



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 08.01.2019	Pronounced on: 22.01.2019
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Coram:

The Honourable Dr.Justice G.Jayachandran

Second Appeal No.828 of 2004

- 1.Balusamy Nainar,
S/o. Natesa Nainar,
2. Rasu Nainar,
S/o.Balusamy Nainar,
Both are residing at Alathur Village,
Thittakudi Taluk, Cuddalore District.
... Appellants/ Respondents/Defendants

/versus/

1. Ganapathy Konar, (Died)
S/o.Alagappa Konar,
2. Adhimoola Konar,
S/o.Alagappa Konar,
3. Smt.Pachaiammal,
W/o.Late Ganapathy Konar,
4. Manavalan,
S/o. Late Ganapathy Konar,
5. Gunasekaran,
S/o.Late Ganapathy Konar, ... Respondents
RR2 to 5 are at No.1/14,
New No.1/101 West Street,
Alathur Village, Thittakudi Taluk, Cuddalore District.

RR3 to 5 Brought on record as LRs of the deceased R1 vide order of Court dated 18.12.2013 made in CMP.Nos.971 to 973 of 2013 in S.A.No.828 of 2004.

PRAYER: This Second Appeal has been filed under Section 100 of Civil Procedure Code, praying against the judgment and decree dated 27.02.2003 in A.S.No.17 of 2002 on the file of the Additional District Judge, Fast Track Court No.2,Cuddalore, at Vridhachalam, reversing the judgment and decree in O.S.No.417 of 1996 dated 25.02.2002 on the files of the District Munsif-cum-Judicial Magistrate, Thittakkudi.

For Appellants : Mr.R.SelvaKumar

For Respondents: Mr.S.Parthasarathy, Senior Counsel
for Mr.P.Dinesh Kumar
for Sarvabhuman Associates

J U D G M E N T

The defendants in the original suit are the appellants before this Court in the Second Appeal. Aggrieved by the reversal finding of the lower Appellate Court, the present appeal is preferred.

2. The brief facts leading to this appeal is as under:

The plaintiffs who are the respondents herein are son of Azhagappan Konar. The first defendant/Balusamy Nainar is son of Nadesan Nainar. The second defendant/Rasu Nainar is son of first defendant.

3. For easy understanding, parties are described as per their designation and ranking in the suit.

4. The subject matter of the suit is 3½ cents of land in 8 cents in old patta No.61, new UDR Patta No.324 and at present Re-survey No.85/5. According to the plaintiffs, 6½ cents of land inclusive of 3 ½ cents of land, which is subject matter of the suit, originally belong to Ramasamy Konar. The said Ramasamy Konar had two sons by name Azhagappan and Muthu. After the demise of Ramasamy Konar, his sons entered into oral partition and divided 6½ cents of land into two half diagonally which was conventionally known as "%iy jj;jp ghfk;". Thus, Azhagappan, the father of the plaintiffs got the North-East and South-West corner of 3¼ cents. Muthu Konar got North-West and South-East corner of 3¼ cents. The other half share enjoyed by Muthu Konar devolved on his wife Lakshmi. The said Lakshmi settled the property to her brother Perumal Konar on 29.04.1961. The said Perumal Konar sold the property to the first plaintiff on 10.08.1962. Thus, the plaintiffs got title and possession over entire 6½ cents. In or about 3 cents, they have constructed a tiled house on the eastern side running South-West facing East. They are enjoying the house for more than 12 years. In the balance 3½ cents of land, they have stocked haystack and using it to tether cattles. They have also fenced their boundaries with Kattukkaruvai and Murungai trees. By continuous enjoyment for more than 12 years, they have also perfected the title by adverse possession. The defendants who have 1½ cents of land from out of 8 cents in S.F.No.85/5, which they have purchased from Krishna Konar wanted to purchased the suit property from the plaintiffs. When the plaintiffs refused to sell the property, they tried to encroach upon the suit land on 15.01.1991. To prevent this, suit is laid for declaration that the suit portion of the land belongs to the plaintiffs and permanent injunction restraining the defendant their men and

agents from interfering with the peaceful possession. In alternate the plaintiffs have prayed for recovery of possession.

5. In the written statement, the defendants have denied the averments made in the plaint and the title claimed by the plaintiffs through the settlement deed executed by one Lakshmi in favour of Perumal Konar and the sale deed executed by Perumal Konar in favour of the first plaintiff. According to the defendants, the total extent of land in S.F.No.85/5 in Alathur Village is 8 cents. In which Ramasamy had only 4 cents. Out of which the plaintiffs got 2 cents from their father Azhagappa Konar. The remaining 2 cents inherited by Muthu Konar from his father Ramasamy Konar. On the demise of Muthu Konar this property passed on to her wife Lakshmi. She settled that 2 cents of land in favour of her brother Perumal. However, the Perumal has sold $3\frac{1}{2}$ cents of land to the plaintiffs under the sale deed dated 10.08.1962 which is beyond the extent of land settled in favour of Perumal Konar. Therefore, the claim of the plaintiffs that they have inherited $3\frac{1}{4}$ cents from Azhagappa Konar and purchased $3\frac{1}{4}$ cents of land from Perumal Konar is factual not correct. The defendants have also denied the plaint averments that out of 8 cents of land in S.F.No.85/5, only $1\frac{1}{2}$ cents of land was owned by the defendants vendor Krishna Konar.

6. According to the defendants, in S.F.No.85/5 out of 8 cents Ramasamy Konar who is the grand-father of the plaintiffs had only 4 cents of land. The remaining 4 cents of land was owned by Krishna Konar. From Krishna Konar, the first defendant has purchased the property and put up construction. The plaintiffs through their father got 2 cents of land and remaining 2 cents of land, was allotted to their junior paternal uncle Muthu Konar. That 2 cents was inherited by Lakshmi W/o Muthu Konar exclusively since his son Jagannathan died unmarried and intestate. Perumal Konar who got the 2 cents from his sister Lakshmi under the settlement deed can alienated only 2 cents of land. Therefore, the plaintiffs are not entitled for the relief sought.

7. In short, out of 8 cents of land in S.F.No.85/5 plaintiffs claim $6\frac{1}{2}$ cents of land, tracing the title through their grand father Ramasamy Konar and from the sale deed executed by Perumal Konar. Whereas the defendants claim right over 4 cents of land, which they claim to have purchased from one Varatharaja Konar son of Krishna Konar. The disputed extend is $3\frac{1}{2}$ cents in S.F.No.85/5 located west of the plaintiff house.

8. The trial Court, based on the pleadings has framed the following issued.

- (i). Whether the plaintiffs are entitled for $3\frac{1}{2}$ cents on the west of their house?
- (ii). Whether the plaintiffs have got adverse possession over the suit property?
- (iii). Whether the plaintiffs have got only $\frac{1}{2}$

cents on the west of their House ?

(iv). Whether the defendants have got right of enjoyment over the suit property on the west of plaintiffs house ?

(v). What other relief the plaintiffs are entitled for ?

Additional issues:

Whether the defendants have perfected their title by adverse possession over the western 4 cents in S.F.No.85/5 of Alathur Village ?

9. The trial Court, after framing relevant issues on the side of plaintiffs examined 3 witnesses. 6 documents were marked as Ex.A.1 to Ex.A.6. On the side of the defendants 2 witnesses were examined. 26 documents were marked as Ex.B.1 to Ex.B.26. The Commissioner's report, plan and objections were marked as Ex.C.1 to Ex.C.6.

10. The trial Court dismissed the suit holding that the plaintiffs have proved their enjoyment only to an extent of $\frac{1}{2}$ cents on the eastern portion of the suit property and the defendants are enjoying the rest of the suit property. The trial Court held that the plaintiffs cannot claim title in excess of 4 cents on further eastern portion in S.F.No.85/5. Also held that the defendants have perfected their title over 4 cents on the western portion in S.F.No.85/5 by adverse possession. The trial Court has negatived Ex.A.1 settlement deed dated 29.04.1961 on the ground that the certified copy of the document can be relied upon only when it is proved that the original is destroyed or untraceable. So Ex.A.1 a certified copy of the settlement deed cannot be relied upon. As a consequence Ex.A.2 sale deed executed by Perumal Konar in favour of the first plaintiff based on the settlement deed Ex.A.1 also cannot be considered since it has lost its evidenciary value.

11. Aggrieved by the dismissal of the suit, the plaintiffs have preferred A.S.No.17/2002 before the Additional District Judge-cum-Fast Track Court No.3, Viruthachalam, Cuddalore.

12. The lower Appellate Court has formulated the following points for determination.

(i). Whether the plaintiffs/appellants have absolute right and title over the suit property?

(ii). Whether the plaintiffs/appellants are in peaceful possession and enjoyment of suit property?

(iii). Whether the plaintiffs/appellants have acquired right and title over the suit property by virtue of adverse possession?

(iv). Whether the defendants have got absolute right and title over 4 cents situate on the western side to the plaintiffs house?

(v). Whether the defendants/respondents have acquired right and title over 4 cents in S.F.No.85/5 by virtue of adverse possession?

(vi). Whether the plaintiffs/appellants are entitled to the relief of permanent injunction?

(vii). Whether the decree and judgment passed by Lower Court is sustainable in law ?

(viii). What are the reliefs if any plaintiffs/appellants are entitled to ?

13. After considering the documents relied by the respective parties, particularly the settlement deed Ex.A.1 executed in favour of Perumal Konar, the sale deed Ex.A.2 executed by Perumal Konar in favour of the first plaintiff, the Commissioners report and sketch, the boundaries described in the documents relied by the parties, the lower Appellate Court reversed the finding of the trial Court.

14. The first Appellate Court Judge has observed that if the lower Court had properly considered the discrepancies in the boundary described in Ex.B.1 and Ex.B.2 it would have easily passed a restricted decree for $3\frac{1}{4}$ cents in S.F.No.85/5 in favour of the plaintiffs/appellants. The Lower Appellate Court after analysing Ex.C.1 to Ex.C.5 partially allowed the appeal. Passed decree declaring title to the plaintiffs over the area measuring $3\frac{1}{4}$ cents in S.F.No.85/5 and granted injunction against the defendants from interfering with the plaintiffs peaceful possession and enjoyment of $3\frac{1}{4}$ cents of land. The relief to the plaintiffs restricted to $3\frac{1}{4}$ cents as against $3\frac{1}{2}$ cents claimed.

15. The present Second Appeal is therefore filed by the defendants raising the following Substantial Questions of law.

1. Whether the lower Appellate Court is right in reversing the finding regarding Ex.A.1, which has been rejected by the Trial court as inadmissible in evidence as the same is only a certified copy with out any pleading or explanation as to the original and basing the decision especially on Ex.A.1, without assigning any reason as to what is the illegality in the finding of the trial Court over Ex.A.1?

2. Whether the lower Appellate Court is right in reversing the trial Court's judgment when Ex.A.1 and Ex.A2 are silent as to how the predecessor in title acquired the same especially when the partition alleged is oral one?

16. The learned counsel appearing for the appellants would submit that the plaintiffs have failed to explain the non-availability of the original settlement deed before marking the secondary evidence namely Ex.A.1 which is the certified copy of the settlement deed executed by Lakshmi in favour of Perumal Konar. The trial Court has rightly rejected the said document as inadmissible in evidence as per Section 65 of the Indian Evidence Act. Whereas, without assigning any reason the Appellant Court has relied upon Ex.A.1 which is an inadmissible document and Ex.A.2 sale deed which trace the source of vendor's right from the Ex.A.1 settlement deed.

17. Further the learned counsel for the appellants also contended Perumal Konar who is the vendor of the plaintiffs had no right to alienate more than what he got under the settlement deed, Ex.A.1. Even if the plaintiffs relies upon Ex.A.2 as source of their title, it is only to an extent of 2 cents, which the Perumal Konar has got from his sister Lakshmiammal through the settlement deed Ex.A.1. The learned counsel would further submit that the trial Court ought not to given undue importance to the discrepancies of boundaries shown in Ex.B1 and Ex.B2.

18. Per contra, the learned Senior Counsel appearing for the respondents would submit that the reasoning of the trial Court for not relying upon Ex.A.1 is against law and also against fact. Under Section 65(c) of the Indian Evidence Act Secondary Evidence relating to the document can be adduced not only when original is destroyed or untraceable as observed by the trial Court, but also when the party offering the evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

19. Relying upon Section 65(c) of the Indian Evidence Act and the deposition of PW.1 wherein, the plaintiff has explained in his chief examination itself that the original of the certified copy Ex.A.1 is with his vendor Perumal Konar and when Ex.A.1 the certified copy of the registered settlement deed was marked as an exhibit the defendants did not object the marking of the said document. Therefore, they cannot raise objection at the later stage in the Second Appeal.

20. In support of the submissions, the learned Senior Counsel for the respondents would rely upon the paragraph 20 of the judgment of the Hon'ble Supreme Court rendered in R.V.E.Venkatachala Gounder Vs. Arulmigu Viswesaraswami & V.P.Temple and another reported in (2003) 8 SCC 752 which read

as below:-

"The learned counsel for the defendant-respondent has relied on The Roman Catholic Mission Vs. The State of Madras & Another (AIR 1966 SC 1457) in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the abovesaid case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes:-

(i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and

(ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient.

In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking

indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court.

21. The above principle has been followed by the Supreme Court and relied in its later judgment Dayamathi Bai Vs. K.M.Shaffi reported in (2004) 7 SCC 107.

22. Regarding the tracing of title, the learned Senior Counsel for the respondents would submit that the total extent in S.F.No.85/5 is 8 cents. Out of 8 cents the plaintiffs have title in respect of 6 $\frac{1}{2}$ cent. It is not disputed by the defendants that the plaintiffs are grand son of Ramasamy Konar. After the demise of Ramasamy konar the properties was divided into two half each 3 $\frac{1}{4}$ cents. While the plaintiffs father Azhagappan got the 3 $\frac{1}{4}$ cents, the remaining 3 $\frac{1}{4}$ cents went to their junior paternal uncle Muthu Konar which was later settled in favour of Perumal Konar by the wife of Muthu Konar. The said Perumal Konar in turn has sold the said 3 $\frac{1}{4}$ cents to the plaintiffs under Ex.A.2. The said contention of the plaintiffs has been proved through title deeds, Revenue receipts and by Commissioner's report. While so, the trial Court without proper appreciation of the recital of Ex.A1 and Ex.A2 by misconstruing Section 65(c) of the Indian Evidence Act had rejected Ex.A1. Whereas, the Appellate Court applying the law correctly had accepted Ex.A.1 and other documents. Hence, the appeal is liable to be dismissed.

23. Now after hearing the rival submission, adverting to the Substantial Questions of Law formulated this Court finds that Ex.A.1 is the certificate copy of the registered settlement deed dated 29.04.1961. While marking this document as an exhibit the defendants have not objected. At the time of marking this document, the witness has specifically deposed that the original settlement deed is with his vendor. The schedule of the properties settled in favour of Perumal Konar under Ex.A.1 contains various items of land under different Survey Numbers. It includes 2 cents of land, out of S.F.No.85/5 with particular boundary and 1 $\frac{1}{4}$ cents of land, under the same survey number with different boundary. These 2 items total extend of 3 $\frac{1}{4}$ cents settled in favour of Perumal Konar has been sold by Perumal to the plaintiff in Ex.A.2. Therefore, the trial Court has grossly erred on facts by observing under Ex.A.1, Lakshmi

has bequeath only 2 cents of land to Perumal Konar, so Perumal Konar cannot sell more than 2 cents of land in S.F.No.85/5 under Ex.A.2 to the plaintiffs. Further, scrutiny of the boundaries of these two items of property falling under S.F.No.85/5, cannot find that for the 2 cents of land the eastern boundary is shown as first defendant property. For the 1¼ cents of land eastern boundary is shown as Krishna Konar land. The 1st plaintiff property is shown as Western boundary. Therefore, from the Commissioners report and Sketch, the Lower Appellate Court has identified the actual extent of land held by the plaintiffs by correlating with the title documents and had allowed the suit restricting the declaration to an extent of 3¼ cents which the plaintiffs have purchased from Perumal Konar with specific boundaries. The Patta and Kist receipts marked by the plaintiffs were relied by the Appellate Court to hold the possession in favour of the plaintiffs.

24. The defendants admits that the total extent in S.No.85/5 is 8 cents. They claim title and right over the suit property through the sale deed executed by Varatharaja Konar son of Krishna Konar. According to them, the Krishna Konar had title for 4 cents of land. On the demise of Krishna Konar, the property devolved on his son Varatharaja Konar. The said Varatharaja Konar executed two sale deeds for 2 cents each in favour of the 1st defendant. Ex.B.1, is the sale deed dated 08.05.1978. Admittedly in the said sale deed the eastern boundary is shown as first plaintiff land. The second defendant who was examined as DW.1, in his deposition had stated that the sale deed Ex.B.1, the property should have been described as East of remaining land of Varatharaja Konar. Whereas, it is wrongly mentioned as East of Ganapathy Konar.

25. If really the boundaries has been wrongly described in the sale deeds, the defendants ought and might have taken steps to rectify the defects in the description of the boundaries. Not only in the Ex.B.1 but also in Ex.B.2 which was executed subsequently in the year 1981, in respect of 2 cents of land, which according to the defendants is adjacent to his land purchased under Ex.B.1, he is not shown as one of the adjacent land owner.

26. The 2nd defendant/DW.1 admits in his deposition that under Ex.B.2, the western boundary of the land purchased is not mentioned as East of their land purchased by them under Ex.B.1. Apart from the description in the boundaries, admittedly the defendants has failed to place any document to shown how their vendor Varatharaja Konar derived title in respect of S.F.No.85/5 or his father Krishna Konar derived title for the land under S.F.No.85/5.

27. For the said reasons, the Lower Appellate Court has reversed the finding of the trial Court pointing out that the plaintiffs have proved the title over the suit property to an extent of 3¼ cents which they have purchased from Perumal Konar who got the property from the legal heirs of original owner Ramasamy Konar.

28. As rightly pointed out by the learned Senior counsel for the respondents that when Ex.A.1 the certified copy of the sale deed marked, the appellant herein did not object the marking of the secondary evidence. In fact, in the chief examination, while marking document itself, the witness has explained about the non-availability of the original settlement deed. When several properties are settled in favour of Perumal Konar and Perumal Konar in turn has sold two items of properties to the plaintiffs under Ex.A.2, the purchaser cannot except his vendor to handover the original document which confers right over several items of properties to his vendor. Therefore, he has given out a reason for non-availability of the original with him. This explanation has been accepted by the defendants without any murmur while marking Ex.A.1.

29. In the light of the judgments of Hon'ble Supreme Court in R.V.Venkatachala Gounder and Dayamathi Bai cited supra, the reasoning of the trial Court for not relying upon Ex.A.1 is to be held perverse.

30. The Lower Appellate Court has rightly ignored the perverse reasoning of the trial Court for rejecting Ex.A.1 and proceeded to appreciate the facts in accordance to law. Therefore, the Substantial Questions of law has to be held against the Appellants since, non availability of original and the production of secondary evidence has been explained by the plaintiffs in his deposition and impliedly accepted by the defendants by not objecting the marking of the exhibit.

31. No doubt, Ex.A.1 and Ex.A.2 is silent about how plaintiffs predecessor in title acquired the property. The very same silence is found in the defendants documents also. Admittedly, the plaintiffs are straight descents of Ramasamy Konar. The suit property has been acquired by them by inheritance as well as through purchase from the other descents. Whereas, the defendants are stranger to the suit properties and their lands are shown as one of the boundaries in S.F.No.85/5.

32. In the said circumstances, this Court finds no error in finding of the Lower Appellate Court to interfere. The Substantial Questions of law are answered accordingly.

33. In the result, the Second Appeal is dismissed. The judgment and decree in A.S.No.17 of 2002 dated 27.02.2003 passed by the Additional District Judge, Fast Track Court No.III, Cuddalore at Vridhachalam is confirmed. No costs.

Sd/-

Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

bsm

To,

1.The District Munsif-cum-Judicial Magistrate, Thittakkudi.

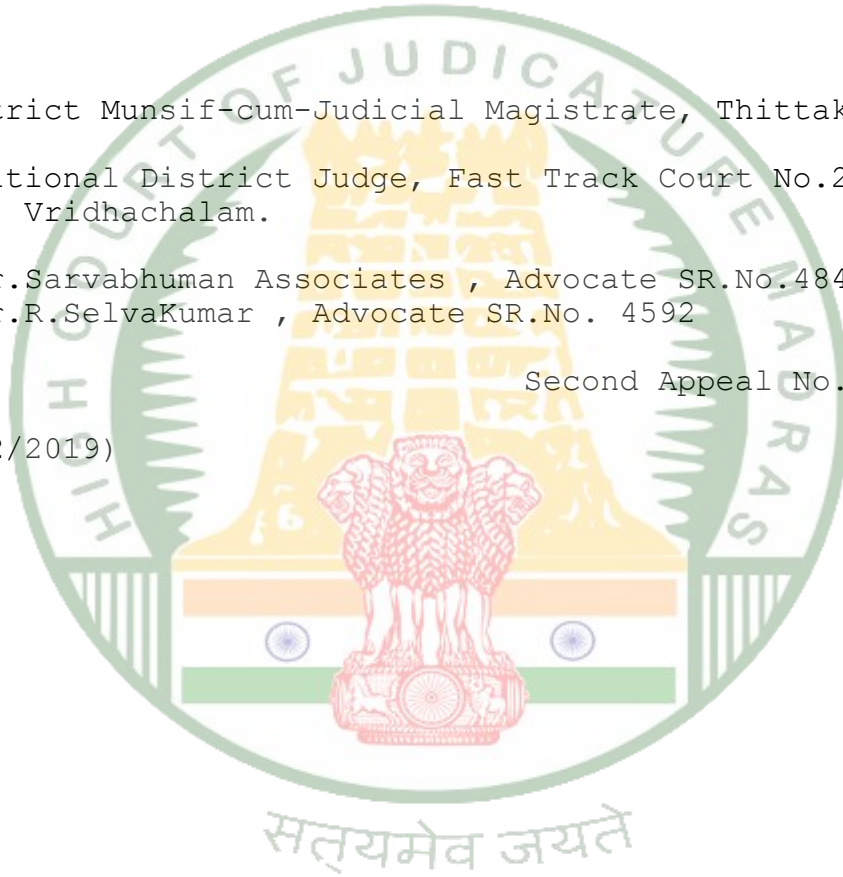
2.The Additional District Judge, Fast Track Court No.2, Cuddalore, Vridhachalam.

+lcc to Mr.Sarvabhuman Associates , Advocate SR.No.4848

+lcc to Mr.R.SelvaKumar , Advocate SR.No. 4592

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