



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.03.2019

PRONOUNCED ON : 16.04.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1234 of 2006
and
C.M.P.No.6177 of 2019

1.Radhabai
2.Samundeeswari ..Appellants/Defendants 3 & 4

Vs.

1.Santhi
2.Meena @ Menakshi
3.Mahalakshmi ..Respondents 1 & 3/Plaintiffs
4.Saroja
5.Samudi ..Respondents 4 & 5/Defendants 1 & 2

Prayer :- Second Appeal has been filed under Section 100 of the Civil Procedure Code against the Judgement and Decree dated 19.12.2005 passed in A.S.No.15 of 2005 on the file of the Principal District Court, Vellore District, modifying the judgement and decree dated 09.03.2005 passed in O.S.No.385 of 1994 on the file of the Subordinate Court, Tirupattur.

For Appellants : Mr.V.Raghavachari

For Respondents : Mr.T.M.Hariharan
Nos.1 to 3

Respondent No.4 & 5 : No appearance
set exparte vide order
dated 25.03.2019

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 19.12.2005 passed in A.S.No.15 of 2005 on the file of the Principal District Court, Vellore District, modifying the judgement and decree dated 09.03.2005 passed in O.S.No.385 of 1994 on the file of the Subordinate Court, Tirupattur.



WEB COPY

2.The second appeal has been admitted on the following substantial questions of law:

"1.Whether the Courts below are justified in decreeing the suit for partition when no relief had been sought for as against defendants 3 onwards and a rival right was sought to be established?

2.Whether the suit for partition could be filed as against strangers holding the property and claiming a rival title as against the plaintiffs and defendants 1 and 2?

3.Whether the plaintiffs and defendants 1 and 2 are estopped from challenging the status of the appellants in view of Ex.B9?

4.Whether the Will under Ex.B12 could be rejected on mere surmises when its due attestation and execution had been established.

5.Whether the decree of the lower Court is not beyond the scope of the pleadings and evidence?"

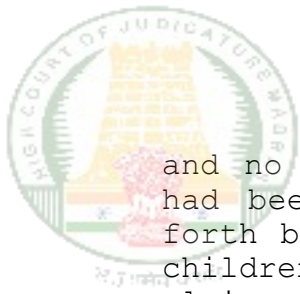
3.Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

5.The plaintiffs had laid the suit against the defendants for partition, mesne profits and permanent injunction.

6.In brief, according to the plaintiffs, the suit properties are the separate properties of their father Samraj and accordingly, they are entitled to obtain 3/5th share in the suit properties and inasmuch as the defendants 3 to 5 did not come forward to allot their shares in the suit properties, to which, they are entitled to and hence, according to them, they had been necessitated to lay the suit against the defendants, in all, for appropriate reliefs.

7.The plaintiffs and the second defendant are the children of Samraj. It is not in dispute that the first defendant is the wife of the deceased Samraj. According to the plaintiffs, the third defendant Radhabai is the concubine of the deceased Samraj



and no marriage had taken place between them. However, Samraj had been keeping her as concubine and accordingly, it is put forth by the plaintiffs that the third defendant as well as the children born to her through Samraj would not be entitled to claim any share in the suit properties belonging to Samraj and hence, according to the plaintiffs, only they and the defendants 1 & 2 are entitled to obtain their due shares in the suit properties and hence, the suit.

8.The defendants 3 & 4 resisted the plaintiffs' suit contending that the third defendant is the second wife of the deceased Samraj and it is further stated that the marriage took place between Samraj and the third defendant on 06.06.1970 and it is also stated that one son by name Kannan and another son by name Sivakumar were also born, however, it is stated that Kannan and Sivakumar had died and accordingly, the case had been projected by the defendants 3 & 4 that Samraj had separated from the defendants 1 to 2 and the plaintiffs over a considerable period of time and accordingly, contacted the marriage with the third defendant and lived with her as husband and wife and furthermore, it is also put forth by the defendants 3 & 4 that the properties had been acquired even with the income contributed by the third defendant and furthermore, the defendants 3 & 4 also resisted the plaintiffs' suit contending that Samraj had executed a Will dated 20.01.1993 bequeathing his properties in favour of the third defendant and in such view of the matter, the claim of the plaintiffs that Samraj had died intestate is false and accordingly, inter alia, the defendants 3 & 4 have sought for the dismissal of the plaintiffs' suit.

9.Based on the materials placed on record by the respective parties, both oral and documentary, the trial Court was pleased to grant the relief of partition in favour of the plaintiffs in respect of the items 1 & 2 of the plaint "A" schedule properties as prayed for and as regards the third item of the plaint "A" schedule properties held that the first defendant and the third defendant are each entitled to $\frac{1}{2}$ share and accordingly, disposed of the suit laid by the plaintiffs directing them to workout their claim of mesne profits in respect of the items 1 & 2 of the plaint "A" schedule properties by way of a separate proceeding as per law and also granted the relief of permanent injunction in respect of the items 1 & 2 of the plaint "A" schedule properties in favour of the plaintiffs and also granted the relief of permanent injunction in favour of the first defendant in respect of the third item of the plaint "A" schedule properties and dismissed the plaintiffs' suit as regards the plaint "B" schedule properties. On appeal, the first appellate Court, on an appreciation of the materials placed on record, was pleased to confirm the judgment and decree of the trial Court in all aspects, however, modified the same,



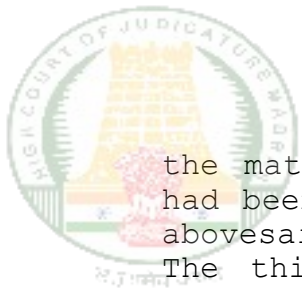
only by holding that the plaintiffs and the defendants 1 & 2 are entitled to 1/5th share each in respect of 0.50 cents in item 3 of the plaint "A" schedule properties and that the first defendant is entitled to 1 acre and 1/5th share in 0.50 cents in item 3 of the plaint "A" schedule properties and accordingly, disposed of the appeal. Impugning the same, the present second appeal has been preferred by the defendants 3 and 4.

10. Mainly, two points had been canvassed in the second appeal. According to the third defendant, the marriage had taken place between her and the deceased Samraj and therefore, as per law, she and her son are also entitled to share in the properties left behind by the deceased Samraj and contended that the abovesaid fact had not been properly considered and determined by the Courts below and the same needs reversal. Furthermore, according to the third defendant, the Courts below had failed to note that the deceased Samraj had not died intestate. On the other hand, he had executed a Will bequeathing the suit properties in her favour and therefore, the plaintiffs are not entitled to claim any share in the suit properties on the footing that they are the legal heirs of the deceased Samraj, on the footing that he had died intestate.

11. It is not in dispute that the first defendant is the legally wedded wife of the deceased Samraj. In such circumstances, when even according to the third defendant, the deceased Samraj had married her during the subsistence of his marriage with the first defendant, it is obvious that the alleged marriage between Samraj and the third defendant cannot be a valid marriage. In fact, according to the plaintiffs, no marriage at all had been performed between the deceased Samraj and the third defendant and according to them, the third defendant was only kept as a concubine by the deceased Samraj and therefore, it is further put forth that neither the third defendant nor the children born to her through the deceased Samraj would be entitled to claim any share in the properties left behind by the deceased Samraj.

12. In the light of the abovesaid factors, particularly, the plaintiffs having challenged that no marriage at all took place between the deceased Samraj and the third defendant, the onus is only upon the third defendant to establish that the marriage had been celebrated between her and the deceased Samraj as claimed by her.

13. Other than vaguely stating that the marriage between her and the deceased Samraj took place on 06.06.1970, nothing has been averred in the written statement as to where the said marriage took place and in whose presence and in what mode, manner and custom, the same was celebrated and in such view of



the matter, the claim of the third defendant that the marriage had been celebrated between her and the deceased Samraj, on the abovesaid indistinct plea ipso facto cannot be readily accepted. The third defendant has been examined as DW1 and during the course of evidence, DW1 would state that the marriage between her and the deceased Samraj took place on 06.06.1970 and admitted that at that point of time, Samraj's first marriage was subsisting and would also claim that her marriage with Samraj took place in the presence and to the knowledge of one and all. However, even during the course of evidence, the third defendant has not whispered as to where her marriage took place, in whose presence, in specific and in what manner, the same was celebrated. In addition to that, she had also not endeavoured to examine any person, who is said to have participated in the alleged marriage between her and the deceased Samraj.

14. According to the third defendant, the invitation card had been printed in connection with her marriage with Samraj and the invitation card has been marked as Ex.B1. According to the plaintiffs, Ex.B1 had been concocted for the purpose of this case and no reliance could be placed on the same. As rightly determined by the Courts below, no one has been examined to establish the authenticity of Ex.B1 marriage invitation card and the name of the printing press which had printed the same has not been disclosed in the same. Furthermore, Ex.B1 does not disclose as to in whose presence the marriage was celebrated in particular and the card recites, as if the marriage had been celebrated on Saturday and therefore, the Courts below had doubted the truth of Ex.B1 marriage invitation card also on the footing that the Hindu marriage would not be celebrated on Saturday. Be that as it may, when the factum of the marriage between the third defendant and the deceased Samraj had not been established by examining independent persons and when the marriage invitation card marked as Ex.B1 ipso facto cannot be at all safely relied upon for accepting it as a proof for the said marriage, I do not find any reason to deviate from the abovesaid determination of the Courts below in not placing reliance upon Ex.B1 invitation Card projected for sustaining the defence version.

15. The defendants would also put forth and rely upon the birth certificates marked as Exs.B2 to 5 and the death certificate marked as Ex.B6 for sustaining their case of marriage between the deceased Samraj and the third defendant. The abovesaid documents are stated to be pertaining to the children born to the deceased Samraj through the third defendant. No doubt, the name of Samraj is mentioned in the abovesaid documents, but, as rightly put forth by the plaintiffs' counsel and as rightly determined by the Courts below, the abovesaid birth certificates and the death



certificate could not be considered as the proof of marriage between the deceased Samraj and the third defendant and in such view of the matter, the Courts below are found to be totally justified in not placing reliance upon the abovesaid documents for sustaining the defence version that the marriage had taken place between the deceased Samraj and the third defendant.

16. Similarly, the recitals found in the sale deed dated 01.04.1991, marked as Ex.B9 wherein, the property had been conveyed to Samraj and minor Sasikumar, the 5th defendant (since deceased) represented by the father and guardian, the deceased Samraj are relied upon. In the abovesaid document, the minor Sasikumar has been represented by the deceased Samraj as his father and no dispute is raised that Sasikumar was born to Samraj through the third defendant. However, according to the plaintiffs, no marriage had taken place between the deceased Samraj and the third defendant and the third defendant only is kept as the concubine by the deceased Samraj and therefore, out of the abovesaid illicit relationship, children were born to them and accordingly, it is their contention that in Ex.B9 sale deed, Sasikumar born to Samraj through the third defendant on account of the abovesaid illicit relationship, Sasikumar had been represented by Samraj describing himself as his father and the guardian. In such view of the matter, as rightly determined by the Courts below, merely because, Sasikumar had been represented by Samraj as his guardian and father in Ex.B9 sale deed, that would not constitute as proof of marriage between the deceased Samraj and the third defendant and in such view of the matter, the abovesaid document would also not be useful for sustaining the alleged marriage between the deceased Samraj and the third defendant.

17. As abovenoted, though the third defendant would claim that her marriage with the deceased Samraj was celebrated to the knowledge of one and all and in the prersence of Village elders, however, no one has been examined to sustain the said fact. At least, to establish that thereafter Samraj and the third defendant had been living as husband and wife together, no independent witness has been examined with reference to the same and in addition to that, if they had been living together as husband and wife after the alleged marriage and recognised as husband and wife by the society at large, as rightly put forth, independent witnesses would have been examined by the third defendant pointing to the same and also the documents, such as the voters card, ration card, etc., would have been projected by the third defendant for sustaining that the deceased Samraj and she had been living together as husband and wife and accordingly, they had been recognised as husband and wife by the society at large and they had been depicted so in the Government records as abovenoted. However, absolutely, there is no



material to hold that since the date of the marriage on 06.06.1970, they had been living together as husband and wife and they had been looked upon as husband and wife by the society at large. However, the contention has been put forth by the third defendant's counsel that the presumption should be raised that they had been living together as husband and wife as per law, as the Courts had frowned upon taking any presumption against concubinage and in such view of the matter, according to him, considering the materials placed on record, the Court should infer that on account of long and continuous cohabitation between the deceased Samraj and the third defendant, the presumption of marriage should be accepted in their favour and on that footing, contended that the judgement and decree of the Courts below are liable to be set aside. But the above argument cannot be readily acceded to. When as abovenoted, for raising such a presumption, inasmuch as the third defendant had failed to place convincing and reliable materials to hold that the deceased Samraj and she had been living together as husband and wife and they had been so looked upon by the society at large and when the documents projected by the third defendant do not point to the abovesaid factual matrix and when no one had been examined by the third defendant to sustain the abovesaid case, merely because, the third defendant had been enjoying the properties of the deceased Samraj one way or the other, on that score alone, we cannot infer that the marriage had been celebrated between her and the deceased Samraj, as put forth by her. In all, it is found that the third defendant has miserably failed to establish the factum of marriage between her and the deceased Samraj as put forth by her and in such view of the matter, though children had been born to her through the deceased Samraj, however, the factum of marriage not having been established as abovenoted, as rightly determined by the Courts below, Section 16 of the Hindu Marriage Act would not be applicable to the case at hand and in such view of the matter, it is found that the children born to the third defendant through Samraj would not be entitled to claim any share in the properties left behind by the deceased Samraj. In all, I do not find any valid reason to interfere with the abovesaid determination of the Courts below that no marriage had taken place between the deceased Samraj and the third defendant and the alleged marriage said to have taken place between the deceased Samraj and the third defendant on 06.06.1970 has not been established by the third defendant and furthermore, the third defendant has also failed to establish that the deceased Samraj and she had been living together as husband and wife over a period of time and that, on account of their long and continuous cohabitation, they had been looked upon as husband and wife by the society at large and in such view of the matter, no presumption could be raised in her favour that the deceased Samraj and she had been living together as husband and wife,



१२.५ आमेव अरुं

evidence one way or the other. But both DWs4 & 5 have admitted



that they are not in the possession of any document containing the signatures of their father as projected by them and in such view of the matter, when as abovenoted, they have also not placed any proof to hold that they are the sons of the attestors Rajamani and Krishnan as put forth by them and the propounder, the third defendant, in all, the Courts below are found to be totally justified in not relying upon their evidence for determining the truth and validity of Ex.B12 Will.

19.No doubt, the propounder would be entitled to establish the truth and validity of the Will in question in the absence of the availability of the attestors to the same either on account of death or on account of his inability to summon them for adducing evidence in the Court one way or the other. When even the factum of the death of the attestors have not been established as such and in addition to that, when the plaintiffs have thrown a challenge that DWs 4 & 5 are not the sons of so-called attestors, in such view of the matter, the failure of the third defendant in establishing the abovesaid fact at the foremost, would only render the defence version unacceptable and accordingly, as rightly determined by the Courts below, no safe credence could be attached to the evidence of DWs 4 & 5 for upholding the truth and validity of Ex.B12 Will.

20.In the light of the abovesaid factors, when DW2's evidence cannot be solely relied upon for accepting Ex.B12 Will and when the status of DWs4 & 5 have not been established by the third defendant as above discussed and furthermore, when on the face of it, Ex.B12 also throws certain suspicions i.e. the stamp papers on which it had been scribed are found to have been acquired in the name of Sivasankaran, Natrampalli on 27.07.1989, but the same had come to be executed on 20.01.993, the abovesaid factor cannot be easily ignored as such. Furthermore, when the deceased Samraj was having legally wedded wife and four children born to him through her, to say that he had completed excluded them and left his properties to be enjoyed by his concubine the third defendant also lends suspicions and create doubt in the genuineness and validity of Ex.B12 Will and the abovesaid factors, as determined by the Courts below, cannot be easily brushed aside for accepting the case projected by the third defendant.

21.In any event, as determined by the Courts below, the third defendant has failed to establish the truth and validity of Ex.B12 Will as provided under law as above pointed out. The inevitable conclusion is that Ex.B12 Will cannot be accepted as a true and valid document and therefore, the defence projected by the third defendant on that score to stifle the case of the plaintiffs, has been rightly negatived by the Courts below and no interference is called for with reference to the same.



22.The argument has been put forth by the defendants 3 & 4 that the plaintiffs cannot be allowed to maintain the suit for partition as against the strangers and accordingly, on that footing alone, the plaintiffs' suit should fail. No doubt, the plaintiffs have laid the suit both against their brother, mother as well as the defendants 3 to 5 and the defendants 1 & 2, as such, have not challenged the plaintiffs' case. It is only the defendants 3 & 4 who are contesting the plaintiffs' case. However, when according to the plaintiffs, the third defendant, taking advantage of her illicit relationship with the deceased Samraj, had been meddling with the properties belonging to Samraj one way or the other and furthermore, the third defendant has also projected a rival claim of title to the suit properties by putting forth the defence version that she has contacted a marriage with the deceased Samraj as put forth by her and also projected Ex.B12 Will for negating the plea of partition prayed for by the plaintiffs, in such view of the matter, the plaintiffs' suit cannot be held to be not maintainable as sought to be made out by the defendants 3 & 4 and hence, the abovesaid arguments /grounds projected by the defendants 3 & 4 for non-suiting the plaintiffs, as such, cannot be accepted in any manner.

23.C.M.P.No.6177 of 2019

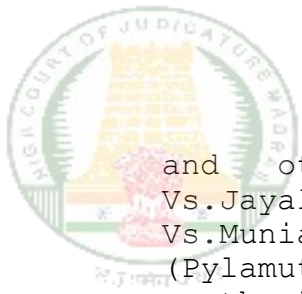
The abovesaid application has been preferred by the defendants 3 & 4 / appellants contending that the attestors of Ex.B12 had passed away and they had already examined their sons as DWs 4 & 5 and inasmuch as the Courts below had concluded that they had failed to establish that DWs 4 & 5 are the sons of the attestors, accordingly, it is their case that they had been necessitated to file the Aadhaar Card, Voters Card and Family Card of the abovesaid witnesses as additional evidence in the matter and accordingly, come forward with the application for the reception of the additional documents in support of their case.

24.The abovesaid application has been resisted by the plaintiffs contending that no reason has been adduced by the defendants 3 & 4 / appellants for not producing the additional documents before the trial Court or before the first appellate Court and therefore, the application for the reception of additional evidence does not satisfy the requirements of Order 41 Rule 27 CPC and furthermore, it is also contended that even after the institution of the second appeal, nearly 13 years thereafter, the application has come to be filed very belatedly and inasmuch as the defendants 3 & 4 have not made out any case for upholding the truth and validity of Ex.B12 Will before the Courts below, there is no scope for the reception of the additional evidence as such and accordingly, prayed for the dismissal of the application as devoid of merits.



25.As rightly put forth by the plaintiffs' counsel absolutely, no reason has been adduced by the defendants 3 & 4 for not producing the additional documents now projected by them before the Courts below. Even during the course of trial itself, the plaintiffs had thrown a challenge that DWs 4 & 5 are not the sons of the attestors. Other than denying the same, the third defendant or DWs4 & 5 had not endeavoured to place any proof to hold that DWs 4 & 5 are the sons of the attestors as such. In such view of the matter, when the third defendant had proceeded with the matter on the abovesaid set of evidence and the Courts below had, on an appreciation of the available materials on record, determined the case against her, to say that the defendants 3 & 4 should be provided with an opportunity to place further materials to buttress their case, as such, cannot be readily countenanced. It is not the case of the defendants 3 & 4 that they are not aware the defence projected by the plaintiffs challenging the evidence of DWs4 & 5 and in such view of the matter, as rightly contended that when the defendants 3 & 4 are fully aware of the case projected by the plaintiffs challenging the status of DWs 4 & 5, as such, in such view of the matter, every endeavour should have been made by them to place further materials before the trial Court itself to establish the status of DWs 4 & 5 i.e. they are the sons of the attestors to Ex.B12 Will and the defendants 3 & 4 having failed to place any material with reference to the same before the Courts below and their case now projected that they should be provided an opportunity to place further materials with reference to the same by way of the additional evidence, as such, cannot be accepted in any manner. As rightly put forth by the plaintiffs' counsel, when the application for the reception of additional evidence does not satisfy their requirements of Order 41 Rule 27 CPC in any manner and the application has come to be laid nearly 13 years after the institution of the second appeal itself, in all, it is found that the application for the reception of the additional evidence is found to be totally devoid of merits and not entitled for acceptance. Accordingly, the application for reception of additional evidence is dismissed.

26.In support of his various contentions, the counsel for the defendants 3 & 4 placed reliance upon the decisions reported in (1996) 8 Supreme Court Cases 81 (S.Ajarma Bi Alias S.Hajaram Bibi and another Vs. S.Khurshid Begum and others), 2003-4-L.W.698 (Solaiammal (died) and another Vs.Rajarathinam and others), (1991)-1-CTC 372 (Kamakshi Ammal Vs.Rajalakshmi and 6 others), (2007) 11 Supreme Court Cases 621 (Savithri and others Vs.Karthayayani amma and others), 2010- 3- L.W.282 (Karpagam and another Vs.E.Purushothaman and others), 2001 (3) CTC 513 (Kanagavalli and 4 others Vs. Saroja and 3 others), (2011) 11 Supreme Court Cases 1(Revanasiddappa and another Vs.Mallikarjun



and others), 1988-2-L.W.354 (Adhilakshmiammal & another Vs. Jayalakshmiammal and 3 others), 2010 (2) CTC 622 (Kuppan Vs. Muniammal and another), (2011) 12 Supreme Court Cases 189 (Pylamutyalamma Alias Satyavathi Vs. Pyla Suri Demudu and another), (2010) 9 Supreme Court Cases 209 (Madan Mohan Singh and others Vs. Rajni Kant and Another), 1992 Supp (2) Supreme Court Cases 304 (S.P.S. Balasubramanyam Vs. Suruttayan Alias Andali Padayachi and others), 2008-4-L.W.390 (Parvathi Vs. K. Sivalingam and another), 2008-4-L.W.397 (Union of India, Owing Southern Railway, rep. by General Manager Vs. P. Gowri & 4 others), 2000-2- L.W.782 (Chinnammal and 7 others Vs. Elumalai and 4 others), 1988-2- L.W.348 (Sivalingam Vs. Sakthivel, rep. by his power of attorney agent Kunjithapatham Pillai and another), 2000-1- L.W.593 (Karuppayammal and another vs. S. Ramalingam Pillai and 2 others) and the judgement of this Court dated 02.07.2008 passed in A.S.No.1009 of 1990 (Jayammal and others Vs. V. Kumar and others). Similarly, in support of his contentions, the counsel of the respondents placed reliance upon the decisions reported in (2001) 7 Supreme Court Cases 503 (N. Kamalam (Dead) and another Vs. Ayyasamy and another), (1980) 1 Supreme Court Cases 412 (Smt. Pramod Kumari Bhatia Vs. Om Prakash Bhatia and others), (2015) 17 Supreme Court Cases 713 (A. Andisamy Chettiar Vs. A. Subburaj Chettiar), (2017) 4 Supreme Court Cases 760 (Satish Kumar Gupta and others Vs. State of Haryana and others), (2018) 4 Supreme Court Cases 659 (Akhilesh Singh Alias Akhileshwar Singh Vs. Lal Babu Singh and others), (1983) 1 MLJ 311 (Alagammal and others Vs. V. Rakkammal. .), 1952 SCR 825 (Thakur Gokal Chand Vs. Parvin Kumari Alias Usha Rani) and the judgment of this Court dated 11.09.1987 passed in S.A.No.3 of 1979 (Govindasami Padayachi (dead) & ors. Vs. Boorasami Padayachi (dead) and others.). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

For the reasons aforesaid, the second appeal fails and is, accordingly, dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

sms



To

1.The Principal District Judge, Vellore District.

2.The Subordinate Judge, Tirupattur.

+1cc to Mr.V.Raghavachari, Advocate SR.No.37236

+1cc to Mr.T.M.Hariharan, Advocate SR.No.37596

S.A.No.1234 of 2006

GJ II (CO)

GMV (05/09/2019)