

TANZANIA / JUDGMENT

GLENCORE INTERNATIONAL AG VS T INTERNATIONAL CONTAINER TERMINAL SERVICES LTD COMM CASE NO

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 33 OF 2014 GLENCORE INTERNATIONAL
AG.....PLAINTIFF VERSUS TANZANIA INTERNATIONAL CONTAINER TERMINAL
SERVICES LIMITED..... DEFENDANT

JUDGMENT

Mansoor, J: Date of JUDGMENT- 22nd APRIL 2016 The plaintiff is a limited liability company incorporated under the laws of Switzerland, and the defendant is a limited liability Company incorporated under the laws of Tanzania. The plaintiff's claim against the defendant is for payment of US\$ 1,546,656.86 being the value of the cargo of 149.904 1 metric tons (net weight) of copper cathodes ("the Cargo"), stacked into the containers numbered GLDU 552737-7, MEDU 2341267-7, FCIU 341141-1, TGUH 319566-5, PONU 01979-8 and CAIU 1251038-7 ("the consignments") which were to be shipped to Pakistan, Cairo, Egypt and Shanghai, China. The plaintiff claims against the defendant is also for general damages for breach of contract, costs of the suit and any other relief this Court may deem fit and just to grant. At paragraph 4 of the plaint, the plaintiff pleaded that the plaintiff was insured by Lloyds Syndicates, thus it recovered the loss from the insurers, and hence the suit was brought under the subrogation principle. The plaintiff alleges that it had purchased the Cargo from Kanshani Mining Pic and Mopani Copper Mines Pic, Mining Companies based in Zambia. That the plaintiff entered into an agreement with its Agent namely Inara Investments Limited from Zambia to facilitate transportation of Cargo from Zambia to Tanzania at the Depot of Tanzania Road Haulage (1980) 2 Limited "TRH". TRH was to handle the cargo and deliver to the Defendant. TRH sub contracted Ocean Air Freight Limited "Oceanair" to ensure the Cargo is exported to the destinations through the defendant's terminal at the Port of Dar es Salaam. The plaintiff continued to state that TRH parked the cargo and Oceanair Freight Limited issued the Stuffing Report showing Mine Reference, Bundle Numbers, Gross Weight, Container Numbers and Seal Numbers. That the plaintiff represented by

Inara Investments Limited, and TRH, and Oceanair Freight Limited contracted the defendant to safely receive, process, store, keep, handle and load the cargo at the defendant's terminal at the Port of Dar es Salaam, and to ensure that the Cargo was shipped, discharged and delivered to the Purchasers. The Plaintiff alleges that the defendant breached the contract. That the Cargo which was in Container No. GLDU 552737-7 which was to be shipped to Pakistan Cables Limited, never reached its destination. This container was delivered by TRH to the defendant on 28th March 2011 ready for loading in MV ER CAEN against payment of the Invoice No. 3 754934 issued by the Defendant. The Defendant issued Equipment Interchange Receipt no. 1105931 dated 28th March 2011 acknowledging receipt of this particular container. It is alleged by the plaintiff that the defendant breached its duties, he did not load this container in the vessel and as a result the said container was lost under the jurisdiction of the defendant. Another container lost in the hands of the defendant, alleged by the plaintiff is Container No. MEDU-2341267-7 and Container No TGUH 319566-5. These containers were for Grade One Electrolytic Copper Cathodes to a company in Cairo, Egypt known as United Metals Company. The Defendant issued Equipment Interchange Receipt No. 1117313 and No. 1117366 in respect of these containers dated 13th April 2011. It is alleged by the Plaintiff that TRH delivered the three containers Numbered MEDU- 2341267-7, FCIU 341141-1 and TGUH 319566-5, to the defendant on 13th April 2011 to be loaded to MV AYALA ready to be shipped to United Metal Company in Cairo Egypt. Payments to the 4 defendant were made, and the defendant issued invoice No. 758018. These containers, as alleged by the plaintiff, were never loaded in the said ship, as a result the containers were lost in the hands of the defendant. The plaintiff alleged that, in respect of Container No. FCIU 341141-1, the defendant did not issue the Equipment Interchange Receipt Form, as the Defendant had run out of the Forms, and instead the Defendant stamped the Export Container Order, on Oceanair Freight Limited headed paper as proof that the Defendant had received the said Container. The Export Container Order was dated 13th April 2011. Another container lost, as alleged by the Plaintiff is Container No. PONU 01979-8 and No. CAIU 251038-7 for Copper Cathodes to be shipped to Shanghai China for Shanghai Langning Trade Co. Limited. It's alleged by the Plaintiff that these Containers were delivered to the Defendant by TRH on 15th April 2011, against payment of invoice no. 757635 issued by the Defendant, to be loaded on MV ULYSES. These 5 Containers were not loaded into the Ship by the Defendants, the said Vessel sailed on 22nd April 2011, without these two containers. These two containers are alleged to have been missing, as the Agreement with the Chinese Company was for 100 Containers, but these two containers were missing. Against these two containers the Defendant issued the Equipment Interchange Receipts dated 15th April 2011. In total therefore Six Containers containing Copper Cathodes were missing. Despite several demands and requests, it is alleged by the plaintiff that the defendant refused or neglected to make good for the lost containers. In its defence, the defendant denied each and every allegations contained in the plaint, and stated that it never breached any of its duties, and denied being responsible for any missing containers. The defendant requested the plaintiff to be put under strict proof of its claims. 6 On the above pleadings, this Court has framed the following issues for trial.

1. Whether there was an agreement of handling six lost containers between the plaintiff and the defendant;
 2. If, yes, whether the defendant breached the contract, and
 3. To what reliefs are the parties entitled. In the course of trial and during the hearing of the plaintiffs case, the plaintiff presented Mr Victor Mesquite, an employee of Glencore International AG. He stated in his witness statement that the plaintiffs company purchased the Copper Cathodes from Mopani Copper Mines Pic, and from Kanshani Mining Pic in Zambia. The Cargo was transported using a company known as Inara Investments Limited. The Cargo was duly packed in the vehicles. Mopani and Kanshani issued a Loading List signed by all the parties to evidence that the cargo was loaded into the vehicles. He said that Inara delivered the cargo to the depot of Tanzania Road Haulage
- (1980) Limited “TRH”. TRH received the Cargo and delivered it to the Defendant by road. Inara contracted TRH to perform clearing and forwarding services in respect of the Copper Cathodes. TRH then in turn appointed an in house company Oceanair Freight Limited “Oceanair” to perform the clearing and forwarding services. Oceanair contracted TRH to stack the copper cathodes into the containers, TRH made bookings instructions to the defendant and issued Copper Stuffing Reports for each consignments. The Defendant issued Tax Invoices for each Container to Oceanair. He said, TRH delivered the Containers by Road to the Defendant and the Defendant acknowledged Receipt of the Containers by issuing Equipment Interchange Receipts for all the Containers except for Container No. FCIU 341141-1, where the defendant acknowledged having received it by stamping in the Export Container Order No. 10909 of Oceanair dated 13th April 2011. The six containers which were lost were to be shipped to 8 different destinations. One container was to be shipped on MV ER Caen, three on MV MSC Ayala, and two on MV Ulysses. He said, in a number of correspondences, the defendant’s officers admitted that the containers went missing. This witness produced in Court as Exhibits the following documents:
1. 2010-2011 Evidence of Cover (Insurance), from Lloyds & Partners Limited (Exhibit P1);
 2. Subrogation Form issued by underwriters authorising the underwriters to use the name Glencore International AG, dated 28/07/2011 (Exhibit P2);
 3. Evidence Cover issued by Lloyds Partners Limited for 2010-2011 specifically for Glencore International AG (Exhibit P3); 9
 4. A letter dated 24/08/2012 from EALC to TICTS (Exhibit P4) On cross examined this witness said that Glencore never dealt with the defendants directly but through its Agent namely INARA, he also admitted that they have already recovered the loss through their insurers Lloyds, and Lloyds are not parties to these proceedings but they are suing under the principles of subrogation. The 2nd witness for the plaintiff was Mr Hasnain Mussa, the Terminal Manager of TRH. He testified that TRH was contracted by INARA in March 2011 for clearing and forwarding copper cathodes to three different destinations, namely Egypt,

China and Pakistan. That the said copper cathodes were packed into six different containers. He acknowledged to have received the cargo from Inara, and that his company namely TRH packed the Cargo into the containers and delivered them to the defendant's Terminal at 10 Dar es Salaam Port, and that the defendant's issued Equipment Interchange Receipts acknowledging receipt of the Containers. The witness testified that TRH contracted Oceanair Freight Limited to provide freight forwarding services, and that Oceanair attended to packing the Cargo and prepared stuffing report. That Oceanair made an order for exporting the containers using the services of the defendant. The defendant received the containers and they were supposed to load the containers into the ship. The defendant issued the tax invoices for the services. This witness testified that he learned about the lost six containers in April 2011, when informed by the plaintiff. This witness presented in court the following documents as evidence in support of the plaintiffs case:

1. Equipment Interchange Receipt issued by the defendant, dated 28/03/2011 (ExhibitP5); 11
2. Equipment Interchange Receipt issued by the Defendant dated 13* April 2011 (Exhibit P6);
3. Equipment Interchange Receipt issued by the Defendant dated 15/04/2011 (Exhibit P7);
4. Equipment Interchange Receipt issued by the Defendant dated 15th April 2011 (Exhibit P8);
5. Equipment Interchange Receipt issued by the Defendant dated 13/04/2011 (Exhibit P9);
6. Export Container Order issued by Oceanair in lieu of Equipment Interchange receipt as the printer of the Defendant was not working dated 13/04/2011 (Exhibit P10);
7. Copper Stuffing Report issued by TRH showing the bundles and weight of copper cathodes (Exhibit Pl 1);
8. Copper Stuffing Report by TRH dated 06 April 2011, verified on 11 April 2011 (Exhibit Pl2); 12
9. Copper Stuffing Report by TRH dated 08/04/2011 (Exhibit Pl3);
10. Copper Stuffing Report dated 9/04/2011 (Exhibit P14). Another witness for the plaintiff was Mr David Duffus. This witness tendered in court the Report dated 15th May 2011 following the investigation of theft of 6 containers containing Copper Cathodes. This Report was admitted as Exhibit P16. This Report was sent to Glencore International for Insurance claims to their insurer in London. Mr Duffus is the Managing Director of DPS March (Africa), based in Cape Town, South Africa. He testified that his company was instructed by the plaintiff to conduct an investigation in respect of the theft of the six containers loaded with copper cathodes, which went missing at the defendant's container terminal, and upon investigation they were able to establish that the theft of the cargo have occurred while the Cargo were in the defendant's care in its container terminal in the Port of Dar es Salaam, 13 and that the containers were not loaded onto the respective vessels. Another witness for the plaintiff was Mr Siddhartha Patel, a Director of Tanzania Shipping Agency. He testified that Ocean air placed a shipment order on behalf of the plaintiff on 6th April 2011 to ship a 80x80 ft. containers on board MV MSC Ayala from Dar es Salaam, Tanzania to Sokhna Egypt, and

that TRH delivered the containers No MEDU-234126-7, FCIU 341141-1, and TGHU 319566-5, which were scheduled to be loaded onto MV MSC Ayala on 18th April 2015 but these containers could not be found in the defendant's terminal despite the fact that the Defendant had acknowledged Receipts of these Containers through Equipment Interchange Receipts No. 1117313, 1117366 and stamped the Export Container Order to acknowledge receipt of Container No. FCIU-341141. The Consignee for these three Containers was United Metal Company of Egypt. He testified further that WEC, the Shipping Line issued the Bill of Lading but these three containers were not listed in the Container List to the Bills of Lading, meaning 14 that these containers were not loaded in the ship by the Defendant. He testified that MV MSC Ayala sailed on 19th April 2011 without the above mentioned containers on board the vessel. Another witness for the plaintiff was Mr. Dipesh Solanki, a customer Service Manager at Nyota Tanzania Limited, an Agent of Maersk Shipping Line. He confirmed that the plaintiff placed a booking and acting on behalf of Maersk, Nyota Tanzania Limited issued a booking confirmation for shipping six 20 ft. containers on board MV ER Caen from Dar es Salaam to Salalah Oman. He testified further that Container No. GLDU 5527377 was scheduled to be loaded onto MV ER Caen on or before 5th April 2011 but it was not loaded on Board the Vessel prior to its Departure from the Dar Es Salaam Port. That Maersk Shipping line issued a bill of Lading showing that only five containers were loaded in the MV ER Caen to Pakistan. One Container was not loaded. 15 He testified further that the plaintiff placed another booking and was provided with a booking amendment on 26th April 2011 by Nyota acting on behalf of Maersk for shipping 100 containers of Copper Cathodes on board MV Ulysses from Dar es Salaam to Tanjun Pelepas, Malaysia. That Containers No. PONU 019767-8 and No. CAIU 251038-7 were scheduled to be loaded onto MV Ulysses between 15th to 21 April 2011 but these containers were not loaded on board the vessel prior to its departure from the Port of Dar es Salaam. The Bill of Lading issued by Maersk on 26th April 2011 but these two containers were not listed in the respective Container List annexed to the Bill of Lading, and that only 98 Containers were loaded on Board the Vessel, and there was a shortfall of 2 containers. The last witness for the plaintiff case was Mr Solomon Wilson Mahogo who works at Inara Investments Limited. He testified that the plaintiff appointed Inara as its agent to transport copper cathodes by road haulage from Zambia to the depot of TRH in Dar es salaam and that the cargo arrived at the TRH 16 Depot at Dar es Salam safely, and that TRH packed the Cargo into the containers, and the containers were handed over to the defendant for shipping. That the six containers were never loaded on board the vessel by the defendant. The six containers were found missing, and never reached the purchasers in Pakistan, China and Egypt. I have carefully considered the witness's testimonies, and the exhibits presented in court, and I have also heard Mr Juvenalis Ngowi, learned counsel appearing for Plaintiff and Zaharan Sinare, learned counsel appearing for the defendant. The Learned counsel for the plaintiffs would submit in his arguments that the plaintiff, in the course of its business sought to export six containers of Copper Cathodes on Board MV Caen from Dar es Salaam to Pakistan as per Maersk Line Booking Confirmation No. 861675705. That Maersk Lines issued Bill of Lading no. 861675705 on 7th April 2011 indicating that only Five Containers containing 71 bundles of copper

cathodes were boarded on the Vessel MV Caen by the Defendant. Container No. GLDU 5527377 was not listed in the 17 Bill of Lading, proving that this Container was not loaded on board the vessel by the defendant. It is on evidence that the Defendant issued Equipment Interchange Receipt No. 1105931 dated 28th March 2011 acknowledging receipt of this Container, and an invoice no. 754934 was issued by the defendant signifying that the defendant had agreed to perform the work of handling and loading this container on board the vessel MV ER Caen. The Counsel further submitted that the said cargo was entrusted with the defendant who being a Shipping, Clearing and Forwarding Agent of the plaintiff through the Agents TRH and Oceanair and the said Cargo were stored at the defendant's terminal at the Port of Dar es Salaam for transportation and shipment on board vessel 'M.V. Caen1 for safe carriage through sea. He would also submit that the said cargo was never loaded on 'M.V. Caen' for a period of 28th March 2011 to 5th April 2011. The Counsel for the plaintiff was able to establish that the plaintiff through its agents TRH and Oceanair placed another booking with Maersk shipping Line through Nyota Tanzania 18 Limited, and was provided with Booking Amendment No. 861704571 on 26 April 2011 for shipping a further consignment of copper cathodes in 100 containers to be shipped on board MV Ulysses from Dar es salaam to Shanghai, China to a Company known as Langning Trade Co Limited. Maersk Shipping Line issued 5 different Bills of Lading for this consignment, and out of 100 containers two containers were not listed, i.e. Container Nos PONU 019767-8, AND No. CAIU 251038-7, which means that only 98 containers were shipped on Board MV Ulysses, and 2 containers were not shipped, whereas as per Maersk Line Booking Amendment No. 861704571, 100 containers should have been shipped on Board MV Ulysses. It is on evidence that TRH through Oceanair delivered these two containers to the defendant on 15th April 2011, and the defendant issued an Invoice No. 757635 accepting to handle the 100 containers to be shipped to Shanghai China. The Defendant also issued Equipment Interchange Receipts (Annexure G11) to the Plaintiff, acknowledging receipt of the 19 100 containers including the two containers which were lost or mishandled by the defendant, i.e. Container Nos PONU 019767-8, AND No. CAIU 251038-7. Again, the plaintiff through its Agents TRH and Oceanair placed a booking for shipping the following containers on Board MV MSC Ayala to Sohna Egypt. That, it is on evidence that TRH delivered the containers to the Defendant's Terminal on 13th April 2011:

1. Container No. MEDU 234126-7
2. Container No. FCIU 341141-1
3. Container No. TGHU 319566-5. It is on evidence that these containers were scheduled to be loaded onto MV MSC Ayala on 18th April 2011 but they were not loaded by the defendant. It is also on evidence that the defendant acknowledged receipt of these containers through Equipment Interchange Receipt No. 1117313, 1117366 and also stamped the Export Container Order of Oceanair acknowledging receipt of Container No. FCIU341141-1. It is on 20 evidence that despite having acknowledged receiving these containers, the defendant failed to board these containers on board the vessel MV MSC Ayala on 18th April 2011. It is

also in evidence that the Shipping Line did not list these missing containers in the Container List to the Bills of Lading, proving that the containers were not loaded on board the vessel by the defendant. The Shipping Line confirms through its two Bills of Lading that only 77 containers were shipped, and that there was a shortfall of three containers i.e. Container No. MEDU 234126-7, Container No. FCIU 341141-1, and Container No. TGHU 319566-5. It is no doubt that the Shipping Lines incorporated in their respective Bills of Lading issued for the purpose of export the available cargo on board the respective vessels at the time of loading. Apart from the proof by the Shipping Lines through their respective Bills of Lading there was on record a survey which was conducted by one DPS March (Africa) a surveyor of security and investigation specialized in cargo insurance 21 claims of Cape Town, South Africa who had conducted various interviews with the plaintiff's officers, the defendant's officer as well as their respective agents, they obtained and reviewed the Booking Confirmations for the loading the Containers onto Maersk Vessel the MV ER Caen, MV Ayala and MV Ulysses, they have examined the Copper Stuffing Reports by TRH, they analyzed the Bills of Lading and Equipment Interchange Receipts issued by the Defendant, and concluded that the six missing containers were delivered to the Defendant's container terminal between 28th March 2011 and 15th April 2011, and they established that the theft of the cargo had occurred while the cargo were in the defendants' care in its container terminal in the Port of Dar es Salaam, and that these containers were not loaded onto the respective vessels. The Learned counsel for the plaintiff would further submit in his argument that the short shipment should have been caused in between the receipt of the cargo by the defendant in between 28th March 2011 to 15th April 2011 when the cargo were entrusted with the defendant for the completion of 22 transportation of cargo for boarding the ship. He would also submit that there is no failure on the part of the plaintiff or its agents in delivering the six containers to the defendant's terminal at the Port of Dar es Salaam, and I fully agree with the arguments by the Counsel for the plaintiff. I would also say that the negligence of the defendant's men and the failure on the part of the defendant to take proper care and action in handling the said cargo in a safer manner, and boarding the cargo into the vessels, the plaintiff sustained a loss to the tune of USD 1,546,656.86 being the value of the cargo of 149.904 metric tons (net weight) of copper cathodes stacked in the containers Nos GLDU 552737-7, MEDU 2341267-7, FCIU 341141-1, TGUH 319566-5, PONU 01979-8 and CAIU 1251038-7. I would also hold that the bills of lading prepared for the transportation of the cargo was also solemn documents, I must say that although these Bills of Ladings were not submitted as evidence since they were not available at the time of trial, but since these Bills of lading were referred to in the pleadings as well as the witness statements, and since these Bills of Lading were properly reviewed and incorporated in the Report of the Surveyor, and since the Surveyors Report was accepted in evidence as Exhibit P16, and since there was no evidence led by the defendant to contradict them and when such solemn documents are produced into court in a report, the court has taken it that the documents are true and genuine and since there was no rebuttal evidence produced or even mentioned in the pleadings of the defendant for disproving the said documents/ the bills of lading, the evidence is acceptable and since the documents namely, the bills of lading have

been used for the transportation of the cargo in this case, it could be presumed to be true documents and the contents mentioned therein are also true and genuine, I have therefore examined the contents of the said documents and on such examination, I have found that there is a shortage of the 6 containers which were not loaded on board the vessels but also there is enough evidence adduced by the plaintiff based on the Equipment Interchange Receipts and Tax invoices issued by the defendants and presented to court 4[^] 24 as evidence by the plaintiff that these six missing containers were received by the defendant at its terminal at the Port of Dar es Salaam but were never loaded on board the vessels, and therefore, the defendant is liable to compensate the plaintiff for the said shortage. It is submitted that the plaintiff's loss was made good by the insurers. I believe that the plaintiff had already executed necessary document of subrogation to claim the suit amount (as evidenced in Exhibits, P1, P2 and P3) as short shipment and also on the foot of the said document on subrogation, the plaintiff is entitled to proceed against the defendant for the recovery of the said damages caused due to the short shipment of cargo. I would also say that the Bills of Lading issued by the carrier containing the amount of the containers loaded on board the vessels would be a conclusive proof regarding the shipped cargo and the difference in between the cargo entrusted to the defendant by the plaintiff and its agents and the cargo shipped would amply show the shortage of shipment of cargo. 25 Similarly, the survey report done by Mr. David Duffus a Director of DPS March (Africa) who had the chance to evaluate the said Bills of Lading and comparing them with the Booking Confirmation by the carriers or Shipping Lines, and comparing them with the Equipment Interchange Receipt and Tax invoices issued by the defendant, and since the Report of this witness was admitted as evidence in Court coupled with the various correspondences between TRH and the Defendants' officers, it would show that the shipped cargo was short of six containers. I shall hold that that these documents need not be proved by any other evidence unless it is disproved by rebuttal evidence by the defendant's side, which was not the case here. The learned counsel for the defendant Mr. Zaharani Sinare never submitted any closing submissions, and also his one witness never produced any document in rebuttal of the evidence produced by the plaintiff. In the pleadings of the defendant the defendant denies to have been entrusted with the cargo by the plaintiff or its agents but the defendant was not able to deny the Equipment 26 Interchange Receipts and the Tax Invoices it had issued in respect of the missing six containers. The defendant was also not able to prove the fact that it loaded the six missing containers on board the respective vessels on the booked dates or even thereafter. The defendant failed to adduce evidence to contradict the case of the plaintiff that it was not entrusted with the cargo and that it had no duty to exercise care in keeping the cargo in safe custody from the time the cargo was delivered at its terminal by TRH or Ocean air until the time the cargo was to be loaded or loaded onto the vessels. Based on the above, and in deciding issue No. 1, I would say that, yes, there was an agreement between the plaintiff and the defendant for handling the six containers. The existence of the Agreement was evidenced through the Tax Invoices and the Equipment Interchange Receipts issued by the Defendant to the plaintiff's Agents as discussed above. To answer issue No. 2, yes, the defendant breached the agreement and as per the works order, and the

Equipment interchange Receipts, and the Tax Invoices issued by the 27 Defendant to Oceanair, the cargo was entrusted with the defendant at its terminal at the Port of Dar es Salaam. The said cargo was taken possession by the defendant in between 28.03.2011 and 15 April 2011 for shipping them on board in the vessel "M.V. ER Caen, MV Ayala and MV Ulysses" for safe carriage by sea to China, Pakistan and Egypt. It is also an established fact that the said cargo, entrusted with the defendant was never loaded at the said ships as per the Booking Confirmation Order. It was also an established fact that there was a survey taken by the qualified Surveyor for purposes of insurance. According to the survey which was taken and it showed that the shipped cargo was missing the six containers which were not loaded on board the vessels by the defendant. There is evidence that the six containers were delivered to the defendant, and on that basis, invoices were also raised to for the services. The said invoices were prepared and issued by the defendant, and produced in court as exhibits. 28 On answering issue No. 3 and as discussed in the previous issues, this Court has come to a conclusion that the plaintiffs are entitled to the relief as sought for in the plaint against the defendant over the claim of US\$ 1, 546,656.89. The plaintiffs have asked for general damages for breach of contract to be assessed by the Court. This Court award the plaintiff the general damages to the tune of 8% of the principal amount of USD 1,546,656.89 and the general damages should be calculated from the date of filing of the plaint till the date of payment since the transaction being a commercial one. Therefore, the suit is liable to be decreed as prayed for with , costs. In the result, the suit is decreed as prayed for with costs. . DATED at DAR ES SALAAM this 22nd day of APRIL, 2016 MANSOOR JUDGE 22nd APRIL 2016 29

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