Act was passed by the Joint Registrar (General) Ernakulam on 23.4.2015. Ext P6 in WP(C) No.10982 of 2020,,

is the order passed u/s.68(2) of the KCS Act. As per Ext P6 order, liability was fixed on the petitioners in these writ petitions. The petitioner in WP(C) No.10982 of 2020 is serial No.5 in",,

the table shown in the last portion of Ext P6 order. The petitioners in WP(C) No.13951 of 2018 are serial Nos. 10, 2, 3, 6, 4, 7, 8 and 9 respectively in the table shown in the concluding",,

portion in Ext P6 order produced in WP(C) No.10982 of 2020. Aggrieved by the order u/s.68(2) of the KCS Act, the petitioners filed an appeal before the Government u/s.83 of the KCS",,

Act. The Government rejected the appeal filed by the petitioners as evident by Ext P8 in WP(C) No.10982 of 2020. Aggrieved by the order under Section 66(2) and the order of the,,

Government rejecting the appeal filed u/s.83 of the KCS Act, these two writ petitions are filed. Ext P9 produced in WP(C)No.10982 of 2020 is the notice issued by the Joint Registrar to",,

the petitioners seeking explanation as to why they shall not be removed from continuing as a member of the society. The petitioner in WP(C) No.10982 of 2020 challenged Ext P9 before,,

this Court by filing WP(C) No.14142 of 2018 in which this Court directed the petitioner to appear before the authority and submit his objection. It was further ordered by this court to the,,

effect that if any adverse orders are passed against the petitioner, the petitioner was allowed to challenge the same and also directing the authority concerned to keep in abeyance that",,

order for a period of two weeks. Ext P10 is the judgment. Thereafter, the petitioner in WP(C) No.10982 of 2020 filed a review petition in WP(C)No.14142 of 2018. Ext P13 is the order in",,

the review petition leaving open all the questions of law and facts raised in the writ petition. The petitioners in these writ petitions are mainly challenging the order passed u/s.68(2) of the,,

KCS Act and the order rejecting the appeal filed against the same u/s.83 of the KCS Act.,,

5. Heard the senior counsel George Poonthottam for the petitioner in

WP(C)No.10982 of 2020, Advocate P.V.Baby for the petitioners in WP(C)No.13951 of 2018 and Smt.Sheeja C S,",,

the Government Pleader.,,

6. The counsel for the petitioners submitted that the order passed u/s.68(2) of the KCS Act is unsustainable for the simple ason that it violates the pre-conditions to initiate proceedings,,

under Section 68 of the KCS Act. According to the counsel, an order u/s.68 of the KCS Act can be passed only if there is an inspection in which it is found that any person who is or was",,

entrusted with the organization or management of the society has made any payment contrary to the KCS Act and the Rules or bye-laws or has caused to any loss or damage in the,,

assets of the society by breach of trust or willful negligence or mismanagement or has misappropriated or fraudulently retained any money or other property belonging to the said society,,

or has destroyed or caused the destruction of the record. According to the counsel, even if the entire allegation mentioned in the order passed u/s.68(2) of the KCS Act are accepted, the",,

conditions for passing surcharge order u/s.68 of the KCS Act is not attracted. The counsel appearing for the petitioners submitted that the allegation against the petitioners is that they sold,,

rubber on a credit basis. The counsel submitted that the rubber was sold after accepting a cheque. That will not amount to a sale on a credit basis. The counsel conceded that the cheques,,

issued by the customer were dishonoured when it was presented before the bank. Immediately proceedings were initiated before the criminal court u/s.138 of the Negotiable Instruments,,

Act. Arbitration proceedings were also initiated against the defaulter. An award was passed in ARC 71/12 on 31.8.2017. It is also submitted by the counsel that the complaint filed u/s.138,,

of the Negotiable Instruments Act was sent for settlement to the Lok adalat. The matter was settled with the accused based on his assurance that he will pay the amount due in,,

instalments. Ext P12 in WP (C) No.10982 of 2020 is the award of the Lok adalat along with the settlement signed by both parties. In such circumstances, the counsel submitted that there",,

is no misappropriation of the fund of the society or there is no mismanagement by the petitioners or there is no loss or damage in the asset of the society. In such circumstances, the",,

counsel submitted that the order passed u/s.68(2) of the KCS Act will not stand. The counsel for the petitioner relied upon the judgment of this Court in A.K.Francis v Joint Registrar,,

(1990(2) KLT 470) and the judgment of the apex court in Pollachi Cooperative Marketing Society v K.N.Valuswami and others (1994 Supp(3) SCC 134).,,

7. The Government Pleader submitted that Section 68(2) KCS Act order was passed, based on Section 66 inquiry. The Government Pleader take me through the Section 66 inquiry report,",,

in which it is clearly found that there is mismanagement on the part of the petitioners. The Government Pleader also take my attention to clause 27 of the bye-law of the society.,,

According to the Government Pleader, the society acted in violation of the bye-law and the Rules framed based on clause 27 (1) of the bye-law. The Government Pleader submitted that",,

the decision in A.K.Francis's case is not applicable in this case because that was a decision rendered in 1990. Thereafter â??mismanagementâ? was added in Section 68 of the KCS Act.,,

According to the Government Pleader, there is mismanagement on the part of the petitioners. Government Pleader also relied upon the judgment of this Court in Thrikkadavoor Service",,

Co-op. Society Ltd. V Sivasankara Pillai (1990(2) KLT 594) which was after the judgment in A.K.Francis's case(supra). The Government Pleader submitted that the committee of a,,

society cannot wash off their hands from liability by contending that there was a secretary in office or the petitioners were not in charge of the affairs mentioned in the impugned orders.,,

Therefore, the Government Pleader submitted that there is nothing to interfere with the order passed by the authority u/s.68(2) of the KCS Act. The Government Pleader also submitted",,

that the Government after considering all the contentions of the petitioners rejected the appeal u/s.83 of the KCS Act. According to the Government Pleader, there is nothing to interfere",,

against these orders in a writ petition filed u/s.226 of the Constitution of India.,,

8. The short point to be decided in these two writ petitions is whether the order passed by the authorities u/s.68(2) of the KCS Act is sustainable or not. It would be better to extract,,

Section 68 of the KCS Act to decide the issue.,,

â??68.Surcharge:- (1) If in the course of an audit, inquiry, inspection or the winding up of a society, it is found that any person, who is or was entrusted with the organization or management of such society",,

or who is or has at any time been an officer or an employee of the society, has made any payment contrary to the Act and the rules or the bye-laws, or has caused to any loss or damage in the assets of the",,

society by breach of trust or willful negligence or mismanagement or has misappropriated or fraudulently retained any money or other property belonging to such society or has destroyed or caused the,,

destruction of the records, the Registrar may, of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorised by him by an order in writing",,

in this behalf, to inquire into the conduct of such person.",,

(2) Where an inquiry is made under sub-section (1), the Registrar may, after giving the person concerned an opportunity of being heard, by order in writing, require him to repay or restore the money or other",,

property or any part thereof, with interest at such rate, or to pay contribution and costs or compensation to such extent, as the Registrar may consider just and equitable.",,

(3) Where the money, property, interest, cost, or compensation is not repaid or restored as per sub-section (2), the Registrar shall take urgent steps to recover such amounts from the concerned persons as",,

arrears of public revenue due on land as specified in Section 79 of the Act.""",,

9. For ordering an enquiry u/s.68 of the KCS Act, the following conditions are to be satisfied.",,

1. If in the course of an audit, inquiry, inspection or to winding up of a society, it is found that any person",,

a) Who is or was entrusted with the organization or management of such society,,

b) Who is or has at any time been an officer or an employee of the society,,

2. Has made any payment contrary to the Act and the Rules or the bye-laws,,

3. Has caused to any loss or damage in the assets of the society by breach of trust or willful negligence or mismanagement,,

4. Has misappropriated or fraudulently retained any money or other property belonging to such society,,

5. Has destroyed or caused the destruction of the records.,,

10. This Court in A.K.Francis's case considered the conditions precedent to attract Section 68 of the KCS Act. This Court also considered the situation in which an order u/s.68 of the,,

KCS Act can be passed. The relevant portion of A.K.Francis's case is extracted hereunder:,,

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11. The question for consideration is whether the action is valid, and whether it is justified under S.68 of the Act. S.68 reads:",,

68. Surcharge.-(1) If in the course of an audit inquiry, inspection or the winding up of a society, it is found that any person, who is or was entrusted with the organisation or management of such society or",,

who is or has at any time been an officer or an employee of the society, has made any payment contrary to this Act, the rules or the bye laws, or has caused any deficiency in the assets of the society by",,

breach of trust or wilful negligence or has misappropriated or fraudulently retained any money or other property belonging to such society or has destroyed or caused the destruction of the records, the",,

Registrar may, of his own motion or on the application of the committee, liquidator or any creditor, inquire himself or direct any person authorised by him by an order in writing in this behalf, to inquire into",,

the conduct of such person.""",,

The first requirement of the section, which constitutes the condition precedent for its operation, is that the payment contemplated or the deficiency in the assets of the society should have been found in the",,

course of audit, inquiry, inspection or the winding up of the society. The section can be invoked by the Registrar only if the finding was made in this manner and not otherwise. The facts giving rise to the",,

charge have to be disclosed in the course of an audit under S.63, inquiry under S.65, inspection under S.66 or on the winding up of the society. - vide Pentakota Sriramulu v. Cooperative Marketing Society",,

Ltd. AIR 1965 SC 621, where the Supreme Court spoke as follows with reference to an analogous provision in S.49(1) of the Madras Cooperative Societies Act,1932:-",, Besides the two factors to which learned counsel referred and which we have just set out, there is also another condition which has to be satisfied before S.49(l) could be attracted. The facts giving rise to",,

the charge have to be disclosed in the course of an audit under S.37or an enquiry under S.38 or an inspection under S.39 or on the winding up of the Society.""",,

It is evident that the Supreme Court related the audit, enquiry and inspection to the statutory proceedings contemplated by the Act, which in this case fall under S.63, 65 and 66. There is no case that the",,

disclosure about the conveyance allowance was made in the course of any audit or inspection. The enquiry ordered by the first respondent on the complaint petition was also not one under S.65 of the Act.,,

Therefore, the essential condition for S.68 to be invoked did not exist and the entire proceedings leading to Exts.P13A and P17 have to fall as wanting in jurisdiction. (See also Para.6 of ILR 1979 (1) (Volume",,

29) Karnataka page 739, Gopal Krishna Vishweshwar v. Yellapura T.A.P.C.M. Society).",,

12. The further requirement of S.68 is that the payment or deficiency in the assets of the society was made, or caused by breach of trust of wilful negligence or misappropriation or fraudulent retention of",,

money. It is not the mere wrongful payment or causing of deficiency in the assets that attracts S.68, but the further fact that such payment or deficiency was made or caused by the breach of trust, wilful",,

negligence, misappropriation or fraud of the person concerned. Unless the latter ingredient is found to exist, action under S.68 is ruled out",,

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16. The uniform trend of decisions is therefore, that negligence simpliciter is not sufficient to visit the officer of a cooperative society with proceedings under S.68. His conduct should be wilful, implying",,

culpability with an element of deliberateness or mens rea involved in the conduct or omission which resulted in the loss. Without such conduct or omission, resulting in loss to the society, the Registrar is",,

not entitled to proceed under S.68 or to pass an order of surcharge.,,

17. Proceedings for surcharge are serious in their import, akin to misfeasance proceedings under S.543 of the Companies Act. Under that Act however, the procedure is elaborate as in civil cases, and the",,

person concerned gets full opportunity of putting forward his pleas before the High Court in relation to the charge of misfeasance or malfeasance. On the other hand, the proceedings under S.68 are at a",,

departmental level, at the level of the Joint Registrar of Cooperative Societies in ordinary cases, with only the remedy of an appeal to government. It is therefore, imperative that the special statutory remedy",,

of surcharge is invoked only if the conditions prescribed by S.68 are strictly complied with. A person can be proceeded against, and visited with liability, only if an objective assessment of the evidence and",,

the materials available on record leads to the irresistible inference that the person concerned is guilty of one or other of the acts specified in the section. A mere routine, mechanical chanting of the section or",,

of the acts mentioned, without anything more, is not sufficient in law to sustain an order of surcharge. It should be based on relevant and adequate materials on which a court could satisfy itself that the",,

person concerned was guilty of breach of trust, wilful negligence, misappropriation or fraud.",,

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11. TheÂ GovernmentÂ PleaderÂ submittedÂ thatÂ after A.K.Francis's case, mismanagement is also added in Section 68(1) of the KCS Act. This Court in Mahendran v. Joint",,

Registrar of Co- operative Societies (General) (2019(3)KLT 627) considered the word â??mismanagementâ? mentioned in the amended Section 68 of the KCS Act. The relevant portion,,

of the judgment is extracted hereunder:,, xxx,,

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14. It is indubitable from the manner in which S.68 is drafted that any of the aforementioned classes of persons, who either makes payment contrary to the Act, Rules and Bye-laws, or causes any loss or",,

damage to the assets of the Bank on account of breach of trust, willful negligence, mismanagement or misappropriate would certainly become liable to answer the rigor of the said Section. Pertinently, the",,

word â??Mismanagement' in the said Section has been used without any other qualification and therefore, a simplicitor mismanagement, even without it being willful or otherwise, certainly would bring the",,

responsible person under the clutches of the said Section. This is incontestable because, in the other areas of the Section, it is clearly mandated that the loss or damage to the assets of the Bank must be",,

made either by breach of trust; or by willful negligence; or by misappropriation; or by fraudulent retention of money, but when it comes to â??mismanagement' there is no such qualification that it ought to",,

be willful, fraudulent or in violation of trust. I am, therefore, firm in my mind that even simplicitor case of mismanagement would be sufficient to bring the enumerated classes of persons within the ambit of",,

the said Section.,,

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12. While considering a similar provision of the Tamil Nadu Co-operative Societies Act, 1961, the apex court considered the situation in which the surcharge proceedings can be initiated.",,

In Pollachi Co-operative Marketing Society's case(supra) the apex court observed like this:,,

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â??3. Respondents 1- 14 thereupon 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 willful negligence. The word 'willfulness', 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 willful 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 Cooperative Cases was wrong as it had posed for answer the following question: â??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.â? 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 willful negligence.,,

4. The High Court was, in our view, right in emphasizing that the degree of negligence that had to be established under Section 71 was not mere negligence but willful negligence and that this imported a",,

consciousness that injury or loss was likely to arise from an act of commission or omission. The basis upon which the Tribunal considered the matter was, therefore, erroneous. Once we come to the",,

conclusion that the test applied by the High Court was the right test, we must concur with the High Court in its finding that the evidence did not disclose the legal inference that Respondents 1-14 had been",,

guilty of willful negligence.â??,,

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13. A plain reading of Section 68 of the KCS Act, it is clear that to initiate a proceedings u/s.68 of the KCS Act, an audit, inquiry, inspection or the winding up of a society is necessary",,

and also in the course of such audit, inquiry, inspection or the winding up of a society, the other conditions mentioned in Section 68 of the KCS Act are to be there. If a person who is or",,

was entrusted with the organization or management of a society or who is or has at any time being an officer or employee of the society has made any payment contrary to the Act and,,

Rules or bye-law of the society, Section 68 KCS Act proceedings can be initiated against him. Therefore, the first condition for initiating the surcharge proceedings is that the employee or",,

the other persons mentioned above has to make payment contrary to the Act and Rules or bye-laws. The second one is that such person has caused any loss or damage in the assets of,,

the society by breach of trust or willful negligence or mismanagement. Therefore, loss or damage in the assets of the society coupled with a breach of trust or willful negligence or",,

mismanagement by a person who is or was entrusted with the organization or management of the society or who has at any time being an officer or an employee of the society is,,

necessary to attract the proceedings u/s.68 of the KCS Act. It is true that in Mahendran's case (supra) this Court observed that since there is no qualification mentioned for,,

â??mismanagementâ? in Section 68 of KCS Act even simplicitor case of mismanagement is sufficient to attract action. Similarly there is no qualification for Breach trust mentioned in the,,

section. According to my opinion, the qualification is inbuilt in the words ""breach of trust"" and ""mismanagement"". That is all meant by this court in Mahendranâ??s case(supra). The word",,

mismanagement is not defined in the KCS Act. Therefore we have to accept the dictionary meaning of ""mismanagement"". As per Oxford Advanced, Learner's Dictionary",,

mismanagement means â??to deal with or manage badlyâ?. In other words, the meaning is the process of managing something badly or wrongly. Therefore, the qualification is inbuilt in",,

the word â??mismanagementâ?. Similarly, if persons referred in Section 68(1) has misappropriated or fraudulently retained any money or other property belonging to such society or has",,

destroyed or caused the destruction of the records, the Registrar can initiate proceedings u/s.68 of the KCS Act. A bare reading of the above provisions it is clear that an element of",,

criminal intention in the action of the person mentioned above is necessary to initiate a proceedings u/s.68 of the KCS Act. It is to be noted that the mere negligence on the part of the,,

persons mentioned in Section 68 of the KCS Act is not a ground to initiate proceedings u/s.68 of the KCS Act unless there is willful negligence. Therefore, willful negligence,",,

mismanagement, misappropriation, fraudulently retaining money or other property belonging to the society, destroying or causing destruction of records etc. are the reason to initiate",,

Section 68 of the KCS Act. If these types of activities are done by a person referred in the section, of course, criminal prosecution is also possible. If a person attached to the affairs of",,

the society committed these types of mischiefs, according to me, the authorities not only initiate proceedings u/s.68 of the KCS Act, they should also set the criminal law into motion by",,

filing a complaint before the Station House Officer concerned. I only meant that in such a situation an investigation by the police is necessary to find out whether any criminal offence is,,

made out or not. The police have to investigate the case independently. I once again make it clear that simply because there is an order u/s 68(2) of the KCS Act, the police need not file a",,

charge sheet against the culprits. The police have to investigate to find out whether any criminal offence is made out. I only mentioned that if an order u/s 68(2) of the KCS Act is passed,,

the authority concerned should set the criminal law into motion. But this provision cannot be misused if there is minor negligence or minor defaults from an employee or other office,,

bearers of the Managing Committee of a society. The section is so clear about the conditions in which an order u/s.68 of the KCS Act can be initiated. To err is human but to persist in,, error is of course diabolical. But simple human errors are not a ground to initiate proceedings u/s.68 of the KCS Act.,,

14. Now coming to the facts of the case, the main ground for passing an order u/s.68(2) of the KCS Act is that the petitioners, in violation of the bye-law and also by committing a breach",,

of trust, mismanagement, and with wilful negligence sold rubber on credit basis and consequently there is a loss of Rs.50,40,028/- in the assets of the society. Therefore, the order was",,

passed u/s.68(2) of the KCS Act to recover the amount of Rs.50,40,028/- from ten persons which include the petitioners and another @ Rs.5,04,002/- each. The question to be decided is",,

whether there is actually any sale on a credit basis in the society and whether it was with the connivance of the petitioners. Another question is, whether the sale on a credit basis is",,

prohibited in the bye-law and whether that can be a ground to initiate an inquiry and pass orders u/s.68 of the KCS Act.,,

15. I perused the order passed u/s.68(2) of the KCS Act which is impugned in this case. It is stated in the order that as per bye-law 27(i), the petitioners have not made arrangements for",,

the sale of rubber. Probably this finding in the order u/s.68(2) of the KCS Act may not be correct. Ext P16 in WP(C) No.13951 of 2018 is the bye-law. Rule 27(i) of the bye-law is,,

extracted hereunder:,,

â??27(i). It shall be competent to the Board of Directors to frame subsidiary bye-laws for the conduct of the business of the society consistent with the Act, the Rules made under the Act and these bye-",,

laws, such subsidiary bye-laws shall be entered in the minute book of the Society and they shall be got approved by the Registrar of Co-operative Societies.â??",,

Sl No.,The sale of rubber as per,Rs.

1,Bill No.261 dated 20.3.2012,"Rs.13,81,608/-

2,Bill No.263 dated 22.3.2012,"Rs. 20,97,214/-

3,Bill No.264 dated 23.3.2012,"Rs.10,40,804/-

4,Bill No.266 dated 24.3.2012,"Rs.5,20,402/-

,Total,"Rs.50,40,028/-

