BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 01.08.2022

CORAM :

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

A.S(MD)No.213 of 2010
and
M.P(MD)No.1 of 2010

The Joint Commissioner/Executive Officer,
Arulmigu Meenakshi Sundareswarar Temple,
South Adi Street, Madurai. ... Appellant

vs.

1.S.Balan

2.The Commissioner,
HR & CE Department,
119, Nungambakkam High Road,
Chennai-600 034.

3.The Joint Commissioner,
HR & CE (Administration),
Dindigul Road, Madurai-1.

4.A.Rengasamy

5.A.Prusothaman ... Respondents

Appeal Suit filed under Section 96 of the Civil Procedure Code, against the judgment and decree dated 11.01.2010 made in O.S.No. 130/1999 on the file of the III Additional Sub Court, Madurai.

For Appellant : Mr.S.Manohar
For R1 : No appearance
For R2 & R3 : Mr.M.Lingadurai
Special Government Pleader

JUDGMENT

The 1st respondent as a plaintiff filed a suit in O.S.No. 130/1999 on the file of the III Additional Sub Court, Madurai, against the respondents 2 to 5 and appellant, who are the defendants in the suit, for setting aside the surcharge proceedings initiated against the 1st respondent by the appellant in his order dated 10.06.1997 in official reference No.3900/86/C1 and also his final order regarding the same on 16.10.1997 in his office reference No.5204/97/C1 and to direct the respondents 2 and 3 and the appellant to take action against the respondents 4 and 5 to recover the surcharge amount from them with costs of the suit. After trial, the trial Court, by judgment and decree dated 11.01.2010, decreed the suit, by setting aside the surcharge proceedings initiated by the appellant in his order dated 10.06.1997 and also his final order dated 15.10.1997. The trial Court further directed the respondents 2 and 3 and the appellant to recover the surcharge amount from the 5th respondent and as far as the 4th respondent is concerned, the trial Court dismissed the suit and disallowed the costs of the suit. Aggrieved by the said judgment and decree, the 3rd defendant as appellant, has filed this appeal.

2. Brief averments stated in the plaint are as follows:-

The 1st respondent was working as Superintendent of Inspector of Foreign Service for the period from 12.03.1983 to 17.09.1987 at Meenakshi Sundareswarar Temple, Madurai, and his duties were allotted by the Executive Officer then and there. At the time of his service as Special Inspector, he was looking after pay bills, T.A. bills of the Executive Officer and others, temple servants, checking of punching tickets at Kalaikoodam on rotation once in a month, feeding to temple animals and also other works allotted by the Executive Officer. The 5th respondent was a Record Clerk of the suit temple and he was looking after the selling of tickets to the visitors at Kalaikudam.

2.2. During his period of service, he misappropriated a sum of Rs. 1,45,005/-. On 27.01.1987, one Hariharaputhran, Special Superintendent and the 1st respondent conducted a surprise inspection and found that the Personal Register No.23 was not at all maintained by the 5th respondent and respective challans had not been posted in the Register No.24 by the 5th respondent against each collection and remittance of the amount. Further, the counterfoil of the sold entrance tickets have not been compiled alphabetically, date and serial number-wise. When there were unsold entrance tickets with the 5th respondent, additional supply of entrance tickets was made in violation of the rules, thereby, the 5th respondent was allowed to sell the said unsold entrance tickets fraudulently to commit breach of trust. Thus, the plaintiff and the Special Superintendent made a complaint to the Deputy Commissioner cum Executive Officer of the temple along with a special report and based on that report, a criminal case was registered against the 5th defendant in Crime No.323/87 under Sections 409 and 420 IPC on the file of Madurai City B-1 Police Station, which is pending.

2.3. Thereafter, the Regional Audit Officer of the HR & CE Department audited the accounts of the temple and found defalcation to the tune of Rs.1,20,642.50/- for the period between 24.12.1984 and 27.01.1987 on special audit. The Special Auditor sent a report to the

Chief Audit Officer of the HR & CE Department, Madras, stating that the then Executive Officer/4th respondent is solely responsible for the tickets at the store. Thus, surcharge proceedings were initiated against the 5th respondent as per the audit report, for recovery of Rs.1,45,005/-. Apart from that, disciplinary proceedings were also initiated on 26.04.1989 against one Hariharaputhran, 1st respondent, C.Muthuvel and V.Dharmalingam. Thereafter, another disciplinary proceeding was initiated against the 4th respondent on 06.09.1987.

2.4. As per the report of the enquiry officer, the 4th respondent was awarded with a punishment of censure. Except the 1st respondent, all other delinquents were punished with stoppage of one year increment, but no final order was passed against the 1st respondent. Thereafter, the Executive Officer enquired the office servants and recorded their statements and then the fit person of the temple passed a resolution dated 29.06.1988 to the effect that the 5th respondent alone was responsible for the entire defalcation of Rs.1,45,005/- and therefore, he was dismissed from service, apart from the action taken against him to recover the amount of misappropriation at Rs.1,45,005/-. Further, the

5th respondent also admitted the misappropriation committed by him before the enquiry officer. Subsequently, no action was taken against the 5th respondent.

2.5. Thereafter, the 1st respondent was transferred to various places in the same department and lastly when he was working in the office of the Joint Commissioner, HR & CE, Tirunelveli, he received a letter dated 10.06.1997 from the appellant that he is responsible for the loss caused for the period from 20.12.1984 and 27.01.1987 as per the audit report for the Fasli 1395 and also as per the report of the Regional Audit officer dated 28.07.1987. According to the 1st respondent, for the past 10 years, no action was taken against the 5th respondent as per the resolution of the fit person and in the reference mentioned in the order dated 10.06.1997 as well as in the audit report, the 1st respondent's name was not found and therefore, it is not known how he was implicated in the matter. Since the 1st respondent was in the edge of retirement, he requested the Executive Officer to allow him for verification of records in connection with defalcation accrued 10 years ago, however, the Executive Officer passed an order dated 15.10.1997, stating that the abovesaid defalcation amount should be remitted by the 1st respondent. After getting the certified copies of documents, the 1st respondent filed an appeal before the 2nd respondent who in turn directed the 1st respondent to file a civil suit under Section 90(3) of the HR & CE Act.

2.6. Hence, the present suit was filed by the 1st respondent, contending that the alleged recovery of defalcation amount is barred by limitation and even the earlier disciplinary proceedings initiated against him and other employees ended and a fit person passed a resolution on 29.06.1988 holding that the 5th respondent alone is responsible for the defalcation and therefore, the said amount has to be recovered from him only.

3. Brief averments stated in the written statement filed by the appellant are as follows:-

It is admitted that the 1st respondent was working as Superintendent of Inspector of Foreign Service as alleged in the plaint. The 5th respondent was under the direct control of the 1st respondent and therefore, he has been held responsible by the department for the misappropriation of Rs.1,45,005/- in selling the tickets of Kalaikoodam. It is the duty of the 1st respondent to see that the personal registers are maintained by the 5th respondent and accounts are properly maintained. The allegation that during the inspection on 27.01.1987, the 1st respondent found the personal register No.23 was not maintained and the challans were not posted by the 5th respondent, has been invented by the 1st respondent, as all the acts done by the 5th respondent were in collusion with the 1st respondent. The 1st respondent was posted in the appellant temple as a foreign service official only to supervise the administration and the income and to report the maladministration of the subordinates to the appellant, but the 1st respondent colluding with the 5th respondent, misappropriated the temple funds.

3.1. When the abovesaid misappropriation was brought to the knowledge of the appellant, a criminal complaint was lodged against the 5th respondent for misappropriation of the temple funds. Though proceedings have been taken against the 5th respondent, later, it was found out that both the 1st respondent and the 5th respondent colluding together, misappropriated the temple funds. Thereafter, the Audit wing of the Department in its audit report for Fasli 1395, raised objection for the said misappropriation and therefore, the appellant called for an explanation from the 1st respondent, but the 1st respondent by letter dated 30.06.1997 sought time to give explanation and also sought for copies of documents. The appellant by letter dated 09.07.1997, granted permission to the 1st respondent to get the copies of documents on 21.07.1997 in the office, but on that day, the 1st respondent sent a letter to the appellant seeking further records, for which, the appellant replied on 28.07.1997, directing the 1st respondent to visit the office on 04.08.1997 and get all the records. Thereafter, again the 1st respondent sent a letter dated 31.07.1997 to the appellant to send copies of 24 documents and sought time till September 1997 to furnish explanation and the appellant also by letter dated 10.09.1997, granted time till 30.09.1997 to give explanation for the misappropriation of the funds and to pay the amount, but the 1st respondent did not turn up to submit his explanation and therefore, the appellant by letter dated 26.09.1997 gave time to the 1st respondent till 13.10.1997 to submit explanation as a final chance. Even thereafter, the 1st respondent by a telegram dated

13.10.1997 sought further extension of ten days time and therefore, the appellant finally passed orders on 15.10.1997, fixing liability on the 1st respondent for the loss caused during the period from 20.12.1984 to 27.01.1987.

3.2. After passing orders by the appellant, the 1st respondent sent a letter dated 29.10.1997 to furnish copies of documents to file appeal to the Commissioner and all the copies were furnished to him on 19.01.1998. The appellant also sent a letter to the Joint Commissioner, Palani, on 21.02.1998, to recover the misappropriated amount from the 1st respondent. Thereafter, the 2nd respondent has passed orders on 18.06.1998, but the 1st respondent filed the present suit on 31.08.1998 beyond the 30 days period of limitation, as such, the suit is barred by limitation. Hence, the suit is liable to be dismissed.

4. Brief averments in the written statement filed by the 4th respondent are as follows:-

The 4th respondent was the then Deputy Commissioner/Executive Officer of Meenakshi Sundareswarar Temple. He contended that the suit is liable to be dismissed for non payment of necessary court fee. Further, the suit challenging the final order dated 15.10.1997 passed by the appellant ought to have been filed within 30 days from 15.10.1997, whereas the suit was filed on 27.07.1998, as such, it is barred by limitation. The 1st respondent has impleaded the 4th respondent with a malafide intention to harass him. During his service, the 4th respondent was properly discharging his duties. The 1st respondent himself has admitted the alleged misappropriation in the departmental enquiry. The custody of tickets for Kalaikoodam was only with the 1st respondent and not with the appellant as alleged in the plaint. Therefore, when the 5th respondent has unsold tickets in his possession, the 1st respondent in violation of the rules, ought not to have given further tickets to him, thereby, he in connivance with the 5th respondent, misappropriated the temple funds. Though disciplinary proceeding was initiated against the 4th respondent, it was ended by giving censure. Even thereafter, the 4th respondent was promoted as a Joint Commissioner and he retired in that post. Thus, the suit is liable to be dismissed as against the 4th respondent.

5. Based on the above pleadings, the trial Court framed the following issues:-

(i) Whether the 1st respondent is entitled to the relief of setting aside the surcharge proceedings initiated against him by the appellant in his order dated 10.06.1997 in his official reference No.3900/86/C1 and also his final order regarding the same on 15.10.1997 in his office reference No.5204/97/C1?

(ii) Whether the 1st respondent is entitled to the relief of direction to the respondents 1 and 2 and the appellant to take action against the respondents 4 and 5 to recover the said surcharge amount?

(iii) To what other reliefs, the 1st respondent is entitled to?

5.1. The trial Court also framed an additional issue:-

(i) Whether the suit is barred by limitation?

6. In order to substantiate the case, on the side of the plaintiff, the plaintiff examined himself as PW1 and 16 documents were marked as Exs.A1 to A16. On the side of the defendants, 3 witnesses were examined as DW1 to DW3 and 7 documents were marked as Exs.B1 to B7.

7. The trial Court, considering the pleadings, oral and documentary evidence, by a judgment and decree dated 11.01.2010, decreed the suit as stated above. Aggrieved by the said judgment and decree, the 3rd defendant as appellant, has filed this appeal.

8. The learned counsel for the appellant would submit that the suit is barred by limitation. The 1st respondent has been posted on foreign service only for proper supervision of the temple museum and he has to daily check the sale of tickets for the temple museum by the 5th respondent and report it to the higher official, whereas, the 1st respondent in collusion with the 5th respondent, had misappropriated the temple funds in gross violation of the rules. Though a criminal complaint was given against the 5th respondent, subsequently departmental proceedings were initiated, in which, action has been taken and the 5th respondent was dismissed from service. It is the bounden duty of the 1st respondent to monitor the day-to-day works of the 5th respondent. If the 1st respondent monitored the 5th respondent properly and discharged his duties, the loss could have been avoided. Though the 5th respondent was dismissed from service for the alleged charge of misappropriation,

subsequently it was found out that the 1st respondent was also equally liable for misappropriation and therefore, an explanation was called for from the 1st respondent, but despite sufficient opportunities, the 1st respondent sought for adjournments and evaded to give explanation and also failed to co-operate for the enquiry. Therefore, the 2nd respondent/Commissioner, HR & CE, Chennai, passed an order against the 1st respondent on 18.06.1998. Challenging the said order, the 1st respondent has filed the suit on 31.08.1998. As per Section 90(3) of HR & CE Act, the suit has to be filed within 30 days from the date of the said order, but the 1st respondent has not filed the suit within the said time frame and therefore, the suit is barred by limitation.

9. The learned counsel would further submit that the trial Court failed to appreciate the duties and responsibilities of the 1st respondent and the attitude of the 1st respondent in not giving reply and not appearing before the enquiry officer despite several opportunities. Since the 1st respondent did not co-operate for the enquiry despite several opportunities, the appellant sent a letter dated 21.02.1998 to the Joint Commissioner, Palani, to recover the misappropriated amount from the

1st respondent and thereafter, the 2nd respondent passed orders on 18.06.1998. Had the plaintiff been diligent in his duty, the loss would not have occurred, but without considering the same, the trial Court held that the appellant had not followed the principles of natural justice in recovering the amount, totally ignoring the fact that despite several opportunities, the 1st respondent did not come forward to submit reply denying the allegations and only after affording sufficient opportunities, order of recovery was passed. The learned counsel would further submit that the trial Court failed to see that the 1st respondent himself has admitted in the enquiry that he has not supervised the maintenance of Register Nos.22 to 24 by the 5th respondent and he has not given any explanation for the various audit objections and the criminal case has nothing to do with the departmental proceedings.

10. It is also submitted that the suit has not been properly valued, as such, it is liable to be dismissed for non payment of required court fee. The trial Court failed to consider all these aspects and proceeded to hold as if the 2nd respondent passed the order without any materials with malafide intention. The 1st respondent has not proved his case by proper

documentary evidence and the trial Court has not properly considered the documentary evidence and has not even discussed the documents marked by the appellant. Ex.A1 notice dated 11.06.1997 will not give him a cause of action to file the suit and the 1st respondent cannot claim limitation based on Ex.A1. The evidence produced on the side of the appellant would establish that the 1st respondent was responsible for the loss and hence the amount has to be recovered from him. Therefore, the suit filed by the plaintiff is not maintainable. Hence, the judgment and decree passed by the trial Court are liable to be set aside.

11. The learned counsel for the 1st respondent sent a letter to the 1st respondent seeking instructions which was returned as refused. Therefore, he filed a memo dated 19.07.2022, reporting no instructions. Thus, this Court by order dated 22.07.2022, recording the said memo, directed the Registry to remove the name of the counsel for the 1st respondent and to print the name of the 1st respondent in the cause list. Despite the name of the 1st respondent being printed in the cause list, today, there is no representation on his behalf either by himself or through any counsel. Thus, this Court is inclined to dispose the appeal on merits.

12. It is the contention of the 1^{st} respondent/plaintiff that there is no material to show that he colluded with the 5^{th} respondent and caused loss to the temple. During the relevant point of time, the 1^{st} respondent was working as Superintendent of Inspector and the 5^{th} respondent was not under the direct control of the 1^{st} respondent. The 2^{nd} respondent/1^{st} defendant is the Commissioner of HR & CE and he is having overall administration and control throughout the State. The suit temple is also under his control. The 3^{rd} respondent/2^{nd} defendant was the Joint Commissioner at Madurai during the relevant point of time and he was having administrative control over the suit temple. The appellant/3^{rd} defendant was the Joint Commissioner cum Executive Officer of the suit temple during the relevant point of time. The duties of the appellant/3^{rd} defendant is fixed by the 2^{nd} respondent/1^{st} defendant. The respondents 3 and 4 and the appellant are under the control of the 2^{nd} respondent. The 5^{th} respondent was the Record Clerk of the suit temple and he was looking after the selling of tickets to the visitors at Kalaikudam.

13. It is the further contention of the 1^{st} respondent that as per the rules of the said temple, the Kalaikudam entrance ticket being

printed in the authorised printing press in various colours in the respective alphabetic series. The Store Clerk will make entries of the details of the stock of the tickets as per Register No.22. If the salesman writes any book, he will approach the appellant and he will pass orders for supply of tickets. The salesman should make entries in his personal register No.23 about the receipt of tickets then and there. Further, the salesman should also maintain register No.24 denoting the sale of the tickets on the Register Nos.23 & 24 which should be kept ready at any time for inspection by the inspecting authorities. The salesman should also maintain punching tickets indicating the punching of one ticket. The salesman should remit previous day collection amount on the following day by producing the register Nos.23 and 24 before the 3rd respondent with the help of Special Inspector and Shroff and he will receive the amount along with the challan and make entries in his daily cash book then and there. The salesman should maintain the respective challan in his Register No.24. All the entries in Register No.24 should be compared, checked by the Special Inspector and Special Deputy Inspector daily. During the inspection of the Special Superintendent Thiru.Hariharaputhran and the 1st respondent on the surprise visit on

27.03.1987, they found that the personal Register No.23 was not at all maintained by the 5th respondent. The respective challan has not been posted in the Register No.24 by the 5th respondent against each collection and remittance of the amount. Further, the counterfoils of the said entrance ticket have not been compiled alphabetically, date and serial number-wise. Therefore, during the surprise inspection, it was found that the 5th respondent committed fraud in selling unrecorded tickets in the register from 01.07.1986 to 27.01.1987. Thereafter, the 1st respondent and the Special Superintendent made a complaint against the 5th respondent to the Deputy Commissioner cum Executive Officer of the temple along with special escort. Even after the registration of criminal case against the 5th respondent, departmental proceedings were initiated, in which, the 5th respondent was held liable for misappropriation and therefore, he was dismissed from service.

14. It is the further case of the 1st respondent that the appellant/3rd defendant did not take any action against the 1st respondent and he was transferred to various places and all of a sudden, he received a notice on 10.06.1997, stating that he is responsible for the loss caused

for the period from 24.12.1984 to 27.01.1987. Thereafter, the 1st respondent made several representations, but without giving opportunity, orders have been passed against him intentionally by the respondents 2 and 3 and the appellant. The appellant has not proved that the 1st respondent/plaintiff was solely responsible for the misappropriation of funds and he failed to establish the collusion between him and the 5th respondent. Even the 5th respondent also admitted during enquiry that he alone misappropriated the temple funds and there are no materials to connect the 1st respondent with the alleged charge of misappropriation and therefore, the trial Court rightly appreciated the evidence and held that without any materials, the respondents 2 and 3 and the appellant intentionally issued notice and passed orders. The 1st respondent received the final order on 16.10.1997 and within the period of limitation, filed the suit and therefore, the suit is not barred by limitation. The trial Court rightly appreciated the evidence and decreed the suit. There is no merit in the appeal and the same is liable to be dismissed.

15. Heard the learned counsel for the appellant and the learned Special Government Pleader for the respondents 2 and 3.

16. Admittedly the 1st respondent was working in the appellant temple for the period between 12.03.1983 and 17.09.1987. Admittedly, the 5th respondent was a salesman during the abovesaid period and he was under the direct control of the 1st respondent. Though the 1st respondent has stated that the 5th respondent was not under his direct control, the appellant has clearly stated that the 1st respondent was appointed as Superintendent of Inspector of Foreign Service to monitor the works of the subordinates and the appellant has clearly established that the 1st respondent is responsible to monitor the work of the 5th respondent and verify his day-to-day activities, verify the accounts maintained by him. The duty of the 1st respondent is to verify Register Nos.22 to 24 maintained by the 5th respondent. The 1st respondent himself admitted that he has not verified the same daily which itself clearly shows that he has not discharged his duties diligently or even otherwise, it can be stated that with the connivance of the 5th respondent, the 1st respondent also actively participated in the

misappropriation. Even during those period, the tickets for the temple museum were sold for 50 paise or 25 paise etc., and therefore, when the loss comes to Rs.1,45,005/-, it could not have been done in a single day, whereas, it is for the period from 24.12.1984 to 21.01.1987. The 1st respondent has not established that during the abovesaid period, he inspected the abovesaid registers maintained by the 5th respondent If the 1st respondent as a dutiful officer, had discharged his duties diligently, he could have avoided the loss caused to the temple.

17. Mere filing of the criminal complaint and registration of the criminal case, has nothing to do with the departmental proceedings, as the standard of proof required in the departmental proceedings is only preponderance of probability and not strict evidence as required in the criminal case. Though the appellant found during the enquiry that the 5th respondent directly involved in the misappropriation and thereafter, dismissed him from service, later, it was found that the 1st respondent also was equally liable for the alleged charge of misappropriation. Though the 1st respondent stated before the trial Court that adequate opportunity was not given, but however, the written statement filed by

the appellant clearly shows that despite several opportunities given, the 1st respondent did not utilise the same. Though legally the 1st respondent is not duty bound to file a reply statement to the written statement, when the appellant has clearly stated in the written statement that despite several opportunities, the 1st respondent had never utilised the same, he was prolonging the proceedings and also failed to submit his explanation even after sufficient opportunities, the 1st respondent ought to have filed reply to the written statement, which he had not done. Further, the 1st respondent has only challenged the notice calling for the explanation and he has not challenged the final order passed by the 2nd respondent dated 18.06.1998.

18. Apart from the averments in the written statement, the oral and documentary evidence produced by the appellant clearly show that the 1st respondent failed to monitor the 5th respondent and also failed to conduct inspection of the registers and accounts maintained by the 5th respondent who was under the direct control of the 1st respondent. Though the 5th respondent was dismissed from service for the alleged charge of misappropriation, subsequently since it was found that the 1st

respondent was also equally liable for misappropriation, a notice was sent to the 1st respondent seeking to submit his explanation. Despite sufficient opportunities, the 1st respondent did not come forward to submit his explanation nor he co-operated for the enquiry. The evidence produced by the appellant also shows that during the relevant period, Register Nos.22 to 24 were not properly maintained by the 5th respondent and the 1st respondent also not inspected the same which resulted in the loss to the tune of Rs.1,45,005/- to the temple and therefore, the 1st respondent was responsible for the same, or even otherwise, knowing fully well about the activities of the 5th respondent, the 1st respondent has not brought it to the knowledge of his higher authorities. There are no records to show that the 1st respondent discharged his duties diligently and despite the same, he could not find out the misappropriation of the 5th respondent.

19. Under these circumstances, the trial Court failed to appreciate the oral and documentary evidence in proper perspective and had gone to the extent to say that the appellant intentionally passed order against the 1st respondent without giving opportunities and also gone to the

extent of directing the appellant and the respondents 2 and 3 to recover the surcharge amount from the 5th respondent. The trial Court has not considered the pleadings and evidence properly and failed to look into the admitted and proved fact that the 5th respondent was working as a ticket seller for the temple museum and he did not maintain register Nos. 22 to 24 properly and the 1st respondent who is duty bound to monitor the day-to-day works of the 5th respondent, also did not do so nor made inspection of the registers, whereas, the evidence produced reveals collusion between the respondents 1 and 5 which resulted in loss of temple funds to the tune of Rs.1,45,005/-. Further, knowing fully well about the final order passed by the 2nd respondent on 18.06.1998, the 1st respondent has only challenged the notice 10.06.1997 and order dated 16.10.1997.

20. This Court as a first appellate Court which is a final Court of fact finding, has to re-appreciate and give independent finding. This Court independently weighing the entire materials and considering the oral and documentary evidence of both the parties and also the judgment of the trial Court, is of the view that the trial Court failed to

appreciate all the facts and had gone beyond the materials and has invented its own reasons for decreeing the suit. Therefore, the judgment and decree passed by the trial Court warrants interference.

21. In view of the above, the judgment and decree dated 11.01.2010 made in O.S.No.130/1999 on the file of the III Additional Sub Court, Madurai, are set aside and this Appeal Suit is allowed. Considering the facts and circumstances of the case, there shall be no order as to costs.

01.08.2022

Index : Yes / No
Internet : Yes
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To

The III Additional Sub Judge,
Madurai.

P.VELMURUGAN, J.

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JUDGMENT MADE IN
A.S(MD)No.213 of 2010
DATED : 01.08.2022