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THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 26.04.2024	Delivered on 03.06.2024
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CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR JUSTICE R.SAKTHIVEL

A.S.No.789 of 2018
and
C.M.P.No.21157 of 2018

M/s.Binny Limited,
Container Freight Station,
Cooks Road, Perambur,
Chennai – 600 012.

...Appellant

Vs.

1.M/s.Bharat Fritz Werner Ltd.,
Represented by its Secretary,
N.N.Upadhyay
Off Tumkur Road,
Bangalore – 560 022.

2.M/s.ICICI Lombard General Insurance Company Limited,
Chattabhai Centre, Second Floor,
Nungambakkam,
Chennai – 600 034.

...Respondents



A.S.No.789 of 2018

Prayer: Appeal filed under Section 96 of the Code of Civil Procedure, against the judgment and decree of the VII Additional City Civil Court at Chennai dated 28.03.2018 in O.S.No.5947 of 2015.

For Appellant	: Mr.P.Valliappan Senior Counsel for Mr.N.Loganathan
For 1 st Respondent	: Mr.T.V.Suresh Kumar for M/s.Genicon & Associates
For 2 nd Respondent	: Mr.S.S.Sajeev Kesan

J U D G M E N T

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

The 1st defendant is on appeal, aggrieved by the decree and judgment in O.S.No.5947 of 2015 on the file of the VII Additional City Civil Court, Chennai.

2. The said suit was launched by the 1st respondent herein seeking a decree for a sum of Rs.10,88,707/- with interest at 18% per annum from the date of plaint till date of realization towards damages to the goods belonging



A.S.No.789 of 2018

to the 1st respondent that were entrusted with the appellant herein, a Container Freight Station. The 2nd respondent herein, a General Insurance Company was impleaded, as the appellant had insured the said goods in its custody with the said Company.

3. Henceforth, the parties will be referred to as per their rank in the suit for the sake of convenience.

4. The plaintiff sued for damages contending that the goods imported by it were entrusted with the 1st defendant, a Container Freight Station for custody till such time the customs duty payable on the goods is paid by the plaintiff. The entrustment of the goods was also acknowledged by the 1st defendant. The storage charges included the insurance premium payable to the 2nd defendant for covering all risks for the goods that were stored with the 1st defendant. Unfortunately, due to the heavy rains that lashed Chennai during October 2005, the entire warehouse, where the goods were stored got inundated, resulting in damage to the goods.



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5. The plaintiff was informed of the loss by the 1st defendant and a survey was conducted by a qualified surveyor on 03.11.2005. The surveyor assessed the damage to the goods and the 1st defendant lodged a claim with the 2nd defendant in respect of the goods lying in the warehouse. The plaintiff also on its part lodged a claim on 21.11.2005. A joint survey was conducted on 29.11.2005 and some of the goods belonging to the plaintiff were found to have been damaged and the value of the damaged goods was assessed at Rs.10,88,707/-. The 1st defendant referred the claim to the Commissioner of Customs, since the goods damaged were dutiable goods. The Commissioner of Customs lodged a claim with the 2nd defendant under the insurance policy dated 21.06.2005. The 2nd defendant did not settle the claim. Since the goods were urgently required by the plaintiff for its manufacturing purposes, the plaintiff had paid the customs duty under protest and cleared the goods.

6. Contending that the cargo was damaged due to the negligence of the 1st defendant and the 1st defendant as a bailee was duty bound to protect the goods in terms of Section 151 and 152 of the Indian Contract Act, 1872,



A.S.No.789 of 2018

the plaintiff laid the suit impleading the Insurance Company as the 2nd defendant, since according to it, the 1st defendant is entitled to indemnity from the 2nd defendant as there was a valid insurance policy, which covered the risk of damage to the goods at the relevant point of time.

7. The suit was resisted by the 1st defendant contending that it had taken all necessary care that was expected of a bailee as required under Section 151 of the Act. It was contended that if the goods are damaged despite the bailee having exercised due care as expected of it under Section 151 of the Contract Act, it cannot be held liable for any loss to the goods. It was the further contention of the 1st defendant that in any event the goods having been insured with the 2nd defendant under the all risk policy at the relevant point of time, it is the 2nd defendant, which would be liable to pay the damage that had occurred to the 1st defendant.

8. The 2nd defendant resisted the claim contending that the cover under the policy does not extend to the loss of goods. According to the 2nd defendant, the coverage is available only in respect of liability to pay



customs duty and the beneficiary under the policy is only the customs department and not the bailee.

9. On the above pleadings, the learned trial Judge framed the following issues and an additional issue:-

1. Whether the plaintiff is entitled to a sum of Rs.10,88,707/- with interest at 18% p.a. as prayed for?

2. Whether the 1st defendant is responsible for the damages caused to the plaintiff's goods due to the negligence of the 1st defendant?

3. Whether the claim for loss/ damages to the goods was covered under the contract of insurance issued by the 2nd defendant?

4. Whether the plaintiff has a sustainable claim after the first defendant has issued full discharge upon settlement of the claim by the 2nd defendant for Rs.14,30,875/- under the contract of insurance?

5. Whether the plaintiff is entitled to claim any interest for the suit amount?

6. To what relief, the plaintiff is entitled?

Additional Issue:

1. Whether the 1st defendant is liable to the suit claim?



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10. At trial one Thiru.R.J.Ravindranatha, Manager- Strategic Sourcing Division of the plaintiff was examined as PW1 and Exs.A1 to A30 were marked. On the side of the defendants one Thiru.K.Prabhu, Officer – Bond of the 1st defendant Company was examined as DW1 and Ex.B1 was marked. The 2nd defendant Insurance Company did not choose to let in any evidence.

11. On an appreciation of the evidence on record, the learned trial Judge concluded that the loss had occurred due to the negligence of the 1st defendant. The learned trial Judge found that the care expected of the bailee was not taken by the 1st defendant and therefore there was negligence on its part, resulting in damage to the goods concerned.

12. On the issue relating to the liability of the 2nd defendant, the learned trial Judge on an interpretation of the policy of insurance, held that what was insured was only the liability to pay customs duty and not the interest in the goods. On the said finding, the learned trial Judge exonerated



A.S.No.789 of 2018

the Insurance Company and passed a decree only against the 1st defendant.

Hence, the 1st defendant is on appeal.

13. We have heard Mr.P.Valliappan, learned Senior Counsel instructed by Mr.N.Loganathan, learned counsel for the appellant, Mr.T.V.Suresh Kumar, learned counsel for M/s.Genicon & Associates for the 1st respondent and Mr.S.S.Sajeev Kesan, learned counsel appearing for the 2nd respondent.

14. Mr.P.Valliappan, learned Senior Counsel appearing for the appellant would vehemently contend that the learned trial Judge erred in concluding that the 1st defendant had not taken the care expected of it. He would contend that the statutory duty imposed upon the 1st defendant under Section 151 of the Indian Contract Act, 1872 is limited to the care to be taken by a man of ordinary prudence. Contending that there was no negligence or lack of prudence on the part of the 1st defendant, the learned Senior Counsel would submit that the cause for damage being an act of god it will not result in the liability being mulcted on the 1st defendant. The learned Senior Counsel would further argue that there was no evidence to



A.S.No.789 of 2018

substantiate the claim that the damage occurred due to the negligence in handling the goods by the 1st defendant.

15. Arguing further the learned Senior Counsel would submit that in any event the trial Court was in error in exonerating the Insurance Company of the liability. Relying upon Ex.A23 the policy of Insurance, the learned Senior Counsel would submit that the contention of the Insurance Company, that the scope of cover was restricted to the liability to pay the customs duty arising under Section 45(3) of the Customs Act alone and not the loss or damage to the goods, is flawed. The learned Senior Counsel would point out that the learned trial Judge has completely overlooked the fact that the insured's interest as a bailee in the event of loss or damage to the goods is also covered under the policy. Pointing out the exclusions, the learned Senior Counsel would submit that though there are about 13 different heads of exclusions enumerated under the policy, there is nothing in the exclusion clause, which would exclude the liability arising out of damage to the goods.



A.S.No.789 of 2018

16. The learned Senior Counsel would also draw our attention to the judgment of the Single Judge of Allahabad High Court in ***Shanti Lal and another Vs. Tara Chand Madan Gopal*** reported in ***AIR 1933 Allahabad 158*** to contend that as a bailee the 1st defendant would not be liable as it had taken prudent care and the cause of the damage was an act of god and therefore it cannot be held responsible for the damage caused.

17. Reliance is also placed by the learned Senior Counsel on the judgment in ***Baldeo Narain Singh and others Vs. State*** reported in ***AIR 1959 Patna 442***, wherein, the Division Bench of the Patna High Court considered the right of a bailee to compensation for damages caused due to vis major / flooding.

18. The learned Senior Counsel would also draw our attention to the judgment of the Single Judge of this Court in ***Foolchand Vs. Union of India*** reported in ***AIR 1961 Madras 64*** to justify the claim that it is entitled to be indemnified by the Insurance Company / 2nd defendant in the event of it being made liable for the loss in terms of Order I Rule 3 of the Code of



Civil Procedure.

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19. Contending contra Mr.T.V.Suresh Kumar, learned counsel appearing for the plaintiff would submit that the fact that the goods were highly sophisticated machinery and it required more careful handling was known to the 1st defendant. As a Container Freight Station, the 1st defendant was bound to take utmost care and it cannot escape liability by claiming that the damage occurred due to the act of god. The survey report also indicates that the 1st defendant should have been more careful in handling the goods. Once it is found that the care as a man of ordinary prudence was wanting, the 1st defendant would be liable.

20. On the question of liability of the Insurance Company, the learned counsel for the plaintiff would submit that the trial Court erred in concluding that the policy covered only the liability to payment of customs duty and nothing more. The learned counsel would also heavily rely upon the fact that the charges levied by the 1st defendant for storage of the goods with it included the Insurance premium also, which, according to him, would show



A.S.No.789 of 2018

that what was insured was interest in the goods also and not only the customs duty payable.

21. Attempting to avoid the liability Mr.S.S.Sajeev Kesan, learned counsel appearing for the Insurance Company/ 2nd defendant in the suit would contend that what was covered under Ex.A23, the insurance policy was only the liability towards payment of customs duty and nothing more, that is the precise reason why the beneficiary under the policy is shown as the customs department and not the insured viz., the 1st defendant.

22. We have considered the rival submissions.

23. The following points arise for determination in this appeal:

1) Whether the 1st defendant had failed in its duty as a bailee to take reasonable care to protect the goods which were entrusted to it?

2) Whether the 2nd defendant Insurance Company is liable for the loss caused to the goods?

Point No.1:



A.S.No.789 of 2018

24. The factum of entrustment and the factum of damage are admitted. Therefore, it is only the question of the degree of care that ought to have been taken and that was taken, which is in dispute. The plaintiff would contend that the goods were parts of sophisticated machinery which required a higher degree of care and caution on the part of the 1st defendant.

25. No doubt, there was some evidence to show that there was very heavy rains in Chennai during the 27th and 28th of October 2005 and there was heavy flooding in several areas. The godown of the 1st defendant was also not spared, resulting in huge damage. DW1 has admitted that there will be water logging during rainy seasons in the floor level of the warehouse and he has also admitted that electric motors will be used to drain flood water from the warehouses. He would further go on to admit that there is a condition that Container Freight Stations should keep the areas free of flooding while permission is granted by the customs Department. Therefore, the fact that the 1st defendant had not taken due care is evident from the deposition of its own witness.



26. No doubt, Section 151 of the Contract Act requires a bailee to take reasonable care as an ordinary prudent man would do and nothing more.

The position of the 1st defendant, though in law, could be equated to that of a bailee, it is not, in a strict sense, a bailee. The entrustment of the goods with the 1st defendant is pursuant to a statutory compulsion under the Customs Act and the 1st defendant in fact is an agent of the customs department, while it is in the custody of the goods. Therefore, the theory of reasonable care cannot be strictly applied to the 1st defendant as the 1st defendant is not the choice of the owner of the goods viz., the importer. The 1st defendant is put in custody of the goods solely because it is licensed by the Customs Department to possess dutiable goods during such time the duty is paid. Therefore, the standard of care that is required of the 1st defendant, in our considered opinion, should be definitely more than that of an ordinary bailee, which is put in custody of goods, belonging to another, for variety of reasons.

27. The evidence of DW1 discloses that the water stagnation is a



A.S.No.789 of 2018

regular feature and that by itself would show that the 1st defendant has not taken the required care for safekeeping of the goods, which are entrusted with it. We are therefore unable to agree with the contention of the learned senior counsel for the appellant that it had taken all the care required of it under Section 151 of the Contract Act and therefore it cannot be made liable for the damages caused.

28. The judgment of the Division Bench of Patna High Court relied upon by the learned Senior Counsel for the appellant arose out of the case where the bailee sued for damages to the goods that were entrusted to it. Therefore, the Division Bench took a view that a bailee would be entitled to damages for the goods that were entrusted with it from the State, which was the owner of the goods. The issue relating to degree of care that is to be taken by a bailee was not gone into, though a reference was made to Sections 151 and 152 of the Contract Act by the Division Bench.

29. However, on the evidence that is available in the case on hand, we



find that there was some negligence on the part of the 1st defendant in handling the goods that was entrusted to it and we do not see any reason to disturb the finding of the learned trial Judge regarding the liability of the 1st defendant. Therefore point No.1 is answered against the appellant.

Point No.2:-

30. While it is the contention of the plaintiff and the 1st defendant that the policy of Insurance, Ex.A23 covers the loss of goods also, apart from the liability to pay the customs duty, the 2nd defendant would plead that the policy does not cover the loss of goods, since the 1st defendant, the insured has no interest in the title to the goods. In order to appreciate this contention, we will have to necessarily go by the scope of cover enumerated in Ex.A23 the policy of Insurance. Clause 2 of the Schedule to the policy which deals with the scope of cover reads as follows:-

2. Scope of Cover:

The Company hereby agrees (subject to the terms, conditions and exclusions herein contained or endorsed or otherwise expressed hereon) to indemnify the Insured in respect of the Customs Duty paid by the Customer to



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A.S.No.789 of 2018

Customs Authorities under a Demand note arising out of the Customer's legal liability to Customs Duty under Section 45(3) of the Customs Act for Loss of or damage to Goods (as defined) whilst stored/ moved/ handled by the Insured's employees of their agents at the Customs Bonded Warehouse in the Insured's Container Freight Station at Binny Mills premises, Cookes Road, Perambur, Chennai – arising out of the following perils only:

1.Fire, Burglary, theft and Pilferage

2.Accidental Damage

3.The cover will operate only if a demand note is rec'd from customs department and if the demand note itself is a consequence of loss due to Fire, Burglary, ,theft pilferage and Accidental Damage only, subject to exclusions stated in the All Risk Policy.

(Excluding Fines, Penalties, Punitive or Other damages of any Kind)

The Insured's interest as a “Bailee” in the event of the loss or damage to the Goods due to the above mentioned perils stands covered.

31. We should also point out that Clause 3 which deals with



A.S.No.789 of 2018

Exclusions does not exclude the liability of the Insurance Company in the event of loss or damage to the goods. The learned counsel for the Insurance Company/ 2nd defendant would rely upon the opening part of Clause 2 to contend that what is insured is the liability to pay customs duty arising under the demand note issued by the Authority under Section 45(3) of the Customs Act alone. The learned counsel for the appellant and the 1st defendant would submit that apart from covering the liability to pay customs duty, the policy also covers the insured's interest as a bailee in the event of loss or damage to the goods. This according to the learned counsel, is evident from the later part of Clause 2, which has been highlighted above.

32. Reliance is also placed by the learned counsel for the appellant on the judgment in *Canara Bank Vs. United Insurance Company Limited and others* reported in *2020 (3) SCC 455*, wherein, the Hon'ble Supreme Court had dealt with the liability of the Insurance Company for the loss of goods, which were entrusted with the cold storage, due to a fire. The farmers who were the owners of the agricultural produce viz., chilli, had stored their goods with a cold storage, which had availed an insurance with



A.S.No.789 of 2018

M/s. United India Insurance Company Limited. A fire accident took place and the entire building was engulfed in fire and the entire agricultural produce that were stocked in the building were destroyed. A claim was made by the farmers before the Karnataka State Consumers Disputes Redressal Commission. The Insurance Company raised a defence contending that as there was no privity of contract between it and the farmers, it is not bound to make good the loss. It was also contended that the fire was not an accidental one.

33. The State Commission however concluded that the fire was accidental and it also found that as per the tripartite agreement between the Bank which had advanced money to the farmers for cultivation, the cold storage and the farmers, an Insurance policy was mandatory and therefore the Insurance Company is liable to make good the loss.

34. In some of the cases the Bank was made liable to pay the costs and in majority of cases the complaint against the Bank was dismissed. Therefore, the Insurance Company and the Bank preferred a bunch of



appeals to the Hon'ble Supreme Court. The Hon'ble Supreme Court concluded that the Insurance Company will be liable to pay the value of the goods that were damaged and disposed of the appeals with several other directions for payment of loans that were outstanding and payable to the Bank out of the payments that were made by the Insurance Company.

35. One of the questions that were considered by the Hon'ble Supreme Court was the interpretation of Insurance Company involving third party beneficiaries. In considering the said question the Hon'ble Supreme Court held as follows:-

22. The principles relating to interpretation of insurance policies are well settled and not in dispute. At the same time, the provisions of the policy must be read and interpreted in such a manner so as to give effect to the reasonable expectations of all the parties including the insured and the beneficiaries. It is also well settled that coverage provisions should be interpreted broadly and if there is any ambiguity, the same should be resolved in favour of the insured. On the other hand, the exclusion clauses must be read narrowly. The policy and its



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A.S.No.789 of 2018

components must be read as a whole and given a meaning which furthers the expectations of the parties and also the business realities. According to us, the entire policy should be understood and examined in such a manner and when that is done, the interpretation becomes a commercially sensible interpretation.

36. The Hon'ble Supreme Court also took note of the fact that the premium was paid and the policies were taken at the cost of the farmers and therefore, they have a right to seek damages directly against the Insurance Company. This right of the farmers was considered by the Hon'ble Supreme Court along with the question as to whether the farmers can be termed as “consumers”. In deciding the said question, the Hon'ble Supreme Court observed as follows:-

29. The definition of “consumer” under the Act is very wide and it includes beneficiaries who can take benefit of the insurance availed by the insured. As far as the present case is concerned, under the tripartite agreement entered between the Bank, the cold store and the farmers, the stock of the farmers was hypothecated as security with the Bank and the Bank had insisted that the said stock should be



WEB COPY



A.S.No.789 of 2018

insured with a view to safeguard its interest. We may refer to the penultimate clause of the tripartite agreement, which reads as follows:

“whereas the Third Party has agreed to insure the produce/goods stored in the cold storage to indemnify the produce in case of any casualty or accident by any means to cover the risk and also to cover the loan amount to avoid loss at the cost of the Second Party till the release order or repayment of the loan amount.”

30. *The aforesaid clause in unambiguous terms binds the cold store to insure the goods, to indemnify the produce, to cover the risk and cover the loan amount. This insurance policy has to be taken at the cost of the second party, which is the farmer. Therefore, there can be no manner of doubt that the farmer is a beneficiary under the policy. The farmer is, therefore, definitely a consumer and we uphold the orders of both the Commissions that the complaint under the Act is maintainable.*

37. In the case on hand, Ex.A23, the Insurance Policy, in our opinion, covers the insured's interest as a bailee, which would mean that the liability which the insured incurs as a bailee will stand covered. The 1st defendant



A.S.No.789 of 2018

incurs the liability in terms of Sections 151, 152 of the Contract Act, 1872.

Once it is held that the 1st defendant is liable for damages and that the 1st defendant had a right to be indemnified by the 2nd defendant in the event it is made liable for damages, the Insurance Company would automatically be liable to indemnify the 1st defendant.

38. The next question that would arise is as to whether the plaintiff, which is a third party to the contract of insurance can make the claim directly against the 2nd defendant/ Insurance Company. Though it would be ideal to follow the procedure under Order VIII-A where the 1st defendant would make a claim against the 2nd defendant in the suit itself, we do not think that such a technicality should be an obstacle for the plaintiff to make a claim against the Insurance Company in the suit against the 1st defendant. Order 1 Rule 3 of the Code of Civil Procedure enables joinder of any person where any right to relief in respect of same act or transaction or series of acts or transactions is alleged to exist against such persons and where separate suits are brought against such persons a common question of law or fact would arise.



39. In *Foolchand Vs. Union of India* reported in *AIR 1961 Madras*

64, the Insurance Company of the consignor of the goods, who had entrusted the goods with the railways was impleaded as a party to the suit. An objection was taken by the other defendants in the suit to the joinder of the Insurance Company as a party and the learned trial Judge passed an order directing the plaintiff to elect against which of the two sets of defendants he would prefer to continue the suit. The said order was assailed in a revision before this Court and it was held that joinder of the Insurance Company will not amount to mis-joinder of parties or causes of action and it was held as follows:-

Generally in such cases the insurer insists on the consignor proceeding against the carrier first and if the carrier is found liable, the insurer is absolved; if the former is held not liable, the latter's liability will arise. In either case the liability arises by reason of the loss of goods in transit. The claims against the railway and the insurer would thus be in the alternative. The learned Judge has evidently failed to notice that Order 1 Rule 3 C. P. C. permits joinder of several defendants against whom any right to relief in respect of or arising out of the same act or



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A.S.No.789 of 2018

transaction is alleged to exist whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise.

The words used in Order 1 Rule 3 C. P. Code relate to the same act or transaction and not the same cause of action. The substantial case for the plaintiff before the lower court was that he lost the goods on transit. The loss would be the act or transaction giving rise to liability of the defendant. Whether the loss took place in circumstances which would render the Railway Administration liable or otherwise can only be ascertained at the trial. The common question to be decided in the circumstances of the case is the loss and the right to relief will be in the alternative depending on the finding of the court.

40. We find that the above observations of this Court would equally apply to the present case also. As a fact we should point out that the charges that has been collected by the 1st defendant from the plaintiff for the facility that is offered to the plaintiff include the charges of insurance also. Therefore, we do not find anything amiss in the Insurance Company being



made the 2nd defendant in the suit.

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41. We therefore conclude that in view of our finding on point No.1 the 1st defendant would be liable for the value of the goods damaged and the 2nd defendant as the insured would be liable to indemnify the 1st defendant. We find that the learned trial Judge has granted interest at 18% per annum from the date of plaint till date of realization. No doubt, it is a commercial transaction, but, the grant of 18% interest post decree, in our considered opinion, is on the higher side. We therefore reduce the post decree interest to 9% from 18%.

42. In fine, the appeal is **allowed in part**. The 1st defendant is entitled to be indemnified by the 2nd defendant for the damages caused and the post decree interest is reduced to 9%. The suit in O.S.No.5747 of 2015 will stand decreed in the following terms:

*1) the 2nd defendant is liable to pay a sum of Rs.10,88,707/-
with 18% interest from the date of suit till date of decree and 9%
interest thereafter till date of realization;*



A.S.No.789 of 2018

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2) *the plaintiff would be entitled to the costs of the suit; and*

3) *we direct the parties to bear their own costs in this appeal.*

Consequently, the connected miscellaneous petition is closed.

(R.SUBRAMANIAN, J.)

(R.SAKTHIVEL, J.)

03.06.2024

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Index : Yes

Internet : Yes

Neutral Citation : Yes

Speaking order

To

The VII Additional Judge,
City Civil Court, Chennai.



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A.S.No.789 of 2018

R.SUBRAMANIAN, J.
and
R.SAKTHIVEL, J.

dsa

A.S.No.789 of 2018
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C.M.P.No.21157 of 2018

03.06.2024