



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 03.12.2021
PRONOUNCED ON: 11.01.2022

CORAM

THE HON'BLE Mr. JUSTICE G.CHANDRASEKHARAN

S.A.No.1266 of 2019

N.Munisamy ...Appellant/Respondent/Plaintiff

Vs.

V.Mohana ...Respondent/Appellant/Defendant

PRAYER: Second Appeal is filed under Section 100 of the Code of Civil Procedure, to set aside the judgment and decree, dated 05.08.2019 in the appeal in A.S.No.35 of 2018 on the file of the learned Principal District Judge, Krishnagiri, reversing the Judgment and decree, dated 27.04.2018 in O.S.No.60 of 2012 on the file of the learned Subordinate Judge, Hosur.

For Appellant : Mr.A.R.Suresh, for
Mr.J.Muthukumaran

For Respondent : Mr.Thirumalai Balaji for
Mr.P.Subba Reddy

JUDGMENT

This Second Appeal is filed challenging the Judgment and decree of the learned Principal District Judge, Krishnagiri in A.S.No.35 of 2018 reversing the Judgment of the learned Subordinate Judge, Hosur in O.S.No.60 of 2012.

2. The appellant / plaintiff filed a suit for specific performance of contract on the basis of sale agreement, dated 23.03.2009 alleged to have been executed by the respondent/defendant in favour of the appellant for possession of the suit property and for costs.

3. The case of the appellant, in brief, is as follows:

The suit property belongs to the respondent. She purchased the suit property as a house site on 27.09.2007 and then she constructed a building in the suit property. The respondent and



her husband approached the appellant offering to sell the suit property due to their urgent need of funds to discharge sundry debts and meet their urgent expenses. Upon agreeing to purchase the suit property, negotiation was conducted in the presence of middlemen. The sale price was fixed at Rs.5 lakhs. The Sale agreement was entered into between the appellant and the respondent on 23.03.2009. Upon paying the advance amount of Rs.2 lakhs, the period for completion of the sale was fixed as 3 years. The appellant was ready and willing to pay the balance sale consideration of Rs.3 lakhs and complete the sale. However, the respondent was evading under some pretext or other in executing the sale deed. The appellant approached the respondent through middle men for the completion of sale transaction. Even thereafter, the respondent successfully evaded to execute the sale deed. Therefore, the appellant issued a legal notice on 14.03.2012, calling upon the respondent to appear before the Sub Registrar Office, Hosur on 21.03.2012 at 10.00 a.m to receive the balance sale consideration and complete the sale transaction. On receiving the legal notice, dated 14.03.2012, the respondent neither chose to appear before the Sub Registrar Office, Hosur for executing the Sale Deed nor sent a reply. Left with no other option, the appellant filed the suit for the reliefs aforesaid.

4. The case of the respondent is that she purchased the suit property as a vacant site on 27.09.2007 and then she constructed an RCC building in the house site. It is emphatically denied that she and her husband approached the appellant to sell the suit property for a consideration of Rs.5 lakhs. It is her case that she and her husband approached the appellant for hand loan of Rs.1,50,000/- for the expenses relating to modification of existing house in the suit property. The appellant insisted the respondent and her husband to execute a nominal sale agreement by showing the nominal sale consideration, in his favour, as a security for advancing the loan. The appellant is giving finance to various persons. On believing his words, the respondent agreed to execute the nominal sale agreement in his favour. The appellant calculated interest for the hand loan of Rs.1,50,000/- for 3 years, and make the respondent to execute the nominal sale agreement by showing the advance sale consideration as Rs.2 lakhs. However, the respondent has received only an amount of Rs.1,50,000/- as loan from the appellant. While the market value of the suit property is more than Rs.60 lakhs, a meager amount of Rs.5 lakhs was shown as a sale consideration in nominal sale agreement executed as a security in connection with the aforesaid loan transaction. The allegations that the appellant demanded the



respondent to execute the sale deed and the respondent evaded to execute the same, are denied. After receiving the legal notice, when the respondent approached the appellant to receive the loan amount of Rs.1,50,000/- with interest at Rs.50,000/-, the appellant evaded to receive the said amount and filed the suit with an ulterior motive to grab the suit property by cheating the respondent. The respondent is ready to repay the hand loan of Rs.1,50,000/- along with the interest at Rs.50,000/-. The appellant has not approached the Court with clean hands and therefore, the respondent prays for the dismissal of the suit.

5. On the basis of the aforesaid pleadings, the trial Court framed the following issues and additional issues:

Issues:

1. Whether it is true that the respondent agreed to sell the suit property to the appellant?
2. Whether the appellant is entitled for the relief of specific performance?
3. To what relief, if any, the parties are entitled to?

Additional Issues:

- i. Whether the claim of the respondent that she executed the suit sale agreement as a nominal sale agreement for the purpose of security at the time of obtaining the loan of Rs.1,50,000/- from the appellant is true?
- ii. Whether the appellant was ready and willing to perform his part of the contract?

6. During the course of trial, P.W.1 to P.W.3 were examined and Exs.A1 to A5 were marked on the side of the plaintiff. On the side of the defendant, she has examined herself as D.W.1 and no documents were marked on her side.

7. The learned trial Judge on considering the oral and documentary evidence, had found that the suit sale agreement was executed for the purpose of selling the suit property by the respondent in favour of the appellant and the claim of the respondent that the suit sale agreement was executed as a security for the loan received from the appellant, is not true. In this view of the matter, the trial Court found the case in favour of the appellant and decreed the suit. Aggrieved, the respondent/defendant preferred an appeal in A.S.No.35 of 2018.



8. On a re-appreciation of the oral and documentary evidence, the learned first appellate Judge found that the case of the respondent that the suit sale agreement was executed in connection with the loan transaction, was true and therefore reversed the Judgment of the trial Court and dismissed the suit by allowing the appeal. Aggrieved, the appellant/plaintiff has come up with this Second Appeal.

9. The following substantial questions of law were framed at the time of admission:

- i. Whether the learned Judge is right in not following the settled law reported in 2017 (3) CTC 657, when admittedly, the execution of Ex.A-1 agreement of Sale is admitted by the defendant/respondent?
- ii. Whether the learned Judge is right in not adverting to the fact that the entire burden lies on the respondent to disprove the contention Ex.A1, Agreement of Sale?

Again on 03.12.2021, after hearing the learned counsel appearing for the parties, the following substantial question of law was also framed:

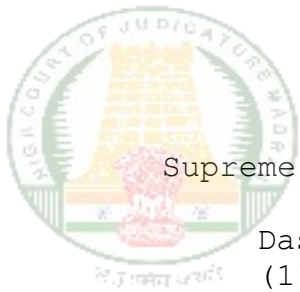
"Whether the reversal of the Trial Court Judgment, among other reasons, for the reason that the plaintiff has not established his readiness and willingness to perform his part of contract can be sustained?"

10. The learned counsel for the appellant submitted that the respondent admitted the execution of Ex.A1 Sale Agreement. When she admitted Ex.A1 sale agreement, it is for the respondent to prove that Ex.A1 is not a sale agreement and it is an agreement which is executed only as a security in connection with the loan transaction. The respondent has not produced any evidence either oral or documentary in support of her case. The appellant has examined himself as P.W1 and examined two other witnesses who knew the execution of the sale agreement in support of his case. They have given a cogent and convincing evidence with regard to the receipt of Rs.2 lakhs paid as advance by the respondent and execution of sale agreement. It is not necessary that the attestors to the sale agreement should have been examined. It is enough the persons who knew the execution of the sale agreement are examined. In the case on hand, P.W.2 and 3 were examined for this purpose. Picking some part of the evidence of P.W.1, here and there, the learned first appellate Judge has wrongly come to the conclusion that the



agreement, dated 23.03.2009 was not intended to be a Sale agreement and it is a document, executed in connection with the loan transaction. The respondent has not produced any material to show that the value of the suit property is about Rs.60 lakhs or Rs.15 lakhs. In the absence of any evidence, the first appellate Court had wrongly fixed the value of the suit property as Rs.15 lakhs. The sale agreement is a registered one and therefore the respondent cannot give evidence against the contents of the sale agreement. The appellant was always ready and willing to pay the balance sale consideration and execute the sale deed, but the respondent was not willing to come and execute the sale deed. Therefore, the finding of the learned first appellate Judge that the appellant has not expressed his readiness and willingness to perform his part of contract, is not correct. The trial Court rightly decreed the suit. Without properly appreciating the evidence, the first appellate Court reversed the findings of the trial Court. Hence, the learned counsel for the appellant prays for allowing the appeal.

11. Per contra, the learned counsel for the respondent submitted that it is not true that the respondent admitted the execution of the sale Agreement. It is the specific case of the respondent that to make alterations in the existing building, the respondent approached the appellant for financial help and she received a sum of Rs.1,50,000/- as a hand loan. The appellant demanded the respondent to execute a nominal sale agreement with a nominal sale consideration for extending the loan facility. Left with no other option, believing the words of the appellant, the respondent had executed Ex.A1 Sale agreement only for security purpose for loan transaction. Appellant has not examined the attestors to the sale agreement to prove that Ex.A1 was really a sale agreement. Appellant has also not proved that he was always ready and willing to perform his part of the contract. P.W.1 stated that he did not read the sale agreement and he is not aware the fact that there is a three storeyed building in the suit property. It is a common knowledge that the price of the lands in real estate business will always increase and no seller will wait for three years for completing the sale. The value of the suit property is more than Rs.60 lakhs. Respondent has evidence to prove that Ex.A1 is not a sale agreement and it is a document executed in connection with the loan transaction. Therefore, the respondent is entitled to give oral evidence with regard to Ex.A1 to prove that it was not intended to be acted upon as a sale agreement. In support of this proposition, the learned counsel for the respondent relied on the Judgment in Roop kumar Vrs. Mohan Thedani reported in 2003 (6) SCC 595, wherein the Hon'ble



WEB COPY

Supreme Court has observed as follows:

"This Court in *Gangabai V. Chhabubai and Ishwar Dass Jain V. Sohan Lal* with reference to Section 92 (1) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon, but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

12. Following the decision of the Hon'ble Supreme Court cited supra, the Division Bench of this Court in *Kamireddy Sattiraju and another Vrs. Kandamuri Boolaeswari* reported in 2007 (1) LW 309, has observed as follows:

"15. In the judgment reported in 2003 (6) SCC 595, in paragraph 22, the Supreme Court has stated the legal position as regards the substantive part of [Section 92](#) of the Indian Evidence Act in the following words:

"22. This Court in [Gangabai v. Chhabubai](#) (1982(1) SCC 4: AIR 1982 SC 20 = (1982)95 L.W.15 & 138 S.N.) and [Ishwar Dass Jain v. Sohan Lal](#) (2000(1) SCC 434 : AIR 2000 SC 426 = 2000-1-L.W.425) with reference to [Section 92\(1\)](#) held that it is permissible to a party to a deed to contend that the deed was not intended to be acted upon but was only a sham document. The bar arises only when the document is relied upon and its terms are sought to be varied and contradicted. Oral evidence is admissible to show that document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties.

16. In the decision reported in 2004(4) SCC 794 = 2004-4-L.W.53, the Supreme Court has held as under in paragraph 9:

"...An enquiry into reality of transaction is not excluded merely by availability of writing reciting the transaction. [Tyagaraja Mudaliyar vs. Vedathanni](#) (AIR 1936 PC 70:64 IA 126 = (1936)43 L.W.271) is an authority for the proposition that the oral evidence in departure from the terms of a written deed is admissible to show that what is mentioned in



the deed was not the real transaction between the parties but it was something different..."

17. From the above ratio laid down by the Supreme Court, when we analyse the stand of the parties, according to the appellants, irrespective of the fact that Ex.A-1 came into being, it was contended that the deed was never intended to be acted upon and that it was a sham document. When the said stand is probed into further, as held by the Supreme Court, the bar under Section 92 of the Indian Evidence Act vis-a-vis Ex.A-1 would operate if only the appellants attempt to rely upon Ex.A-1 agreement and simultaneously sought to vary and contradict its terms. Such is not the case of the appellants. The appellants are not attempting to contend that the terms contained therein are to be varied or that the evidence let in on their side was to contradict the terms contained therein. According to the appellants, the entire evidence let in both oral and documentary, was only to demonstrate that in spite of existence of Ex.A-1, it will have to be held that the parties had a different contract altogether and Ex.A-1 was never intended to be acted upon. At the risk of repetition, we state that applying the ratio laid down by the Supreme Court, such a stand of the appellants was certainly not prohibited under Section 92 of the Indian Evidence Act."

13. This position was reiterated in Rajammal and another Vrs. Senbagam, reported in 2016 (6) CTC 225. The relevant paragraphs are extracted hereunder for better appreciation:

"19. From the above categorical pronouncements made by the Apex Court as well as by this court, there cannot be any doubt as to the entitlement of the defendants to dispute with regard to the actual intention of the agreement and raise such defense, though they admit its execution. In other words, as observed by the Apex Court in Roop Kumar's case, though the defendants admit the execution of the agreement, they are entitled to contend that it was not intended to be acted upon and on the other hand, the same was executed in support of the loan transaction. Only when the defendants sought to rely upon the agreement, they cannot contradict or vary the terms of such agreement and only under such circumstances, the bar under Section 92 would come into operation. Otherwise, there



WEB COPY

is no legal bar or impediment for the defendants to raise the plea with regard to the actual intention of the parties to the agreement. Therefore, I am of the view that both the courts below are erred in law in holding that the defense raised by the defendants in this aspect is hit by Section 92 of the Indian Evidence Act. On the other hand, as discussed supra, it is not so."

14. This Judgment was also relied for the proposition that the appellant/plaintiff should establish that he was always ready and willing to perform his part of the contract and it is not enough that the suit was filed within the period of limitation. The relevant paragraphs are extracted hereunder for better appreciation:

"23. In this case, the total sale consideration fixed was Rs.2,00,000/-. Admittedly, the plaintiff paid Rs.1,65,000/- as advance on the same day of date of execution of the agreement. There is no convincing reason stated as to why the plaintiff sought for three years time for paying the balance sum of Rs.35,000/- and to get the sale deed executed, more particularly, when the fact remains that her brother is a money lender. Let us assume that there was some reason for fixing such three years time. It is to be noted at this juncture that right to pay the balance amount and claim for execution of sale deed does not arise for the plaintiff at the eleventh hour of the third year and on the other hand, such right commences even from the date of the execution of the agreement. In other words, the plaintiff should plead and prove her readiness and willingness right from the date of agreement till the decree is passed. This court already considered such issue and held in a decision reported in 2016(4) CTC 643, S.Mallika v. R.Saravanan that the time limit fixed in an agreement is only an upper time limit not the exact time to perform the contract. In this case, admittedly the suit notice came to be issued only on 16.05.2005 i.e., after nearly two years from the date of the agreement. What prevented the plaintiff from paying the balance amount and seeking for execution of the sale deed all these two years, is not explained. Therefore, it is evident from the conduct of the plaintiff that she was not ready and willing to perform her part of the contract, as contemplated under section 16(c) of the Specific Relief Act from the date of the



WEB COPY

agreement, even though the balance amount payable is a small portion of the total sale consideration.

24.No doubt, the suit is filed within the period of limitation. For the purpose of considering as to whether the suit is filed within time, the issuance of the notice and the date of filing the suit may be relevant. But for considering the issue regarding the readiness and willingness, filing of the suit within the time of limitation cannot be the answer. In this aspect, this court's decision reported in 2016(4) CTC 152, Johnson vs. E.Pushpavalli, would apply to the present case as well.

.....

27.Right to seek the relief of specific performance is one thing, whereas pleading and proving the readiness and willingness to seek such relief is another thing. Mere right to sue within time is not enough to get the relief of specific performance automatically even in the case of an admitted agreement, unless the plaintiff pleads and establishes the readiness and willingness in a manner known to law. In this case, I found that the plaintiff miserably failed to prove such readiness and willingness, even assuming that the suit agreement was intended to be acted upon. This aspect has not been considered by the courts below in a proper and perspective manner. Therefore, the findings rendered by the courts below, even though concurrently in favour of the plaintiff, are to be held as perverse."

15. The Judgment reported in 2011 (5) CTC 543 in lakshamma Vrs. Rathinamma is also relied on by the learned counsel for the proposition that nobody would make alterations in the suit property by investing money after entering into the sale agreement. The relevant paragraph is extracted hereunder:

"21. Further, as per Ex.A1, a land having an extent of 1305 sq.feet and a building constructed thereon was agreed to be sold and it is specific case of the Appellant/Defendant that it was not intended to be acted upon and it was only given as security for the amount received. If Ex.A1, was intended to be acted upon as an Agreement of Sale having regard to the subsequent conduct of the parties, the Appellant /Defendant would not have put up further construction over the suit property and the Respondent/Plaintiff would not have also allowed the



WEB COPY

Appellant to put up further construction, having agreed to purchase of land as well as the superstructure constructed thereon. Therefore, having regard to the conduct of the parties viz., permitting the Appellant to put up further construction over the suit property and the non production of the muchalika executed by the appellant in favour of the respondent/appellant, it is made clear that the parties never intended Ex.A1 to be used as an Agreement of Sale and it was only executed as a security for the amount received by the Appellant / Defendant."

16. It is submitted that the case of the respondent is that the respondent borrowed money for the purpose of making changes in the existing structure that is for the construction of 3rd floor. If she really intended to sell the suit property, she would not have gone ahead with the construction of 3rd floor. It clinches the issue that Ex.A1 is not really a sale agreement, but it is only a document executed in connection with the loan transaction.

17. I have considered the rival submissions and perused the materials available on record.

18. From the case set out in the pleadings, evidence and the submissions of the counsel appearing for the parties, it is clear that there is no dispute with regard to the fact that the respondent is the owner of the suit property. Respondent admitted the execution of the sale agreement, but stated that it was executed in connection with a loan transaction at the instance of the appellant. There was no real intention on her part to sell the suit property to the appellant. The suit property is shown as a land with an RCC building consisting of a ground floor and first floor in the plaint. The respondent claims that she borrowed money from the appellant for putting up an additional construction of a floor.

19. Reading of the Judgment of the trial Court shows that the learned trial Judge has not considered the oral evidence of witnesses in proper perspective. The learned trial Judge has relied on the precedents cited by the counsel appearing for the plaintiff before him to come to the decision. However, the first appellate Court considered the evidence of PWs1 and 2 extensively and found that the sale agreement could not have been true and it is only a document executed in connection with a loan transaction.



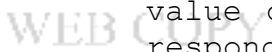
20. With regard to the submission of the learned counsel appearing for the appellant that the respondent cannot give evidence against the contents in the registered document, it is true that when terms of any contract, grant or other disposition of the property or any matter required by law, to be reduced to the form of a document, no oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to or subtracting from its terms. Proviso (1) to Section 92 of the Indian Evidence Act, 1872 reads as follows:

"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, want or failure of consideration, or mistake in fact or law.

This proposition is supported by the Judgments relied on by the learned counsel for the respondent reported in 2003 (6) SCC 595 and 2007 (1) LW 309 cited supra.

21. It was already found that the trial Court has not properly appreciated the oral and documentary evidence. However, this Court finds that the first appellate Court on going through the evidence held that though P.W.2 and 3 claimed that they were witnesses to the execution of the sale agreement, they have not signed in the sale agreement as attestors. Therefore, he cannot rely on the said witnesses to find out whether Ex.A1 sale agreement was really executed as a sale agreement. Therefore, he was left with only the evidence of P.W.1. P.W.1's evidence is strange in the sense as he admitted that he has not read the sale agreement. As indicated above, the sale agreement and the description of the property in the plaint show the existence of ground and first floor in the suit property. It is evident from the evidence of P.W.2 that there were two floors in the suit property at the time of entering into the sale agreement and after that an additional floor was constructed.

22. It is the submission of the respondent that she borrowed money only for the purpose of making alterations, that is, putting up additional construction in the suit property. It is a common knowledge that if a person intends to sell the suit property, that person would not take efforts and labour to put up additional floor in the property. It is now proved from the evidence of P.W.2 that after execution of the sale agreement one more floor is constructed in the suit property. Construction of additional floor clearly proved that the respondent had not intended to execute the sale agreement to sell the suit



26. As regards the submission regarding readiness and willingness, the Judgement reported in 2016 (6) CTC 225 supra makes it clear that the plaintiff should plead and prove her / his readiness and willingness to perform his part of the contract from the date of agreement till the decree is passed. The time limit fixed in the agreement is upper time limit and not the time limit to perform the contract. This Judgment squarely applies to the facts and circumstances of the case on hand. Though the sale agreement was said to have been executed



on 23.03.2009, the legal notice requiring the respondent to execute the sale deed was given only on 14.30.2012, which is 10 days before the expiry of three years period fixed in the sale agreement. Though it is claimed by the appellant that he was constantly requiring the respondent to receive the balance sale consideration and execute the sale deed and the respondent has not come forward to execute the sale deed, the appellant has not produced any reliable evidence in support of his case.

27. One more pertinent question arises in this regard is that what is the necessity for fixing three years period for completing the sale. Admittedly, the appellant is a financier and he is not a man short of funds. He could have easily mobilized the amount of Rs.5 lakhs and straight away gone ahead with execution of sale deed, instead of choosing a troublesome route by executing the sale agreement, fixing three years period for paying balance sale consideration for completing the sale. In this regard, the submission of the learned counsel for the respondent that when the price of the immovable properties is always on the upward trend, no seller would wait for a period of three years for completing the sale, is very relevant and it appeals to reason. There is no reason given in the sale agreement as to why a time limit of three years was fixed for completing the sale. Fixing the period of three years for completion of the sale agreement, non examination of attestors to the sale agreement, apparent under valuation of the suit property in the sale agreement, admission of P.W.1 that he has not read the sale agreement, failure to establish that the appellant was always ready and willing to perform his part of the contract from the date of execution of the sale agreement, create strong suspicion in the genuineness of the sale agreement as to whether it was really a sale agreement.

28. On the other hand, the respondent by incisive cross examination of P.W.1 to P.W.3, and from other facts and circumstances of the case, satisfactorily established that the suit sale agreement was not really an agreement of sale, but only a document came to be executed in connection with the loan transaction. Thus, this Court finds that the first appellate Court has rightly negatived the relief of specific performance.

29. The respondent accepted the execution of Ex.A1 as a nominal sale agreement executed in connection with the loan transaction. For the reasons stated above, she is entitled to give evidence against this document. This binding is supported in the Judgment reported in 2003 (6) SCC 595 and other Judgments relied on by the learned counsel for the respondent. Therefore



this Court finds that the law settled in 2017 (3) CTC 657 is not applicable to the facts and circumstances of the case. The respondent by cross examination of P.W.1 to P.W.3, placing her own case, disproved that Ex.A1 is not really a sale agreement, but it is a document executed in connection with a loan transaction. The first appellate Court had rightly found that the appellant has not established that he was always ready and willing to perform his part of the contract from the date of agreement of sale. Thus, the substantial questions of law framed in this second appeal are answered against the appellant.

30. This Court finds from the written statement of the respondent that the respondent has time and again pleaded that she is always ready to repay the amount of Rs.1,50,000/- with interest at Rs.50,000/-. Though the appellant has not prayed for alternative relief of return of advance amount, this Court in terms of equity and to render substantial justice to the parties, directs the respondent to repay the sum of Rs.2 lakhs with interest at 12 % per annum from the date of plaint till the date of decree and thereafter at 6% per annum on Rs.1,50,000/- from the date of decree till the date of realization of the amount.

31. In fine, this Second Appeal is dismissed by confirming the Judgment of the first appellate Court. However, the appellant is entitled to receive the sum of Rs.2,00,000/- with interest at 12 % per annum from the date of plaint till the date of decree and thereafter at 6% on Rs.1,50,000/- per annum from the date of decree till the date of realization. There shall be no order as to costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

vum
To

1. The Principal District Judge,
Krishnagiri.
2. The Subordinate Judge,
Hosur.



3. The Section Officer,
VR Section,
High Court of Madras.

WEB COPY

+1 CC to Mr.J.Muthukumaran, Advocate sr 2446
+1 CC to M/s.P. Subba Reddy, Advocate sr 2385.

S.A.No.1266 of 2019

SMI (CO)
SP (27/04/2022)