

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 16.11.2016

PRONOUNCED ON: 15.12.2016

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

CS.No.601 of 2009

Shankar Karikar Plaintiff

Vs

1.M/s.Envee Enterprises by its Partner
Sasikala Vamanan, Chennai-4

2.Sasikala Vamanan

3.Mani Prakash Defendants

Prayer:- This Civil Suit is filed under Order VII Rule 1 of CPC read with Order IV Rule 1 of the Original Side Rules for the reliefs as stated therein.

For Plaintiff : Ms.G.Sumitra for
Mr.R.Subramanian

For Defendants : Mr.V.Raghavachari for
Mr.Md.Ashraf Ali

JUDGEMENT

This civil suit has been filed to pass a judgement and decree, against the Defendant:-

- a)directing the Defendants jointly and severally to pay a sum of Rs.52,34,750/- with subsequent interest at 18% per annum on the principal amount of Rs.35 lakhs.
- b)directing the Defendants jointly and severally to pay the costs of the suit to the Plaintiff.

2. The plaint averments are that the 1st Defendant is a Partnership Firm and the Defendants 2 and 3 are its partners. The 1st Defendant had entered into an agreement of sale on 9.8.2006, agreeing to sell an extent of 2800 sq.ft. of land in Old Door No.19/1, New Door No.23, Centoph Road, Chennai, comprised in RS.No.3856/B, Block No.76, Mylapore, for a total consideration of Rs.1,25,00,000/-. It had been agreed that the sale shall be completed within a period one month from the date of release of the sale deed dated 21.10.2003, by which, the 1st Defendant had purchased the above property from its owners.

3. The Plaintiff had further stated that he had paid a sum of Rs.25 lakhs as advance on the date of the agreement and had paid a further sum of Rs.10 lakhs in the following manner:-

S.No	Date	Cheque No.	Amount (Rs.)
1	12112006	165011	200000
2	12112006	798597	50000
3	14112006	142218	50500
4	14112006	469083	49500
5	14112006	798596	50000
6	16112006	165412	400000
7	16112006	675599	200000
Total			1000000

The Plaintiff had, therefore, stated that he had paid a total sum of Rs.35 lakhs towards part of the sale consideration as per the agreement dated 9.8.2006. Though

the Plaintiff was always ready and willing to perform his part of the contract, the Defendants have been evading execution of the sale deed. The Defendants did not produce the patta, relating to the property and were also reluctant to measure the property and mark its boundaries as required by the Plaintiff.

4. The Plaintiff had further stated that during December 2006, he learnt that the Defendants were actually not in possession of the property and there was a dispute over possession between the Defendants and the National Bank for Agriculture and Rural Development (herein after referred to as NABARD). This has resulted in a police complaint lodged by NABARD on 30.12.2006 against one J.Subramaniam and others, alleging that they had trespassed into the property on behalf of the 1st Defendant. The Plaintiff came to know that the NABARD had filed WP.No.549 of 2007, against the 1st Defendant and others, seeking declaration that the land, which had been agreed to be sold by the Defendants, had been earmarked as open space for car parking under the planning permit granted to them and no construction shall be raised. It also came to know that the court had granted an order of interim injunction, restraining the Respondents therein from modifying the use of the land in violation of the planning permission

no.1788/B/28A/C/86, dated 21.2.1986.

5. The Plaintiff then had approached the Defendants 2 and 3 seeking clarification and since they were not able to give necessary clarifications, the Plaintiff by letter dated 28.3.2007, addressed to the husband of the 2nd Defendant, informed his intention to purchase the land if it is made clear that there is relevant floor space index attached to the land agreed to be sold. The Plaintiff had further stated that there was no reply either from the Defendants or the husband of the 2nd Defendant to the said letter. In the said circumstances, the Plaintiff had issued a legal notice through his counsel on 2.2.2009, seeking refund of the advance paid with interest 18% p.a. The Plaintiff had further stated that the Defendants through their counsel had sent a reply, admitting receipt of Rs.35 lakhs and also admitting filing of Writ Petition by NABARD, but claimed that the court, by its judgement dated 21.11.2007 in WP.549 of 2007, had affirmed the ownership of the Defendants to the lands in question. They had further stated that the court had permitted NABARD to raise objection before the concerned authority at the time when the planning permission is sought for construction. The Plaintiff had further stated that consequently, the title of the property

is not clear from any cloud.

6. The very fact that a third party has been allowed to object to the planning permission would show that the Plaintiff would be purchasing litigation instead of property which he can enjoy peacefully. The Defendants had further stated that the deficit stamp duty payable in respect of the document, namely the sale deed dated 21.10.2003, had been agreed to be paid by the Plaintiff as and when it is determined by the Appellate Authority, namely, the Chief Controlling Revenue Authority, before whom the appeal was said to be pending. The Defendants claimed that they had paid a sum of Rs.21,16,252/- as additional stamp duty and registration fee and hence, they are not liable to repay the advance amount.

7. Claiming that the stand of the Defendants is not in accordance with the terms of the agreement dated 9.8.2006, whereby the Defendants were bound to convey the land without any encumbrance, the Plaintiff has filed the suit seeking repayment of the said advance amount of Rs.35 lakhs with interest. The Plaintiff had further stated that the Defendants had withdrawn the appeal filed by them before the Chief Controlling Revenue Authority and had paid the deficit stamp duty payable under the document dated 21.10.2003 on their own without any reference to the

Plaintiff. Again claiming that this was against the agreement entered into between the parties, the Plaintiff had sought repayment of the advance amount paid to them. In these circumstances, the suit has been filed as aforesaid for repayment of Rs.52,34,750 with subsequent interest at 18% p.a. on the principal amount of Rs.35 lakhs.

8. In the written statement, filed on behalf of the Defendants, they had stated that they had sent a reply notice dated 13.2.2009, in reply to the notice dated 2.2.2009, issued by the counsel for the Plaintiff, in which the Defendants had elaborately stated how they are not liable to pay the amounts claimed and further it had been stated that the Defendants admit that they had received a sum of Rs.35 lakhs as advance amount and stated that the Plaintiff is not entitled for refund of the said amount. It had been stated that on the date of execution of the agreement of sale, an appeal was pending before the Inspector General of Registration for adjudication of payment of proper stamp duty on the sale deed dated 21.10.2003. As instructed by the Plaintiff, the Defendants had paid a sum of Rs.21,16,252/- as additional stamp duty and additional registration fees even before the adjudication of proper stamp duty and got release of the

sale deed, dated 21.10.2003, bearing Doc.No.1074 of 2003 from the District Registrar Office of Stamps.

9. It had been further stated that the said amount had been paid only from the advance amount paid by the Plaintiff. The Defendants therefore averred that the Plaintiff was not entitled to claim refund of the said Rs.25 lakhs. With respect to the subsequent payment of Rs.10 lakhs on various dates, the Defendants stated that again the Plaintiff is not entitled to claim since he alone committed default in completing the sale even though the Defendants were ready and willing to perform the terms of the agreement of sale dated 9.8.2006.

10. With respect to the writ proceedings, it had been stated that WP.No.549 of 2007 filed by NABARD had been disposed of on 21.11.2007 and in the order, this court had held that the Defendants are the owners and in possession of the suit property and only liberty was given to NABARD to raise objections if any before the planning authorities when the Defendants file applications for planning permission for construction of a building in the suit property if the proposed building area is in violation of FSI norms. The appeal filed by NABARD in WA.No.173 of 2008 was dismissed by the Division Bench of this court by judgement dated 2.7.2008. Consequently, there was no cloud

on the title of the property. It had been stated that as mentioned in the reply notice dated 13.2.2009, in the compromise memo filed in CS.No.753 of 1990, the NABARD, which was a signatory, also admitted that the Defendants are in possession and enjoyment of the suit property. Consequently, It had been stated that repudiation of the suit agreement by the Plaintiff is not acceptable and breach had been made only by the Plaintiff and he is not entitled to claim refund of the advance amount. Further, the Plaintiff is also not entitled to claim any interest as claimed in the suit as there is no agreement for payment of interest when the amount becomes repayable. In the written statement, the Defendants also denied each and every allegations raised in the plaint and finally prayed that the suit should be dismissed.

11. On perusal of the rival pleadings of the parties, by order dated 14.12.2011, the following issues were framed:-

1. Whether the Plaintiff is entitled to claim refund of the entire advance amount of Rs.35,00,000/- paid under the suit agreement for sale with interest?
2. Whether the Plaintiff has committed breach of the agreement for sale dated 9.8.2006?
3. Whether the Defendants are entitled to deduct a sum of Rs.21,16,252/- from the amount paid by the Plaintiff towards the differential stamp duty paid by the Defendants in respect

of the sale deed dated 21.10.2003 under which they had purchased the suit property?

4. Whether the Plaintiff is entitled to a decree against the Defendants for recovery of a sum of Rs.52,34,750/- with subsequent interest at the rate of 18% per annum on the principal amount of Rs.35,00,000?

5. To what other relief the Plaintiff is entitled to?

12. Both the parties, to substantiate their rival claims, had let in oral and documentary evidence. On the side of the Plaintiff, the Plaintiff had examined himself as PW.1 and marked Exs.P1 to P8. On the side of the Defendant, the 3rd Defendant was examined as DW.1 and Ex.D1 to D5 were marked.

13. This court heard the arguments advanced by Ms.G.Sumitra, the learned counsel for the Plaintiff and Mr.V.Raghavachari, the learned counsel for the Defendant.

14. Issue (1):- The Plaintiff had entered into an agreement of sale with the 1st Defendant Firm, which is represented by the Defendants 2 and 3, for purchase of the property more fully described in the schedule to the plaint and measuring an extent of 2800 sq.ft. at Old Door No.19/1, New Door No.23, Centoph Road, Chennai. This agreement of sale was entered into on 9.8.2006. The suit agreement of sale had been produced before this court and

had been marked as Ex.P1. In Ex.P1, it is seen that the same had been signed on behalf of the Defendants by the 2nd Defendant. This is crucial since the 2nd Defendant had not entered into the witness box, but the 3rd Defendant, who is also a partner of the 1st Defendant Company, had let in oral evidence. Even though the competency of the 3rd Defendant to lead evidence on behalf of the Defendants, cannot be questioned, still it is to be mentioned that the actual signatory to the agreement, who is the 2nd Defendant, had kept shy and did not grace the witness box. The person, who actually knew the terms of the agreement, was not examined by the Defendants. This fact becomes crucial since the interpretation with respect to the forfeiture clauses in the agreement turns the suit for deeper consideration. The agreement as stated above is dated 9.8.2006. It is not registered. In the suit agreement, the Defendants, who were the vendors, had represented that they are the absolute owners of the property. They had further stated that they had purchased the property by a sale deed registered as Doc.No.1074 of 2003 on the file of the Sub Registrar, Thousand Lights and also as per the terms of the compromise deed, dated 23.7.2003 in CS.No.753 of 1990 on the file of this court.

15. It had been further covenanted in the

agreement of sale that the original sale deed dated 21.10.2003, registered as Document No.1074/2003 was with the District Revenue Officer for payment of actual stamp duty as determined by him. A appeal before the Inspector General of Registration was pending against the order passed by the District Revenue Officer, determining the actual stamp duty payable on the sale deed. It had been stated that the purchaser, namely, the Plaintiff had agreed and undertaken to pay the stamp duty that would be determined by the Inspector General of Registration in the appeal. This clause and covenant is again very important because both the parties, who are the signatories to the agreement, had agreed that the stamp duty as determined by the Inspector General of Registration alone had been agreed to be paid by the Plaintiff. At no point of time, had the Plaintiff agreed to pay the amount fixed by the District Revenue Officer and had there been such agreement by the Plaintiff, that would have been incorporated in the agreement itself. While drawing up the agreement, the Plaintiff would have covenanted that the amount determined by the District Revenue Officer can be taken out from the advance amount paid by him at the time of executing this agreement of sale.

16. Even otherwise, it had been further agreed

that the entire consideration for the sale of the schedule property was fixed at Rs.1.25 crores. It had been further stated that the stamp duty shall be in addition to the sale consideration and shall not be inclusive of the sale consideration. Again this is important. This clause when interpreted would mean that on the date of the determination of the stamp duty by the Inspector General of Registration, before whom the document was pending for adjudication, the Plaintiff should first pay the stamp duty as fixed by him and then pay the sale consideration of Rs.1.25 crores. As has transpired, the Defendant had subtracted the amount fixed by the District Revenue Officer towards the stamp duty payable from the amount paid as advance by the Plaintiff. Further, the clauses in the agreement of sale, reveal that the Plaintiff had paid as advance as Rs.25 lakhs by cheque no.738752 dated 9.8.2006 drawn at Corporation Bank to the vendors. It had been further stated that the sale shall be completed within a period of one month from the date of release of the sale deed by the registration authorities. This clause is also very important. This naturally means that the time was not the essence of the agreement. As and when the registration authority finally releases the document of sale deed, the period starts, however, the Defendant as has transpired

from the evidence, did not wait for the Inspector General of Registration to finally determine the stamp duty. On the other hand, the Defendant had paid the amount fixed by the District Revenue Officer and had subtracted the said amount from the advance amount paid by the Plaintiff.

17. It had been further stated that the Defendants had delivered all copies of documents of title to the legal advisor of the Plaintiff. Again this is important since on the date of the agreement of sale, the Plaintiff had never agreed that the Defendants had clear title to the property. It had been further stated that the legal advisor's opinion as to the title of the Defendants would be final and binding on both the parties. It had been further stated that if the purchaser fails to complete the sale as per the agreement, he shall pay a sum of Rs.1.25 crores as liquidated damages. It had been further stated that the Defendants would also have the right to enforce the agreement specifically under the provisions of the Specific Relief Act. It had been further stated that the Defendants shall deliver vacant possession. Finally under clause (11), it had been specifically stated that the Plaintiff should bear the payment of additional stamp duty that would become payable after the dispose of the above said appeal now pending before the Inspector General of

Registration. It is therefore seen that this agreement contemplated that the Inspector General of Stamps should determine the stamp duty payable. That stamp duty alone was agreed to be paid by the Plaintiff on the date of agreement of sale. The District Revenue Officer had determined the stamp duty payable, but the Plaintiff was not agreeable for such amount and had stated that it was only the amount fixed by the Appellate Authority that he was ready and willing to pay.

18. Ex.P2 is a copy of the police complaint given by NABARD to the Station House Officer, Teynampet Police Station, complaining of trespass and encroachment of land by one J.Subramanian, advocate of the Defendants along with other two persons. This document naturally means that there is a cloud over the possession of the lands, for which the Defendants had entered into the agreement of sale. This police complaint is dated 30.12.2006 much after Ex.P1 agreement.

19. Ex.P3 is the affidavit filed on behalf of NABARD in WP.No.549 of 2007. WP.No.549 of 2007 had been filed against the Commissioner of Corporation of Chennai, Member Secretary, CMDA, an individual M.Kesavan and the 1st Defendant herein. The said Writ Petition had been filed for the relief of declaration, declaring that the South

West corner and North East corner of the lands shown in the planning permission no.1788/B2/28A/C/86, dated 21.2.1986 issued by the 2nd Respondent are the lands surrendered to the 2nd Respondent therein to be utilized for the convenient enjoyment of the Petitioner therein, for whose benefit the planning permission was issued.

20. Ex.P4 is a copy of the said Writ Petition, setting out the above prayer in the said Writ Petition. Ex.P5 had been marked subject to objections. This document is an order of this court made in MP.No.1 of 2007 in WP.No.549 of 2007 and it is dated 8.1.2007. During the course of arguments, the learned counsel for the Defendants did not point out as to why he had objected at the time when this document was marked as exhibit during the trial. In fact, this being an order of this court, can never be objected to by the Defendants. Still they had though it fit to raise objections and again thought it fit not to clarify the reasons therefor during the arguments. In the said order, this court had granted an order of interim injunction to the extent of restraining the Respondents in WP.No.549 of 2007 in modifying the use of the land in violation of the planning pemrission no.1788/B/28A/C/86, dated 21.2.1986.

21. Ex.P6, again marked during the trial and again

marked subject to objections is a letter given by the Plaintiff confirming intention. It is clear that there is relevant FSI attached to the specific 2800 sq.ft under consideration. It is again not clear why the Defendants had raised objections for marking this letter issued by the Plaintiff to the Defendants.

22. Ex.P7 is a copy of the notice along with the returned cover issued by the Plaintiff. Ex.P8 is a copy of the reply dated 13.2.2009, which has been heavily relied on in the written statement. A careful perusal of the records reveals that the Defendants had actually given a go by to the agreement for sale entered into by them with the Plaintiff. The Defendants had marked Ex.D1, which is the judgement made in WP.No.549 of 2007 dated 21.11.2007. In the said judgement, this court had stated that the Petitioner therein, namely, NABARD was at liberty to approach the appropriate forum for appropriate relief if and when necessity arises. In the said order, it had been further stated that when the planning permission is advanced by the Defendants, then the NABARD can object to the same. Ex.D2 is the order made in the appeal dated 2.7.2009 and this has also been relied on by the learned counsel for the Plaintiff since in the appeal, this court had stated that when an application is made to CMDA, it

shall consider the application and shall also hear the Petitioner NABARD with respect to the planning permission.

23. Ex.D3 is a copy of the Document No.1074 of 2003 dated 21.10.2003. This document had been produced to show that the additional stamp duty had been paid on the sale deed as determined by the District Revenue Officer and not by the Inspector General of Stamps as agreed to in the agreement for sale entered into between the parties. The Defendants had utilised the advance amount to clear their title.

24. The Defendants also marked after getting permission from this court the letter dated 10.6.2006 as Ex.D5. Ex.D5 has been strenuously disputed by the learned counsel for the Plaintiff. It is a letter which according to the Defendants had been written by the Plaintiff to the 2nd Defendant. In the said letter, it is stated as follows:-

"We understand that the document conveying the property to yourselves as per the orders of the Honourable High Court of Madras is lying with the Collector of Chennai and there is a dispute as to the value of stamp paper for the purposes of registration.

It is now agreed that we will now discuss the matter with the authorities concerned and arrange to get the document registered and releases at our expenses, both statutory and incidental. This and any other expense we may incur in the process and or in any manner whatsoever, leading to the sale and

registration of the property in our name will in no way affect the total consideration of Rs.125 lakhs payable to you.

It is also agreed that the entire process will be completed by August 15, 2006, failing which the discussions and agreement shall be null and void with no obligation whatsoever on either party.

Pleas confirm your acceptance by signing the duplicate copy of this letter."

25. The pertinent aspects to be pointed out are that the date of the letter is much prior to Ex.P1 agreement of sale. In the agreement of sale, as pointed out above, it has been very specifically agreed between the parties, to which both the Plaintiff and the 1st Defendant are signatories, that the stamp duty payable would be determined by the Inspector General of Registration. It had been further stated in Ex.P1 that on the date of Ex.P1, the stamp duty had not been determined by the Appellate Authority, namely, the Inspector General of Registration. To this, in direct contrast to Ex.P1, Ex.D5 states that there is a dispute with respect to the stamp duty and both the parties agreed that the document can be registered and released at the expenses of the Plaintiff. In fact, a careful reading of Ex.D5 shows that they had never agreed to settle the issues as to the amount determined by the District Revenue Officer. Even otherwise, if the

Defendants are to rely on Ex.D5, merely marking it on their side does not amount to proof and admissibility. The Plaintiff, who is the signatory to the document, should have been confronted with the said document during the trial, but it was not done. Even if the documents had been obtained by them subsequently, the Defendants should have taken out an application to recall PW.1 and confront him with this document because he is the author of the document. It is also to be seen that the recipient of the document, namely, the 2nd Defendant did not come to the witness box. The document was marked through the 2nd Defendant, who was examined as DW.2. Even though he may be a partner of the 1st Defendant Company, this court holds that Ex.D5 has not been proved in accordance with law. Moreover, it is to be seen that DW.1 was not even a signatory to the agreement of sale. He might have knowledge about the agreement as a partner of the 1st Defendant Company, but that knowledge cannot be equivalent to the knowledge of the signatory to the agreement, who is the 2nd Defendant. Non examination of the 2nd Defendant as a witness is fatal to the case of the Defendants. Therefore, this court also holds that Ex.D5 had been deliberately suppressed and produced at a later date and the witness who speaks about it does not have any knowledge

about the same. Irrespective of the above, it is seen that during the cross examination on 8.7.2014 of DW.1, he had very categorically stated that he does not remember the amount received from the Plaintiff at the time of entering into Ex.P1. This clearly shows that the witness is an incompetent witness. He thereafter states that he finds that he had received Rs.25 lakhs at the time of entering into Ex.P1. To repeat, DW.1 has no direct knowledge of Ex.P1. He further stated that he is also unable to say whether he received the amount in instalments or in lump sum. He further stated that Ex.P1 is the written confirmation from the Plaintiff for the payment of additional stamp duty by his Company. However, he is not aware of the terms of the agreement and it is clear from the agreement that it is only on determination by the Inspector General of Registration that the stamp duty become payable. Even otherwise, under Section 92 of the Indian Evidence Act, no oral evidence can be appreciated when it is in direct contrast to a written agreement, Ex.P1.

26. The second aspect with respect to the challenge by NABARD is with respect to the grant of planning permission. It is seen that the property agreed to be sold and purchased was actually earmarked for car parking space.

The Defendants have deliberately suppressed the main planning permission which they have forwarded to the planning authorities. In fact, this court had granted permission to NABARD to challenge the said planning permission. All these aspects clearly show that there is a direct cloud over the title and the actual possession of the property and when there is a cloud over the property, the Defendants are responsible for the same owing to suppression of material facts. Further in Ex.P1 the Plaintiff has clearly stated that they are agreeable for concluding the agreement only on legal advise from their counsel. There being no evidence of legal advise being tendered to conclude the contract, I hold that the agreement of sale had not been fructified into a concluded contract and consequently, the Plaintiff is entitled to claim refund of the entire advance amount Rs.35 lakhs paid under the suit agreement for sale with interest. Issue (1) is answered in favour of the Plaintiff accordingly.

27. Issues (2) and (3) :- It is seen that the Defendants claimed that the Plaintiff had committed breach of agreement of sale. However, the Defendants have not pointed out even in the written statement as to what was exactly the breach. In their reply notice, they had

categorically stated that the advance of Rs.25 lakhs is acknowledged by them. With respect to the further amount of Rs.10 lakhs paid in various instalments by the Plaintiff to the Defendants, receipt was also admitted, but they claimed forfeiture. When there is a cloud over the title and also actual possession of the property and when the Plaintiff had reserved a right that he will proceed further only when his counsel accedes to clearance of title, I hold that the Plaintiff has not committed any breach. With respect to these issues, I hold that the Defendants are not entitled to deduct a sum of Rs.21,16,252/- from the advance amount paid by the Plaintiff. The reasoning for this is that in the agreement, it has been specifically stated that only on the determination of the stamp duty determined by the Inspector General of Registration, will the Plaintiff be called upon to pay the said amount. In fact, the amount shown as advance in Ex.P1 is only towards part sale consideration. This is very important because in Ex.P1 itself it had been mentioned that the amount payable to the Registration Department is exclusive of the sale consideration. The sale consideration was fixed at Rs.1.25 crores and on the date of Ex.P1 towards the total consideration of 1.25 crores, an advance of Rs.25 lakhs

had been paid. On subsequent dates, towards the said total sale consideration of Rs.1.25 crores, further advances amounting to Rs.10 lakhs had been paid. This naturally means that the entire advance of Rs.35 lakhs was only towards the sale consideration. At no point of time, had the Plaintiff committed themselves to deduct or permit the Defendants to deduct the stamp duty payable from this advance amount. The stamp duty had not been determined by the Inspector General of Registration. Only after the process of such determination was completed, would the question of payment of stamp duty arises and in the absence of determination of the stamp duty by the Inspector General of Registration, the Defendants are not entitled for any deduction. Consequently, I hold the issues (2) and (3) against the Defendants.

28. **Issues (4) and (5) :-** In view of the reasonings afforded with respect to the above issues, I hold that the Plaintiff is entitled for a decree as prayed for with costs and accordingly, these issues also answered in favour of the Plaintiff.

29. In the result, this civil suit is decreed as prayed for with costs. Time for payment is three months.

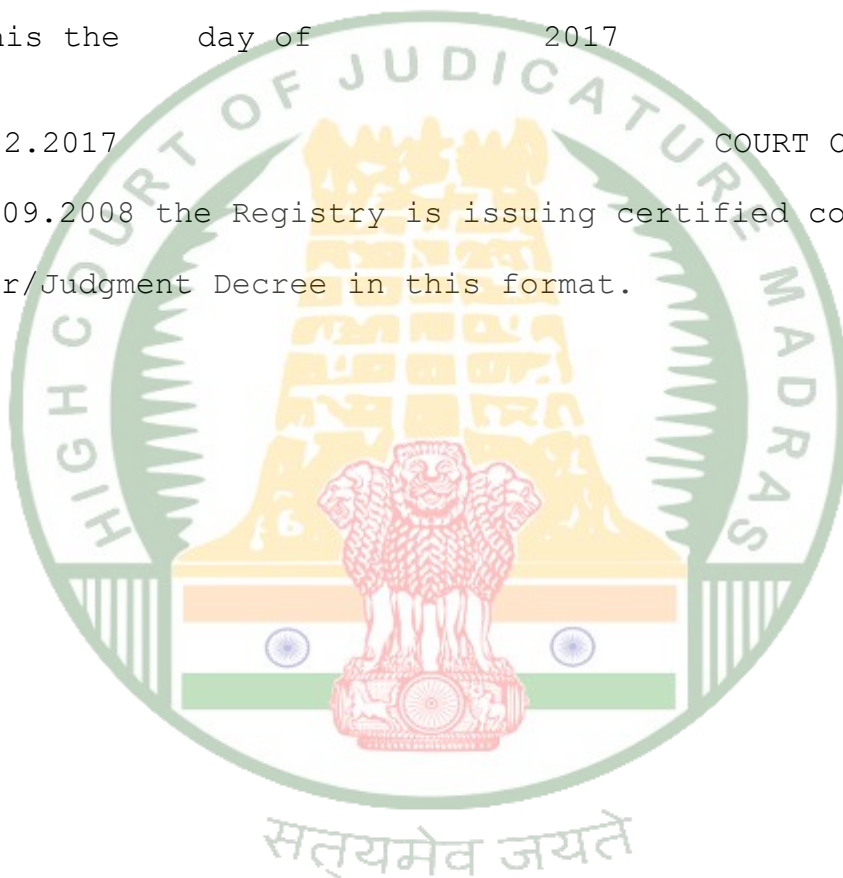
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15.12.2016

//Certified to be a true copy//

Dated this the day of 2017

R.s/28.02.2017 COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.



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