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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08 / 09 / 2021

CORAM:

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL NO.826 OF 2014

AND

MP NOS.1 OF 2014 & 1 OF 2015

1.Kaliyamoorthy alias Ramachandran

2.Janakiraman

3.Gopalakrishnan

... Appellants/Appellants/Defendants

Vs.

Krishnamoorthy

... Respondent/Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of Civil Procedure Code against the judgment and decree dated 04.01.2014 made in AS No.35/2012 on the file of Subordinate Court at Chidambaram, confirming the judgment and decree dated 19.10.2012 made in O.S.No.40/2009 on the file of Additional District Munsif Court at Chidambaram.

For Appellants : Mr.Srinath Sridevan

For Respondent : Mr.S.Parthasarathy

Senior Counsel for

Mr.J.Ramakrishnan

JUDGMENT

Aggrieved over the concurrent findings of the Courts below, the unsuccessful defendants have preferred the above Second Appeal. Even though several issues were raised, the appellants prefers to insist on the question of law as to whether the Suit is maintainable in the light of the bar under Order IX Rule 9 (1) of Code of Civil Procedure, 1908.

2.For the benefit of understanding, the brief facts are given as under:

(a) Originally, the Suit properties belonged to one Chinnappa Sethuvarayar, who got the same through a registered Partition Deed dated 20.04.1970 entered into between his brother Saranga Sethuvarayar.



(b) The appellants are the defendants in the Suit. They are the legal-heirs of Saranga Sethuvarayar. As per the Partition Deed dated 20.04.1970, "A" Schedule properties were allotted to the present appellants' father and "B" Schedule properties were allotted to Chinnappa Sethuvarayar. On the death of Chinnappa Sethuvarayar, his second wife Savithri Ammal and first wife's daughter Mayasakthi inherited the properties. They entered into a registered Partition Deed dated 26.07.1972. Savithri Ammal had no issues. The properties allotted to Savithri Ammal were bequeathed by her in favour of her sister Muthulakshmi, by a registered WILL dated 23.09.1978, who is the wife of the plaintiff. Savithri Ammal died on 28.05.1998. After the death of Savithri Ammal, Muthulakshmi became the owner of the properties.

(c) Since the appellants / defendants interfered with her peaceful possession and enjoyment, she filed O.S.No.95/1999 on the strength of the WILL executed by Savithri Ammal dated 23.09.1978. Since Muthulakshmi was not able to attend the case due to illness, the Suit was dismissed for default on 06.08.2003.

(d) Taking advantage of the dismissal of the Suit, the defendants/ appellants taken possession of the Suit properties and transferred patta in their name. The patta transfer proceedings were going on before the Revenue Authorities till 04.08.2005.

(e) In the meanwhile, on 25.06.2008, the said Muthulakshmi executed an unregistered WILL in favour of the respondent / plaintiff and she died on 01.07.2008. On the strength of the WILL executed by Muhulakshmi in favour of the plaintiff, the present Suit came to be filed for declaration and recovery of possession.

(f) The defendants denied the validity of the WILL executed by Savithri Ammal dated 23.09.1978 in favour of Muthulakshmi and contended that the plaintiff is not entitled to the relief of declaration and recovery of possession.

(g) The Trial Court framed the following issues for consideration:

- "1. Whether the WILL dated 23.09.1978 is true and valid ?
2. Whether the WILL dated 26.05.1998 is true and valid ?
3. Whether the WILL dated 25.06.2008 is true and valid ?
4. Whether the plaintiff is entitled for the relief of declaration and a consequential



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relief for recovery of possession of 1st item as prayed for ?

5. Whether the plaintiff is entitled for the relief of declaration and for a consequential relief of injunction of 2nd item as prayed for ?

6. To what other relief the plaintiff is entitled to ?”

(h) The Trial Court, after elaborate trial, has held that the WILL executed in favour of the plaintiff's wife is valid and decreed the Suit in favour of the respondent / plaintiff. On appeal, the decree and judgment granted by the Trial Court was confirmed. Aggrieved over the same, the defendants / appellants have preferred the above Second Appeal.

3. Even though various issues with regard to proof of execution of WILL and other issues were raised, the learned counsel for the appellants would focus his arguments mainly on the issue of maintainability of the Suit in the light of the bar under Order IX Rule 9(1) of Code of Civil Procedure, 1908.

4. It is relevant to note that the issue of bar under Order IX Rule 9(1) of Code of Civil Procedure, 1908, was not framed as an issue before the Trial Court nor a ground was raised before the First Appellate Court and the said issue is now raised for the first time before this Court.

5. In support of his contention, the learned counsel for the appellants would rely on the following judgments:

(i) Judgment of the Hon'ble Supreme Court in YESWANT DEORAO DESHMUKH VS. WALCHAND RAMCHAND KOTHARI [AIR 1951 SC 16]

(ii) Judgment of the Hon'ble Supreme Court in CHITTURI SUBBANNA VS. KUDAPA SUBBANNA AND OTHERS [MANU/SC/0254/1964]

(iii) Judgment of the Hon'ble Supreme Court in M/S. PARASRAM HARNAND RAO VS. M/S. SHANTI PARSAD NARINDER KUMAR JAIN AND ANOTHER [1980 (3) SCC 565]

(iv) Judgment of this Court in C. ARULSAMY AND ANOTHER VS. STATE OF TAMIL NADU REP. BY THE DISTRICT COLLECTOR, PUDUKOTTAI DISTRICT AND OTHERS [2003 (4) CTC 670]

(v) Judgment of this Court in S. AZHAGESAN AND OTHERS VS. THANGAVELU [MANU/TN/9067/2007]



(vi) Judgment of this Court in RAJESWARI
VS. SELVARAJ AND OTHERS [2014 (1) MWN (CIVIL)
274]

6. According to the learned counsel for the appellants, a new plea of pure question of law can be raised for the first time in the Second Appeal. When a Suit is dismissed under Order IX Rule 9 CPC, it will operate as res-judicata and there can be no escape from the position that the application is clearly barred by the principle. A subsequent Suit cannot be filed by the legal-heirs of the plaintiff through whom the Suit was dismissed, as they are precluded by law from putting forward such a case. If it is permitted, then the provision will have no value and the bar imposed could be rendered meaningless. Further, when a question of law is raised for the first time in a Court of Law, upon the construction of a document or upon facts of either or proved beyond controversy, it is not only competent but expedite in the interest of justice to entertain the plea. Therefore, by the very same admission made in the plaint that there was a Suit filed by Muthulakshmi withdrawing the plaint in O.S.No.95/1999 for declaration and injunction and the factum that it was dismissed for default due to her illness is also admitted and the averments that the plaintiff stepped into the shoes of Muthulakshmi and filed the second Suit, as pleaded, it amounts to categorical admission that the first suit in O.S.No.95/1999 was dismissed for default under Order IX Rule 9 CPC and therefore, the bar of filing a fresh Suit will operate.

7. The learned counsel for the appellants would rely on a judgment of the Hon'ble Supreme Court in CHITTURI SUBBANNA VS. KUDAPA SUBBANNA AND OTHERS [MANU/SC/0254/1964] wherein the Hon'ble Supreme Court relied on its judgment in YESWANT DEORAO DESHMUKH VS. WALCHAND RAMCHAND KOTHARI [AIR 1951 SC 16] for the proposition that if the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final court of appeal.

8. He would also rely on a judgment of this Court in RAJESWARI VS. SELVARAJ AND OTHERS [2014 (1) MWN (CIVIL) 274] for the proposition that if a new plea raised is a pure question of law, it can be raised for the first time in the Second Appeal and for the proposition that whether the Suit can be remitted back to consider the issue as to whether the Suit was maintainable in view of Order IX rule 9(1) CPC.

9. Per contra, the learned counsel for the respondent would rely on a judgment of a Division Bench of this Court in



THE COMMISSIONER VS. V.KRISHNASWAMI AND ANOTHER [AIR 1975 MAD 167] and a judgment of the Hon'ble Supreme Court in SURAJ RATTAN THIRANI AND OTHERS VS. AZAMABAD TEA CO. LTD., AND OTHERS [AIR 1965 SC 295] for the proposition that the parties are at liberty to waive his right to fight against bar of a trial against the Suit. Once he waived his right and contested the case on merits and allowed the case to be decided on merits, it will be most inequitable on his part to fall back upon a technical plea and raised it at the stage of Second Appeal. So far as the complexion of the Suit is changed and the subsequent Suit is filed on a different cause of action, Order IX Rule 9 CPC will not be attracted.

10.I have considered the submissions made on either side.

11.It is imperative to decide as to whether the issue of maintainability of the Suit in the light of bar under order IX Rule 9 CPC can be raised at the Second Appeal stage for the first time.

12.It is relevant to note that in the judgment of this Court in C.ARULSAMY AND ANOTHER VS. STATE OF TAMIL NADU REP. BY THE DISTRICT COLLECTOR, PUDUKOTTAI DISTRICT AND OTHERS [2003 (4) CTC 670] this Court has held that a new plea of raising pure question of law can be made for the first time in the Second Appeal. In the said case, under Section 4 of Tamil Nadu Irrigation Tanks (Improvement) Act, 1949, there is a bar of Suit. The Courts without adverting to the factum that the Suit is barred, rendered a decision on merits. In that case, this Court has held that the bar of Suit as per the statute is a pure question of law and it can be raised at any stage. Para 14 of the said judgment reads as under:

"14. Neither, defendants 1 to 3 nor defendants 4 to 7 have taken any specific stand in their separate written statements, that the civil suit is not maintainable and the same is barred under the provisions of Tamil Nadu Irrigation Tanks (Improvement) Act, 1949. On the other hand, defendants 1 to 3, have stated that the suit as framed is not maintainable. It seems the bar of the suit before the Civil Court, for injunction, was not raised before the courts below and therefore, they had no occasion to consider whether the suit is barred under the Tamil Nadu Irrigation Tanks (Improvement) Act, 1949. This is purely a question of law, for which generally no specific pleadings are necessary. A question of



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law can be allowed at any stage to be raised in order to decide even the maintainability of the suit, because of the fact, if the suit itself is not maintainable, then question of granting relief would not arise for consideration. In this view, this Court has allowed the parties to raise the jurisdiction of the Civil Court or the bar imposed under the Act to maintain the suit. "

13. Likewise, in the judgment of this Court in RAJESWARI VS. SELVARAJ (DIED) [2014 (1) MWN (CIVIL) 274] also, it is held that the bar of Suit is a pure question of law, which can be raised at the stage of Second Appeal.

14. In the light of the above judgment, it has to be seen as to whether the present Suit is barred by law and the question of bar under Order IX Rule 9 (1) CPC is a pure question of law or not?.

15. In the instant case, even though pleadings are made to the effect that O.S.No.95/1999 filed by Muthulakshmi, wife of the plaintiff, for declaration and injunction, during the evidence of D.W.1, it is admitted by the defendants themselves that the previous Suit is one for bare injunction. Whether the fact that the previous Suit was for declaration and injunction or not for bare injunction is a matter of fact. The contradictory statements made in the plaint and the deposition of D.W.1 is subjected to proof. In that view of the matter, it cannot be held that it is a pure question of law.

16. In the judgment of the Hon'ble Supreme Court in M/S.PARASRAM HARNAND RAO VS. M/S.SHANTI PARSAD NARINDER KUMAR JAIN AND ANOTHER [1980 (3) SCC 565] it is held as under:

"5. In the first place it was argued that so far as point No. 1 is concerned, the High Court was wrong in holding that the application of Respondent No. 1 was not barred by the reason of the dismissal of the appellant's suit for setting aside the ex-parte decree by the principle of Res Judicata or Order IX Rule 9 C.P.C. It was contended that even if the previous suit filed by respondent No. 1 for declaration of his status as a tenant was dismissed for default but as the application for setting aside the decree also failed, there was an adjudication against the then plaintiff-respondent No. 1 and therefore the present suit was clearly barred by the principles of Res Judicata or Order IX Rule 9. At any rate there



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can be no escape from the position that the application of respondent No. 1 would be clearly barred by the principle contained in Order IX Rule 9, C.P.C. In case of Suraj Ratan Thirani & Ors. v. The Azamabad Tea Co. & Ors.(1) this Court held thus:

"We are not however impressed by the argument that the ban imposed by O. IX, r. 9 creates merely a personal bar or estoppel against the particular plaintiff suing on the same cause of action and leaves the matter at large for those claiming under him. Beyond the absence in O. IX, r. 9 of the words referring "to those claiming under the plaintiff" there is nothing to warrant this argument. It has neither principle, nor logic to commend it .. The rule would obviously have no value and the bar imposed by it would be rendered meaningless if the plaintiff whose suit was dismissed for de fault had only to transfer the property to another and the latter was able to agitate rights which his vendor was precluded by law from putting forward." "

17.It is true to state that in the said judgment, the Hon'ble Supreme Court dealt with a situation where the plaintiff whose Suit was dismissed for default, cannot transfer the property to others and the purchasers were unable to file a fresh Suit on the very same subject matter. This judgment will not apply to the present case for the reason that there were lot of events had taken place between the predecessor in title and the present plaintiff. After the death of Savithri Ammal, the Testator of the WILL dated 23.09.1978, the defendants interfered with the possession of the plaintiff's wife. Therefore, she filed a Suit for injunction and that Suit was dismissed for default. Thereafter, the defendants have actually taken over possession and got the revenue records mutated in their favour. There were litigations before the Revenue Court on transfer of patta for a period of around two years. Therefore, it cannot be said that the cause of action is one and the same. The matter got enlarged from the issue of simple protection from interference of possession to one of denial of entitlement to hold and enjoy the property. Therefore, the bar under Order IX Rule 9(1) CPC will not apply to the present case.



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18. In CHITTURI SUBBANNA VS. KUDAPA SUBBANNA AND OTHERS [MANU/SC/0254/1964] the Hon'ble Supreme Court has relied on its judgment in YESWANT DEORAO DESHMUKH VS. WALCHAND RAMCHAND KOTHARI [AIR 1951 SC 16] and observed as under:

"5. The appellant could not have claimed-and did not claim a right to urge the new point which had not been taken in the grounds of appeal. He made a separate application for permission to take up that point. The procedure followed was in full conformity with what had been suggested in Wilson v. United Counties Bank, Ltd. (1) to the effect :

"If in exceptional cases parties desire to add new grounds to those of which they have given notice, it will usually be convenient, by a substantive application, to apply to the indulgence of the Court which is to hear the appeal."

6. In Yeswant Deorao Deshmukh v. Walchand Ramchand Kothari this Court allowed a question of law to be raised at the hearing of the appeal even though no reference to it had been made in the Courts below or in the grounds of appeal to this Court. This Court said :

"If the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final court of appeal. The following observations of Lord Watson in Connecticut Fire Insurance Co. v. Kavanagh ([1892] A.C. 473) are relevant. He said : 'When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea



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cannot be disposed of without deciding nice questions of fact in considering which the court of ultimate review is placed in a much less advantageous position than the courts below."

19.A close reading of the above judgment will categorically prove that if the facts are proved and found established or sufficient to make out a case, then it will be a question of law and such question will be raised at any stage of the case even in the final disposal stage.

20.It is relevant to find that the fact that as to whether the Suit is barred under Order IX Rule 9(1) CPC has been pleaded, proved and established or not? Even though the plaintiff in the pleadings has stated that the predecessor in title filed a Suit for declaration and injunction and it was dismissed for default due to her illness, the factum of bar of Suit was not pleaded in the written statement. In fact, D.W.1 in his evidence would state that the previous Suit was one for bare injunction. In that event, it is incumbent on the part of the defendants to plead and prove that the Suit was barred under Order IX Rule 9(1) CPC.

21.It is well settled principle that bar of the Suit and bar of the trial of the Suit are two different issues. When a plea of res-judicata is taken, the issue tried in the subsequent Suit is directly and substantially the issue in the former Suit between the same parties or between the parties under whom they claim, litigating under the same title and was heard and finally decided by competent Court cannot be agitated or tried in a subsequent Suit. It amounts to clear bar of entertaining a Suit itself, which is finally decided on the very same subject matter between the same parties.

22.In so far as Order IX Rule 9 CPC is concerned, it cannot be an absolute bar to bring a fresh Suit in respect of the same cause of action. Order IX Rule 3 CPC is concerned, where neither party appears, when the Suit is called on for hearing and the Suit is dismissed for default, it is not a bar for filing a fresh Suit, in view of Rule 4, wherein a dismissal for default under Order IX Rule 8 CPC, when the plaintiff alone does not appear and the defendant appears, the plaintiff cannot file a fresh Suit under Order IX Rule 9(1) CPC.

23.In the instant case, even though a plea was made that the Suit was dismissed for default due to non appearance of the plaintiff, it is not clear as to whether the defendants appeared and the Suit was dismissed denying their claim or



admitting the plea of the defendants. This fact was not pleaded nor raised as an issue and proved before the Trial Court.

24. The Hon'ble Supreme Court in YESWANT DEORAO DESHMUKH VS. WALCHAND RAMCHAND KOTHARI [AIR 1951 SC 16] has held that if the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final court of appeal. Para 16 of the said judgment reads as under:

"16. Having thus got over the difficulty in his way under section 48 of the Code of Civil Procedure, he has next to meet the objection under the Limitation Act. On behalf of the appellant, it was urged that section 18 of the Limitation Act applied to the facts and that the right to apply accrued to the appellant when the fraud by the judgment-debtor became known to him in 1946. No reliance was placed on section 18 of the Limitation Act in the courts below and no reference to it is found in the grounds of appeal to this court. It is however mentioned for the first time in the appellant's statement of the case. If the facts proved and found as established are sufficient to make out a case of fraud within the meaning of section 18, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final court of appeal. The following observations of Lord Watson in Connecticut Fire Insurance Co. v. Kavanagh (2) are relevant. He said: "When a question of law is raised for the first time in a court of last resort upon the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the court of ultimate review is placed in a much less advantageous position than the courts below."



The repeated employment of the words that the facts are either admitted or proved beyond controversy will go to show that to make out an issue or question of law, it requires clear admission and proof. In this case, there is no clear admission or proof that the Suit was dismissed under Rule 3 or 4 or 8 of Order 9 CPC. In the absence of any proof, it can be taken that it will not operate as res-judicata.

25. In the instant case, the issue pertains to fact and not of pure question of law. When it is an issue of mixed question of law and fact, unless it is clearly admitted or proved by framing a specific issue, in the considered opinion of this Court, it cannot be raised for the first time in the Second Appeal. In other words, the issue raised by the appellant is not a pure question of law, but a mixed question of law and fact, without proof.

26. A Division Bench of this Court in THE COMMISSIONER, HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS, MADRAS VS. V. KRISHNASWAMI AND ANOTHER [AIR 1975 MAD 167] has observed as under:

"14. A Bench of this Court in Moturi Seghavva v. Venkatadri Apparao, 31 Mad LJ 219 = (AIR 1917 Mad 950) has held that the 'Plea of res judicata is one which does not affect the jurisdiction of the Court and it is only a Plea in bar of a trial of a suit or an issue as the case may be, which a party is at liberty to waive. Even so in respect of a plea under Order 9, Rule 9, Civil P.C., it is one which a party can choose to waive and defend a later action on the strength of his case and on the merits of the controversy. Having invited the Court to render a decision on merits it will be most inequitable if the party is allowed to fall back upon a technical plea and oppose an action of the other party when such a plea was wholly available to him even at the very inception of the action and which plea he failed to put forward and instead chose to hazard a decision of the case on merits....."

In the considered opinion of this Court, the observation made above by a Division Bench of this Court squarely applies to this case also.

27. At the outset, the factum as to whether the Suit is barred by Order IX Rule 9(1) CPC was not framed as the issue before the Trial Court and no evidence was let in on this aspect. In fact, it is deemed that the defendants have chosen to



waive the issue and contest the case on merits as to whether the WILL dated 23.09.1978 is genuine and valid. It is categorically proved before the Courts below that the WILL executed by Savithri Ammal dated 23.09.1978 was validly executed and proved through competent witnesses. When an appeal was filed, the present appellants / defendants have not chosen to raise any ground in the Memorandum of Appeal on this aspect. They allowed the case to be decided on merits. Now that, as found in the above judgment, having invited the Court to render a decision on merits, it will be most inequitable for the appellants to fall back upon a technical plea and oppose an action of the other party when such a plea was wholly available to him even at the very inception of the action and which plea, he failed to put forward and instead chose to hazard a decision of the case on merits.

28. Further, the Hon'ble Supreme Court in DHARAMPAL (DEAD) THROUGH LEGAL REPRESENTATIVES VS. PUNJAB WAKF BOARD AND OTHERS [2018 (11) SCC 449] has observed as under:

"23. Second, assuming for the sake of argument, we consider this plea on merits then also, in our opinion, it has no substance. It is not clear from the record and nor the learned counsel for the appellant was able to point out as to whether the dismissal of earlier suit (74/71) was under Rule 3 or Rule 8 of Order 9 of the Code.

24. In our opinion, in order to examine such plea, what is relevant at the first instance is to find out as to whether dismissal of the suit is under Rule 3 or Rule 8 of Order 9 of the Code. If it is under Rule 3 then filing of fresh suit is permissible as provided under Rule 4 but if the dismissal is under Rule 8 then fresh suit may be barred as provided under Rule 9.

25. So far as the present case is concerned, we take the dismissal of earlier suit (74/71) to be under Rule 3 and, therefore, in our opinion, the present suit was not barred by virtue of Rule 4 and was, therefore, rightly entertained by the Courts below for being tried on merits.

26. Apart from what is held above, even otherwise, in our opinion, the present suit could be filed notwithstanding dismissal of the earlier suit because the earlier suit was filed



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only against one defendant, i.e., father of defendant No.1 on a cause of action which accrued against one defendant at that time whereas the present suit was filed against three defendants out of which two defendants were not parties to the earlier suit. So the parties and even part of the cause of action qua defendants were different in both the suits. It is for all these reasons, so far as the first submission of learned counsel is concerned, it has no merit and hence rejected."

29. In view of the above findings, I do not find that the question of law projected by the learned counsel for the appellants as to whether the Suit is maintainable in view of bar under Order IX Rule 9(1) CPC is not a pure question of law to be raised for the first time in the Second Appeal. Thus, no substantial question of law arises for consideration for admission of the Second Appeal. Therefore, the Second Appeal merits no consideration and accordingly, is dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS II)

/True Copy//

Sub Assistant Registrar

TK

To

1. The Subordinate Judge,
Subordinate Court,
Chidambaram.
2. The Additional District Munsif,
Additional District Munsif Court,
Chidambaram.

Copy To:-

The Section Officer,
V.R. Section, Madras.

+1cc to Mr.J.Ramakrishnan, Advocate, S.R.No. 45705

SECOND APPEAL NO.826 OF 2014
and MP NOS.1 OF 2014 & 1 OF 2015

PP (CO)
TE (26/11/2021)