



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 22.08.2016

CORAM

THE HON'BLE DR.JUSTICE S.VIMALA

Crl.O.P.(MD) Nos.21691, 18274, 19972 and 20845 of 2015

MP(MD)Nos.1,1,1,2,2 & 2 of 2015

1. Hemantkumar Ptilokani
2. Pitambardas H Jaswani
3. Sunil Harichand Balchandani
... Petitioners/A9 to A11 in Crl.O.P.(MD)21691/2015

1. S.Sivasakthivel @ Sarvajit
2. S.Kamaraj
3. M.Vamathevan ... Petitioners/A1 to A3 in Crl.O.P.(MD)
18274/2015

Sunil Kumar Govindani ... Petitioner/A4 Crl.O.P.(MD)19972/2015

1. Ashok Kumar Mulwani
2. Suresh Kumar Govindani
3. Omprakash Kukreja
4. Badri Kalyan ... Petitioners/A5 to A8 in Crl.O.P.(MD)
20845/2015

vs.

1.The State rep. by its
The Deputy Superintendent of Police,
Srivilliputhur Sub-Division,
Srivilliputhur,
Virudhunagar District.
(Crime No.356 of 2014) ... 1st Respondent in all petitions

2. K.Sakthivel ... 2nd Respondent/Defacto Complainant
in all petitions

Common Prayer: Petitions filed under Section 482 of Cr.P.C. to call for the records relating to C.C.No.242 of 2015 pending on the file of the Judicial Magistrate No.II, Srivilliputhur and quash the same.

For Petitioners: Mr.Veera Kathiravan, Senior Counsel
in all Crl.OPs. For Ms.J.Maria Roseline

For R1 : Mr.A.P.Balasubramani
in all Crl.OPs. Govt. Advocate (Crl.Side)

<https://hcservices.ecourts.gov.in/hcservices/>

For R2 : Mr.Prabhu Rajadurai for
in all Crl.OPs. Mr.M.P.Senthil



Orders Reserved on : 10.08.2016
Orders Pronounced on : 22.08.2016

COMMON ORDER

A1 to A3 filed CrI.O.P.(MD) 18274 of 2015, A4 accused filed CrI.O.P.(MD) 19972 of 2015, A5 to A8 filed CrI.O.P.(MD) 20845 of 2015 and A9 to A11 filed CrI.O.P.(MD) 21691 of 2015 to quash the charge sheet, filed by the 1st respondent under Section 103 (a)(c) (e) and 104 of Trade Marks Act, 1999 and under Sections 420, 482, 485, 486, 109 IPC in C.C.No.242 of 2015 before the learned Judicial Magistrate No.II, Srivilliputhur.

2. Prior to that, A2 and A5 filed a petition to quash the FIR in Crime No.356 of 2014. At that time when the matter was taken up for hearing, as the final report had been filed before J.M.II, Srivilliputhur, this Court restrained from quashing the FIR, by making an observation that the remedy open to the petitioners is to challenge the final report after the cognizance is taken by the Court and thus directed the J.M.II, Srivilliputhur to expedite the process of taking cognizance.

Brief Facts leading to filing of the complaint:

3. The defacto complainant is one of the partners of M/s.Welcome Match Works, Srivilliputhur, which deals with manufacturing of different kinds of matches and that the Trade Mark, namely, "The Pipe" was registered in the name of S.K.Perumalappan, Trading as M/s.Welcome Match Works in the year 1965. The same is renewed upto 10.11.2017; the said firm has given permission to A1 to A3 to use the trade mark "The Pipe" on the condition that their product should be of the same quality as that of the product of M/s.Welcome Match Works and that A1 to A3 should not market the same in defacto complainant's market area; that since the A1 to A3 failed to manufacture good quality / same quality products, the permission was cancelled. But A1 to A3 continuously involved themselves in manufacturing low quality matches. Therefore, notice was issued to A1 to A3 to stop the manufacturing of the matches. In spite of the notice, A1 to A3 produced the quality of match sticks and started marketing the same at the market place of the defacto complainant (including the petitioners).

3.1. Therefore complaint was lodged before the learned JM No.II, Srivilliputhur and Magistrate forwarded the same to the 1st respondent under Section 156(3) Cr.P.C with direction to register the same. According, the case was registered in Crime No.356 of 2014 under Section 103 (c) 104 of Trade Marks Act and Section 420 IPC. After investigation, the 1st respondent has laid the charge sheet against the petitioners in all the O.Ps.

<https://hcmjcases.ecourt.gov.in/hcmjcases/>

The case of the accused:

4. The grand father of A1 to A3 was one S.K.Perumalappan. He



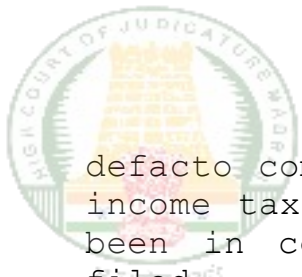
pioneered the match business at Srivilliputhur in the year 1961. Later on, a partner by name Mr. Paulraj joined the grand father in the year 1962. The brand name "The Pipe" was registered in the individual name of S.K. Perumalappan in Trade Mark No. 232202 in the year 1965. Perumalappan as a partner of M/s. Welcome Match Works permitted the firm to manufacture in the brand name "The Pipe" and got royalty from the firm for the same. Many partners were inducted and many of them went out as partners from 1965 to 1990.

4.1. S.K. Perumalappan permitted some other firms also I.e. M/s. Jupiter Match works, M/s. Karunaivel Match Works and M/s. Velavan Match Works to use the Trade Mark "The Pipe" and was getting royalty for the same.

4.2. S.K. Perumalappan by a deed of assignment dated 15.09.2013 assigned the Trade Mark "The Pipe" to M/s. Welcome Matches in which his three sons are partners. The deed of assignment was also registered with the trade mark registry and based on the assignment deed, the change of name of the ownership of brand "The Pipe" was also applied before the Registrar under Form TM-24 on 01.12.2003. Under the Will dated 17.12.2003, the Will has been executed by S.K. Perumalappan, in which a mention has been made about the assignment deed and under which, the ownership's right has been given to the sons of Perumalappan. Perumalappan died on 07.10.2004. Since then, the partnership firm M/s. Welcome Match Works did not function. The license under the Arms Act, which was in the name of S.K. Perumalappan was not renewed. There were no filing of income tax returns and sales tax returns. PF and ESI transactions of the firm also did not take place. Therefore, the Trade Mark "The Pipe" exclusively belongs only to S.K. Perumalappan and after him, to his three sons. The change of name of ownership of the brand "The Pipe" was also applied before the Trade Mark Registry under Form 24 on 01.12.2013 and 26.12.2013.

4.3. The defacto complainant along with one Brindhamani and Vijayan who are ex-partners of Welcome Match Works fraudulently created documents, as if they are the existing partners of Welcome Match Works and as if the firm is in existence without mentioning anything about 34% share of deceased of the S.K. Perumalappan. They have started using the Trade mark "The Pipe" illegally and they were also marketing the same in the area where A1 to A3 were supplying the matches.

4.4. The defacto complainant also filed a false and frivolous suit in O.S. No 102 of 2013 on the file of District Court against the alleged accused and other legal heirs of S.K. Perumalappan for permanent injunction. The alleged accused 1 to 3 requested the District Judge to direct the plaintiff /



defacto complainant to produce the relevant documents (sales tax, income tax, PF and ESI returns) to show that the partnership had been in continuous existence. Till date, no document has been filed.

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4.5. The defacto complainant's mother Brindhamani started M/s.Meenakshi Match Works and the defacto complainant's father Kumaravel started M/s.Kumaran Match Works and the defacto complainant K.Sakthivel started M/s.Sathya Match Works. They are doing business separately in the brand name "INSAT" and doing job works for ITC. The defacto complainant did not run M/s.Welcome Match Works as stated in the complaint. The defacto complainant and his family members suffered heavy loss and he was convicted two years imprisonment in a case under Section 138 NI Act and SARFAESI Proceedings have been initiated for recovery of more than 3 crores and it is pending on the file of DRT, Madurai. Therefore, with the help of third party, the defacto complainant has created documents as if they were carrying on partnership firm M/s.Welcome Match Works.

4.6. Sensing fully well that there is no possibility of winning the civil suit, this prosecution has been initiated and it is liable to be quashed on the following grounds:

i) Learned Magistrate has taken cognizance without ascertaining the ownership of the Trade mark and the alleged infringement and failed to note that the Trade mark "The Pipe" has been registered exclusively in the name of S.K.Perumalappan. The Trial Judge should have noted that material facts have been suppressed especially the pendency of civil suit.

ii) The pendency of Form TN-24 before Trade Mark Registry for change of name filed by A1 to A3 was ignored by the Investigating Agency. The Court below omitted to take note of the fact that on the expiry of the partnership, the share will not be automatically cancelled.

iii) The Investigating Agency came to the wrong conclusion that deed of assignment and the will executed by S.K.Perumalappan has been forged and it has not been informed to other partners.

5. The learned counsel for the petitioners contended that the defacto complainant neither established that he had a registered trade mark with the Registrar of Trade Mark nor that there was an infringement and therefore, the pre-conditions attracting Sections 78 and 79 is not established and therefore, it is the case to be quashed.

6. Section 31 of the Trade and Mercantile Act, 1958 is the <https://hcservicescourts.mv.in/hcservices/> which registration is prima facie evidence of a valid trade mark. Section 29 of the Act defines what is the infringement of Trade Mark. Section 78 is the Penal provision for



applying false trade mark and Section 79 is the Penal provision for selling goods to which false trade mark of or false trade description is applied.

7. In the decision relied in the case of **National Insurance Co. Ltd., vs. Manoranjan Dash and another**, reported in **AIR 1986 Orissa 210**, it has been held that (Or.211)

"The complainant who complains of infringement of his trade mark in respect of any article by somebody else must first establish that he has a registered trade mark with the Registrar of the Trade Marks. There has been no such averment in the complaint petition or in the initial statement of the complainant and, therefore, the complainant has not been able to establish the necessary pre-conditions which would attract the provisions of Sections 78 and 79 of the Trade and Merchandise Marks Act. 1958. In that view of the matter, the cognizance taken by the learned Magistrate must be held to be invalid.

8. The 2nd contention is that when the allegation in the complaint did not make out an offence under the required Section, the prosecution is not maintainable, especially when the dispute is mainly civil in nature. In support of the proposition, the following decisions were relied upon:

a) **Raymond Ltd. and others vs. Rameshwar Das Dwarjadas P.Ltd., Crl.M.C.1124 of 2007, decided on 08.04.2013;**

"27....There is no dispute about the proposition of law that a complaint disclosing civil transaction may also have criminal texture and the court must see whether a dispute which is essentially of a civil nature has been made a criminal offence. If the court finds that the dispute is mainly of civil nature and has been given a criminal colour, the High Court must use its inherent powers to quash the criminal complaint. But, at the same time, if the act/complaint gives rise to the civil as well as criminal remedy the person aggrieved is at liberty to avail either or both the remedies."

b) **Afsar Mohd. vs. State of M.P., reported in (2014) 2 Crimes (HC) 518;**

"10. In the present case, civil suit between the parties is already pending before lodging of FIR in which genuineness of Hibas' which are executed in favour of both the parties is to be considered and civil Court has to give verdict about genuineness of one of them, therefore, without consideration of evidence on the point of genuineness of Hibananma, the FIR lodged in the police is premature as Hibia cannot be said to be forged merely on the ground of allegation made by opposite party. Judgments cited by learned counsel for the respondent no.2 are



applicable in a case where civil suit between the parties was not pending or in civil suit genuineness of Hibas' in favour of both the parties was not to be considered. The case of the petitioner is squarely covered by the judgment cited by learned counsel for the petitioner in the matter of Ajay Pandey (supra) based on judgments of Hon. Apex Court, therefore, CSP, Kotwali Division, Bhopal has rightly sent the report (Annexure P7) to the Director General of Police but the respondent No.2 has filed similar FIR before another police station and got the FIR registered, therefore, looking to the judgment passed by this Court in the matter of Ajay Pandey (supra), the FIR lodged against the petitioner is liable to be quashed under Section 482 of CrPC as it is a grave misuse of process of law, therefore, petition is allowed and FIR registered at Crime No.152/2012 at police station Talaiyya, Bhopal on 6.7.2012 against the petitioners for the offence punishable under Sections 420, 467, 468 and 471 of IPC and subsequent proceedings thereto are hereby quashed."

c) **Paramjeet Batra vs. State of Uttarakhand and others,**
reported in **(2013) 11 SCC 673;**

"12.....Whether a complaint discloses a criminal offence or not depends upon the nature of facts alleged therein. Whether essential ingredients of criminal offence are present or not has to be judged by the High Court. A complaint disclosing civil transactions may also have a criminal texture. But the High Court must see whether a dispute which is essentially of a civil nature is given a cloak of criminal offence. In such a situation, if a civil remedy is available and is, in fact, adopted as has happened in this case, the High Court should not hesitate to quash criminal proceedings to prevent abuse of process of court.

13.....The pending civil suit will take care of all those issues. The allegation that forged and fabricated documents are used by the appellant can also be dealt with in the said suit.....

..... In such a situation, in our opinion, continuation of the pending criminal proceedings would be abuse of the process of law."

d) **Ratansi Mulji vs. Vinod Ratilal Gandhi and another,**
reported in **1991 CriLJ 2766;**

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27.....The Supreme Court specified that where the grounds on which the prosecution is based are so absurd



11. It is pointed out that filing of the civil suit is not at all suppressed, as contended by the petitioners and the details of the suit pending finds place in the list of documents as item Nos.16 and 17, where-under there is a reference about the suit pending in Virudhunagar District Court in O.S.No.102 of 2013.

12. Disclosure in the list of documents, without the contextual description in the body of the complaint, would not exhibit the bonafides on the part of the respondent. Suffice to point out that mentioning is different from explaining. The further question is whether it is sufficient to mention the pendency of the suit by enclosing a copy of the plaint in the list of documents and whether it is not incumbent upon the investigating agency to consider the implication of the pendency of the suit, vis-a-vis the complaint. The documents relied upon by the prosecution is shown in the list of documents, but there is no indication that the implication of the pendency of the suit have been considered by the prosecution.

13. More over the question is regarding disclosure of the pendency of the suit by the complainant and not about the disclosure of the pendency of the suit by the investigating officer at the closure of the investigation.

14. The next issue is, on the death of Perumalappan, what would happen to the rights of Perumalappan, as an individual holding the Trade name in his own name, vis-a-vis, as a partner, doing business using the Trade Mark for the partnership business / as a partner in a firm in which the Trade Mark is owned by the firm.

15. The charge sheet refers to Clause 15 of the partnership dated 01.04.1990, in which the consequences of death, retirement, lunacy, insolvency or removal of one partner from the partnership firm has been mentioned and the investigating agency had interpreted the same as, on such happenings, the partner loses all his rights automatically. The interpretation placed by the prosecution implies that on the death of S.K.Perumalappan his rights over the partnership has been brought to an end by virtue of clause 15.

15.1. Clause 15 of the partnership deed dated 01.04.1990 reads as under:

"15.The death, retirement, lunacy or insolvency of a partner shall not dissolve the firm automatically. The books of accounts of the partnership business need not be closed every now and then on the admission or retirement of a partner. It is agreed that the profit or loss



accrues evenly throughout the year of account and the profit or loss shall be ascertained prorata on time basis in such events."

16. A perusal of the partnership deed dated 01.04.1990 would reveal that the profit or loss in the partnership business have to be divided among the partners in the ratio of 34%, 33% and 33% respectively, under which S.K.Perumalappan is a party of the first part and R.Vijayan is a party of the second part and K.Brindamani is a party of the third part. Clause 15 reads that the death retirement, lunacy or insolvency of a partner does not dissolve the firm automatically.

17. From the recital of clause 15, it is evident that clause 15 speaks only about the continuance of the partnership firm on the death / retirement of one of the partner. It does not speak specifically about the possibility of including legal heirs of the deceased partner either *suo motu* or at the request of the legal heirs. Therefore, from clause 15, nothing can be inferred.

18. The learned counsel for the petitioner would submit that if the property in the Trade Mark is that of the partnership firm definitely mention would have been made in the partnership deed itself and there is no reference at all in the partnership deed, thereby giving an implication that the property is that of the individual and not that of the partnership firm. A perusal of the partnership deed would disclose that no mention has been made about the trade mark which could be used by the partnership firm. But, it merely speaks about the fact that the partnership is to be carried under the name and style of "Welcome Match works" at Srivilliputhur. It is relevant to point out that the firm in which Perumalappan was a partner itself has been paying royalty to Perumalappan apart from other Firms, which had been paying royalty to Perumalappan (not to M/s.Welcome Match Works)

19. When a partner dies, subject to any contract to the contrary, partnership is dissolved. Section 42 of the Indian Partnership Act, 1932 ("**Act**") provides for dissolution of partnership on occurrence of certain contingencies which includes 'death of the partner' as one of those contingencies. Plain reading of the Section 42 would show that, subject to the contract between the partners, a firm stands dissolved by death of a partner. However, **in cases where the terms of the partnership deed are silent on continuation of partnership's business**, a contract to continue the partnership after the death of a partner may be implied from the conduct of the parties. This means that where it is evident that such an intention was present, the nominee or legal representative of the deceased partner can take the place of deceased partner and business of the firm can be continued with the presumption that the



partnership was never dissolved on the death of that partner. The above legal position is based on two assumptions- (a) there are more than two partners in the firm, and (b) the legal representatives are interested in taking forward the business of the firm.

"Clause (c) : Death of a Partner.- The principle underlying the rule stated in this clause is that partnership is founded on a *delectus personae*, which implies that persons who enter into the relationship rely on the personal character, credit, substance, knowledge and ability of one another. They also rely on the co-operation and assistance of one another in carrying on the common business. The death of a partner in most cases does away with these elements and the law assumes, in the absence of any agreement between the partners, that it was their intention that death of one of them was to result in termination of the relationship subsisting between them. It has accordingly been laid down in this clause that the death of a partner will ordinarily have the effect of dissolving a firm. **Where the surviving partners carry on the business of the partnership, it would tantamount to succession of one firm by another firm and not a change in constitution of the erstwhile partnership. When a deed of partnership stipulates continuation of the firm on the death of a partner, the firm would not be dissolved.**"

20. Under such circumstances, it is a matter for evidence from which conclusion has to be arrived at as to whether the business was continued, if so, whether the L.Rs. of Perumalappan showed the inclination to continue the business etc.

21. The most important question is who is the owner of the trade mark. Whether it is individual or it is partnership firm. If the trade mark is that of the individual, it can be assigned, but if it is the property of the partnership firm, then it is subject to the terms and conditions of the partnership deed.

22. The learned counsel for the respondent would submit that even though trade mark is in the name of S.K.Perumalappan as he has been described as S.K.Perumalappan trading as "Welcome Match Works" and the address given is that of the business place, it must be construed that the trade mark belongs to the partnership firm. On the other hand, the learned counsel for the petitioner would submit that the name in which the registration document stands gives a presumption that the party in whose name the trade mark has been registered is the owner of the trade part.

23. The learned counsel for the petitioner would submit that royalty payment received by the individual would be the proof to



show that the individual is the owner. On the other hand, the learned counsel for the respondent would submit that the royalty payment is not consistent and the payment were made only for accounting purposes. These issues are subject matter of evidence, inference and interpretation. Therefore, without trashing out those issues in the civil suit, no inference can be drawn with regard to the ownership. Suffice to point out that prima facie, Perumalappan as individual is the owner of the trade mark.

24. Perusal of the partnership deed dated 08.10.2004 would disclose that on the death of S.K.Perumalappan, the remaining partners wanted to continue the partnership as a going concern under the name and style of "Welcome Match Works", but curiously this deed is silent on shares which the deceased was holding (34%). Whether it is settled in favour of the legal representatives or whether the legal representatives were inclined to join the partnership or not, is nowhere mentioned. This singular circumstance, the silence with regard to the share of the deceased on his death, would speak negatively about the genuineness of the prosecution case.

25. The contention of the learned counsel for the respondent that the legal heirs of the deceased partners can ask only for profit sharing and cannot ask for a share in the partnership is not applicable to the facts and circumstances of this case.

26. The learned counsel for the respondent relied upon the following decisions;

(i) The first contention of the respondent is that the pendency of the civil suit would not deprive the criminal Court to take necessary penal action, for which he relied upon a decision reported in **1998 (II) CTC 651 (Anja Match Industries Vs. South Indian Lucifer Match Works)**, wherein a learned Single Judge of this Court has held in paragraph No.27 as follows;

"27.It is settled law, as laid down in Central Bureau of Investigation Vs. Duncans Agro Industries Ltd., 1996 (5) SCC 591, that parallel proceedings both in civil and criminal Courts are permissible. Mere pendency of the civil suit would not deprive the complainant of his liberty to request the criminal court to take necessary penal action, as contained in the Act."

(ii) For the very same contention, he relied upon the decision in **(2008) 13 SCC 678 (Suryalakshmi Cotton Mills Ltd., Vs. Rajvir Industries Ltd., and others)**, wherein the Hon'ble Apex Court has held as follows;

"22.Ordinarily, a defence of an accused although appears to be plausible should not be taken into consideration for exercise of the said jurisdiction. Yet again, the High Court at

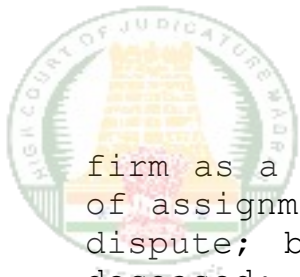


that stage would not ordinarily enter into a disputed question of fact. It, however, does not mean that documents of unimpeachable character should not be taken into consideration at any cost for the purpose of finding out as to whether continuance of the criminal proceedings would amount to an abuse of process of Court or that the complaint petition is filed for causing mere harassment to the accused. While, we are not oblivious of the fact that although a large number of disputes should ordinarily be determined only by the civil Courts, but criminal cases are filed only for achieving the ultimate goal, namely, to force the accused to pay the amount due to the complainant immediately. The courts on the one hand should not encourage such a practice; but, on the other, cannot also travel beyond its jurisdiction to interfere with the proceeding which is otherwise genuine. The Courts cannot also lose sight of the fact that in certain matters, both civil proceedings and criminal proceedings would be maintainable."

26.1. The legal proposition in these two decisions are not applicable to the facts of this case. Already circumstances have been pointed out to show that how it is essential to decide certain issues in the civil suit before a prosecution can be maintained.

(iii) Contending that the right of the legal representatives is only to receive the share of profit and nothing more, the learned counsel for the respondent relied upon the decision reported in **AIR 1966 SC 1300 (Addanki Narayanappa and another Vs. Bhaskara Krishnappa and others)**, wherein the Hon'ble Supreme Court has held in paragraph No.5 as follows;

"It seems to us that looking to the scheme of the Indian Act no other view can reasonably be taken. The whole concept of partnership is to embark upon a joint venture and for that purpose to bring in as capital money or even property including immovable property. Once that is done whatever is brought in would cease to be the exclusive property of the person who brought it in. It would be the trading asset of the partnership in which all the partners would have interest in proportion to their share in the joint venture of the business of partnership. The person who brought it in would, therefore, not be able to claim or exercise any exclusive



firm as a partner and royalty received from other firms, the deed of assignment and the Will having been executed long prior to the dispute; b) license under Arms Act standing in the name of the deceased; c) the pendency of the civil suit; d) non filing of the documents by the defacto complaint before District Court; e) defacto complainant's mother and father running separate match business by the use of trade mark INSAT cumulative taken together, would disclose that there is a disputed question of fact and the said fact is predominantly civil in nature and therefore, the prosecution is not maintainable at this stage.

In the result, all these Criminal Original Petitions are allowed and the entire proceeding C.C.No.242 of 2015 pending on the file of the Judicial Magistrate No.II, Srivilliputhur is quashed in respect of the petitioners. Consequently, connected miscellaneous petitions are closed.

Sd/
Assistant Registrar(P&A)

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Sub Assistant Registrar

To:

1. The Judicial Magistrate No.II,
Srivilliputhur
2. The Deputy Superintendent of Police,
Srivilliputhur Sub-Division,
Srivilliputhur,
Virudhunagar District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.

+4ccs to M/S.M.P.SENTHIL, Advocate in SR.Nos.46577,46578,46579,46580
+4ccs to Mrs.Maria Roseline, Advocate in SR.Nos.46835,46836,46837,46838

PRE-DELIVERY ORDERS IN
Crl.O.P.(MD)Nos.21691, 18274, 19972 and 20845 of 2015
22.08.2016

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PA/AAL-MPA/SAR SAR I/14.09.2016/14P/12C(IT)