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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :17.09.2021

PRONOUNCED ON :27.09.2021

CORAM:

THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.Nos.2382 & 2383 of 2021

and

CMP Nos. 13502 & 13515 of 2021

M/s. Olympia Opaline Flat Owners Association (OOOA),
Represented by its member
Mr. Sivabaskaran Pachamall
having its Office at Aethyst Stilt,
Olympia Opaline, Phase I,
Old Mahabalipuram Road,
Navalur, Chennai - 603 103,
Tamil Nadu.

...Appellant/Respondent/
Claimant in Both CMAs

vs.

Olympia Infratech, a Unit of
Olympia Tech Park (Chennai) Private Limited
Having its registered Office at 1,
Sidco Industrial Estate,
Guindy,
Chennai - 600 032.

...Respondent/Applicant/
Respondent in Both CMAs

Common Prayer: Civil Miscellaneous Appeals filed under Section 37 of the Arbitration and Conciliation Act, 1996 against the Order dated 21.02.2021 made in IA No.2 and IA No.3 of 2019 in Arbitration Case No.5 of 2019 on the file of the Arbitral Tribunal consisting of the Sole Arbitrator and consequently appoint the Engineer Commissioner as sought for in I.A.No.2 of 2019 and consequently appoint the Government Surveyor as sought for in I.A.No.3 of 2019.

For Appellant : Mr. Nithyaesh Nataraj
for M/s. Nithyaesh and Vaibhav

For Respondent : Mr. M.S. Krishnan
Senior Advocate
for M/s. Fox Mandal & Associates



COMMON JUDGMENT

(This case was heard through Video Conferencing)

These Appeals have been filed under Section 37 of the Arbitration and Conciliation Act, 1996 (henceforth referred to as "Act") challenging the order dated 21.02.2021 passed by the Arbitral Tribunal in IA No.2 of 2019 and IA No.3 of 2019 in Arbitration No. 5 of 2019 under Section 17 of the Arbitration and Conciliation Act, dismissing the Applications filed by the Appellant seeking the following reliefs :

a. the appointment of Government approved surveyor for the purpose of measuring the land in the presence of representatives of both the parties pertaining to the land covered under Phase I of the project measuring 15.780 Acres.

b. the appointment of Engineer Commissioner assisted by representatives from both the parties for assistance for the following purposes :

(i) to assess the claimant report dated 15.02.2016 submitted to the respondent for the purpose of verification about its veracity and make a detailed report on the issue of inferior quality, mismatch of grounds and in other relevant information required to arrive at the amenities not provided.

(ii) to identify such of those promises made in the sale brochure of the respondent/ sale agreement and compare the same with the actual delivery

(iii) to get quotes from the market vendors for supply, installation and commissioning of amenities that have not been complied and submit the report within a period of 30 days from the date of order passed by the Arbitral Tribunal.

2. The Appellant is the claimant and the respondent is the respondent in the Arbitration. The Appellant / Flat Owners Association represents the interest of various flat owners who had purchased flats from the respondent who is a promoter and builder of flats. The case of the Appellant / Flat Owner Association is that there were several deficiencies in the flats purchased by the members of the Appellants Associations and a breach of contract was committed by the respondent which has been denied by the respondent. The dispute between the parties was referred to Arbitration by this Court and the Arbitral Tribunal was constituted. The Appellant in the Arbitration has claimed damages which has been quantified by them in terms of money and they have also sought for a permanent injunction restraining the respondent from promoting the members of Olympia Sequel or any other third parties claiming right to interest through the respondent from accessing or using the common area or facilities or amenities exclusively belonging to the



Appellant Association. Before the Tribunal, the respondent has filed their statement of defence denying their liability and they have also made a counter claim against the Appellant which has been quantified in terms of money. They have also sought for a permanent injunction restraining the Appellant / claimant from interfering with the respondent's right for further development in the remaining extent of the lands.

3. The Trial in the Arbitration has commenced and the Appellant's / claimant's witness has also been cross examined by the respondent before the Arbitral Tribunal on 07.08.2021 as seen from the Additional Typed set of papers filed by the Appellant before this Court.

4. During Trial, the Appellant has filed the aforementioned IAs under Section 17 of the Arbitration and Conciliation Act, seeking the reliefs mentioned supra. According to the Appellant, as seen from the Affidavit filed in support of IA Nos. 2 and 3 of 2019, the need for filing the aforementioned IAs under Section 17 of the Arbitration and Conciliation Act, arises for the following reasons

a. the Respondent has given a misleading advertisement in the brochure and also in the sale deed for the common area dated 20.09.2012 that the total area was 15.780 Acres, whereas after the Appellant Association took over the Management, the private Surveyor appointed by them has submitted a report disclosing that the actual measurement of the land was only 13.240 Acres.

b. There are several deficiencies of service committed by the respondent and the respondent has delivered possession of the flats to the members of the Appellant Association and after taking delivery of the flats the Appellant Association found poor workmanship and quality of the flats and the flats have been delivered in an incomplete fashion. A counter affidavit was filed by the respondent before the Arbitral Tribunal in IA Nos.2 & 3 of 2019 denying the allegations of the Appellant and reiterating that the flats were delivered to the members of the Appellant Association only in accordance with the agreement. They have also pleaded that the applications filed by the Appellant is not maintainable. According to them, the Appellant cannot seek to shift their burden of proof on the respondent and they cannot use such interim reliefs as an evidence gathering mechanism.

They have also specifically pleaded that Apartment Complex being 9 to 10 years old since completion, the Applications filed by the Appellant are not maintainable as the normal wear and tear of the



building cannot be stopped or arrested.

5. The Arbitral Tribunal by its order dated 21.02.2021 in IA Nos. 2 & 3 of 2019 in Arbitration No.5 of 2019 dismissed the applications by giving the following reasons :

a. A clear stand has been taken by the Appellant Association that they had already appointed an expert for conducting a study who filed a report in Ex. C12 series and also another study conducted by an Engineering contractor regarding the plumbing work and report has been filed as Ex. C24.

b. The respondent has denied both the aforementioned documents and therefore it is for the Appellant Association to examine the Author of the reports to substantiate their allegations.

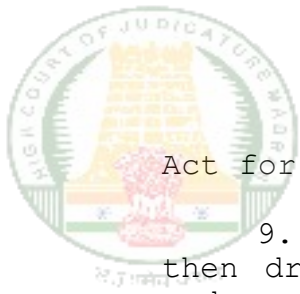
c. Section 26 of the Act talks about appointment of an expert, but does not speak about import of expert evidence.

d. the Appellant having taken specific stand in their claim and having filed documents in support of the claim, it is for them to prove their case in the manner known to law. The circumstances pleaded by the Appellant for appointment of expert did not arise in this case and burden of proving their claim is solely vested with them. In the absence of the respondent, not agreeing to the conduct of service by a Government approved surveyor and taking note of the stand taken by the respondent in their pleadings, it is unnecessary to order IA No.2 of 2019.

6. Aggrieved by the dismissal of IA Nos.2 & 3 of 2019 by the Arbitral Tribunal on 21.02.2021, these Appeals have been filed under Section 37 of the Arbitration and Conciliation Act by the claimant in the Arbitration.

7. Heard, Mr. Nithyaesh Nataraj, learned counsel for the Appellant and Mr. M.S. Krishnan, learned Senior counsel, for M/s. Fox Mandal & Associates for the respondent.

8. Mr. Nithyaesh Nataraj, learned Counsel for the Appellant would submit that IA Nos.2 & 3 of 2019 were filed by the Appellant before the Arbitral Tribunal only under Section 17 of the Arbitration and Conciliation Act, but the Arbitral Tribunal has misdirected itself by referring to Section 26 of the Arbitration and Conciliation Act which pertains to appointment of an Expert by the Arbitral Tribunal and would submit that even in the counter Affidavit filed by the respondent in IA Nos. 2 & 3 of 2019 before the Arbitral Tribunal, the respondent never took such a stand but the Arbitral Tribunal has on its own without any basis has erroneously relied upon Section 26 of the



Act for dismissing the Applications.

9. Mr.Nithyaesh Nataraj, learned Counsel for the Appellant then drew the attention of this Court to Section 4 of the Act and would submit that having not raised any such defence as pointed out by the Arbitral Tribunal under the impugned order, the respondent are now estopped from raising the question of maintainability of these Appeals under Section 37 of the Arbitration and Conciliation Act on the ground that the impugned order is in the nature of order passed under Section 26 of the Act which is not an appealable order under Section 37 of the Act.

10.Mr.Nithyaesh Nataraj, learned counsel for the Appellant then drew the attention of this Court to the Single Bench Judgment of this Court in the case of V.G. Santhosam and others Vs. Shanthi Gnanasekaran and others reported in 2020 SCC Online Mad 560 and in particular referred to paragraph 42 of the said order which reads as follows :

42. No order of an Arbitrator can remain as remediless. There is no express provision in the Arbitration Act for the impleadment of the third party. Thus, any such interim application filed for impleadment by a third person is necessarily to be treated as an application under Section 17 (1)(ii)(e) of the Act. Once the impleadment is allowed, then the right of appeal cannot be denied. The Arbitrator allowed a third person to a contracted Arbitration Agreement to participate in the arbitral proceedings and such an order of impleadment cannot be construed as a final order in the Act, is entertainable by this Court and consequently, the point of maintainability raised by the first respondent is devoid of merits and stands rejected.

After relying upon the aforementioned paragraph, Mr.Nithyaesh Nataraj would submit that applying the same ratio decidendi, the Appellant cannot be left remediless aggrieved by the impugned order.

11. Mr.Nithyaesh Nataraj, learned counsel for the Appellant then drew the attention of this Court to Section 17 (1)(ii)(c) of the Act and would submit that the words, preservation or inspection of any property contained therein gives wide powers to the Arbitral Tribunal under Section 17 and according to him, the reliefs sought for by the Appellants fall well within the purview of Section 17 (1)(ii)(c) of the Act and therefore, he would submit that the impugned order was passed only under Section 17 of the Act and hence they are appealable orders under Section 37 of the Act.

12.Mr.Nithyaesh Nataraj, learned counsel for the Appellant



then drew the attention of this Court to the Affidavits filed in support of IA Nos.2 & 3 of 2019 before the Arbitral Tribunal and would submit that though the brochure advertised by the respondent for the building project in which the members of the Appellant Association purchased flats reveals that the extent of the land covered under the project is 15.780 Acres, on measurement through a private Surveyor appointed by the Appellant it was found to be only 13.240 Acres. According to him, since the respondent is disputing the report of the private Surveyor, it became necessary for the Appellant to file Applications under Section 17 of the Act for appointment of a Government Surveyor and an Engineering Commissioner. He would also submit that there are several deficiencies in the flats delivered to the members of the Appellant Association and many of them have been delivered incomplete. Under those circumstances, the Appellant has filed the Applications under Section 17 of the Arbitration and Conciliation Act. According to him, no prejudice will be caused to the respondent, if the prayers sought for in IA Nos.2 & 3 of 2019 before the Tribunal were granted as it will enable the Tribunal to find out the truth.

13. Per contra, Mr. M.S. Krishnan, Senior Counsel, for M/s. Fox Mandal & Associates for the respondent would submit that the claim made by the Appellant before the Arbitral Tribunal is false and an unsustainable one. He would submit that many of the members of the Appellant Association have not paid their maintenance charges to the respondent. According to him, only to fill up the lacuna in the Appellant's evidence, they have filed IA Nos. 2 & 3 of 2019 before the Arbitral Tribunal which is not maintainable. According to him, the Arbitral Tribunal has rightly rejected the Applications on the ground that the Appellant cannot collect evidence through the appointment of a Government Surveyor and an Engineering Commissioner by the Arbitral Tribunal.

14. Mr.M.S.Krishnan, Senior Counsel, drew the attention of this Court to the cross examination of the Appellant's / claimant's witness (CW1) before the Arbitral Tribunal and in particular he referred to question Nos.104, 105 and 106 contained therein and would submit that the maintenance management for the building complex was handed over to M/s. Blue Bell in October, 2016 and thereafter the alleged deficiencies were also set right by M/s.Blue Bell even according to the Appellant. Therefore, the Applications filed by the Appellant before the Arbitral Tribunal has been rightly dismissed since the alleged deficiencies cannot be found now.

15. Mr.M.S.Krishnan, learned Senior counsel for the respondent would further submit that having filed the claim, it



is for the Appellant to prove the same through oral and documentary evidence. They cannot seek the assistance of the Arbitral Tribunal that too after several years for appointment of a Government Surveyor and an Engineering Commissioner. He drew the attention of this Court to the survey report which the Appellant / claimant are relying upon to show that the actual extent of land for the building project in Phase I was only 13.240 Acres and not 15.780 Acres and would submit that the respondent is constructing flats under different phases over a total extent of approximately 50 Acres.

16. According to him, the building project involving the Appellant Association pertains to Phase I and when Phase I was getting developed, the respondent had developed 15.780 Acres and now Phase II has commenced and therefore a portion of Phase I developed was merged with Phase II development in the common interest of all the residents who have purchased flats in various Phases in the total extent of land measuring 50 Acres approximately. He then drew the attention of this Court to the sale deeds conveyed to members of the Appellant Association and would submit that as per Schedule-B which is the total extent in which Phase I is situated, the land measures 11.86 Acres and therefore the respondent never agreed to convey the total extent of 15.780 Acres as alleged by the Appellant Association for the Phase I project. Therefore, according to him, there is no merit in the contentions raised by the Appellant. Further, he would submit that the reliefs sought for by the Appellant before the Arbitral Tribunal in IA Nos.2 & 3 of 2019 are in the nature of relief that the Court is empowered to grant under Section 27 of the Act which enables the Arbitral Tribunal or the party with the approval of the Tribunal to seek the assistance of the Court in taking evidence. According to him, even though the Applications have been filed by the Appellant under Section 17 of the Arbitration and Conciliation Act, since it is in the nature of Section 27 of the Act, the impugned orders are not appealable under Section 37 of the Act and therefore according to him the present Appeals are not maintainable.

17. Mr.M.S.Krishnan, learned Senior counsel for the respondent also drew the attention of this Court to the impugned orders and would submit that the Appellant Association having referred to Section 26 of the Act before the Arbitral Tribunal which has also been considered by the Arbitral Tribunal, the present Appeals are not maintainable as the impugned orders are deemed to have been passed under Section 26 of the Act which is not Appealable under Section 37 of the Act.

Discussion:

18. One of the main objects of the Arbitration & Conciliation Act is to minimize the supervisory role of Courts



in the Arbitral proceedings.

19. The scope of challenging an Arbitral Award under Section 34 of the Arbitration & Conciliation Act is limited and that is the reason the Section says "setting aside" and not an "Appeal". Section 34 Application is a summary proceeding and is in the nature of "judicial review jurisdiction" but is not a regular first appeal where reappreciation of evidence is permissible.

20. Though Section 37 Appeals challenging the interim order passed by the Arbitral Tribunal under Section 17 of the Act does not impose similar restrictions as that of Section 34, Courts cannot completely ignore the scope of Section 34 Vis-a-vis Section 17, while deciding appeals under Section 17 of the Act, arising out of orders passed by the Arbitral Tribunal under Section 17. If the Courts exercising powers under Section 37 of the Act arising out of interim orders passed by the Arbitral Tribunal under Section 17, completely ignores the scope of challenge to Arbitral Awards under Section 34, it would imply that the jurisdiction of the Court over the interlocutory decision of the Arbitral Tribunal is much wider than the jurisdiction against the final Arbitral Award. In that case, the very purpose of the Arbitration which envisages expeditious disposal of disputes and minimal supervision by Courts over Arbitral proceedings will get defeated. The Courts while deciding Appeals under Section 37 of the Arbitration & Conciliation Act must always have an eye on the salutary objects of the Arbitration & Conciliation Act. As a passing reference in the decision rendered by the Hon'ble Supreme Court in the case of National Highways Authority of India versus Gwalior-Jhansi Expressway Limited reported in (2018) 8 SCC 243 while considering an order passed under Section 17 of the Arbitration and Conciliation Act by the Arbitral Tribunal has also referred to the fundamental policy of the Indian law, which is also one of the grounds available under Section 34 of the Act to challenge an Arbitral Award. The relevant portion of the aforesaid decision of the Hon'ble Supreme Court reads as follows :

21..... The order is, indeed, silent in that behalf. But, that will be of no avail to the respondent. For, such exemption ought to have been prayed and expressly granted by the Court. In absence of such express exemption, the respondent was obliged to comply with the terms and conditions of the tender documents publicly notified by the appellant as per its understanding of the order of the High Court. Having failed to participate in the bidding process in consonance with such notified terms and conditions, the respondent lost the opportunity granted under the order



dated 23-7-2016 to match the lowest bid or to exercise ROFR. Any other view would fall foul of the fundamental policy of the Indian law and cannot be countenanced.

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21. Even though, in the aforesaid decision only a passing reference has been made by the Hon'ble Supreme Court to "fundamental policy of the Indian Law", it can be inferred that the Courts while dealing with the appeals arising out of interim orders passed by the Arbitral tribunal cannot totally ignore Section 34 of the Act, where the scope for interference is very limited. With this in mind, this Court proposes to consider whether the impugned orders passed by the Arbitral Tribunal under Section 17 of the Arbitration & Conciliation Act can be interfered or not.

22. The Appellant before the Arbitral Tribunal has sought for appointment of a Government Surveyor and an Engineer Commissioner to evaluate the defects / deficiencies found in the Apartment Complex. Admittedly, the said Apartment Complex was handed over to the Appellant Association in the year 2016 itself. The maintenance Management Company, M/s. Blue Bell, appointed by the Appellant Association also took charge of the maintenance from the respondent in October, 2016 itself. During the course of cross examination of the witness of the Appellant Association (CW1) before the Tribunal, the said witness has deposed as seen from question numbers 104, 105 and 106 that after M/s. Blue Bell took over maintenance Management, the said Company has set right the deficiencies in the Apartment Complex.

23. The Applications seeking for appointment of Government Surveyor and an Engineer Commissioner in IA Nos. 2 & 3 of 2019 before the Arbitral Tribunal were admittedly filed only in the year 2019 that is after three years from the date when the Appellant Association was handed over possession of the Apartment Complex by the respondent. By normal wear and tear of the Apartment Complex due to the long passage of time, it is possible that the Apartment Complex may have suffered certain damages which requires maintenance and repair. Therefore, the Appellant Association's attempt to get a Government Surveyor and an Engineer Commissioner appointed by the Arbitral Tribunal at this stage will not aid them in any way for proving their case before the Arbitral Tribunal that the respondent had committed deficiency in service in the construction of the Apartment Complex.

24. The Arbitral Tribunal under the impugned order has also observed that the learned counsel for the Appellant while making his submissions in IA No. 2 & 3 of 2019 before the Tribunal had referred to Section 26 of the Arbitration & Conciliation Act which deals with the appointment of an expert by the Arbitral



Tribunal. Under Section 26 of the Arbitration & Conciliation Act, Arbitral Tribunal has got the power to appoint one or more experts to report to it on specific issues to be determined by the Arbitral Tribunal.

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25. Mr. M.S. Krishnan, learned Senior Counsel for the respondent has contended before this Court, that the relief sought for by the Appellant Association in IA Nos.2 & 3 of 2019 before the Arbitral Tribunal for appointment of Government Surveyor and an Engineer Commissioner will not fall within the scope of Section 17 of the Arbitration & Conciliation Act and may fall only under Section 27 of the Arbitration & Conciliation Act which enables the party or the Arbitral Tribunal to seek assistance of Court in taking evidence. Any order passed under Section 26 or 27 of the Act by the Arbitral Tribunal is not an appellable order under Section 37 of the Arbitration and Conciliation Act.

26. However, Mr. Nithyaesh Nataraj, learned counsel for the Appellant, disputed the same and would submit that the Applications were infact filed only under Section 17 of the Arbitration & Conciliation Act as Section 17(1)(i)(c) deals with detention, preservation or inspection of any property or thing which enables the Appellant to file Applications under Section 17 of the Arbitration and Conciliation Act before the Arbitral Tribunal.

27. However, if the impugned orders are passed under Section 17 of the Arbitration & Conciliation Act, they are Appealable under Section 37 of the Act. The contentions raised by the respective counsels for and against the maintainability of these appeals under Section 37 of the Arbitration & Conciliation Act are debatable and the necessity for this Court to give its finding on the said debatable issue does not arise, as even on merits, the Appellant Association has not made out a case for appointment of a Government Surveyor and an Engineer Commissioner.

28. The Arbitral Tribunal under the impugned orders has rightly held that the circumstances pleaded by the Appellant Association for appointment of Government Surveyor and an Engineer Commissioner does not arise as the burden of proving the Appellant's claim is solely vested with them. The Appellant Association cannot collect evidence in support of their claim that too after a lapse of five years from the date when M/s. Blue Bell Integrated Facilities Service Pvt Ltd carried out an inspection and submitted a report to the Appellant Association and thereafter they have rectified the deficiencies by carrying out repairs subsequently as seen from the Appellant / Claimant's deposition before the Arbitral Tribunal.



29. The relief under Section 17 of the Arbitration & Conciliation Act is a discretionary relief. The Arbitral Tribunal is required to choose between several different, but equally valid courses of action. Any discretionary power is conferred upon the Arbitral Tribunal / Courts by any statute to decide justly according to the facts and circumstances of each case. The only condition to be satisfied is that the discretion should be exercised judiciously. The discretionary power exercised by Courts / Tribunals is not unfettered, but it should not be arbitrary and should be guided by sound and reasonable judicial Principles. In the case on hand, as seen from the impugned orders, the Arbitral Tribunal has exercised its discretion under Section 17 of the Act, judiciously by giving valid reasons for dismissing the appellant's application filed under Section 17 of the Act.

30. Under Section 19 of the Act, Arbitral Tribunal is also not bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. Section 19 of the Arbitration & Conciliation Act, 1996 reads as follows :

19. Determination of rules of procedure : (1) The arbitral tribunal shall not be bound by the Code of Civil Procedure, 1908 (5 of 1908) or the Indian Evidence Act, 1872 (1 of 1872).

(2) Subject to this Part, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings.

(3) Failing any agreement referred to in sub-section (2), the arbitral tribunal may, subject to this Part, conduct the proceedings in the manner it considers appropriate.

(4) The power of the arbitral tribunal under sub-section (3) includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

31. As seen from Section 19(4) of the Act, failing any agreement, the power of the Arbitral Tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence. In the instant case, the Arbitral Tribunal has given valid and sufficient reasons for rejecting the Applications filed by the Appellant for appointment of a Government Surveyor and an Engineer Commissioner as it thought it fit that no useful purpose will be served for appointment of those experts at this stage. When sufficient and valid reasons have been given by the Arbitral Tribunal for rejection of the appellant's applications, this Court cannot interfere even in



cases where the possibility of having a different view is there as the Arbitral Tribunal is the only Authority to determine the admissibility, relevance, materiality and weight of any evidence under the Arbitration & Conciliation Act, 1996.

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32. Even in cases where the code of Civil Procedure is applicable, the Hon'ble Supreme Court has discouraged the practice of the Appellate Courts interfering with interim discretionary orders passed by the Court below, unless and until the said orders have been exercised arbitrarily or capriciously or perversely or the court below has ignored the settled principles of law. Therefore, when the scope for interference by the Appellate Court over the discretion exercised by the Court below is curtailed, the scope for interference under Section 37 of the Arbitration and Conciliation Act over an order passed under Section 17 of the Arbitration and Conciliation Act by the Arbitral Tribunal is much more restricted as it is settled law that there must be minimal interference by the Courts over the Arbitral proceedings.

33. For the foregoing reasons, there is no merit in these appeals and accordingly both these Civil Miscellaneous Appeals are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CS-VIII)

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Sub Assistant Registrar

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+lcc to M/s.Fox Mandal Associates, Advocate, S.R.No.50005

C.M.A.Nos.2382 & 2383 of 2021
and
CMP Nos. 13502 & 13515 of 2021

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