

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.03.2018

Date of Verdict : 08.06.2018

CORAM

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

CRP.PD.No.3821 of 2016
and CMP.No.19514 of 2016

M/s.Summit Auto Seats Industry(Delhi)
Company Ltd., Rep.by M.Sundara Rajan,
Plot.No.B-17, Sipcot Industrial Park,
Oragadam, Sriperumbudur,
Kancheepuram District 602 105

.. Petitioner

Vs.

M/s.Damco India Private Limited,
13th Floor, Tower A, Urmi Estate,
No.85, Ganpat Rao Kadam Marg,
Lower Parel(W), Mumbai-400 013
office at Pottipatti Plaza, Ground Floor,
No.77, Nungambakkam High Road,
Nungambakkam, Chennai-600 034

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order of the learned XVII Additional City Civil Judge, Chennai passed in IA.No.180 of 2016 in OS.No.4135 of 2016 dated 25.11.2016.

For Petitioner : Mr.Mani for
Mr.S.Namasivayam

For Respondent : Mr.S.Santhosh for
Mr.P.Giridharan

ORDER

This Court has earlier reserved the orders on 06.12.2017 and upon perusing the papers, as this Court needed clarification, the matter was again listed for clarification on 27.03.2018 and orders were reserved.

2. According to the revision petitioner, the respondent / plaintiff has filed a suit in OS.No.4135 of 2016 on the file of the XVII Additional City Civil Court, Chennai under Order XXXVII Rules 1 to 3 of the Civil Procedure Code for recovery of money for a sum of Rs.14,27,085/- against the revision petitioner along with interest at the rate of 18% per annum from the date of filing the suit till the date of realization. The suit was posted to 19.09.2016 for first hearing. On that day, the revision petitioner appeared through counsel, but failed to serve the notice of appearance on the counsel for the respondent. The summary suit can be automatically decreed by court in favour of the

respondent, when the revision petitioner does not comply with the mandatory requirements under Order XXXVII of the Civil Procedure Code. The revision petitioner filed an application under Section 8 of Arbitration and Conciliation Act, 1996 seeking to referral the matter to Arbitration. The said application was dismissed by the court below. Hence, the revision petitioner has filed the present Civil Revision Petition before this Court.

3. According to the revision petitioner, the dispute arising between the revision petitioner and the respondent is the subject matter under agreement dated 30.05.2012 and the same was subsequently renewed between the parties. In the aforesaid agreement, there is a clause under Article 18 of the agreement that the matter shall be referred to Arbitration. Under the plaint, the respondent herein has admitted that the agreement dated 01.09.2013 is only for providing warehousing and logistics services and the said agreement is only an extension of agreement dated 30.05.2012. The respondent has stated that agreement dated 30.05.2012 and 01.09.2013 were entered between the parties. Therefore, there is some invoices which are related to the period after 31.08.2014 which are not covered

under the Arbitration agreement. However, the Hon'ble Supreme Court reported in **(2009) 5 SCC 182** in the case of **N.Srinivasa Vs. Kuttukaran Machine Tools Limited** has held as follows.

"37.It is well settled that even if an agreement ceases to exist, the arbitration clause remains in force and any dispute pertaining to the agreement ought to be resolved according to the conditions mentioned in the arbitration clause. Therefore, in our view, the High Court was not justified in setting aside the order of the trial court directing the parties to maintain status quo in the matter of transferring, alienating or creating any third-party interest in the same till the award is passed by the sole arbitrator."

4. Further, in the light of the decision of the Hon'ble Supreme Court reported in **AIR 2000 SC 1886** in the case of **P.Anand Gajapathi Raju and others Vs. P.V.G.Raju(died) and others**, the Hon'ble Supreme Court has held that the conditions which are required to be satisfied under Sub-sections 1 and 2 of Section 8 before the Court

can exercise its powers are (i) there is an arbitration agreement, (ii) a party to the agreement brings an action in the court against the other party (iii) subject matter of the action is the same as the subject matter of the arbitration agreement (iv) the other party moves the court for referring the parties to arbitration before it submits his first statement on the substance of the dispute.

5. In the case of *Sukanya Holdings Pvt Ltd Vs. Jayesh H.Pandya and another* reported in **AIR 2003 SC 2252(1)**, wherein the Hon'ble Supreme Court has held that such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two difference forums.

6. Further, if there is any objection or applicability of the arbitration clause, the same has to be referred to Tribunal concerned as

decided in the case of *Hindustan Petroleum Corporation Ltd Vs. Pinkcity Midway Petroleums* reported in **(2003) 6 SCC 503**, wherein it is held as follows.

"15. The question then would arise: what would be the role of the civil court when an argument is raised that such an arbitration clause does not apply to the facts of the case in hand? Learned counsel for the appellant contends that it is a matter which should be raised before the arbitrator who is competent to adjudicate upon the same and the civil court should not embark upon an inquiry in regard to the applicability of the arbitration clause to the facts of the case. While learned counsel appearing for the respondent contends that since the applicability of the arbitration clause to the facts of the case goes to the very root of the jurisdiction of the reference to arbitration, this question will have to be decided by the civil court before referring the matter to arbitration even in cases where there is admittedly an arbitration clause. The answer to this argument, in our opinion, is found in Section

16 of the Act itself. It has empowered the Arbitral Tribunal to rule on its own jurisdiction including rule on any objection with respect to the existence or validity of the arbitration agreement. That apart, a Constitution Bench of this Court in *Konkan Rly* with reference to the power of the arbitrator under Section 16 has laid down thus:

"21. It might also be that in a given case the Chief Justice or his designate may have nominated an arbitrator although the period of thirty days had not expired. If so, the Arbitral Tribunal would have been improperly constituted and be without jurisdiction. It would then be open to the aggrieved party to require the Arbitral Tribunal to rule on its jurisdiction. Section 16 provides for this. It states that the Arbitral Tribunal may rule on its own jurisdiction. That the Arbitral Tribunal may rule 'on any objections with respect to the existence or validity of the arbitration agreement' shows that the Arbitral Tribunal's authority under Section 16 is not

confined to the width of its jurisdiction, as was submitted by learned counsel for the appellants, but goes to the very root of its jurisdiction. There would, therefore, be no impediment in contending before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated by reason of the fact that the Chief Justice or his designate constituted before the Arbitral Tribunal that it had been wrongly constituted by reason of the fact that the Chief Justice or his designate had nominated an arbitrator although the period of thirty days had not expired and that, therefore, it had no jurisdiction."

7. In response to the contention of the revision petitioner, the learned counsel for the respondent would submit that an agreement between the respondent and the revision petitioner was entered into for a period of one year in 30.05.2012 for providing warehousing and logistics services. After the expiry of the agreement on 29.05.2013, an extension agreement dated 01.09.2013 was entered into for a further period of one year ending on 31.05.2014. The agreements are only for

providing services. The warehousing agreement dated 30.05.2012 had an arbitration clause which was incorporated by reference in the extension agreement dated 01.09.2013. In the course of its business, apart from providing warehousing and logistics service, various other services such as ocean exports, air imports and exports and custom clearance were also provided by the respondent, for which there is no specific clause in the aforesaid agreement. Therefore, the said suit filed by the respondent is not covered under the agreement dated 30.05.2012 and 01.09.2013. Therefore, the claims arising out of the unpaid invoices raised for services other than warehousing do not form part of the warehousing agreement. According to the respondent except two invoices dated 14.04.2014 and 04.07.2014, all other invoices, which are the subject matter of the present suit does not arise out of the warehousing agreement dated 30.05.2012 and 01.09.2013 between the revision petitioner and the respondent. Therefore application filed by the revision petitioner is correctly rejected by the trial court. In support of the aforesaid contention, the learned counsel for the respondent has relied upon the decision of the Hon'ble Supreme Court in the case of *Sukanya Holdings Pvt. Ltd. Vs. Jayesh H.Pandya and Another* reported in **AIR 2003 SC 2252**, wherein it is held that the

subject matter of the arbitration agreement as well as other disputes, to be referred to Arbitration. There is no provision to refer a portion of the suit for arbitration. Paragraphs 16 and 17 of the Judgment reads as follows.

"16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial

authority is not allowed.

17. Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

8. Therefore, according to the learned counsel for the respondent, there is no provision to refer the subject matter of the suit for arbitration. Hence, the aforesaid decision of the Hon'ble Supreme Court would squarely apply to the case on hand.

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9. Another decision of the Division Bench of this Court in the case of *RK Productions Pvt Ltd Vs. M/s.N.K.Theatres Pvt.Ltd* reported in **2013 28 MLJ 35**, wherein it is held that applying the ratio of *Sukanya Holdings* case, the subject matter of the suit cannot be bifurcated to

refer the parties to arbitration. Then the appeal has to be allowed. In the other case of *GTL Limited and Others Vs. IFCI Ltd and another* reported in **(MANU/DE/3007/2012)**, the Hon'ble Delhi High Court dismissed the said application under 8 of the Arbitration and Conciliation Act, 1996 holding that when the subject matter of the dispute is beyond the scope of agreement in which the Arbitration clause exists, then the said dispute cannot be referred to Arbitration. Paragraph 15 of the judgment is extracted herein

"15. All the lenders of the plaintiff No.2 are parties to the inter creditor agreement. The implication of this has been explained by the plaintiff that the defendant No.1 is estopped from selling the shares or enforcing the security under the agreement by operation of the stand still clause envisaged under the Debtor Creditors agreement dated and Inter Creditor agreement. The said clause contained in the agreements is reproduced below:

The Participating Financial Institutions and Banks and undertake that from the Commencement Date of

Consideration of Reference for the first time by CDR Empowered Group at its meeting, the Lenders shall not commence any civil action and / or make best efforts not to proceed with any civil action, if already initiated, against the Eligible Borrower for recovery of their dues in respect of the financial assistance. However, the aforesaid standstill provision will be operative for a period of 90 days but may be extended upto 180 days, with the specific approval of CDR Core Group, from the Commencement Date. This however, shall not preclude the participating financial institutions and banks from initiating or continuing any action against the eligible borrower or its promoters / directors or its officials for criminal offences. During this period, outstanding foreign exchange forward contracts, derivative products etc. can be crystallized provided such crystallization is permitted under the agreement with the eligible borrower or the eligible borrower is agreeable to such crystallization.

Explanation: For the purpose of this clause, the

term "civil action" shall mean such legal action or proceeding against the Eligible Borrower, or against individual(s) extending personal guarantee(s) in respect of the Financial Assistance provided by the Lenders to the eligible borrower and includes enforcement of securities created in favour of any Lender by the Eligible Borrower."

10. Yet another decision of the Hon'ble Bombay High Court Ruby in the case *Ruby Organics Private Limited Vs. Sai Mitra Innopharm Pvt Ltd* reported in **2014 (1) ABR 738** was also relied upon. In view of the aforesaid decision, the respondent has also claimed invoice bills for other services namely ocean exports, air imports and exports and custom clearance for which there is no specific agreement between the parties, those invoices were not covered under the agreement clause. Therefore, in the light of the aforesaid decisions, there is no provision for splitting the cause or parties and referring a portion of the subject matter of the suit to arbitration and hence, the suit filed by the respondent is within the jurisdiction of the Civil Court. Therefore, the order of the court below is sustainable.

11. Heard the learned counsel for the revision petitioner and the learned counsel for the respondent and perused the materials available on record.

12. On perusal of the materials and the submissions of the learned counsel for the parties, the issues involved in the present Civil Revision Petition before this Court is that whether under Section 8 of the Arbitration and Conciliation Act, 1996, if any dispute arises between the parties, it shall be referred to Arbitration, when the arbitration clause in the agreement covers certain invoices and there are invoices which are not covered under the agreement. The learned counsel for the revision petitioner would submit that the respondent herein has filed a suit with the prayer for recovery of money along with interest. In the aforesaid suit, there is a specific averment in the plaint that an agreement was entered into between the parties on 30.05.2012 and subsequently it was renewed on 01.09.2013 for providing warehousing and logistics services between the parties concerned. According to the revision petitioner, the cause of action in the suit arises on the basis of the warehousing agreement dated 30.05.2012. Therefore, admittedly, the entire plaint has been instituted on the basis of the above

agreement. Therefore, in the light of the decision of the Hon'ble Supreme Court In the case of *Sukanya Holdings Pvt Ltd Vs. Jayesh H.Pandya and another* reported in **AIR 2003 SC 2252(1)**, wherein the Hon'ble Supreme Court has held that such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. Hence, even for an application under Section 8 of Act to be rejected, the prescribed procedure under the said section is required to be followed. When two invoices covered under the agreement, the other invoice are not covered under the agreement, however any dispute arises between the parties, same shall be referred to Arbitration. Further in the case of *Hindustan Petroleum Corporation Ltd Vs. Pinkcity Midway Petroleums* reported in **(2003) 6 SCC 503**, it has been held that, if there is an objection to the application arbitration clause, the same has to be referred to Arbitration concerned. In the case of *P.Anand Gajapathi Raju and others Vs. P.V.G.Raju(died) and others* reported in **AIR 2000 SC 1886**, the Hon'ble Supreme Court has held that the conditions which are required to be satisfied under Sub-sections 1 and 2 of Section 8

before the Court can exercise its powers. However, there is no power to refer the parties to the Arbitration as held in the Suganya case, which the respondent also relied upon, when some of the invoices are not covered under the agreement and the same shall be tried in the suit. Therefore, there is no bar or lack of jurisdiction for the Civil Court to decide the aforesaid issue. In the present case, the suit has been instituted by the respondent and the said suit is pending for recovery of amount along with interest at the rate of 18% per annum from the date of filing the suit. The Bombay High Court in the case *Ruby Organics Private Limited Vs. Sai Mitra Innopharm Pvt Ltd* reported in **2014 (1) ABR 738**, wherein it is held as follows.

"9. Mr.Jain placed reliance on the judgment of the Supreme Court in case of Sukanya Holdings (P) Ltd. vs. Jayesh H.Pandya and another reported in MANU/SC/0310/2003 : (2003) 5 SCC 531 in support of his submission that if it is not possible to bifurcate the subject matter of the suit with the claim which may be arising out of the arbitration agreement, court cannot refer parties to arbitration under section 8 of the Arbitration and

Conciliation Act, 1996. Paragraphs 16 and 17 of the said judgment reads thus:-

"16. The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under Section 8 of the Act? In our view, it would be difficult to give an interpretation to Section 8 under which bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed.

17. Secondly, such bifurcation of suit in two

parts, one to be decided by the arbitral tribunal and other to be decided by the civil court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums."

12. In the judgment of the Supreme Court in case of Branch Manager, M/s.Magma Leasing & Finance Ltd. (supra), it is held that one of the conditions for referring the parties to the arbitration under section 8 of the Arbitration and Conciliation Act, 1996 is that not only the action brought to the court by the arbitration agreement is against other party against the arbitration agreement but the subject matter of the suit shall be the same as the subject matter of the arbitration agreement. In my view, since the claim made in the summary suit is based on the invoices which are not issued since the claim made in the summary suit is based on the invoices which are not issued under the agreement dated 26th May, 2006 entered into between the parties which records the arbitration agreement, mandatory condition under Section 8 of the Arbitration and Conciliation Act is not satisfied. In my

view parties to this suit thus cannot be referred to the arbitration.

13. On perusal of the invoices annexed to the plaint which are subject matter of the suit, it is clear that none of these invoices are based on any of the agreements whether dated 26th May, 2006 or 25th May 2006. In my view subject matter of this suit is not the subject matter of arbitration agreement as the invoices issued and goods sold are not under agreement dated 26th May, 2006 which contained arbitration agreement.

14. Eve if, an attempt is made to bifurcate the transactions which are subject matter of this suit proceedings on the premise that supplies are effected by the plaintiffs based on the agreement dated 26th May, 2006 entered into between the plaintiffs and the defendants and the agreement dated 25th May, 2006 entered into between the sister-concern of the plaintiffs and the defendants, it is not possible to split the claim made by the plaintiffs in the suit and thus parties cannot be referred to the arbitration under Section 8 of the Arbitration and Conciliation Act, 1996."

13. In the case of GTL Limited and Others Vs. IFCI Ltd and

another reported in **(MANU/DE/3007/2012)**, the Hon'ble Delhi High has held that the Civil Suit is not maintainable when there is bifurcation of transacton, one is covered and another is not covered under the agreement. The paragraph 44 of the judgment is extracted as follows.

"44.This aspect has been minutely explained in detail in the case of Sukanya Holdings Pvt. Ltd vsJayesh H. Pandya & Anr, (supra) wherein the Supreme Court while interpreting [Section 8](#) of the Arbitration and [Conciliation Act](#), 1996, has observed on the similar lines as under:-

"Secondly, there is no provision in the Act that when the subject matter of the suit includes subject matter of the arbitration agreement as well as other disputes, the matter is required to be referred to arbitration. There is also no provision for splitting the cause or parties and referring the subject matter of the suit to the arbitrators.

Thirdly, there is no provision as to what is required to be done in a case where some parties to the suit are not parties to the arbitration agreement. As against this, under [Section 24](#) of the Arbitration Act, 1940, some of the parties to a suit could apply that the matters in difference between them be referred to arbitration and the Court may refer the same to arbitration provided that the same can be separated from the rest of the subject matter of the suit. Section also provided that the suit would continue so far as it related to parties

who have not joined in such application."

Thereafter, the Court has proceeded to hold that only those disputes which are entirely covered by the arbitration for which the suit is concerned shall be referred to the arbitration and not the part of the disputes in the suit. This has been explained by the Supreme Court in the following words:-

"The relevant language used in [Section 8](#) is "in a matter which is the subject matter of an arbitration agreement", Court is required to refer the parties to arbitration. Therefore, the suit should be in respect of 'a matter' which the parties have agreed to refer and which comes within the ambit of arbitration agreement. Where, however, a suit is commenced - "as to a matter" which lies outside the arbitration agreement and is also between some of the parties who are not CS (OS) No.2278/2011 Page 19 of 25 parties to the arbitration agreement, there is no question of application of [Section 8](#). The words 'a matter' indicate entire subject matter of the suit should be subject to arbitration agreement."

(Emphasis Supplied) "The next question which requires consideration is even if there is no provision for partly referring the dispute to arbitration, whether such a course is possible under [Section 8](#) of the Act? In our view, it would be difficult to give an interpretation to [Section 8](#) under which

bifurcation of the cause of action that is to say the subject matter of the suit or in some cases bifurcation of the suit between parties who are parties to the arbitration agreement and others is possible. This would be laying down a totally new procedure not contemplated under the Act. (Emphasis Supplied) If bifurcation of the subject matter of a suit was contemplated, the legislature would have used appropriate language to permit such a course. Since there is no such indication in the language, it follows that bifurcation of the subject matter of an action brought before a judicial authority is not allowed. (Emphasis Supplied) Secondly, such bifurcation of suit in two parts, one to be decided by the arbitral tribunal and other to be decided by the civil Court would inevitably delay the proceedings. The whole purpose of speedy disposal of dispute and decreasing the cost of litigation would be frustrated by such procedure. It would also increase the cost of litigation and harassment to the parties and on occasions there is possibility of conflicting judgments and orders by two different forums.

14. Therefore, as the agreement containing arbitration clause is for supply of warehousing and logistics services and according to the respondent it also provided other services such as ocean exports, air imports and customs and clearance by the respondent and claim in

the suit is in respect of other services also which are not covered in any of the agreement entered into between the parties, the present case is covered within the parameters specified in the Sukanya case as relied upon by the trial court. Therefore, there is no error or illegality in the order passed by the court below.

15. The Civil Revision Petition fails and the Civil Revision Petition is dismissed. Consequently, the connected miscellaneous petition is closed. No costs.

08.06.2018

Speaking/Non-speaking

Index : Yes/No

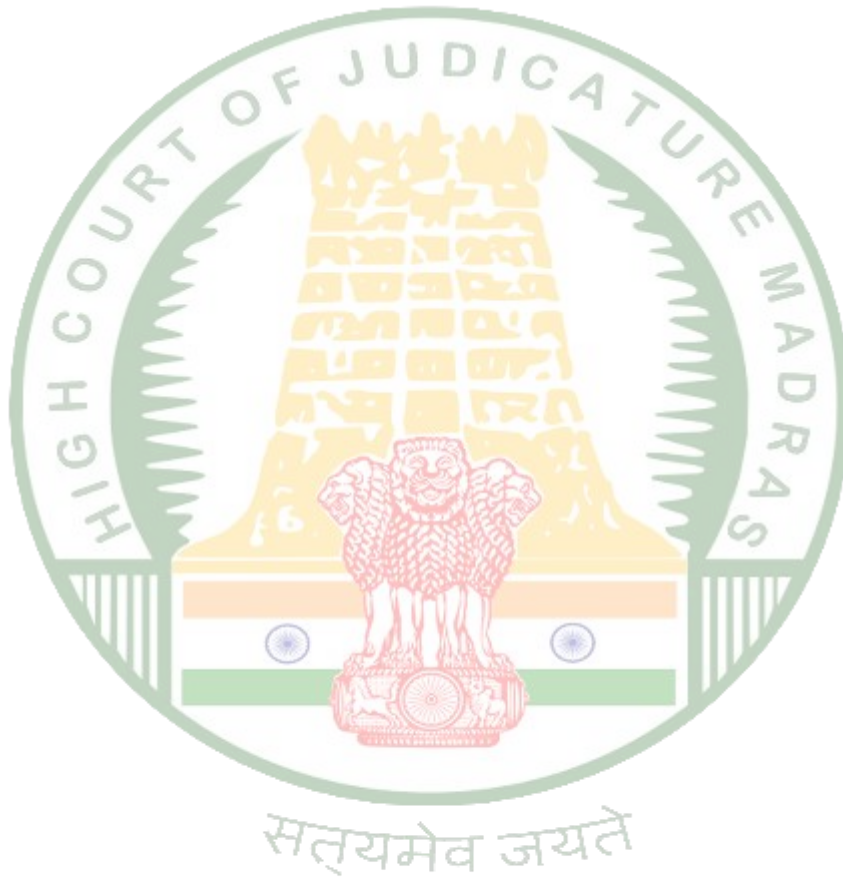
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To

The XVII Additional City Civil Judge,
Chennai



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Pre-delivery Order
in CRP.PD.No.3821 of 2016
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