



A.S.No.321 of 2016

WEB COPY IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.04.2023

CORAM

THE HONOURABLE MRS.JUSTICE K.GOVINDARAJAN THILAKAVADI

A.S.No.321 of 2016

and

C.M.P.No.4082 of 2017

A.N.S.Rajasekaran

.. Appellant/Plaintiff

Vs

1.A.N.S.Appadurai

2.A.N.S.Rajan @ Gnanaselvam

3. A.N.S.Murugaiyan

... Respondents

Prayer: First Appeal has been filed under Order 41 Rule (1) of the r/w Section 96 of the Civil Procedure Code against the judgment and decree dated 29.02.2016 made in O.S. No.40 of 2013 on the file of the Principal District Judge, Pondicherry.



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For appellant : Mr.V.Ragavachari, Senior Counsel

For RR1 : Mr.K.Sathish Kumar

For R2 : Mr.T.Sai Krishnan

For R3 : MR.K.Sukumaran

J U D G M E N T

This Appeal Suit has been filed to set aside the judgment and decree dated 29.02.2016 made in O.S. No.40 of 2013 on the file of the Principal District Judge, Pondicherry.

2.The plaintiff in O.S.No.40 of 2013 on the file of the Principal District Judge, Pondicherry is the appellant herein. The respondents are the defendant in this suit. The plaintiff filed the said suit for partition and for allotment of one half share in the "A" Schedule property. The Trial Court by a decree and judgment dated 29.02.2016, has dismissed the suit with costs. Challenging the same, the plaintiff is before this Court with this first appeal.



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Brief averments of the plaint:

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The plaintiff and the defendants are the sons of one Sachidanandam.

The suit “A” and “B” schedule properties were allotted to the father of the plaintiff and defendants namely Sachidanandam by virtue of a Partition Deed dated 23.01.1959, entered into between him and his brother Muthukumarasamy. The said Sachidanandam died on 5.10.1997. During his life time, he had executed a registered Will dated 21.7.1993, registered as Document No.231 of 1993 in which he had bequeathed suit the “A” schedule property situated at Old Door No.95, New Door NO.109, Kamatchi Amman Koil Street, Puducherry, in favour of the plaintiff/appellant and the 3rd defendant. By the said Will, the said Sachidanandam had also allotted the suit “B” schedule property namely Old Door No.12, New Door No.16. Nehru Street (Mariamman Koil Street), Kadirkamam, Oulgaret Commune, in favour of the 1st and 2nd defendants. The boundaries of the “A” and “B” schedule properties had also been mentioned in the Will. The father of the plaintiff and the defendants divided the “A” schedule property by 17' x 40' each having common pathway instead of dividing into 10.35'x80'. The plaintiff came to know about the registration of the Will only recently. Taking advantage of



his absence, the 3rd defendant had influenced the father Sachidanandam to execute the said Will. The defendants are in joint possession and enjoyment of the suit properties and have not divided the properties into metes and bounds according to the registered Will dated 27.01.1993. However the 3rd defendant had put up a construction over the “A” schedule suit property. The plaintiff also sought a share in the family business. Since the defendants did not come forward for partition of the properties, the plaintiff sent a legal notice on 02.01.2013. Hence the suit.

Brief averments of written statement filed by the 1st and 2nd defendants:-

3. These defendants are unnecessary parties in this suit. These defendants have been allotted with the “B” schedule suit property over which the plaintiff had not sought for any relief. Their father Sachidanandam had bequeathed the properties equally by allotting two shares in the suit “A” schedule property to the plaintiff and the 3rd defendant and allotting two shares in the suit “B” schedule property to these defendants. The Will had come into force and the respective parties are residing in the respective shares and consequently there is no cause of action for the suit and there is no



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necessity for a partition of the property at all. The Will had been in force for sixteen years since 21.05.1997 and the plaintiff also got electricity connection and patta in his name in the year 2006 itself and that the suit is vexatious in nature. The Will had been duly executed and registered by their father and had been acted upon by the parties. Hence a suit for partition is not maintainable.

Written Statement filed by the 3rd Defendant:

4. According to this defendant, the registered Will of the father has been acted upon. The plaintiff and this defendant were allotted equal share with specific boundaries in the “A” schedule property. After the death of the father, the plaintiff and this defendant had taken possession of their respective shares. The plaintiff also issued no objection letter dated 06.04.2000 to the Electricity Department to change the service connection in the name of this defendant in the portion allotted to this defendant. The Municipal Authorities also allotted two separate door numbers for the said two portions in “A” schedule suit property. The plaintiff's portion bears the Door No.109-A and this defendant's portion bears the Door No.109. The



electricity connection for the rear portion for Door No.109-A stands in the name of the plaintiff and the electricity connection for the front portion in Door No.109 is in the name of this defendant also the suit is barred by limitation as correct Court-fees had not been paid. This defendant had also filed necessary revenue records to show that the plaintiff had actually taken possession and enjoyed the portion allotted to him by their father.

5.On consideration of the above pleadings, the trial Court framed the following issues:

1. Whether the plaintiff is entitled to get $\frac{1}{2}$ share in the “A” schedule property?
2. Whether the court fee paid by the plaintiff is correct?
3. To what relief the plaintiff/appellant is entitled?

6. During Trial, the plaintiff was examined as P.W.1.One Pazhani @ Sivalingam was examined as P.W.2. On the side of the plaintiff, as many as 12 documents were exhibited and marked as Exs.A1 to A.12. On the side of



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the defendants/respondents, the defendant 1 to 3 were examined as D.W.1 to D.W.3. Ex.B.1 to B.26 were marked.

7.Having considered all the above, the trial Court dismissed the suit with costs. That is how, the plaintiff is before this Court with this first appeal.

For the sake of convenience, the parties are referred as per ranking in the trial Court.

8.In this first appeal, it is contended by the plaintiff that the trial Court failed to take note of the fact that the suit properties were allotted to the father of the parties namely Sachidanandam, under registered partition deed and so the suit properties are ancestral in nature. Therefore, the father of the parties is not entitled to make a Will. The trial Court erroneously shifted the burden of proof on the plaintiff to disprove the alleged Will, despite the fact that the Will has to be proved in a manner known to law by its propounder. The trial Court failed to apply the principle laid down by the Hon'ble Apex Court in *Kartar Kaur and Anr. vs. Milkho and Ors* reported in



1996(11)SCC626 and in *Jaswant Kaur vs. Smt Amrit kaur*, reported in *AIR*

1977 SC 74 that the Will has to be proved in accordance to law by the person who propounds it. Hence, prays for allowing the appeal by setting aside the judgment and decree passed by the trial Court.

9.The main contention of the learned counsel for the plaintiff is that even if there is no specific denial on the part of the plaintiff in respect of the alleged Will, the propounder of the Will namely the defendant's ought to have proved the execution of the A.1 Will in accordance with law. He would vehemently contend that the burden to prove the execution of the Will is always upon the propounder of the Will. In this case, according to him, the defendants who propounds the Will has not proved the same to the hilt as required under Section 68 of the Indian Evidence Act. The learned counsel would further submit that no steps have been taken by the defendants to summon the attesting witnesses to prove the due execution. Thus, according to him, the requirement of Section 68 of the Indian Evidence Act have not been satisfied by the defendant. By taking me through the evidence of P.W.1 and the averments made in the plaint, he would submit that the plaintiff has



only admitted that existence of the Will and not the execution of the same. So far as the execution of the Will concerned, the plaintiff has denied the same, he contended. The learned counsel would submit that the plaintiff came to know about the registration of the Will only in recent times and taking advantage of the absence of the plaintiff, the 3rd defendant had influenced the father Sachidanandam to execute the said Will. His further contention is that the plaintiff and the defendants are in joint possession and enjoyment of the suit properties and have not divided the properties into metes and bounds as per the Will dated 27.01.1993. Thus, according to the learned counsel, the Will upon which, the defendants claims absolute title has not been proved in accordance with law. He would further submit that, if once, the Will goes out of consideration, as it has not been proved, then, the plaintiff is entitled to half share in the suit "A" schedule property.

10.Reiterating the findings of trial Court, the learned counsel for the defendants submitted that when the plaintiff has admitted the execution of Ex.A.1 Will and acted upon, it is not right to say that Ex.A.1 Will has to be proved in accordance with law. The learned counsel would further submit



that, in the said Will 'B' schedule property was allotted to the shares of defendants 1 & 2 over which the plaintiff had not sought any relief. Their father Sachidanandam had bequeathed equally by allotting two shares in the 'A' schedule property to the plaintiff and 3rd defendant and by allotting two shares in the 'B' schedule property to defendants 1 & 2. The Will came into force and the respective parties are residing in the respective shares and there is no necessity for a partition in the suit properties. It is further submitted that the Will had been in force for sixteen years since 21.05.1997 and the plaintiff also got electricity connection and patta in his name in the year 2006 itself.

11.The learned counsel by referring to the grounds raised in the first appeal would submit that, there was no dispute raised regarding existence and execution of Ex.A1 Will by the plaintiff neither in the plaint nor in his evidence and the plaintiff during his cross examination has categorically admitted the execution of the Will. Therefore, there is no reason to doubt the execution of the Will. Hence, the suit for partition is not maintainable and the trial Court has rightly dismissed the suit with costs. Therefore, no interference calls for in the Judgment and decree passed by the trial Court. Hence, the suit.



WEB COPY 12. From the above submissions made and from the pleadings and evidences available and from the judgment of the trial Court, in my considered opinion, the following points for consideration have arisen in this first appeal:-

"1. Whether the trial Court was right in relying upon Ex.A1. Will only based on the admissions made by the plaintiff without the same being proved in accordance with Section 68 of the Indian Evidence Act?

2. Whether the appeal can be allowed or not?"

13. Point No.1 &2

I have considered the above submissions made by the respective counsels for the parties. The main focus of the argument by the learned counsel for the plaintiff revolved around the admissibility of the Will without the same being proved in accordance with Section 68 of the Indian Evidence Act. The question that arises for consideration is as to whether such a proof



can be dispensed with if the execution of the Will has been admitted by the plaintiff. The learned counsel appearing for the plaintiff relied on the Judgments of the Hon'ble Supreme Court in ***Ramesh Verma (Dead) Through Legal representatives Vs.Lajesh Saxena (dead) by legal representatives and another]*** reported in ***2017 1 SCC 257***. The relevant portion in the judgment is extracted hereunder:

" Para 13. A Will like any other document is to be proved in terms of the provisions of Section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free Will and document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement."



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14. Thus, it is submitted that the principles laid down in the above case is that a Will shall not be used as evidence until it is proved in the manner prescribed under Section 68 of the Evidence Act, even if the opposite party has not specifically denied the execution of the Will.

15. The further contention of the learned counsel for the plaintiff is that, the burden of establishing the execution of the Will without reasonable doubt is upon those propounding the Will.

16. In this regard, he had made reference to the judgment of the Hon'ble Apex Court in ***Kartar Kaur and Anr. vs. Milkho and Ors.***, reported in **1996 (1) SCC 626**, the relevant portion of the judgment is extracted as here under:

"In a suit by heirs of deceased person to declare that the alleged Will of the deceased whereby they are deprived of the succession to his estate, is a forgery, the burden of establishing without reasonable doubt that the Will propounded is of the deceased is upon those propounding the Will."



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17.The learned counsel also relied upon the following judgement by the Hon'ble Apex Court in ***Jaswant Kaur vs. Amritkaur***, reported in ***AIR 1977 SC 74***

"In cases where the execution of a Will is shrouded in suspicion, its proof ceases to be simple and is between the plaintiff and the defendant. What, generally, is an adversary proceedings becomes in such cases a matter of the Court's conscience and then the true question which for consideration is whether the evidence led by the propounder of the Will is such as to satisfy the conscience of the Court that the Will was duly executed by the testator. It is impossible to reach satisfaction unless the party which sets up the Will of his a cogent and convincing explanation of the suspicious circumstances of the surrounding the making of the Will."

18.It is clear from the above decisions that Section 68 of the Evidence Act is mandatory for proof of Will and the burden of establishing the Will without reasonable doubt is upon those persons propounding the Will.

19.Whether the above principles is applicable to the facts and



circumstances of the present case has to be considered. If we analyse the

evidence on record, in my considered opinion, the arguments put-forth by the

learned counsel for the plaintiff cannot be accepted for the following reason.

The plaintiff has admitted in the plaint and in his evidence that during the life

time of his father, he executed a Will dated 21.07.1993 registered as

Document No.231/1993 in which his father had bequeathed the "A" schedule

property situated at old No.95, New Door No.109, Kamatchi Amman Koil,

Puducherry in favour of the plaintiff and 3rd defendant. He further admitted

that his father had also allotted the "B" schedule property namely old No.12

new old No.16 Nehru Street, Kadirkamam outgaret commune in favour of the

defendants 1 & 2. Therefore, it is not as though the plaintiff was not aware of

the Will. His only contention is that taking advantage of his absence, the 3rd

defendant had influenced the father Sachidanandam to execute the said Will.

During the cross examination, the plaintiff has stated that at the time of

execution of Will on 21.07.1993 his father was not keeping good health.

However, the above fact was not mentioned in the plaint averments.

Admittedly, the father of the parties died on 05.10.1997 and even according

to the plaintiff the Will came into operation on 05.10.1997. The defendants



contention is that the said execution of the Will was within the knowledge of the plaintiff. During the cross examination of the 3rd defendant, by the plaintiff, the 3rd defendant had categorically stated the plaintiff and his wife were present at the time of execution of the Will. This fact was not denied by the plaintiff. It was not even suggested to the above witness that the plaintiff and his wife were not present at the time of the execution of the said Will. In fact, after taking their respective portions as per the terms of the Will, the plaintiff has issued no objection letter dated 06.04.2000 to the Electricity Department to change the service connection in the name of the 3rd defendant in the portion allotted to him. The above fact was not denied by the plaintiff during his cross examination. He had also admitted that the suit "A" Schedule property had been already divided and the Municipal Authority has assigned two separate Door Nos.109 and 109-A respectively to the plaintiff and 3rd defendant. But he simply denied that he was not aware of the fact that who is paying the tax to the portion allotted to him. He had also admitted his signature in Ex.B.19 consent letter signed by him for changing the Electricity connection in the portion allotted to the 3rd defendant. Even the witness examined by the plaintiff as P.W.2, categorically admitted the allotment of



"A" schedule property to the plaintiff and the 3rd defendant and also the allotment of "B" schedule property to the defendants 1 & 2. But, he would state that the properties were not divided by metes and bounds. This deposition of P.W.2 cannot be accepted for the reason that if the properties were not divided by metes and bounds, mutation of Revenue records and the change of Electricity connection would not have taken place. On the other hand, the defendants 1 & 2 examined as D.W.1 & D.W.2, marked Exs.B.2 to B.4, the tax receipt, the Electricity demand bill in the name of plaintiff and encumbrance certificate relating to the document executed by the 3rd defendant in favour of Repco Bank. From the above documents, it is clearly seen that the "A" Schedule property has been divided with respective boundaries enjoyed by the plaintiff and the 3rd defendant. The documents Exs.B.9 to B.26, namely the Electricity and Water consumption receipts in the name of the plaintiff and defendants, the undertaking and consent letter given by the plaintiff and the 3rd defendant to the Electricity Department, the Municipal Tax demands would go to show that the Will was acted upon and accordingly suit properties were divided among the parties as per the terms of the Will. Regarding the legal proposition, the existence of the



document is one fact and execution of the document is a different fact. In order to rely on a Will, not only its existence but, its due execution should also be proved. However, the requirement to prove the Will, will arise when execution is disputed. In the instant case, during the course of evidence, and in the plaint averments, the existence and the execution of the Will had been admitted by the plaintiff. At no point of time the plaintiff has denied the existence and the execution of the Will. Above all, the Will has been acted upon by the parties concerned which is evidenced by mutation of Revenue records. When the existence and execution of Will has not been questioned by the plaintiff in the plaint, the question arises whether it is necessary to prove the Will under Section 68 of Indian Evidence Act. This was considered by the Division Bench of Kerala High Court in ***AIR 1990 Kerala 226 [Thayyullathil Kunhikannan and others vs. Thayyullathil Kalliani and others]*** wherein it was held under:

"Order 8 Rule 5 of the CPC provides that unless there is a specific denial of any allegation of fact made in the plaint, it shall be taken to be admitted. Section 58 of the Evidence Act provides that no fact need be proved in any proceedings, which by any rule of pleadings in force at the



time, the parties are deemed to have admitted by their pleadings. In this case, in the absence of any denial in the written statement, the genuineness and the validity of the Will must be deemed to have been admitted by the law of pleadings, namely Order 8 Rule 5, and therefore, that fact was not required to be proved at the trial. Section 68 states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive. The proviso to the Section which was introduced by the amending Act 31 of 1926 makes an exception in the case of any document, not being a Will, which has been registered, unless its execution by the persons by whom it purports to have been executed, is specifically denied. The fact that the proviso is not applicable to Wills and that it does not make an exception in the case of registered Wills, does not lead to any inference that a Will cannot be acted upon or used as evidence, unless it has been proved by examining and attesting witness. The only effect of the proviso is that registration of the Will by itself does not obviate the necessity of calling an attesting witness to prove it, if it is otherwise required to be proved. The proviso does not speak of a case where a Will is not in dispute. Section 68 relates to those documents which require to be proved at the



trial of a Suit. If by any Rule of law or of pleadings, such proof is not required. Section 68 cannot operate to insist on formal proof by calling an attesting witness. Section 58 has to be read as overriding section 68 and as obviating the necessity for calling an attesting witness, unless the execution of the Will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technically and waster of judicial time to insist on examination of an attesting witness, before a Will could be used as evidence. Phipson on Evidence 12th Edition (1976) explains the rationale behind examining an attesting witness as that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, "an agreement which may be waived for the purposes of dispensing with proof at the trial." (paragraph 1751). In paragraph 1757, the learned author points out that proof of execution of documents required by law to be attested is dispensed with (although the attesting witness may be alive and in Court) "when the execution has been admitted for the purposes of trial." Order 8 Rule 5 C.P.C deems the execution of the Will to be admitted in the absence of any denial thereof in the written statement. Examination of any attesting witness is therefore unnecessary when the parties have not joined issue on the validity or genuineness of the Will."



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20.A reading of the above said decision clearly shows that the examination of an attesting witness to a Will is unnecessary when the parties have not joined issue on the validity or genuineness of the Will. As pointed out above, the validity and genuineness of Ex.A-1 Will was not at all in issue in the above suit. Therefore, as laid down in the above said decision, the examination of one of the attesting witness to Ex.A.1 Will is not necessary.

21.Again in *S.Kaliyammal Vs. K.Palaniammal* reported in *AIR 1999 (Madras) 40* the learned Judge of this Court in paragraph 15 of the judgment has observed as follows:

22."I am of the opinion that, only when the execution of the Will is denied by a party, then the burden is on the party who relies upon the Will to prove the execution of the same. When the execution is not denied, it is unnecessary to compel the person who relies upon the document to let in evidence to establish the execution, since the admitted facts need not be proved.



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23. The above decision case clearly lays down the principle that when execution of Will has not been specifically denied, examination of attesting witness to a Will is unnecessary. In so far as, the decision case relied upon by the learned counsel for the plaintiff in **Ramesh Verma** stated supra, this Court in **Boomathi (Died) & Others vs. Murugesan (Died) & others** reported in **2023 2 LW 162** observed as follows:

Para 26. In this Context, it would be relevant to refer to Sections 17 and 58 of the Indian Evidence Act:-

17. Admission defined – An admission is a statement, [oral documentary or contained in electronic form], which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

"58 Facts admitted need not be proved. No fact need to be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of



pleading in force at the time they are deemed to have admitted by their pleadings: provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

(27) Applying the definition of 'admission' as set out in Section 17 of the Indian Evidence Act, if Sections 56 to 58 are applied, it leads to the only conclusion that facts that are admitted, whether it is in oral or documentary form, are not required to be proved.

As already mentioned herein above, proof would become warranted only in cases where execution of the Will has not been admitted, say in cases where execution is specifically denied or not specifically denied.

33. This Court has applied its mind to the various principles laid down by the Hon'ble Supreme Court as well as this Court and other High Courts, especially in this context of Section 68 of the Indian Evidence Act, proof of a Will where execution is not specifically denied and in cases where the execution is categorically admitted. The ratio laid down by the



Hon'ble Supreme Court in Ramesh Verma's case [cited supra] reported in 2017 91 SCC 257, cannot be a precedent for the proposition where the opposite party clearly admits to the execution of the subject Will as in the instant case. Therefore, we are not in respectful agreement within the judgments in P.Malliga's case and Akkinirajan's case [cited supra] following the ratio laid down by the Hon'ble Supreme Court in Jagdish Chand Sharma's case. On the contrary, we approve the ratio laid down in P.Radha vs. Irudayadoss and Others reported in 2022 2 L.W. 124 = 2022 SCC Online Mad 886 and Vanjiammal and Others vs. Viday and Others in the order dated 21.04.2017 made in CRP.[PD] No.3659/2013. Hence, the point Nos.1 & 2 are answered accordingly.

24. The above decision case squarely applies to the facts and circumstances of the present case, the plaintiff neither in the plaint nor in his evidence has stated that the Will was executed in a suspicious circumstances or questioned its genuinity. Therefore, the question of proving the execution of the Will by the defendant do not arise. Instead, the plaintiff categorically admitted the existence and execution of the Will and also took possession of



the portion allotted to him as per the terms of the Will. The Revenue records and the Electricity and Water bills (Ex.B.1 to B.23) in the name of the plaintiff and the 3rd defendant would go to show that the plaintiff and the 3rd defendant are in actual possession and enjoyment of the portion allotted to them as per the terms of the Will. Moreover even according to the plaintiff, the Will was executed in the year 21.07.1993. The above suit was filed only in the year 2013. There is no explanation on the side of the plaintiff for the delay in filing the suit. It would only show that the plaintiff has accepted the Will and for the reason best known to him, the plaintiff had approached this Court belatedly. Therefore, when the Will is not potentially denied, there is no need for the propounder of the Will to prove the same.

25. Therefore, I am of the opinion that, only when the execution of the Will is denied by a party, then the burden is on the party who relies upon the Will to prove the execution of the same as per Section 68 of the Indian Evidence Act 1972. Once, the Will is found to be genuine then it has to be held that the plaintiff is not entitled for any relief in the suit. Therefore, I answer all the points framed in the first appeal in favour of the respondents/defendants.



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18.04.2023

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Speaking/Non-speaking order



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K.GOVINDARAJAN THILAKAVADI, J.

vsn

PRE- DELIVERY JUDGEMENT MADE IN

A.S.No.321 of 2016

and

C.M.P.No.4082 of 2017

18.04.2023