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C.S.No.370 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.10.2022

CORAM

THE HON'BLE MR.JUSTICE M.SUNDAR

C.S.No.370 of 2014

Mr.Gapparov Abdivakhab

.. Plaintiff

Vs.

1. M/s.Golden Trees Biotech Pvt. Ltd.,
Rep. By its Managing Director
Mr.Nasser Ali
Having Office at No.119, Bricklin Road
Grama Street, 1st Floor, Purasaiwalkam
Chennai – 600 007

2. Mr.Nasser Ali
Managing Director
M/s.Golden Trees Biotech Pvt. Ltd.,
No.119, Bricklin Road
Grama Street, 1st Floor, Purasaiwalkam
Chennai – 600 007

.. Defendants

This Civil Suit is preferred, under Order IV Rule 1 of the Original
Side Rules read with Order VII Rule 1 CPC directing the 1st defendant to
pay a sum of Rs.92,51,860/- along with future interest at 24% p.a on



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Rs.75,30,000/- from the date of plaint to till the date of realization,
directing the 1st defendant to pay a sum of Rs.90,00,000/- towards
damages and for the costs of the suit.

For Plaintiff : Mr.K.V.Sundararajan
along with Mr.Vishal.R
& Mr.Sivamanikandan

For Defendants : Set ex parte

JUDGMENT

Captioned suit is listed under the cause list caption 'FOR ORAL
ARGUMENTS'.

2. The proceedings made by Hon'ble predecessor Judge on
25.08.2022 and thereafter, by me in the listings on 27.09.2022,
29.09.2022, 11.10.2022, 18.10.2022 are of relevance and a scanned
reproduction of these proceedings are as follows:



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SENTHILKUMAR RAMAMOORTHY, J

Mr.P.Vasanthakumar Visweswaran,
learned counsel has filed a memo dated
25.08.2022 stating that he has been unable to
obtain instructions from the defendants in
spite of corresponding with the defendants.
Consequently, he seeks to be relieved from
the matter. The Registry is directed to print
the name of the defendants in the cause list in
the next date of hearing instead of the name
of the counsel.

List on 08.09.2022.


25.08.2022


kal



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C.S.No.370 of 2014 (Comm. Suit)

C.S.No.370 of 2014
(Comm Suit)

M.SUNDAR, J.,

Read this in conjunction with and in continuation of earlier proceedings made by Hon'ble predecessor Judge in the previous listing on 25.08.2022 which reads as follows:

'Mr.P.Vasanthakumar Visuvanaren, learned counsel has filed a memo dated 25.08.2022 stating that he has been unable to obtain instructions from the defendants in spite of corresponding with the defendants. Consequently, he seeks to be relieved from the matter. The Registry is directed to print the name of the defendants in the cause list in the next date of hearing instead of the name of the counsel.

List on 08.09.2022.'

2. Mr.K.V.Sundararajan, learned counsel who is before this Commercial Division on behalf of sole plaintiff adverting to earlier proceedings dated 25.08.2022 very fairly points out that name of first defendant along with full/complete address has been correctly printed in the cause list but there is an error in the printing of name of second defendant in the cause list. To be noted, second defendant is Mr.Nasser Ali, Managing Director, M/s.Golden Trees Biotech Pvt. Ltd., but cause list shows The Special Tahsildar (L & A) Housing Scheme, Hosur.

Page Nos.1/2

3. Registry to do the requisite course correcting in the next listing.

4. List day-after-tomorrow. List on 29.09.2022.


27.09.2022

mk



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(Comm.Suits)

M.SUNDAR, J

Read this in conjunction with
and in continuation of earlier
proceedings made in the previous
listing on 27.09.2022.

2. Notwithstanding the
previous proceedings, the name of
the second defendant as well as
full/comple^{again}te address have been ~~erroneously~~ ^{erroneously} printed in the cause list.
This is rather unfortunate. Let
Registry do the needful in the next
listing.

List on 11.10.2022.


29.09.2022

kmi



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M.SUNDAR, J

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(Comm. Suits)

In these proceedings parties shall be referred to by their respective ranks in the main suit for the sake of convenience and clarity.

2. Mr.K.V.Sundararajan, learned counsel for the sole plaintiff is before this Commercial Division but there is no representation for the defendants.

3. These proceedings have to be read in conjunction with and in continuation of earlier proceedings made in the previous listing on 29.09.2022, which in turn has to be read in conjunction with and in continuation of earlier proceedings made in listings prior to 29.09.2022.

4. Memo dated 25.08.2022 filed by the counsel for defendants is of relevance and a scanned reproduction of the same is as follows:



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பேரறிவுரை மன்றம், மதுரை
Ordinary Original

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Mr. Gupparov Abdulkhab
Son of Abdurabbor, Tashkent City

Version

1. M/s. Golden Trees Biotech Pvt. Ltd.
Rep. by its Managing Director
Mr. Nasser Ali,
Having office at No.119, Bricklin Road,
Grama Street, 1st Floor, Purasawalkam,
Chennai 600 007.

2. Mr. Nasser Ali,
Managing Director
M/s. Golden Trees Biotech Pvt. Ltd.,
No.119, Bricklin Road,
Grama Street, 1st Floor, Purasawalkam,
Chennai 600 007.

Defendants

MEMO FILED BY THE COUNSEL FOR THE DEFENDANTS

It is humbly submitted as follows: -

1. It is submitted that the above suit is at the stage of recording evidence of the Defendants. It is submitted that letters dated 12/08/2022 by Registered post with acknowledgment due cards; through courier and email were sent to the known addresses informing the Defendants to appear and be present before this Hon'ble Court and give instructions to the undersigned on or before 25/08/2022. It was also informed in the above communication that if no response is received the undersigned would be constrained to report "NO INSTRUCTIONS" unto this Hon'ble Court.

(Signature)



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2. It is submitted that the letters sent by courier to the address shown in the Plaint were returned unserved. The Letters sent to the address at Kuniamuthur Coimbatore also have been returned as per the postal tracking receipt. The letter dated 12/08/2022 and proof of above return is filed into this Hon'ble Court under this Memo and further the undersigned has not received any instructions from the Defendants and therefore reports "NO INSTRUCTIONS FROM THE DEFENDANTS".

3. It is humbly prayed that this memo may be recorded and thus render justice.

Dated at Chennai this the 25th day of August, 2022

COUNSEL FOR DEFENDANTS

5. Be that as it may, pursuant to earlier proceedings dated 29.09.2022, today, name of the second defendant together with full/complete address is correctly shown in the cause list. Name of the second defendant called out aloud thrice in the Court and adjoining corridors but no response.

6. Before proceeding further, this Court is informed by learned counsel for plaintiff that the evidence of plaintiff's side has been completed i.e., PW-1 has been examined and he has been cross-examined fully by the counsel who was appearing for the defendants. Twelve exhibits [Exs.P1 to P12] have been



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marked. This trajectory necessarily means that the defendants have to be set *ex-parte* and the main suit has to be heard out. Before doing that, this Court deems it appropriate to give one more opportunity to the defendants albeit making it clear that the next listing shall be treated as peremptory.

List one week hence. List on 18.10.2022.

kmi

11.10.2022



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(Comm. Suits)

M.SUNDAR, J.,

Read this in conjunction with and in continuation of earlier proceedings made in the previous listing on 11.10.2022.

2.Mr.K.V.Sundararajan, learned counsel for the sole plaintiff is before this Commercial Division but there is no representation for the defendants today also.

3.In the light of the earlier proceedings made on 11.10.2022, the defendants are set *ex-parte*.

4.This Commercial Division is informed that the plaintiff side witness has been fully cross-examined by the learned counsel for the defendants and what remains is written argument and oral argument. Learned counsel for the plaintiff submits that the written argument may really not be necessary and he would advance oral argument.

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S.List under the cause list caption 'FOR ORAL ARGUMENTS'
day after tomorrow i.e., 20.10.2022.

18.10.2022

PEP

3. The above proceedings are telltale qua the trajectory the captioned matter has taken.

4. Mr.K.V.Sundararajan, learned counsel on record for sole plaintiff along with Mr.Vishal.R and Mr. Sivamanikandan is before this Commercial Division. Learned counsel has placed before this Commercial Division a convenience set. One Kishori Lal, Power of Attorney Agent of plaintiff, was examined as PW1 and he was cross-examined by the counsel for plaintiff on 03.12.2019. Thereafter, the trajectory the matter took has been captured in the proceedings made in the previous listings which have been set out supra.



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5. Learned counsel submits that the captioned suit is one for recovery of money and usual prayer for costs and residuary limb of prayer also form part of the prayer paragraph. Learned counsel submits that money was paid towards supply of cashew nuts by the defendants but the supply ultimately did not happen. In this regard, learned counsel draws the attention of this Commercial Division to Ex.P2, which is a contract dated 29.03.2013 vide which 18 metric tonnes of cashew nuts had to be supplied by the defendants to the plaintiff. Ex.P3 dated 29.03.2013 is the proforma and Ex.P4 dated 02.04.2013 is the receipt evidencing receipt of cash. Thereafter, the defendants sold the consignment to another third party and did not supply to the plaintiff. This resulted in plaintiff issuing a notice dated 26.11.2013 (Ex.P9). This notice from the plaintiff met with a reply dated 20.12.2013 (Ex.P10) from the defendants. In this reply, the defendants do not dispute the non-supply. They go a step further and submit that payment will be made as soon as they receive monies from the third party purchaser to whom they had sold the consignment. Considering the clinching nature of these documents, this Court deems it appropriate to scan and reproduce Ex.P7, Ex.P8 and Ex.P10 which are as follows:



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Golden Trees Biotech Pvt Ltd.

Producers & Exporters of Indoor Palm Trees & etc. Plants

No 116, Beach Lane Road, Gopur Street, 1st Floor,
Purasawalkun, Chennai - 600 027

Tel : +91 44-45000780 Mob : +91 9789008122

E-mail : goldenbtrees@yahoo.com web : www.goldentreesindia.com

TO
MR. GAPPAROTA ABDULAKBAR
KASHIMOV, DIST.
TASHKENT STREET 124
TASHKENT
UZBEKISTAN

DT: 16-11-13

SUB: REFUND OF \$ 124,200 BEING PAID TOWARDS CASHENUTS VIDE CONTRACT
NO. GT 0046/03/13 DT: 29TH MARCH 2013

DEAR SIR,

THIS IS TO INFORM YOU THAT WE HAVE RECEIVED AN ORDER FROM YOU FOR 18 TONS OF WW-240 CASHEW NUTS ALONGWITH FULL PAYMENT TO BE SHIPPED TO TASHKENT ACCORDINGLY WE HAVE SHIPPED THEM TO BANDAR ABBAS PORT, BUT UNFORTUNATELY BECAUSE OF NEW RULE IMPOSED BY UZBEKISTAN GOVERNMENT THAT PARTICULAR CONTAINER COULD NOT BE RELEASED AND THUS WE AGREED TO SELL THAT CONTAINER TO ANOTHER CLIENT IN BANDAR ABBAS.

WE HAVE ALREADY SOLD THE CONTAINER TO A CLIENT COMPANY NAME "ABDOL MOHAMMED HACH SEFAT" IN IRAN AND HE HAS FINALLY AGREED TO MAKE THE PAYMENT BY 30TH OF DECEMBER 2013.

WE HEREBY ASSURE YOU TO PAY THE AMOUNT BY 30TH DECEMBER 2013 WITHOUT FAIL.

REGARDS,

(NAGERALI)
16/11/13





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РЕСПУБЛИКА УЗБЕКИСТАН
ГОРОД ТАШКЕНТ ХОКИМИЯТ ЧИЛАНЗАРСКОГО РАЙОНА
MUSHTARIY METALL SAVDO
общество с ограниченной ответственностью
г.Ташкент, Чиланзарский район, ул.Ганжир – 86 тел (+99871) 279-96-66.
р/сч: 20208000704965677001 в ЧОУББ «Трасбанк» ф-л «Ташкент»
МФО 00850 ИНН 302251873 ОКОНХ 14831

Date: 20-11-2013

From

Abduraupov Akmal Anvarovich
Director of "Mushtariy metal savdo"

To

Mr. Gapparov Abdvakhab
Tashkent City
5, Rahimov District
Taami Street

Dear Mr.Gapparov Abdvakhab

I placed order for Cashew Nuts WW 243. You had promised to supply the Cashew Nuts from India by August 2013 itself. But, you have been continuously giving one false excuse or the other stating that your supplier from India has sent the consignment on the word consignee's name and subsequently got stuck up in some other place, etc. Till now, you had not supplied the goods and because of the same, my commitments with my clients failed and the same has resulted in not only monetary loss but has also created bad name in the business. Kindly return the money immediately, or else no business will be done in the future with you.

Abduraupov Akmal Anvarovich





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CEH 58943-10955

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Small: haqmustafa.com

K.MOHAMED FAZULUL HAQ. P.L.C., P.L.L.

ADVOCATE - WITH THIS FIRM

112-A, KANNAN, ELM STREET, ARAMBURU, POST & TALE, KARAIKAL DISTRICT, TAMILNADU, 624201

Date: 30.12.2013

REGISTERED AD

To
GADRAY KUMAR,
ADVOCATE,
M-1, LAPOSTOLLE ROAD,
NEW DELHI - 110 004.

Re: Your notice dt 25.11.2013 sent on behalf of your client Mr. APPARAOU ABDOLAH of
Tashkent city, 5 Rohimov-Dist. Isfah street, 1257 Uzbekistan to my client Golden Treas
Biotech Pvt Ltd, No-119 Wilson Road, Ganga street, 1st floor, Puravayalakkam, Chennai -600
007 through its managing Director MR MASTER AD has been placed in to my hands with
instructions to issue the following reply:-

The statements in para 1 of your notice that my client along with Mr. Bangerudin and
Mr. Shaper visited my client's company on 26.11.2013, Mr. Shaper my client's Assistant Director
met your client at Airport and took them to hotel on 28.11.2013 my clients Mr. Mr. Banger
at the managing director in Chennai office Mr. Shaper showed them garden of Lushaw with
and ready products in the warehouse. I am at this to deny your client.

The statements in para 2 of your notice is false and correct.

The statements in para 3,4,5,6,7 about the payment are false and correct.

The statements in para 8 of the notice that my client has sent Bill of lading to your
client in which the consignee name was wrongly mentioned and the same was informed to
my client by your client. Subsequently the name of the consignee on the Bill of lading was
changed and new Bill of lading was sent by my client which takes two months are all denied as
false.

The statements in para 9 of your notice that my client did not make sufficient efforts
to ensure the arrival of the consignments within schedule is seriously denied as false. The
further statements in that para about the financial loss, inconvenience suffered, loss of
reputation and other inconveniences are all seriously denied as false.



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your clients for which the goods were bought refused to accept the supply of goods. Accordingly your client requested my client to change the documents making them for a new consignee's name but for a long time no response was received from my client's by your client and the same was explained by my client that it will take time to change the name of the consignee on the documents we all denied as false.

The averments in para 11 of notice that as though your client had resorted to ship and he sustained for which my client had resorted your client to pay again is seriously denied as false. The other averments in that para are also denied as false.

The averments in para 12 of your notice are to be strictly proved by your client.

The averments in para 13 of your notice are seriously denied as false.

My client submits that your client had agreed to purchase cashewnut -240 at the rate and quantum as stated in your notice. Accordingly my client had also agreed to supply the same to your client. At that time of negotiation your client had state that he had no IE license. Hence he resorted to send the goods to the consignee to be mentioned by your client. Accordingly my client had shipped the cargo at South Africa to the consignee specified by your client viz "MAFTUNA SAVDO SERVIS, BERUNIY-B, 59/55, TASHKENT, UZBEKISTAN" on 08.04.2013. Thereafter my client had sent the Bill of Lading to your client. After receiving the Bill of lading your client had resorted my client to change the Name of consignee as "LLC <PROSPERITY BUSINESS> UZBEKISTAN BESH-YOGUCH KORATOSH, STR HOUSE NO-1 TASHKENT CITY". Accordingly my client had changed the name of Consignee as resorted by your client. As this being the fact now your client had falsely state that my client had mentioned wrong consignee in the Bill of lading with a view to screen his faults and to escape from his liability.

My client submits that after the change of consignee name as stated above your client had represented to my client that he was unable to take delivery of the cargo due to the Rule of your client's Government and your client has also represented that as per the Rule of your client's Country the cargo boxes should contain some text in the local language and some other specifications.



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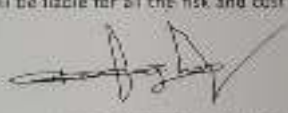
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My client had also represented that he had forgotten to inform the above said Rule of his country to my client prior to shipment. Hence my client had gave two options to your client and one is To change the name to any Bandar Abbas agent and release the container at Bandar Abbas and change the Boxes then take it to Tashkent and the 2nd option is To sell the container to other buyer at Bandar Abbas and to return the amount to your client immediately when the above said new buyer pays the same. From the above two options your client had chosen the 2nd option and there by resorted my client to sell the Goods to some other buyer accordingly my client had sold the container to ABDOL MOHAMMAD HAGH SEFAT OF NO-5 YAZDANFAR ST-SOHANAK AVE-ARTESH HAIGH WAY - TEHRAN IRAN. At the time the above said buyer agreed to take delivery of the consignment on a condition that he will pay the value of the consignment only after selling the goods and the same was agreed by my client as well. The above said condition was also informed to your client by my client. Accordingly the buyer take delivery of the consignment. After taking delivery the buyer sent a letter on 8.11.2013 stating that he sold 5.250 Kg. of cashew nuts only and the remaining will be sold soon for Iran New Year and there by resorted time to pay of the value of consignment till the end of December. Hence my client was unable to repay the amount to your client immediately.

My client submit that it is your client who is the sole reasons for the failure to take delivery of the consignment and there is no fault on the part of my client in the shipment of the consignment.

My client submits that he is ready to pay the amount to your client after receiving the amount from the Buyer via ABDOL MOHAMMAD HAGH SEFAT OF NO-5 YAZDANFAR ST-SOHANAK AVE-ARTESH HAIGH WAY-TEHRAN IRAN and my client is not liable to pay any damages as stated in your notice since your client is the sole reason for this problem.

If inspite of this notice should your client indulge in any activities as stated in your notice my client suitable defend the same and your client will be liable for all the risk and cost incidental thereto.


(K. MOHAMMED FAZLULLAH HAQ)
Advocate



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6. The last three paragraphs of Ex.P10 i.e., wherein the defendants do not dispute non-supply and say that payment will be made on receipt of monies from the third party to whom they have sold the consignment is articulated. However, notwithstanding such plea, defendants have made a counter claim claiming that first defendant has paid a sum of Rs.1,19,49,000/- towards procurement. Such amounts have been incurred only pursuant to the second contract entered into with the plaintiff and therefore, plaintiff is liable to pay this amount. Defendants have claimed a sum of little over Rs.1.50 Crores, i.e., Rs.1,50,55,740/- together with further interest. Plaintiff has filed a written statement (reply to the counter claim) inter-alia contending that the plea that the first defendant has paid Rs.1,19,49,000/- towards procurement and also incurred expenses towards handling charges are false and such documents have been created only for the purpose of this case. It was also contended that the second contract has nothing to do with the first contract.

7. This Court carefully considered all the exhibits, namely Exs.P1 to P12 and the deposition of PW1. There is nothing adverse in the deposition and suffice to say that PW1 has withstood the cross-examination. The deposition of PW1 is in tune and tandem with the



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pleadings in the plaint and it buttresses the plaintiff's claim insofar as the money claim for refund but there is no document as regards damages.

Learned counsel drew the attention of this Court to Ex.P8 and made a faint attempt to say that this may buttress the damages claim. In the considered view of this Commercial Division, there is nothing to demonstrate that the plaintiff has suffered actual loss owing to non-supply.

8. No elucidation is required to say that a counter claim becomes a plaint by itself. This means that burden of proof is on the defendant who makes the counter claim insofar as the counter claim is concerned. This burden never shifts, only the onus may swing like a pendulum. In the case on hand, defendants have not let in evidence and discharged the burden of proof cast on them to show that the alleged expenditure towards procurement and the expenses qua second contract were actually incurred and that the second and first contracts are dovetailed. If only defendants had discharged this initial burden of proof, onus would have shifted to plaintiff but that did not happen. Therefore, it is clear that defendants have not discharged the burden of proof qua counter claim



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and therefore the counter claim inevitably fails and cannot but be dismissed.

9. To be noted, prayer paragraph in the plaint is paragraph 16 and the same reads as follows:

16. The Plaintiff therefore prays that this Hon'ble Court may be pleased to pass a judgment and decree against the Defendants:

a. directing the 1st defendant to pay a sum of Rs.92,51,860/- along with future interest at 24% p.a on Rs.75,30,000/- from the date of plaint to till the date of realization;

b) directing the 1st defendant to pay a sum of Rs.90,00,000/- towards damages;

c) for the costs of this suit and

d) for such other reliefs as this Hon'ble Court may deem fit to pass.

10. The sequitur of the narrative, discussion and dispositive reasoning thus far is, limb (a) is acceded to the extent that there will be a decree for Rs.92,51,860/- together with interest @ 6% p.a on Rs.75,30,000/- from the date of plaint till the date of realization. To be noted, this future interest at 6% is in tune and tandem with Section 34 of 'The Code of Civil Procedure, 1908' ('CPC' for the sake of brevity). As regards limb (b) is concerned, the same is negated as there is no



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document to support damages. As regards limb (c) is concerned, costs are awarded as the plaintiff has been tossed around. This Court has taken the view that compensatory costs for vexatious defences can be awarded under Section 35A in cases where defendants play ducks and drakes with the plaintiff and the legal proceedings. The case on hand appears to be one such typical case as the defendants have entered appearance, filed written statement, cross-examined PW1 and thereafter, allowed the matter to go *ex parte*. Therefore, this would also qualify as a vexatious way of defending a suit. To be noted, sub-section (2) of Section 35-A of CPC has been amended vide 'The Commercial Courts Act, 2015 (4 of 2016)' [hereinafter 'CCA' for the sake of brevity]. Therefore, there is no cap qua compensatory costs under Section 35-A of amended CPC. Considering the nature of the matter, this Court deems it appropriate to award compensatory costs of Rs.1,00,000/- [Rupees One Lakh only] in addition to the usual costs for which bill of costs should be filed by the plaintiff. To be noted, this compensatory costs is awarded under limb (d) i.e., usual residuary prayer limb in a prayer. As regards counter claim, the same is dismissed.



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gpa

Judgment
in C.S.No.370 of 2014

20.10.2022