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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.03.2022

Pronounced on : 07.04.2022

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

A.S.No.570 of 2018

P.Rajalakshmi

...Appellant/Defendant

Vs.

S.Thilagavathi

...Respondent/Plaintiff

Prayer: First Appeal filed under Order 41 Rule 1 & 2 r/w. Section 96 of C.P.C., against the judgment and decree dated 22.09.2017 made in O.S.No.190 of 2014 on the file of the II-Additional District and Sessions Court at Tiruppur.

For Appellant : Mr.S.Mukunth for

M/s.Sarvabhauman Associates

For Respondent : Mr.Ravichandran for

Mr.S.B.Viswanathan

J U D G M E N T

The defendant in O.S.No.190 of 2014 which was on the file of the II-Additional District Court at Tiruppur is the appellant herein.

2.O.S.No.190 of 2014 had been originally filed as O.S.No.315 of 2008 on the file of the Principal District Court at Coimbatore and on formation of the Judicial District at Tiruppur, it had been transferred and renumbered as O.S.No.190 of 2014 and made over to the II-Additional District Court at Tiruppur.

3.O.S.No.190 of 2014 had been filed by the plaintiff, S.Thilagavathi against the defendant, P.Rajalakshmi seeking a judgment and preliminary decree of partition to divide the properties into two equal shares by metes and bounds and allot one share of the plaintiff. It had been stated that the plaintiff and the defendant had jointly purchased the three



separate properties which had been given in the schedule to the plaint. They had purchased the first property situated in SF.No.372 / 1B measuring 0.45 acres at Nambiyampalayam Village, Avinashi Taluk by sale deed dated 25.02.2000 registered as Document No.640 / 2000 in the Sub-Registrar Office at Avinashi. They had purchased the second item of the suit property which was situated in SF.No.372/1B-1 measuring 0.26 acres and 0.78 acres and in SF.No.372/1A measuring 1.30 acres, totally, measuring 2.34 acres in Nambiyampalayam Village, Avinashi Taluk by sale deed dated 25.02.2000 registered as Document No. 641/2000 in the Sub-Registrar Office at Avinashi. They had purchased the third item of the suit property situated in SF.No.371/1A measuring 3.39 acres and in SF.No.372/2B measuring 1.80 acres, totally, measuring 5.19 acres in Nambiyampalayam Village, Avinashi Taluk by sale deed dated 25.02.2000 registered as Document No.642/2000 in the Sub-Registrar Office at Avinashi.

4.The plaintiff claimed that she and the defendant were in joint possession of the suit properties. They were also sharing the income jointly. She claimed that she was entitled one half undivided share in the suit properties. She further stated that on 11.02.2005, she executed a registered Power of Attorney with respect to her one half undivided share in all the aforementioned three properties in favour of A.Gurusamy to sell the properties. She further stated that Gurusamy had failed to find purchasers for the property from 11.02.2005 till 05.11.2007. She obtained an encumbrance certificate by Document No.10423 dated 06.11.2007, which indicated nil encumbrance. She then cancelled the General Power of Attorney on 13.11.2007 by Document No.1841/2007 registered in the Office of the Sub-Registrar, Avinashi. She further claimed that the properties are agricultural properties and that they had not been divided into metes and bounds. Claiming parititon of the said properties, the suit had been filed.

5.The defendant filed a written statement wherein, she admitted purchase of the three items of the suit properties on 25.02.2000 by three separate sale deed in the joint names of herself and the plaintiff and the registration of the sale deeds. She also stated that, however, both the plaintiff and herself did not do any agricultural activity and there was no income from the property. She further stated that the plaintiff had appointed A.Gurusamy as her Power of Attorney by a registered Power of Attorney dated 11.02.2005. She however, denied that A.Gurusamy was not able to get purchasers for the property and that the encumbrance certificate showed nil encumbrance.

6.It was stated that, as a matter of fact, the plaintiff and herself had jointly mortgaged the property in favour of Avinashi



Primary Agricultural Co-operative Bank. This was actually reflected in the encumbrance certificate. She further stated that the Power of Attorney Agent, A.Gurusamy had sold the one half property for which he was given power to deal with by the plaintiff, to herself by Document No.12041 of 2005 registered in the Sub-Registrar Office at Avinashi. She therefore, claimed that she was the absolute owner of the entire properties. She claimed to be in possession and enjoyment. She also stated that the cancellation of the Power of Attorney was much later to the sale deed in her favour and was not binding on her. She also stated that in the sale deed in her favour, she was given the responsibility to discharge the loan to Avinashi Co-operative Primary Agricultural and Rural Development Bank. She however, stated that the Government had waived the loan. She further stated that the plaintiff had never sought partition of the property and she stated that therefore, the suit has to be dismissed.

7.She also stated that the plaintiff had filed another suit before the District Munsif Court at Avinashi in O.S.No.222 of 2011 seeking declaration and cancellation of the sale deed dated 23.12.2005 and that the said suit is pending. In view of that fact, she stated that the present suit should be dismissed.

8.On the basis of the pleadings, the learned II-Additional District Judge, Tiruppur had framed the following issues for trial:-

"1) Whether the plaintiff is entitled to get a decree for partition and separate possession ?

2)Whether the sale deed dated 23.12.2005 in favour of defendant is true and genuine ?

3) To what relief ?"

9.The parties were invited to adduce evidence and accordingly, the plaintiff examined herself as P.W.1 and she filed Exs.A1 to A9. These included the three sale deeds dated 25.02.2000 as Exs.A1 to A3, the Power of Attorney dated 11.02.2005 as Ex.A4, the encumbrance certificate dated 06.11.2007 as Ex.A5, the cancellation of the Power of Attorney dated 13.11.2007 as Ex.A6, the certified copy of the sale deed in favour of the defendant dated 23.12.2005 as Ex.A8.

10.On the side of the defendant, two witnesses were examined. The defendant was examined as D.W.1 and another independent witness was examined as D.W.2. The defendant marked the property tax receipt in her name and the electricity connection bills in her name and the Chitta and Adangal as



Exs.B1 to B7 and, the encumbrance certificate as Ex.B8 and the memorandum of deposit of title deeds as Ex.B9.

11.The learned Trial Judge, took up for consideration both the issues framed for consideration. It was observed that during the cross-examination of the defendant, she had stated that a sum of Rs.4,20,000/- had been paid to the Power of Attorney Agent of the plaintiff for the purchase of the share of the plaintiff but it was found that the original sale deed dated 23.12.2005 had not been filed by the defendant eventhough, she claimed that she was in possession of the said sale deed. It was stated that in the sale deed, the sale consideration was given as Rs.4,10,000/-, which has to be paid to the Avinashi Co-operative Agricultural Socceity to redeem the mortgage. It was stated that the defendant had stated during cross-examination that she and the plaintiff had obtained loan from the said Co-operative Society for a sum of Rs.1,98,000/-. It was also stated that the Government had waived the said loan.

12.The learned Trial Judge then, relied on a judgment of the Hon'ble Supreme Court in Immani Appa Rao Vs. Gollapalli Ramalingamurthi reported in AIR 1962 SC 370, had held that the said transfer in favour of the defendant is a fraudulent transfer. The learned Judge also relied on the judgment in Yanala Malleshwari Vs. Smt.Ananthula Sayamma reported in AIR 2007 Andhra Pradesh 57 with respect to cancellation of a registered sale deed and fraudulent transfer.

13.In view of the above reasonings, the learned Trial Judge came to a conclusion that the defendant had not proved the payment of consideration to the Power of Attorney Agent of the plaintiff with respect to the purchase of the share of the plaintiff's property. It was stated that the said transaction was sham and nominal and therefore, it cannot be binding on the plaintiff and therefore, the Trial Judge granted the relief of partition and separate possession, by judgment dated 22.09.2017.

14.Questioning that particular judgment, the defendant has filed the present First Appeal.

15.Heard Mr.S.Mukunth, learned counsel for the Appellant and Mr.Ravichandran, learned counsel for the respondent.

16.It had been urged by Mr.S.Mukunth, the learned counsel for the appellant that though the plaintiff and the defendant had jointly purchased the suit properties by three separate sale deeds, subsequently the plaintiff had executed a registered Power of Attorney in favour of one A.Gurusamy to deal with her one half undivided share and accordingly, the said Gurusamy had sold the said share of the plaintiff to the defendant for



valuable consideration and in this regard a sale deed had also been executed and registered. In the sale deed it had been stated that the defendant should discharge the loan obtained from the Avinashi Primary Agricultural Society. The learned counsel also stated that since a sale deed had been executed in favour of the defendant, a suit for partition will not lie and the relief of the plaintiff would only be to seek for accounts from the Power of Attorney Agent.

17.It was also pointed out that the plaintiff had actually filed a suit to set aside that particular sale deed, which suit in O.S.No.222 of 2011 is pending on the file of the District Munsif at Avinashi. The learned counsel stated that the plaintiff had never sought the relief for a declaration that the sale deed is not binding on her but still an issue had been framed. It was stated that a reply had not been filed to the written statement of the defendant wherein new facts were pleaded and therefore, the said issue never arose for consideration. The learned counsel therefore, assailed the entire reasoning of the Trial Judge and urged that the said judgment should be set aside and the appeal be allowed.

18.Mr.Ravichandran, learned counsel for the respondent / plaintiff however, pointed out that the parties had been invited to adduce evidence on the issues framed and the parties knew the nature of evidence to be adduced and had entered the witness box with knowledge of the issues framed by the Court. It was stated by the learned counsel that in view of that particular fact, the Court was correct in examining the sale deed and that the Court had rightly negatived the claim of the defendant for absolute title to the suit properties and had granted partition and separate possession.

19.In this connection, the learned counsel for the respondent relied on the judgment in Bhagwati Prasad Vs. Chandramaul reported in AIR 1966 Page 735 wherein, it had been observed by the Hon'ble Supreme Court as follows:-

"10. .. If a plea is not specifically made and yet it is covered by an issue by implication, and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely in the issue, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be



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purely formal and technical and cannot succeed in every case. What the Court has to consider in dealing with such an objection is : did the parties know that the matter in question was involved in the trial, and did they lead evidence about it ? If it appears that the parties did not know that the matter was in issue at the trial and one of them has had no opportunity to lead evidence in respect of it, that undoubtedly would be a different matter. To allow one party to rely upon a matter in respect of which the other party did not lead evidence and had had no opportunity to lead evidence, would introduce considerations of prejudice, and in doing justice to one party, the Court cannot do injustice to another."

20. The learned counsel then relied on the judgment in N.K.S. Sankarakumara Nadar and others Vs. The Assistant Commissioner for Hindu Religious and Charitable Endowments, Tirunelveli Town reported in 88 LW Page 348 wherein, a Hon'ble Division Bench of this Court had observed as follows:-

"10. We now turn to issues 1 and 2. The reason why the learned Judge apparently tried those issues was that if the plaintiffs had not been able to make out a case that the suit temple was a denominational one, it would be idle to try the question whether the suit would be maintainable (instructions of this court prohibits a preliminary disposal on a pure point of law). Though issues 1 and 2 proceed on the basis that the question at issue was whether the temple was a private temple, and therefore not governed by Act XXII of 1959, it is clear that that was not really the question raised by the pleadings. Though in paragraph 3 of the plaint it is stated (wrongly): "It is a private temple belonging to this denomination", a reading of the allegations in the plaint, as a whole, clearly shows that the case of the plaintiff was that it was a denominational temple within the meaning of Art. 26 of the Constitution, and that the department was not entitled to interfere. That is how the plaint was understood by the defendant in their written statement and they disputed the claim of the plaintiffs that it was a denominational temple. Thus, despite the wrong wording of the issues, the real question at issue was understood by both the parties and they proceeded to trial. We would also refer to the observations of the Supreme Court in Nagubai Ammal Vs. Shamarao to show that though issues 1 and 2 were not correctly drafted in this case, that would not matter, since the parties understood the real issue for determination and went to trial. Their Lordships refer to observations of Lord Dunedin in Siddik Md. Shah Vs. Mt. Saran that 'no amount of evidence can be looked into upon a plea which was never put forward and proceed to observed-



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"The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present to the minds of the parties on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto."

21. The learned counsel for the respondent also relied on the judgment of Kewal Krishan Vs Rajesh Kumar & Others reported in CDJ 2021 SC 954 wherein, the Hon'ble Supreme had held as follows:-

"16. Now, coming back to the case in hand, both the sale deeds record that the consideration has been paid. That is the specific case of the respondents. It is the specific case made out in the plaints as originally filed that the sale deeds are void as the same are without consideration. It is pleaded that the same are sham as the purchasers who were minor sons and wife of Sudarshan Kumar had no earning capacity. No evidence was adduced by Sudarshan Kumar about the payment of the price mentioned in the sale deeds as well as the earning capacity at the relevant time of his wife and minor sons. Hence, the sale deeds will have to be held as void being executed without consideration. Hence, the sale deeds did not effect in any manner one half share of the appellant in the suit properties. In fact, such a transaction made by Sudarshan Kumar of selling the suit properties on the basis of the power of attorney of the appellant to his own wife and minor sons is a sham transaction. Thus, the sale deeds of 10th April 1981 will not confer any right, title and interest on Sudarshan Kumar's wife and children as the sale deeds will have to be ignored being void. It was not necessary for the appellant to specifically claim a declaration as regards the sale deeds by way of amendment to the plaint. The reason being that there were specific pleadings in the plaints as originally filed that the sale deeds were void. A document which is void need not be challenged by claiming a declaration as the said plea can be set up and proved even in collateral proceedings."

22. It was pointed out by the learned counsel for the respondent that since, the parties knew the nature of issues framed, the Trial Court was justified in rejecting the sale deed in favour of the defendant and in granting partition and separate possession of the suit properties and thereby, decreeing the suit.



23. I have carefully considered the arguments advanced and perused the material available on records.

24. The point which arises for consideration under Order 41 Rule 31 C.P.C., is

(i) Whether the Trial Court was justified in entering into a discussion on the lawfulness of the sale deed in favour of the defendant, when the plaintiff herself had not questioned or disputed the said sale deed by filing a reply to the written statement of the defendant, wherein disclosure had been made of the sale deed and exclusive title was asserted by the defendant ?

The point answered:-

25. The facts in the case are straight forward:-

i) the plaintiff and the defendant had jointly purchased three items of suit property by three separate sale deeds registered as Document Nos. 640/2000, 641/2000 & 642/2000, all dated 25.02.2000 and all registered in the Office of the Sub-Registrar, Avinashi.

ii) The aforementioned three sale deeds had been marked as Exs. A1, A2 and A3.

iii) This necessarily means that the plaintiff and the defendant were both entitled to an undivided one half share in the said properties.

iv) the plaintiff had executed a registered Power of Attorney in favour of one A. Gurusamy to deal with her one half undivided share and the Power of Attorney dated 11.02.2005 had been marked as Ex. A4.

v) On the basis of the said Power of Attorney, the said Gurusamy had sold the undivided one half share of the plaintiff to the defendant by registered sale deed dated 23.12.2005, registered as Document No. 12041/2005 on the file of the Sub-Registrar, Avinashi. Certified copy of this document had been marked as Ex. A8, during the chief-examination of P.W.1 and as Ex. A9 during the cross-examination of P.W.1.

26. The respondent / plaintiff however claims that she was not aware of this particular sale deed. A mention of this sale is however found in the written statement. She had, even then, not filed any reply to the written statement. Not filing a reply to the written statement would obviously lead to a conclusion that the respondent / plaintiff had not consciously denied that particular statement mentioned in the written



statement of the appellant / defendant, that she had purchased the share of the plaintiff. Evidence cannot be adduced contrary to the arguments in a written document. As a matter of fact, there is no dispute about the sale deed in favour of the appellant by the Power of Attorney Agent. When there was no dispute, there was no necessity of an issue being framed on the lawfulness of the sale deed.

27. Order 14 Rule 1 reads as follows:-

"1. Framing of Issues- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:

(a) issues of fact,

(b) issues of law."

28. In the instant case, the statement by the appellant / defendant in the written statement that she had purchased the share of the plaintiff from a lawfully appointed Power of Attorney Agent is a statement which can be either admitted by the respondent / plaintiff or denied by the respondent / plaintiff. If it is not admitted, it should be specifically denied. If it is not specifically denied, it could be presumed to have been admitted.

29. Order 18 Rule 7 of C.P.C. is as follows:-

"7. Defence of set-off founded upon separate grounds- Whether the defendant relies upon several distinct grounds of defence or set-off (or counter-claim) founded upon separate and distinct facts, they shall be stated, as far as may be, separately and distinctly."

30. In the instant case, the appellant had filed a written statement specifically stating a separate and distinct fact that she had purchased the share of the respondent / plaintiff. This fact will necessarily have to be denied by the respondent / plaintiff. If it had not been so denied, it does not give rise to an issue to be framed and decided by the Court.

31. In view of that particular reasoning, in the absence of pleadings stating a fact and denial of that fact, there cannot be an issue with respect to the veracity of the sale deed in



favour of the appellant. I therefore hold, that the Trial Judge has misdirected himself in framing an issue with respect to the validity of the sale deed in favour of the appellant herein. Evidence, without pleadings cannot be favourably examined. It has not been the case of the respondent / plaintiff that the sale deed has to be set aside. The appellant had also very specifically stated that the respondent / plaintiff had filed O.S.No.222 of 2011 before the District Munsif, Avinashi with a specific relief to set aside the sale deed in favour of the appellant herein.

32.If that be the case, then the respondent, has to necessarily incorporate that particular relief in this suit or pursue that relief in O.S.No.222 of 2011 and explain why that relief was not sought in the present suit. The learned Trial Judge should not have taken that particular relief for consideration without there being any relief valued and without any Court fees paid. Without such relief being sought by the respondent, the entire trial stands vitiated as having been focussed on a non-issue.

33.Section 92 of the Evidence Act is as follows:-

"92. Exclusion of evidence of oral agreement.-When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1) .-Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1[want or failure] of consideration, or mistake in fact or law: (1).-Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 3[want or failure] of consideration, or mistake in fact or law\:"

Proviso (2).-The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms,



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may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract:

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts. Illustrations

34.No amount of oral evidence can be added in the face of a written document, Ex.P8 and P9 are the sale deed in favour of the appellant, which specifically state that the undivided one half share of the plaintiff had been sold to the defendant. The only relief for the respondent / plaintiff is to proceed against the power agent therein, seeking accounts.

35.The judgment reported in AIR 1966 SC 735, Bhagawati Prasad Vs. Chandramaul is distinguishable on facts. In that case, the plaintiff had filed a suit for ejection of the defendant. The defendant admitted the title of the plaintiff and claimed that he had been permitted to remain in possession. He claimed possession on the basis of an agreement. The agreement was not produced. The High Court had held that he was in permissive occupation. This finding was confirmed by the Hon'ble Supreme Court by stating that it will not cause any prejudice to the defendant that there was no error of law.

36.In the instant case, when the appellant had very specifically stated that she had purchased the one half share of the plaintiff then, an obligation was on the respondent /



plaintiff to deny that particular sale and dispute that particular sale deed. In the face of the respondent / plaintiff having not done so, and having not sought any prayer to set aside that particular sale deed, which had been lawfully executed by her Power Agent, whom she had lawfully appointed, I hold that the Trial Court had misdirected itself in overlooking that sale deed and granting partition and separate possession. Therefore, the ratio of this judgment would not be applicable to the facts of this case.

37.The respondent had also relied on the judgment of N.K.S.Sankarakumara Nadar and others Vs. The Assistant Commissioner for Hindu Religious and Charitable Endowments, Tirunelveli Town reported in 88 LW Page 348. The facts in that particular case were that the plaintiff had filed a suit in representative capacity for a declaration that a particular temple belonged exclusively to their community namely, Hindu Nadars. The defendant filed a written statement disputing that particular claim. The defendant was the Assistant Commissioner for Hindu Religious and Charitable Endowments. The issue of maintainability was framed. That was questioned. It was held by the Division Bench that in view of the facts stated in the written statement, the issue of maintainability automatically arises. The first issue was whether it was a private temple belonging exclusively to the Hindu Nadars and the second issue whether it was a public temple. These two issues were framed on the basis of the pleadings and therefore, that judgment does not directly applied to the facts of this case, since there is no dispute raised about the validity of the sale deed by the respondent / plaintiff.

38.The learned counsel for the respondent had also relied on the judgment in Kewal Krishan Vs. Rajesh Kumar & Others reported in CDJ 2021 SC 954. There, the specific case of the plaintiff was that the sale deeds were void and were without consideration. Here, there were no such pleading at all. In that case, there was a specific finding that the sale deed was void and therefore, there was no requirement to seek a relief to set aside that particular sale deed. Here, there was no pleadings at all by the respondent / plaintiff that the sale deed in favour of the defendant should be interfered with.

39. In view of the reasonings, I hold that the Trial Court had misdirected itself and should not have entered into a discussion on the validity of the sale deed, since the sale deed was neither denied nor disputed by the respondent / plaintiff. The point framed is answered accordingly.

40.I hold that the entire reasoning of the Trial Court stands vitiated. The sale deed in favour of the defendant stands and has to be upheld by this Court. The relief of



partition cannot be granted in the face of a document registered lawfully and executed with lawful authority. The judgment of the Trial Court necessarily has to be interfered with and is set aside.

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41. The First Appeal is allowed with costs with the above observations. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To:-

The II-Additional District and Sessions Court,
Tiruppur.

COPY TO
The Section Officer,
VR Section,
High Court, Madras-104.

+lcc to Mr.S.B.Viswanathan, Advocate, S.R.No.24217
+lcc to M/s.Sarvabhauman Associates, Advocate, S.R.No.23724

A.S.No.570 of 2018

SR(CO)
CT/22/06/2022