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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.10.2021

PRONOUNCED ON : 12.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.NO.2049 OF 2021

S.Sivagurunathan

...Appellant

Vs

1.R.Mennan

2.Ms.Aarti Razee,

...Respondents

Prayer:

The Civil Miscellaneous Appeal filed under Section 37 of the Arbitration and Conciliation Act, 1996 against the Order dated 02.03.2021 in an Application filed by the first respondent dated 24.01.2021.

For Appellant : Mr.R.Balachandran
For R.1 : Mr.R.Venkat Raman
For R.2 : Mr.T.M.Naidu & Co

JUDGMENT

This appeal raises an important question of law namely under what circumstances an Arbitration Agreement binds a non-signatory.

2. Certain disputes arose between the parties of a registered partnership firm by name Asvini Foundations. Under the Partnership Deed dated 24.04.2000, the Appellant S.Sivagurunathan and the second respondent Aarti Razee were the partners. Thereafter under the Partnership Deed dated 01.06.2006, Narendra Srisrimal and Surendar Srisrimal were inducted as partners. Thereafter, the partnership firm was reconstituted under a Deed of Reconstitution of Partnership dated 01.04.2009 under which, Sandeep Mehta was inducted as a partner. On 01.04.2011, Narendra Srisrimal and Surendar Srisrimal retired from the partnership under a Retirement Deed dated 01.04.2011 and on the same date, another Deed of Reconstitution of Partnership was executed by the remaining partners namely the Appellant S.Sivagurunathan, the second



respondent Aarti Razee and Sandeep Mehta. Thereafter, on 01.10.2016, under an amendment of Partnership Deed, the first respondent R.Mennan was inducted as a partner and Sandeep Mehta retired from partnership. After the execution of the Amendment of Partnership Deed dated 01.10.2016, the Appellant S.Sivagurunathan and the respondents namely R.Mennan & Aarti Razee became the partners of M/s.Asvini Foundations.

3. The Amendment of Partnership Deed dated 01.10.2016 under which the first respondent was inducted as a partner does not contain an arbitration clause, whereas the original Partnership Deed dated 24.04.2000, Partnership Deed dated 01.06.2006 under which Narendra Srisrimal, and Surendar Srisrimal were inducted as partners, the Deed of Reconstitution of Partnership dated 01.04.2009 under which Sandeep Mehta was inducted as a partner, the Deed of Reconstitution of Partnership dated 01.04.2011 under which, Narendra Srisrimal and Surendar Srisrimal retired from partnership and the Appellant S.Sivagurunathan, the second respondent Aarti J.Razee and Sandeep Mehta remained as partners contained an arbitration clause.

4. There arose disputes between the partners who are the Appellant and the respondents herein. The dispute was referred to arbitration by the second respondent who is one of the partners and she has sought for the following reliefs before the Arbitral Tribunal:

(a) For a declaration to pay a sum of Rs.1,00,00,000/- (Rupees One Crore Only) to the claimant towards costs;

(b) For a declaration to seek for rendition of true and proper accounts to be crystallised and thereafter to sell the properties and the goodwill held by the firm and the sister concern Asvini Foundations Pvt. Ltd be sold by public auction or like wise and thereby defray the monies so obtained to clear the debts if so found and pay the partners in the ratio as agreed in the partnership agreement;

(c) For a declaration to dissolve the partnership firm Asvini Foundations forthwith.

5. Since the amendment of Partnership Deed dated 01.10.2016, under which the first respondent R.Mennan was inducted as a partner did not contain an arbitration clause, the first respondent filed an application under section 16 of the Arbitration and Conciliation Act, 1996 before the Arbitral Tribunal challenging the jurisdiction of the Arbitral Tribunal to decide the dispute as there is no arbitration clause in the amendment of Partnership Deed dated 01.10.2016 and sought for



dismissal of the claim petition filed by the second respondent.

6. By order dated 02.03.2021, the Arbitral Tribunal allowed the application filed by the first respondent and terminated the arbitration on the ground that the Arbitral Tribunal has no jurisdiction to proceed with arbitration, since the first respondent was neither a party to the Partnership Deed dated 24.04.2000 nor the arbitration clause contained in the Partnership Deed dated 24.04.2000 was incorporated by reference in the amendment of Partnership Deed dated 01.10.2016 under which, the first respondent was inducted as a partner.

7. Aggrieved by the order dated 02.03.2021 passed by the Arbitral Tribunal under section 16 of the Arbitration and Conciliation Act, this appeal has been filed by S.Sivagurunathan, the first respondent in the arbitration under section 37 of the Arbitration and Conciliation Act.

8. Heard Mr.R.Balachandran, learned counsel for the Appellant, Mr.R.Venkat Raman, learned counsel for the first respondent and Mr.T.M.Naidu, learned counsel for the second respondent.

9. Mr.R.Balachandran, learned counsel for the Appellant would at the outset submit that the amendment of Partnership Deed dated 01.10.2016 under which the first respondent was inducted as a partner is in the nature of an ancillary agreement and therefore when the original Partnership Deed dated 24.04.2000 which is the mother agreement contains an arbitration clause, the said arbitration clause is binding on the first respondent also who is also a partner.

10. Learned counsel for the Appellant drew the attention of this Court to the original Partnership Deed dated 24.04.2000, Partnership Deed dated 01.06.2006, the Deed of Reconstitution of Partnership dated 01.04.2009 and the Deed of Reconstitution of Partnership dated 01.04.2011 and would submit that in all those deeds, there is an arbitration clause. He also drew the attention of this Court to the amendment of Partnership Deed dated 01.10.2016 under which the first respondent was inducted as a partner and would submit that excepting for this deed, since all other deeds contain an arbitration clause, being a partner, the first respondent is also bound by the arbitration clause contained in the Partnership Deed dated 24.04.2000 which is the mother agreement by which the partnership firm was originally constituted.

11. Learned counsel for the Appellant further submitted that the Arbitral Tribunal has passed the impugned order in conflict with and in contravention of the fundamental



policy of the (a) Contract Act, particularly section 62 of the Contract Act, (b) Partnership Act, particularly sections 29, 58, 63 & 69 of the Partnership Act and (c) Arbitration and Conciliation Act 1996, particularly section 7 of the said Act.

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12. Learned counsel for the Appellant would also submit that the arbitration clause against the first respondent squarely falls within the ratio laid down by the Hon'ble Supreme Court in Chloro Control (I) Pvt., Ltd., vs. Severn Trent Water Purification Inc. & Others reported in (2013) 1 SCC 641 and therefore according to him, the Arbitral Tribunal erroneously allowed the application filed under section 16 of the Arbitration and Conciliation Act, 1996 by the first respondent. According to him, the Arbitral Tribunal has failed to apply correctly the principles of multi agreements involving multi parties in the case of reference to arbitration as laid down by the Hon'ble Supreme Court in Chloro Control (I) Pvt., Ltd. case as well as in the case of Mahanagar Telephone Nigam Limited vs. Canara bank reported in 2019 SCC Online SC 995.

13. Learned counsel for the Appellant also relied upon the decision of the Hon'ble Supreme Court in the case of Cheran Properties Limited vs. Kasturi and Sons Limited and others reported in (2018) 16 SCC 413 and would submit that the Amendment of Partnership Deed dated 01.10.2016 under which the first respondent was inducted as a partner is an ancillary document to the earlier Partnership Deeds where there is an arbitration clause and therefore, according to him, even though there is no arbitration clause under the Amendment of Partnership Deed dated 01.10.2016, the first respondent is bound by the arbitration clause.

14. Per contra, learned counsel for the first respondent would submit that the first respondent never had the intention of binding himself to the Partnership Deed dated 24.04.2000 where there is an arbitration clause. He drew the attention of this Court to the amendment of Partnership Deed dated 01.10.2016 under which, the first respondent was inducted as a partner and in particular, he would submit that under the said deed, fresh terms and conditions were entered into between the parties namely, the Appellant and the respondents herein.

15. Learned counsel for the first respondent would also submit that the terms and conditions of the Partnership Deed dated 24.04.2000 were not incorporated in the amendment of Partnership Deed dated 01.10.2016 which inducted the first respondent as a partner and therefore, the arbitration clause contained in the Partnership Deed dated 24.04.2000 is not binding on the first respondent. He would also submit that at the time of execution of original Partnership Deed dated



24.04.2000, the first respondent was never in the picture and he was also not associated with the partnership firm, but only on 01.10.2016, the first respondent was inducted as a partner and therefore he would submit that the amendment of Partnership Deed dated 01.10.2016 cannot be considered to be an ancillary agreement as claimed by the learned counsel for the Appellant. Hence, he would submit that the Arbitral Tribunal has rightly allowed the application filed by the first respondent under section 16 of the Arbitration and Conciliation Act and has rightly terminated the arbitration as the dispute involves dissolution of a partnership firm where the first respondent is also one of the partners.

16. Apart from relying upon Chloro Control (I) Private Limited case and Mahanagar Telephone Nigam Limited case referred to supra, learned counsel for the first respondent also relied upon the following authority namely M.R.Engineers & Contractors vs. Som Datt Builders Ltd. reported in 2009 (7) SCC 696.

Discussion:

17. The undisputed facts are as follows:

(a) The first respondent is not a party to the Partnership Deed dated 24.04.2000 under which S.Sivagurunathan, the Appellant and the second respondent Aarti Razez became the partners of the partnership firm Asvini Foundations;

(b) The first respondent is also not a party to the Partnership Deed dated 01.06.2006 under which Narendra Srisrimal and Surendar Srisrimal were inducted as partners;

(c) The first respondent is also not a party to the Deed of Reconstitution of Partnership dated 01.04.2009 under which Sandeep Mehta was inducted as a partner along with the existing four partners;

(d) The first respondent is also not a party to the amendment of Partnership Deed dated 09.01.2011 under which the Deed of Reconstitution of Partnership dated 01.04.2009 was amended to enable the partnership firm to avail loans and all the individual partners were granted power to avail loans on behalf of the partnership firm;

(e) The first respondent is also not a party to the retirement deed dated 01.04.2011 under which Narendra Srisrimal and Surendar Srisrimal retired from the partnership;

(f) The first respondent is also not a party to the Deed of Reconstitution of Partnership dated 01.04.2011,



subsequent to the retirement of Narendra Srisrimal and Surendar Srisrimal from the partnership;

(g) The first respondent is also not a party to the amendment of Partnership Deed dated 01.01.2012 under which the existing partners namely S.Sivagurunathan, the Appellant, Aarti Raze, the second respondent and Sandeep Mehta were given powers individually to avail loans on behalf of the partnership firm.

(h) The first respondent was inducted as a partner only under the amendment of Partnership Deed dated 01.10.2016. Under the said deed, Sandeep Mehta retired from the partnership firm which was accepted by the existing partners as well as by the first respondent, the newly inducted partner. Under the said deed, the shares in the partnership firm to the newly inducted partner (the first respondent) and other partners were agreed upon.

(i) Under the amendment of Partnership Deed dated 01.10.2016, the first respondent who was inducted as a partner did not contain an arbitration clause and also did not incorporate either as a part of the contract or by reference the arbitration clause contained in the original Partnership Deed dated 24.04.2000, Partnership Deed dated 01.06.2006, the Deed of Reconstitution of Partnership dated 01.04.2009 and the Deed of Reconstitution of Partnership dated 01.04.2011;

(j) On 24.04.2000, when the partnership firm Asvini Foundations was originally constituted, the first respondent was not involved either directly or indirectly in the partnership business. He came into the picture only on 01.10.2016 when he was inducted as a partner and was allotted shares in the partnership business.

18. The first respondent filed an application before the Arbitral Tribunal under section 16 of the Arbitration and Conciliation Act questioning the jurisdiction of the Arbitral Tribunal to decide the dispute against him on the ground that the amendment of Partnership Deed dated 01.10.2016 under which he was inducted as a partner did not contain an arbitration clause. The said application came to be allowed by the Arbitral Tribunal under the impugned order dated 02.03.2021 and the Arbitral Tribunal has terminated the arbitration as the dispute revolves around the partners and the first respondent is one amongst them.

19. This Court will have to now decide as under what circumstances, a non-signatory will be bound by the Arbitration Agreement.



20. The Hon'ble Supreme Court in the case of Sukanya Holdings Pvt. Ltd. vs. Jayesh H Pandya and another reported in (2003) 5 SCC 531 held that a non-signatory to the arbitration agreement cannot be referred to arbitration as there is no provision in the Arbitration Act which prescribes a mechanism in this regard. In that decision, the Hon'ble Supreme Court held that causes of action against different parties cannot be bifurcated in a single arbitration and that an arbitration agreement will only bind the parties which have entered into the same. However, the aforementioned position of the Hon'ble Supreme Court was broadened in the year 2013 by the Hon'ble Supreme Court in Chloro Control (I) Pvt., Ltd. case.

21. The Hon'ble Supreme Court in Chloro Control (I) Pvt., Ltd. vs. Severn Trent Water Purification inc. and others reported in 2012 SCC Online SC 809 adopted the "Doctrine of Group of Companies" and provided an exceptional scenario wherein a non-signatory could be included in the arbitration. The Group of Companies Doctrine was evolved from ICC arbitral award of Dow Chemical Case (ICC Award No.4131, YCA 1984. AT 131 et seq) and aimed to extend the arbitration agreement, signed only by one or some of the companies of a group, also to the non-signatory companies of the same group. According to it, a non-signatory can be bound by the arbitration agreement, if the conduct of the parties evidences a clear intention about the same. Thus, the court/tribunal can admit a non-signatory as a party when it is satisfied that the non-signatory is a necessary party to the contract.

22. After Chloro Control (I) Pvt., Ltd., judgment of the Hon'ble Supreme Court referred to supra, the Arbitration and Conciliation Act, 1996 was amended in the year 2015 to apply the ratio of Chloro Control (I) Pvt., Ltd judgement, even to the domestic arbitration. Accordingly, section 8(1) of the amendment Act (3 of 2015) was amended and section 8 after the amendment reads as follows:

"8. Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.



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(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof:

Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application alongwith a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

23. As seen from the amendment to section 8 of the Act, the word "party" was replaced with "a party to the arbitration agreement or any person claiming through or under him". Under the Partnership Deed dated 24.04.2000, Partnership Deed dated 01.06.2006, Deed of Reconstitution of Partnership dated 01.04.2009, Deed of Reconstitution of Partnership dated 01.04.2011, the first respondent was never a party and was never involved in the partnership business during those dates. Only on 01.10.2016, the first respondent was inducted as a partner under an amendment of Partnership Deed dated 01.10.2016. The said deed admittedly does not contain an arbitration clause and neither the arbitration clause contained in the earlier deeds referred to supra where the first respondent was not a party was incorporated by reference into the amendment of Partnership Deed dated 01.10.2016 under which the first respondent was inducted as a partner. Therefore, the replacement of the word "party" with "a party to the arbitration agreement or any person claiming through or under him" in section 8 of the Amendment Act, 2015 referred to supra has no bearing to the facts of the instant case.

24. In a recent decision of the Hon'ble Supreme Court in the case of Mahanagar Telephone Nigam Limited vs. Canara bank reported in 2019 SCC Online SC 995, the Hon'ble Supreme Court pointed out the circumstances when the Group of Companies Doctrine as laid down in Chloro Control (I) Pvt. Ltd. case



referred to supra can be invoked to make a non-signatory to be bound by an arbitration clause. They are as follows:

1. When it is established that it was the intention of all the parties to bind the signatory as well as non-signatory to the arbitration agreement.

2. When the non-signatory has been engaged in negotiation/ performance/ termination of the contract.

3. When the non- Signatory has made statements to express its intention to be bound by the contract.

4. When the non-signatory is involved in the execution of Composite Transaction which means a transaction with a common business objective which would not be possible without the participation of a non-signatory party.

5. When the signatory and non-signatory parties exist within a tight group structure with strong organizational and financial links to constitute "A Single Economic Unit".

25. In the case on hand, none of the aforementioned circumstances exist to rope in the first respondent into the arbitration initiated by the second respondent. As observed earlier, the first respondent was inducted as a partner only under the Amendment of Partnership Deed dated 01.10.2016 which document did not contain an arbitration clause. He was no way concerned with the partnership business till such date, eventhough, the partnership business commenced on 24.04.2000 itself, when there were only two partners namely the Appellant and the second respondent. The Amendment of Partnership Deed dated 01.10.2016 under which the first respondent was inducted as a partner cannot be treated as an ancillary document to the earlier Partnership Deeds where the first respondent was not a party. An ancillary document provides support to the primary document. As on the date of the Original Partnership Deed dated 24.04.2000, when the partnership firm was originally constituted, the first respondent was never in the picture and was no way involved in the partnership business. In the subsequent deeds also, upto 01.10.2016, the first respondent was not a party and during those dates also, he was not involved in the partnership business. He became a partner only on 01.10.2016 and only then, he was involved in the partnership business. Therefore, the Amendment of Partnership Deed dated 01.10.2016 cannot be treated as an ancillary document to the Partnership Deed dated 24.04.2000 as claimed by the learned counsel for the Appellant.

26. In the decision rendered by the Hon'ble Supreme Court in the case of M.R.Engineers & contractors vs. Som Datt Builders Ltd., reported in (2009) 7 SCC 696, it has been made



clear that if the contract which does not contain an arbitration clause refers to another contract which contains an arbitration clause, the arbitration agreement contained in the other contract can be made binding on the party to the contract where there is no arbitration clause only when the arbitration clause found in the contract where he is not a party is incorporated into his contract.

27. In the case on hand, neither the first respondent was a party to the Partnership Deed dated 24.04.2000 where there is an arbitration clause nor was the said arbitration clause incorporated by reference into the Amendment of Partnership Deed dated 01.10.2016 under which the first respondent was inducted as a partner. Applying the ratio laid down by the Hon'ble Supreme Court in M.R.Engineers & Contractors case referred to supra, the first respondent cannot be roped into the arbitration initiated by the second respondent as the arbitration clause contained in the Partnership Deed dated 24.04.2000 has not been incorporated into the Amendment of Partnership Deed dated 01.10.2016.

28. In Reckitt Benckiser (India) Private Limited vs. Reynders Label Printing (India) Private Limited and another reported in (2019) 7 SCC 62, the Hon'ble Supreme Court has held that unless the non-signatory's intention to be bound by the arbitration agreement can be established, such non-signatory cannot be referred to arbitration.

29. In the case on hand, the Amendment of Partnership Deed dated 01.10.2016 under which the first respondent was inducted as a partner is not intrinsically connected to the earlier Partnership Deeds right from 24.04.2000 to 01.04.2012 as the first respondent was never connected with the partnership business prior to 01.10.2016. For the same reason, the decision of the Hon'ble Supreme Court in Cheran Properties Limited case reported in (2018) 16 SCC 413 relied upon by the learned counsel for the Appellant has no bearing for the facts of the instant case. In Cheran Properties Limited case, the non-signatory to the arbitration agreement fell within the meaning of "Parties and persons claiming under them" as found in section 35 of the Arbitration and Conciliation Act, 1996 which deals with finality of Arbitral Awards. However, in the case on hand, admittedly there was no connection whatsoever between the first respondent and the Appellant as well as the second respondent until 01.10.2016, when the first respondent was inducted as a partner. Only the documents prior to 01.10.2016 in which the first respondent is not a party contains an arbitration clause and therefore, the first respondent cannot be roped into the arbitration as the Amendment of Partnership Deed dated 01.10.2016 is not intrinsically connected with the previous



documents, when the first respondent was no way connected with the partnership business.

30. The Doctrine of separability applies to an Arbitration agreement. The Doctrine of separability means that an Arbitration clause inserted in a contract is a separate agreement in the underlying contract. There is no such nexus between the Arbitration clause and the underlying contract. Though the existence of the contract is necessary for incorporating the terms of an Arbitration clause, the Arbitration agreement is a separate and distinctive agreement which is the basis for Arbitration as defined under the Principle of separability. The Doctrine of separability does not affect the validity of other obligations in the contract. The Doctrine of separability means that even if an Arbitration is included in the underlying contract, it will be treated as an independent one. Section 16(1) of the Arbitration and Conciliation Act is based on the Doctrine of separability and it clearly states that an Arbitration clause included in the contract shall be treated as a separate and an independent agreement of the other terms of the contract and if the Arbitral Tribunal held the contract null and void, it will not necessarily mean or entail ipso jure the invalidity of the Arbitration clause. The Hon'ble Supreme Court in the case of National Agricultural Cooperative Marketing Federation of India Ltd. vs Gains Trading Ltd. reported in 2007 5 SCC 692 held that Arbitration clause is to be treated independently from the main contract. The Hon'ble Supreme Court held that if the contract is held null and void, then the Arbitration clause cannot be considered to be null and void too. The Doctrine of separability just prevents the Arbitration clause from being affected by the underlying contract. Hence, the clause is an indispensable part of the contract.

31. In the case on hand, the Arbitration clause is admittedly not contained in the amendment of the partnership deed dated 01.10.2016 under which the first respondent was inducted as a partner and the Arbitration clause contained in the previous Deeds in which the first respondent was not a party was also not incorporated by reference in the amendment of partnership Deed dated 01.10.2016. When there is no Arbitration clause and when there was no nexus between the amendment of the partnership Deed dated 01.10.2016 and the previous deeds when the first respondent was never in the picture, applying the Doctrine of separability, it is clear that the first respondent never agreed for Arbitration as per the Arbitration clause contained in the Deeds prior to 01.10.2016, where the first respondent was not a party.



32. From the decisions referred to supra, it is clear that only under the following circumstances, a non-signatory can be roped into the arbitration:

(a) The non-signatory party's contract must be intrinsically connected to the contract which contains an arbitration clause;

(b) The non-signatory on the date of the arbitration agreement must have an intention to agree for arbitration in accordance with the arbitration agreement;

(c) On the date when the contract which contains the arbitration clause came into existence, the non-signatory must be connected with that contract;

(d) A non-signatory is bound by the arbitration clause, if the arbitration clause contained in the main contract is incorporated by reference into the non-signatory party's contract;

(e) The parties to the ancillary contract which does not contain an arbitration clause is bound by the arbitration agreement under the main contract. An ancillary contract is a contract which always provides support to the main contract and is always dependent on the main contract.

(f) There must be consensus ad idem between the non-signatory to the arbitration agreement and the parties to the arbitration agreement about the arbitration agreement.

33. None of the aforementioned circumstances are applicable to the first respondent as he was nowhere in the picture when the partnership business originally commenced and he was neither directly nor remotely connected to the following contracts namely (a) Original Partnership Deed dated 24.04.2000; (b) Partnership Deed dated 01.06.2006; The Deed of Reconstitution of Partnership dated 01.04.2009 and (d) the Deed of Reconstitution of Partnership dated 01.04.2011, which contain an Arbitration clause.

34. For the foregoing reasons, this Court is of the considered view that the Arbitral Tribunal under the impugned order dated 02.03.2021 passed under section 16 of the Arbitration and Conciliation Act, 1996 has rightly allowed the application filed by the first respondent.



35. In the result, there is no merit in this appeal. Accordingly, this civil miscellaneous appeal is dismissed and the impugned order dated 02.03.2021 passed by the Arbitral Tribunal is hereby confirmed. No costs.

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Assistant Registrar

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Sub Assistant Registrar

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To

The Sub Assistant Registrar,
Original Side,
High Court, Madras.

C.M.A.No. 2049 of 2021

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