

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.11.2016

PRONOUNCED ON : 12.01.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.74 of 2011

and

M.P.No.1 of 2011

Ramasamy Gounder

...

Appellant

Vs.

1.Lakshmi

2.Marimuthu

3.Sivaamani

4.Banumathi

5.Parmasivam

6.Thirumalaisamy Gounder

...

Respondents

Second Appeal is filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 31.03.2010 made in A.S.No.80 of 2008 on the file of the First Additional District Judge, Coimbatore reversing well considered and reasoned judgment and decree dated 19.11.2007 made in O.S.No.33 of 2005 on the file of the Sub-ordinate Judge, Pollachi.

For Appellant : Mr.G.Vivekanand

For Respondents : Mr.C.R.Prasanan

JUDGMENT

The plaintiff by way of this second appeal has impugned the judgment and decree dated 31.03.2010 made in A.S.No.80 of 2008 on the file of the First Additional District Judge, Coimbatore, reversing the judgement and decree dated 19.11.2007 made in O.S.No.33 of 2005 on the file of the Sub ordinate Judge, Pollachi.

2. The suit has been laid by the plaintiff for specific performance and permanent injunction.

3. The case of the plaintiff, in brief, is as follows:

The suit property belongs to the defendants 1 to 5. On 30.06.2004, the defendants 1 to 5 entered into an agreement of sale with the plaintiff with reference to the sale of the suit property and the parties have agreed and fixed the sale price at Rs.1,15,000/- and on the date of sale agreement, the plaintiff has paid an advance amount of Rs.25,000/- to the defendants and the period, for completing the sale transaction, was fixed as 6 months. It was agreed that the defendants 1 to 5 have to clear all the disputes and encumbrances with regard to the suit property. In case, the plaintiff fails to complete his part of the agreement, he has to loose the advance amount of Rs.25,000/- and the sale agreement would become unenforceable and in case, the plaintiff is ready to complete the sale transaction and the

defendants fail to execute the sale deed in accordance with the sale agreement, the plaintiff has the right to move a Court of law and get the sale deed executed. The plaintiff has always been ready and willing to get the sale deed executed in his favour, however, the defendants had been delaying the same. On 16.02.2005, at the request of the first defendant, the plaintiff paid a sum of Rs.20,000/- towards a part of the balance sale consideration and the first defendant has also issued a receipt for the same and the other defendants are well aware of the same. It was represented that there is a dispute regarding the suit property with the six defendant Thirumalaisamy, who is the brother of the first defendant and a suit in O.S.No.537 of 2000 is pending with reference to the suit property on the file of the District Munsif Court, Pollachi. The defendants have been representing that they would execute the sale deed in favour of the plaintiff as soon as the suit is disposed off. Even though it was averred in the sale agreement that the suit property is in the possession and enjoyment of the defendants, it is the plaintiff, who is in the possession and enjoyment of the suit property, as per the lease deed dated 09.06.1997 entered into between the plaintiff and the first defendant as regards the suit property. As per the above said lease deed, the plaintiff has paid Rs.10,000/- to the first defendant and been put in possession of the suit property and thus, the plaintiff is entitled to be in possession and enjoyment of the suit property, till the first

defendant repays the amount of Rs.10,000/-,. The plaintiff has come to know that the defendants 1 to 5 have colluded with the 6th defendant Thirumalaisamy and behaving adverse to the sale agreement and therefore, the plaintiff issued a notice through telegram to the 6th defendant about the existence of the sale agreement and also subsequently, the plaintiff issued a legal notice on 22.03.2005 to the defendants 1 to 5 with a copy marked to the 6th defendant to fix a date for the execution of the sale deed. The third defendant has issued a reply notice containing false particulars. The third defendant, concealing the true facts, has issued a lawyers notice dated 21.03.2005 with false particulars and the plaintiff has issued a reply notice to the defendants on 28.07.2005. It is false to state that the defendants 2 to 5 are not aware of the payment of Rs.20,000/- by the plaintiff to the first defendant towards part of sale consideration. Even though the third defendant had by his notice cancelled the sale agreement, still the plaintiff has every right to claim the reliefs as per the sale agreement. Time is not the essence of the contract. The defendants 2 to 4 have also filed a false suit in O.S.No.194 of 2005 against the plaintiff for permanent injunction. The plaintiff is contesting the same. The defendants have to clear the title of the suit property and because of the pendency of the suit in O.S.No.537 of 2000, the sale deed could not be executed. Hence, the suit.

4. In reply statement, the plaintiff has pleaded that it is false to state that the defendants 1 to 5 are always ready and willing to perform their part of the contract and complete the sale transaction. It is false to state that defendants 1 to 5 are in the possession of the suit property. It is false to state that the lease deed dated 09.06.1997 has been created by the plaintiff and the first defendant in collusion. The plea that no valid partition took place between the first and 6th defendant is false. It is false to state that the plaintiff is aware of the suit in O.S.No.537 of 2000 before the sale agreement. The pleas that the description of the property is wrong and the sale agreement will not bind the 6th defendant are false and hence, the suit has to be decreed.

5. The case of the defendants 2 to 5, in brief, is as follows;

The suit is not maintainable either in law or on facts. It is false to state that the suit property absolutely belongs to the defendants 1 to 5. It is true that on 30.06.2004, the defendants have entered into an agreement of sale with the plaintiff regarding the suit property. It is false to state that the plaintiff has always been ready and willing to get the sale deed executed in his favour and that, the defendants are prolonging the same. It is false to state that the plaintiff paid advance a sum of Rs.20,000/- towards the part of the sale consideration to the first defendant. The payment of Rs.20,000/- to the first defendant by

plaintiff will not bind the other defendants. It is false to state that the plaintiff is not aware of the suit in O.S.No.537 of 2000 prior to the sale agreement. The first defendant has laid the suit in O.S.No.537 of 2000 claiming that he is absolute owner of the suit property suppressing the right of the defendants 3 to 5 over the same. The plaintiff is not in possession and enjoyment of the suit property as per the lease agreement dated 09.06.1997 alleged to have been entered into between the plaintiff and the first defendant. The defendants 2 to 5 are not aware of the telegram sent by the plaintiff to the 6th defendant. The plaintiff has issued a lawyer notice dated 22.03.2005 and the same has been repudiated by the defendant by giving a suitable reply. The third defendant has issued a lawyer notice dated 21.03.2005 informing that the sale agreement stands cancelled since the plaintiff was not ready to get the sale deed executed in his favour within the stipulated time. The plaintiff received the same and gave a false reply dated 28.03.2005. It is false to state that the time is not the essence of the contract. The defendants 2 to 5 have laid the suit for permanent injunction against the plaintiff in O.S.No.194 of 2005. It is false to state that the sale deed could not be executed by the plaintiff on account of the pendency of O.S.No.537/2000. The plaintiff is aware that there is no partition between the first defendant and the 6th defendant. There is no cause of action for the suit and the suit is liable to be dismissed.

6. In the additional written statement, the defendants 2 to 5 have also pleaded that there is no valid partition between the defendants 1 to 6 and the suit property and the other properties are in the common possession and enjoyment of the defendants 1 to 6. There is only an extent of 0.88 ½ cents in S.F.No.4/3. The description of the suit property in the sale agreement is wrong. The sale agreement will not bind the 6th defendant and the suit is liable to be dismissed.

7. The case of the 6th defendant, in brief, is as follows;

The 6th defendant is not aware of the sale agreement dated 30.06.2004 between the plaintiff and the defendants 1 to 5 and also not aware of the lease deed alleged to have been executed between the plaintiff and the first defendant. It is false to state that the defendants 1 to 5 have colluded with the 6th defendant in resisting the plaintiff's lawful claim. The plaintiff has issued a telegram to the 6th defendant and since the sale agreement between the plaintiff and the defendants 1 to 5 will not bind the 6th defendant, he has not given any reply to the plaintiff. The suit property belongs to the 1st & 6th defendants' father and they are only the heirs of Palani Gounder. The suit property and the other properties are allotted to Palani Gounder by virtue of the partition deed dated 16.10.1956. As per the same, he has been allotted Acres 3.44 in S.F.No.4/7 and Acres 1.64 in

S.F.No.4/3. Palani Gounder had executed a registered settlement deed in favour of his daughters dated 24.06.1989 regarding acres 2.44 in S.F.No.4/7 and after the same, the defendants 1 to 6 are in possession and enjoyment of Acre 1.00 in S.F.No.4/7 and acre 1.64 (actual extent Acre. 1.77 in S.F.No.4/3) and the defendants 1 and 6 are each entitled to $\frac{1}{2}$ share in the above said suit property. Therefore, the sale agreement between the plaintiff and the defendants 1 to 5 as regards the suit property is not valid and binding upon the 6th defendant. The total extent available to both the defendants 1 and 6 is S.F No.4/3 is 1.77. Therefore, the description of the suit property in the sale agreement as if there is an extent of 2 acre in S.F.No.4/3 is incorrect. There is no valid and effective partition between the defendants 1 and 6, the sale agreement is not valid and unenforceable. The first defendant has laid a false suit in O.S.No.537 of 2000 and subsequently, it was not pressed by him on 06.03.2006. The plaintiff is well aware about the suit prior to the sale agreement. There is no cause of action for the suit and the same is liable to be dismissed.

8. In the additional written statement, the 6th defendant has also pleaded that the defendants 1 to 5 are in possession and enjoyment of the suit property with the 6th defendant and there is no valid partition between the defendants 1 and 6 with reference to the suit property and the other properties. The description of the suit property is

wrongly given in the sale agreement and that sale agreement will not bind the 6th defendant, the suit is liable to be dismissed.

9. In support of the plaintiff's case, PW1 has been examined and Exs.A1 to 25 were marked. On the side of the defendants, DW1 and 2 were examined and Exs.B1 to 5 were marked.

10. On a consideration of the oral and documentary evidence adduced by the respective parties, the trial court was pleased to decree the suit as prayed for granting the reliefs of specific performance and permanent injunction. The defendants 2 to 5 preferred the first appeal and the first appellate court was pleased to set aside the judgment and decree of the trial court as regards the reliefs of specific performance and permanent injunction and granted the alternative relief sought for by the plaintiff as regards the refund of the amount paid towards part of the sale consideration with interest. Challenging the same, the plaintiff has preferred this second appeal.

11. The suit has been laid by the plaintiff for specific performance based upon the agreement of sale dated 30.06.2004 marked as Ex.A1. The case of the plaintiff is that defendants 1 to 5 are the owners of the suit property and that they had agreed to convey the same to the plaintiff and accordingly, the plaintiff and the

defendants 1 to 5 entered into an agreement of sale dated 30.06.2004 for the sale of the suit property for a sum of Rs.1,15,000/- and according to the plaintiff, he has tendered a sum of Rs.25,000/- as advance on the date of the sale agreement and it is stated that six months is stipulated under the sale agreement to complete the transaction. As regards, the sale agreement marked as Ex.A1, the defendants have not disputed the same. Even the 6th defendant, who has been subsequently added, has not thrown a serious challenge to the same, however, he would contend that he is not aware of the sale agreement and hence, the same is not binding upon him in any manner. Now, according to the plaintiff, as per the sale agreement, the defendants are to clear the encumbrance in respect of the property agreed to be conveyed and though he was ready and willing to perform his part of the contract in paying balance sale consideration and get the sale deed executed, defendants 1 to 5 on some pretext or the other, have been procrastinating the same and hence, the suit.

12. The further case of the plaintiff is that towards part of the sale consideration, he has paid a sum of Rs.20,000/- to the first defendant on 16.02.2005 and in evidence thereof, the receipt has been forwarded by the first defendant in favour of the plaintiff and the same has been marked as Ex.A2. The first defendant has not contested the plaintiff's case and he has remained ex parte. The

defendants 2 to 5 are vehemently contesting the case of the plaintiff. According to the defendants 2 to 5, the payment of Rs.20,000/- by the plaintiff to the first defendant under Ex.A2 would not be binding upon them as the plaintiff had not obtained their acknowledgement of the above mentioned payment. Be that as it may, the fact remains that the plaintiff had paid the amount of Rs.20,000/-towards part of the sale consideration to one of the executants of Ex.A1 viz., the first defendant under Ex.A2.

13. As rightly found by the first appellate court, a careful analysis of the evidence, adduced by the parties in the matter, would go to reveal that the plaintiff has not established his readiness and willingness to complete his part of the contract as regards the execution of the sale deed. Now, according to the plaintiff, on account of the pendency of the suit in O.S.No.537/2000 laid by the first defendant against the 6th defendant claiming the relief of permanent injunction, the defendants have not come forward to complete their part of the transaction and he has been handicapped, on that score, to get the sale deed from the defendants 1 to 5. However, as rightly found by the lower appellate court, the pendency of O.S.No.537/2000 could not be stated to be a bar for completing the sale transaction as put forth by the plaintiff. According to the contesting defendants, the plaintiff was aware of the pendency of the above said suit even prior to

the sale agreement . On the other hand, according to the plaintiff, he had come to know about the above referred suit, only subsequent to the execution of the sale agreement. Be that as it may, it has to be seen whether the pendency of the suit in O.S.No.537/2000 had operated as a bar to complete the sale transaction as alleged by the plaintiff. The copy of the plaint filed in O.S.No.537 of 2000 has been marked as Ex.A15, the copy of the written statement filed in the above said suit has been marked as Ex.A16. As adverted to earlier, the said suit has been laid by the first defendant against the 6th defendant for permanent injunction alleging that there has been partition of the properties jointly owned by the first defendant and the 6th defendant. Per contra, according to the 6th defendant, the defence set forth by him is that there has been no partition of the properties between the two brothers. Further, it could be seen that as per Ex.A17, a memo, the above said suit has been not pressed by the first defendant. Though some issue was projected as regards who had filed the said memo, whether the first defendant or the 6th defendant, a perusal of the decree passed in O.S.No.537/2000, the copy of which has been marked as Ex.A18, would go to disclose that, as rightly found by the first appellate court, the suit has been dismissed as not pressed based upon the memo filed by the first defendant to that effect. Therefore, it could be seen that the trial court, as also found by the first appellate court, has erred in holding that inasmuch as the suit has been

dismissed as not pressed, based upon the memo filed by the 6th defendant, the partition has to be believed. On the other hand, as seen, the 6th defendant is fighting tooth and nail that there has been no partition of the properties belonging to the brothers. That apart, even, the defendants 2 to 5, in their additional pleas have also pleaded that no partition has been effected as regards the suit property between the first and 6th defendant and that the suit property is in joint possession. Therefore, when O.S. No.537 of 2000 has been found to be dismissed as not pressed based upon the memo filed by the first defendant on 03.03.2006, it could be seen that there is no question of upholding that the suit property had been partitioned between the brothers as determined by the trial court. Therefore, the findings of the first appellate court that the plea of the plaintiff that on account of the pendency of O.S.No.537 of 2000, there has been some cloud over the title of the suit property and therefore, the transaction could not be completed as such cannot be readily accepted are found to be well-founded and acceptable.

14. It is also found that the property involved in the agreement of sale has not been correctly described or made out and on that score alone, the plaintiff would be disentitled to claim the relief of specific performance. The evidence adduced would disclose that one Ramasamy Gounder and Murugappa Gounder has filed the suit in O.S.No.62/02 on the file of the District Munsif Court, Pollachi against

one Manickam, the defendants 1 and 6 for the declaration of a common pathway in certain survey number including the suit survey numbers. The copy of the plaint filed in the above suit is marked as Ex.A19 and the copy of the written statement has been marked as Ex.A20. The first defendant has put forth no objection to the claim of the plaintiff in the above said suit and the judgment and decree passed in the said suit have been marked as Exs.A23 and 22. The judgement and decree passed in the appeal in respect of the above said suit have been marked as Exs.A25 & 24. Therefore, as rightly found by the first appellate court, a perusal of the above documents would go to reveal that the trial Court has erred in holding that there has been a oral partition in respect of the suit property as made out by the first defendant in the said suit. The above said suit is only with reference the issue of pathway. Therefore, the plea of partition could not be the subject matter in the above said suit. Further, even as found by the first appellate court, the plaintiff has not made a plea of partition of the suit property between defendants 1 and 6 in the suit. Therefore, such being the position, as rightly found by the first appellate Court, the trial court has given undue importance on the outcome of the above said suit (O.S.No.62/02) in holding that there has been a oral partition of the suit property between defendants 1 and 6 so as to project as if there is a cloud of title over the suit property and hence, the sale transaction could not be culminated.

15. It could also be seen that defendants 2 to 5 have laid the suit for permanent injunction against the plaintiff in O.S.No.194 of 2005. According to the defendants, inasmuch their possession in respect of the suit property was sought to be interfered by the plaintiff, they had been necessitated to lay the suit. The said suit would also not lead to the conclusion that there has been an oral partition of the suit property between the two brothers so as to throw a cloud of title in respect of the suit property. The plaintiff has not pleaded that before the sale agreement was effected, the suit property had been subjected to any measurement. As found earlier, the particulars of the description of the suit property in the sale agreement are not clearly drawn out in particular it has not been made out that the suit property described in the sale agreement is available on ground and that the defendants 1 to 5, for that matter, would be entitled to convey the suit property in favour of the plaintiff under Ex.A1. Now, it is admitted that the suit property devolved upon the father of the defendants 1 and 6 viz., Palani gounder under the partition deed dated 16.10.1956, the copy of the same having been marked as Ex.B3. As per the recitals found therein, it could be seen that Palani Gounder has been allotted an extent of Acre 3.44 in SF.No.4/7 and Acre 1.64 in SF 4/3. It is admitted that under Ex.B4 settlement deed dated 24.06.1981, Palani gounder had settled the extent of 2.44 Acre in SF.No.4/ in favour of his daughters. Therefore, after Ex.B4, it could be seen that Palani

Gounder would be entitled to only 1 acre in SF.No.4/7 and Acre 1.64 in S.F.No.4.3 (Acre 1.77 as per present survey), therefore, when Palani Gounder himself is found to be holding only Acre. 1.77 in S.F.No.4/3, it does not stand to reason as to how the defendants 1 to 5 could have agreed to convey an extent of 2 acres in the above said survey S.F.No.4/3 in its entirety to the plaintiff. When it has not been shown that the first defendant is entitled to hold more than 88 ½ in S.F.No.4/3 and when on ground, the total extent available is only Acre 1.77 it is inexplicable as to how 2 acres of land in S.F.No.4/3 could have been agreed to be conveyed to the plaintiff under Ex.A1. Therefore, the case of the plaintiff that the defendants had agreed to convey the total extent of 2 acres in S.F.No.4/3 under Ex.A1 having found to be highly improbable and not possible and when the plea of partition projected has also not been made out and the property is still remaining intact between the brothers D1 and 6, the findings of the first appellate court that the plaintiff could not be granted the discretionary relief of specific performance based on inaccurate particulars found in the sale agreement, do not call for any interference.

16. In the light of the above position, as regards the case of the plaintiff that the defendants have not cleared the cloud over the title of suit property and hence, an embargo had been created in the culmination of the sale agreement, as such, cannot be accepted.

17. The time limit for completing the sale under Ex.A1 is fixed as six months. Now, it has to be seen whether as pleaded by the plaintiff, he has exhibited his readiness and willingness to perform his part of the contract within the time allowed. However, as rightly found by the first appellate court, there is absolutely no evidence to hold that the plaintiff had expressed his readiness and willingness to the defendants 1 to 5 within the time allowed to perform of his part of the contract and complete the sale transaction.

18. For the first time, to show his readiness and willingness the notice has been issued by the plaintiff through his lawyer dated 22.03.2005, which has been marked as Ex.B1. Prior to the same, there is no material on the side of the plaintiff to show that he has been ready and willing to perform his part of the contract. On the other hand, it could be seen that prior to Ex.B1, the third defendant has issued a lawyer's notice dated 21.03.2005 informing that the sale agreement stands cancelled since the plaintiff was not ready and willing to get the sale deed executed in his favour within the stipulated time. The receipt of the said notice has not been disputed. However, according to the plaintiff, he had sent a telegram to the 6th defendant on 17.03.2005 informing him about the existence of the sale agreement between the plaintiff and defendants 1 to 5. The resultant position is that the plaintiff has not placed any material to show that

he has been always ready and willing to perform his part of the contract within the time stipulated in the sale agreement.

19. Now, according to the plaintiff, even prior to the sale agreement, he has been in possession and enjoyment of the suit property under the lease deed 09.06.1997 entered into between him and the first defendant. The reference about the same is conspicuously absent in Ex.A1. On the other hand, the recitals found in Ex.A1 would go to show that it is only the defendants who are in possession and enjoyment of the suit property. Therefore, as rightly found by the first appellate court when according to the case of the plaintiff, he has already been in possession of the suit property under the so-called lease the arrangement, it does not stand to reason as to why he should seek the relief of possession also in this suit from the defendants. As rightly found by the first appellate court, the lease arrangement dated 09.06.1997 projected by the plaintiff marked as Ex.A3 seems to be of recent origin . Therefore, the inconsistent pleas put forth by the plaintiff one way or the other to get the sale deed from the defendants would only go to show his depraved attempts to get the sale deed executed without placing necessary foundation for the same viz., proving his readiness and willingness, proving that the defendants 1 to 5 had the legal competency to convey the suit property to him under Ex.A1, proving that the suit property described

in the agreement is available on ground etc., Inasmuch the plaintiff had failed to get the sale deed executed within the time allowed under Ex.A1, the third defendant had cancelled the sale agreement and thereafter only, it could be seen that the plaintiff had issued the legal notice. Despite all these developments, still, as found by the lower appellate court, the plaintiff has not evinced interest to get the sale deed of the suit property subject to encumbrance, if any, in respect of the same. This attitude of the plaintiff would only go to show that he has never been ready and willing to perform his part of the contract and on the other hand, he had been delaying the same on one pretext or the other. It could be thus seen that he is unable project his case that he has been always ready and willing to complete his part of the transaction and get the sale deed executed. Further, as found by the first appellate court, the plaintiff has not placed any material to show that he was always ready and willing to pay the balance sale consideration and that he was having adequate funds to pay the balance sale consideration to the defendants.

20. In the light of the above facts disclosed, the lower appellate court found that the discretionary relief of specific performance cannot be extended to the plaintiff, who has not come to the court with clean hands and has rightly rejected the request of the plaintiff to grant the relief of specific performance.

21. The plaintiff's counsel has not projected any plausible reason /material to warrant any interference in the findings of the first appellate court negating the plea of specific performance claimed by the plaintiff. When it is found that the 6th defendant also has a legal claim over the suit property in question, in such view of the matter, as rightly found, granting the equitable relief of specific performance in favour of the plaintiff would cause irreparable loss and hardship to the 6th defendant.

22. However, the lower appellate court considering the factum of the payment of Rs.25,000/- under the sale agreement and Rs.20,000/- to the first defendant under Ex.A2, taking into account the above facts, in the right perspective, has proceeded to grant the plaintiff the alternative relief of the refund of the amount paid under the sale agreement.

23. In the light of the above discussion, no ground has been made out to interfere with the findings of the first appellate court in negating the plea of specific performance sought for by the plaintiff, In this connection, the plaintiff's counsel, in support of his case, has relied upon the following decisions reported in **2011-5-L.W.736 (T.R.K.Saraswathy Vs. R.Kandasamy & others), 1921 L.W.562 (Baluswami Aiyar Vs. Lakshmana Aiyar and others) and this**

Court order dated 13.07.1990 in A.S.No.562 of 1981 (Ramani Ammal Vs. Susilammal) and the defendants' counsel relied upon the following decisions, in support of his case, reported in **(2016) 1 Supreme Court Cases 567 (Hemanta Mondal And Others Vs. Ganesh Chandra Naskar)** and **2014-1-L.W.47 (I.S.Sikandar (d) by Lrs. Vs. K.Subramani & ors)**. The principles of law adumbrated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

In conclusion, I hold that the plaintiff has failed to establish that any substantial question of law is involved in this second appeal. Accordingly, the second appeal is found to be devoid of merits and is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

12.01.2017

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Internet: Yes/No
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To

1. The First Additional District Court,
Coimbatore.
2. The Sub-Court, Pollachi.

T.RAVINDRAN,J.

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Pre-delivery Judgment in
S. A.No.74 of 2011
and
M.P.No.1 of 2011

12.01.2017