

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.3.2018

CORAM

THE HON'BLE MR.JUSTICE D.KRISHNAKUMAR

S.A.No.169 of 2014

K.Rajan

... Appellant/Plaintiff

Vs.

1 V.Vijayalakshmi

2 V.Sathish

... Respondents/Defendants

Second appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree of the I Additional Sub Judge, Coimbatore, dated 28.10.2013 made in A.S.No.16 of 2013 reversing the Judgment and Decree of the II Additional District Munsif, Coimbatore, dated 20.12.2012 made in O.S.No.1993 of 2006.

For Appellant : Mr.M.Velmurugan

For Respondents : Mr.V.Sivakumar

JUDGMENT

The brief facts of the case as follows:

The revision petitioner filed a suit in O.S.No.1993 of 2006 for direction directing the respondents/defendants to execute sale deed in respect of the suit property in favour of the petitioner within the specified time. According to the plaintiff/petitioner, the petitioner had entered into a sale agreement with the first respondent/1st defendant being the mother of the second respondent/2nd defendant on 16.8.2004 for the purchase of the suit property for a total sale consideration of Rs.79,420/- and paid a sum of Rs.78,420/- as advance towards sale agreement and the period fixed for the execution of sale is six months. At the time of execution of sale agreement, the respondents/defendants have promised to the petitioner/plaintiff that they would provide the legal heir certificate along with the death certificate of late Varadharaj. The petitioner/plaintiff was ready and willing to execute the sale deed and met the defendants several occasions, however, the defendants prolonged the execution. The defendants deliberately failed and neglected to execute the sale deed. The defendant

avoiding the execution of sale. The defendants did not entrust the document, death certificate, legal heirs certificate and encumbrance certificate and prolonged the execution. Hence, the above suit was filed before the court below.

2 According to the respondents, the suit agreement is not a only agreement. The possession was not handed over to the plaintiff and the defendants are still in possession. The suit property was originally belongs to late Varadharaj. When the 2nd defendant was minor, the sale agreement was entered into with the plaintiff on 12.11.2003 and the sale price was fixed at Rs.57,300/- for 2270 sq.ft. of land. The plaintiff paid an advance amount of Rs.21,000/- The sale agreement expires on 12.5.2004. Thereafter, another sale agreement was entered into between the plaintiff and the defendants wherein the defendants agreed to sell 3145 sq.ft. Of land for a sum of Rs.79,420/- and the plaintiff paid a sum of Rs.58,300/- as an advance. The said agreement expires on 17.8.2004. On 16.8.2004, third sale agreement was entered into between the plaintiff and the defendants. The sale price was fixed at Rs.79,420/- and a sum of Rs.78,420/- was paid as an advance. The 3rd sale agreement expires on 16.2.2005. The plaintiff was neither ready nor willing to purchase the property, but the defendants were ready and willing to sell the property. No notice or intimation was given by the petitioner/plaintiff on or before 16.2.2005 to show his readiness and willingness to purchase the property. The plaintiff failed to perform the contract within the stipulated period, the sale agreement stands cancelled and the amount paid towards advance had been forfeited. The plaintiff has suppressed the earlier sale agreement. The plaintiff failed to perform his part of contract and committed a breach of contract. The defendants sent a legal notice on 19.8.2006 to the plaintiff. The plaintiff was informed that the sale agreements were stands cancelled. The plaintiff has never in possession of the suit property. The plaintiff is not entitled for any relief of specific performance and there is no cause of action. The suit is liable to be dismissed. The trial court upon considering the oral and documentary evidence decreed the suit in favour of the plaintiff. Aggrieved by the same, the respondents herein have filed an appeal in A.S.No.16 of 2013. However, the appellate Court came to the conclusion that the plaintiff suppressed the materials facts, namely, execution of Ex.A1, A2 sale agreements, telegram and notice Ex.A4 and Ex.B3 sent by the defendants, thereby the plaintiff has not come to the court with clean hands and allowed the appeal and dismissed the suit.

3 According to the learned counsel for the appellant/plaintiff, suit for specific performance of contract is based on sale agreement. In the instant case, there are two sale

agreements which were marked as Ex.A1 and A2. The learned counsel for the appellant relied on the evidence of D.W.1 who in her cross examination has clearly stated that the execution of sale deed was only formally postponed. According to the learned counsel for the appellant, time is not the essence of the contract. In support of his contention, he relied on the judgment of the Hon'ble Supreme Court in CHAND RANI VS. KAUL RANI [1993(1) SCC 519]. In the instant case, the plaintiff had almost paid 99% of the sale consideration and remaining sale consideration was just only Rs.1,000/-. The learned counsel for the petitioner also relied upon the decision of the Hon'ble Supreme court in MOTILAL JAIN VS. RAMDASI DEVI (Smt) AND OTHERS [(2000) 6 SCC 420] and ARJUNAN VS. D.PANDI [2012(2) MWN (Civil) 277] SWARNAM RAMACHANDRAN AND ANOTHER VS. ARAVACODE CHAKUNGAL JAYAPALAN [2004(5) CTC 369] and A.K.LAKSHMIPATHY (DEAD) & OTHERS VS. RAJ SAHEB PANNALAL H.LAHOTI CHARITABLE TRUST & OTHERS [2010 (1) MWN (Civil) 101].

4 The learned counsel for the respondent would submit that as per the sale agreements, Ex.A1, A2 and A3, time is essence of contract and before the appellate court, the appellant admits that time is essence of contract. The appellant/plaintiff never purchased stamp papers made ready draft sale deed and deposited balance sale price before the trial court. The period of performance of the sale agreement is fixed as 6 months, which expires on 16.2.2005. However, the plaintiff was neither ready nor willing to purchase the property, whereas the defendants 1 and 2 were ready and willing to sell the property ever since the date of agreement. The appellant/plaintiff never fulfilled the terms of contract. Therefore, the appellate court rightly set aside the judgment of the trial court and consequently, the Civil revision petition is liable to be dismissed.

5 Heard the rival submissions of both sides and perused the materials available on record.

6. The trial court framed the issues whether the plaintiff is entitled for the relief of Specific performance. The trial court under Ex.A1 sale agreement entered between the appellant and the defendants on 12.11.2003 and the same was extended under Ex.A2 which expires on 12.5.2004 and again extended under Ex.A3 which expires on 16.2.2005. The telegram was sent by the respondent/defendant on 16.8.2006 and on 19.8.2006 notice was sent by the appellant/plaintiff. The suit was filed on 23.8.2006 by the appellant for specific performance. The trial court has considered the issue whether the time is essence of contract in the present suit. The appellate court has held that the plaintiff has not performed the contract within the period as specified in Ex.A3 sale

agreement and nearly after 1½ years, the plaintiff/appellant herein has come forward for performing the contract. The respondent/defendant has communicated to the plaintiff by telegram and notice by cancelling the sale agreement and forfeited the advance amount paid by the appellant/plaintiff. In the plaint averments, the appellant has submitted that the respondent/ defendant promised to furnish death certificate and legal heir certificate of Varadaraj and the plaintiff was always ready and willing to execute sale deed by paying remaining dues as per the agreement. But the respondent/defendant has not come forward to execute the sale deed. After receipt of telegram and notice, the present suit has been filed by the plaintiff. The trial court has accepted the contention of the appellant/plaintiff that sale agreement was entered into between the appellant/ respondent for total sale consideration of Rs.79,420/- and the appellant/ plaintiff paid a sum of Rs.78,420/- towards sale consideration under the sale agreement and held that the plaintiff paid 99% of sale consideration and the payment of balance amount would not curtail the right of the appellant/plaintiff to perform his part of the contract. Therefore, time is not essence of contract by considering the said facts of the case. Challenging the aforesaid judgment and decree, the respondent has preferred an appeal in A.S.No.16 of 2013. The respondent/ defendant raised a ground before the appellate court that the trial court has not considered the point for determination, whether the plaintiff was ready and willing to perform his part of the contract.

7 The learned counsel for the defendants/respondents contended that as per the recital in Ex.A3, it is the obligation of the appellant/plaintiff to satisfy the clause in the sale agreement and the appellant/plaintiff ought to have purchased stamp paper in the name of the plaintiff or his nominee for registering the sale deed within the aforesaid six months period. In default, the plaintiff will have to suffer loss of earnest money. The contention of the respondent/defendant that the appellant/plaintiff has not performed his contractual obligation within the stipulated time as fixed in Ex.A3. Therefore, aforesaid appeal was allowed by holding that the appellant/plaintiff failed to perform his part of the contract for the reason that he is not ready and willing for execution of the sale deed by the defendant within the period as stipulated in the terms and conditions of Ex.A3 sale agreement. Challenging the aforesaid judgment and decree, the plaintiff has preferred the Second appeal before this court.

8 This court while admitting the Second appeal, framed the following substantial questions of law.

1) Whether the First Appellate Court judgment in which it is held that the appellant is not ready and willing to perform the contract is perverse finding ?

2) Whether the time is the essence of contract as pleaded by the respondents ?

9 The learned counsel for the appellant would submit that sale agreement under Ex.A1 was executed between the appellant and the respondent on 12.11.2003. Pursuant to the said sale agreement, Ex.A2 was executed between the parties on 17.5.2004 for extension of time for executing the sale deed. Under Ex.A3, sale agreement was executed between the parties on 16.8.2004. In the aforesaid Ex.A3, sale has to be completed on or before 16.2.2005. In so far as the first question of law raised in the Second appeal, the learned counsel for the appellant would submit that in the plaint averments, it is specifically stated that at the time of execution of sale agreement, the defendant has promised to provide the legal heir certificate and death certificate of late Varadharaj besides encumbrance certificate for the suit property along with the title deeds and he met the first defendant several occasions to execute sale deed with due consideration and it is also specifically averred that he was ready and willing to perform his part of the contract under the aforesaid agreement. The respondent/defendant has not come forward to execute sale deed in favour of the appellant/plaintiff. The appellant has invested huge amount for the purchase of the suit property and he has paid a sum of Rs.78,420/- towards the sale consideration and the balance amount payable by the appellant/plaintiff is Rs.1000/- only to the respondents/defendants. According to the learned counsel for the respondents/defendants, despite several request made by the respondents, the appellant has not come forward to execute sale deed for non production of aforesaid certificate to the appellant/plaintiff. Further, the appellant/ plaintiff has delayed in performing his part of the contract by not getting the required stamp papers ready for execution of sale deed. The trial court has considered the evidence of plaintiff side and the documents, decreed the suit in favour of the appellant/plaintiff. The trial court has held that the appellant/ plaintiff had paid the entire sale consideration except a balance amount of Rs.1000/-. Therefore, for the meager amount, there is no intention for the plaintiff to drag on the defendant for performing his part of the contract. The trial court passed a detailed judgment upon oral and documentary evidence. But the appellant court without appreciating the contention of the appellant/plaintiff reversed the judgment of the trial court by holding that the appellant/plaintiff has not come forward within the stipulated time for performing his part of the contract for the execution of the sale deed and no evidence was adduced on the side of the appellant/plaintiff to show that the appellant/plaintiff was ready and willing to perform his part of the contract on or before 15.2.2005. The

appellate court disbelieved the contention of the appellant/plaintiff that the respondent/defendant has not come forward to furnish death certificate, legal heirs certificate of Varadharaj. By accepting the contention of the respondents/defendants, the appellate court has erroneously come to the conclusion that the appellant/plaintiff was not ready and willing to perform his part of the contract. In support of his contention, the learned counsel for the appellant/plaintiff relied upon the decision of the Hon'ble Supreme court in MOTILAL JAIN VS. RAMDASI DEVI (Smt) AND OTHERS [(2000) 6 SCC 420] wherein the Hon'ble Supreme Court has held as under:

'8. However, a different note was struck by this Court in Chandiook case [(1970) 3 SCC 140 : AIR 1971 SC 1238] . In that case 'A' agreed to purchase from 'R' a leasehold plot. 'R' was not having lease of the land in his favour from the Government nor was he in possession of the same. 'R', however, received earnest money pursuant to the agreement for sale which provided that the balance of consideration would be paid within a month at the time of the execution of the registered sale deed. Under the agreement 'R' was under obligation to obtain permission and sanction from the Government before the transfer of leasehold plot. 'R' did not take any steps to apply for the sanction from the Government. 'A' filed the suit for specific performance of the contract for sale. One of the contentions of 'R' was that 'A' was not ready and willing to perform his part of the contract. This Court observed that readiness and willingness could not be treated as a straitjacket formula and that had to be determined from the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. It was held that in the absence of any material to show that 'A' at any stage was not ready and willing to perform his part of the contract or that he did not have the necessary funds for payment when the sale deed would be executed after the sanction was obtained, 'A' was entitled to a decree for specific performance of contract.

10. In the instant case a perusal of paras 6 to 11 of the plaint does clearly indicate the readiness and willingness of

the plaintiff. The only obligation which he had to comply with was payment of balance of consideration. It was stated that he demanded the defendant to receive the balance of consideration of Rs 8000 and execute the sale deed. The defendant was in Patna (Bihar) at the time of notices and when he came back to his place the plaintiff filed the suit against him. In support of his case, he adduced the evidence of PW 1 and PW 2. The plaintiff had parted with two-thirds of the consideration at the time of execution of Ext. 2. There is no reason why he would not pay the balance of one-third consideration of Rs 8000 to have the property conveyed in his favour.''

10 In ARJUNAN VS. D.PANDI [2012(2) MWN (Civil) 277] this Court has held as under:

"40. Now, in the case before us, under Ex A.2 Sale Agreement Rs. 1,00,000/- was paid. It is a substantial amount. Further, Rs. 1,45,000/- has been paid (See Ex.A.3). As against the fixed sale consideration of Rs. 2,50,000/-, totally Rs. 2,45,000/- has been paid. The balance payable is only Rs. 5,000/-. It amounts to readiness and willingness to pay the balance sale consideration to the Defendant.

43. The fact that more than 95% amount is paid and only a small amount of Rs. 5,000/- was balance and that was also repeatedly offered make it clear that Plaintiff has been continuously ready and willing to perform his part of the contract."

11 In the light of the aforesaid decision of this Court, the appellant/plaintiff has to show his bonafide to satisfy the requirements under the Specific Relief Act that he is always ready and willing to perform his part of the contract. The learned counsel for the respondents/ defenants would submit that sale agreement entered into between the appellant and the respondent under Ex.A3, dated 16.8.2004 the time fixed to perform his part of the contract was on or before 15.2.2005. There is specific clause under the sale agreement that the appellant has to perform his part of the contract within the aforesaid stipulated period in default, recital of the agreement clearly states that the advance amount paid by the appellant/

plaintiff under the sale agreement Ex.A3 will be forfeited. The appellant/plaintiff has not come forward to show his bonafide that he was ready and willing to perform his part of the contract within the stipulated period under the sale agreement. The respondents/defendants sent telegram on 16.8.2006 and issued legal notice on 19.8.2006 to the plaintiff by informing that the sale agreement entered into between the parties and subsequently, the same was cancelled. Till such time, the appellant/ plaintiff has not come forward to get the sale deed executed and has not shown readiness and willingness to perform his part of the contract. The contention of the appellant in the plaint that death certificate and legal heir certificate were not furnished to the appellant was negated by the appellate court by holding that there is no recital in the sale agreement Ex.A3 entered into between the parties relating to furnishing of legal heirship certificate. Sale agreement was entered into between the parties subsequent to the death of Varadharaj. Hence, the appellate court has rightly rejected the contention of the appellant that the delay has been caused due to non furnishing of those documents by the respondents/defendants.

12 On perusal of the Ex.A3 sale agreement entered into between the parties, it is specifically stated that out of total sale consideration of Rs.79,420/-, the appellant has paid a sum of Rs.78,420/- to the defendant and the balance amount of Rs.1000/- to be paid by the appellant/plaintiff to the respondents/defendants. Sale agreement entered into between the parties under Ex.A1 to A3 is not disputed by the defendants in their written statement. The respondents/defendants have not disputed Ex.A1 to A3 wherein the appellant/plaintiff had paid almost entire sale consideration except Rs.1000/-. In the light of the decision of the Hon'ble Supreme Court as well as High Court, the bonafide of the appellant/plaintiff that except Rs.1000/- he paid the entire sale consideration would not rescue the appellant/plaintiff when he was not ready and willing to perform his part of the contract. It has been specifically averred that plaintiff has not paid balance sale consideration and not even he deposited the balance amount before the court below. In the written statement, it has been specifically denied that the appellant/ plaintiff was never ready and willing to purchase the property. When there is specific denial by the defendants that the appellant/plaintiff was ready and willing to perform his part of the contract, the appellant/plaintiff has to satisfy the requirement under the provisions of Specific Relief Act to prove his bonafide. In the absence of any materials, there is no force in the contention of the appellant/plaintiff.

13 In the light of the decision of the Hon'ble Supreme Court, it has been held that he has not proved before the court below that he was ready and willing to perform his part of the contract as per the requirements under the Specific

Relief Act. Secondly, time is essence of contract or not ?. It is the case of the appellant/plaintiff that the respondents/defendants have not furnished death certificate, legal heir certificate of Varadharaj inspite of request made by the appellant/ plaintiff. There is no clause in the sale agreement to provide those documents to the appellant/plaintiff. Therefore, the appellant/plaintiff cannot claim that by not providing aforesaid documents, the respondents/ defendants were not ready and willing to perform their part of the contract. Further, according to the learned counsel for the appellant/ plaintiff, even though time has been fixed in the sale agreement, in the light of the factual position, time is not a essence of contract in the case in hand. In support of his contention, the learned counsel for the appellant/ plaintiff relied on the decision of the Hon'ble Supreme Court in SWARNAM RAMACHANDRAN AND ANOTHER VS. ARAVACODE CHAKUNGAL JAYAPALAN [2004 (5) CTC 369] wherein the Hon'ble Supreme Court held as under:

"11. According to Pollock & Mulla's Indian Contract & Specific Relief Act - [(2001) 12th Edition 1086], the intention can be ascertained from:

- i) the express words used in the contract;
- ii) the nature of the property which forms the subject matter of the contract;
- iii) the nature of the contract; and
- (iv) the surrounding circumstances.

12. That time is presumed not to be of essence of the contract relating to immovable property, but it is of essence in contracts of reconveyance or renewal of lease. The onus to plead and prove that time was the essence of the contract was on the person alleging it, thus giving an opportunity to the other side to adduce rebuttal evidence that time was not of essence. That when the plaintiff pleads that time was not of essence and the defendant does not deny it by evidence, the Court is bound to accept the plea of the plaintiff. In cases where notice is given making time of the essence, it is duty of the Court to examine the real intention of the party giving such notice by looking at the facts and circumstances of each case. That a vendor has no right to make time of the essence, unless he is ready and willing to proceed to completion and secondly, when the vendor purports to make time of the essence, the purchaser must be guilty of such gross default as to entitle the vendor to rescind the

contract.

13.....

14. In the present case, it was submitted on behalf of the appellants that time to pay Rs.75,000/- on or before 30.9.1981 was made the essence of the contract by notice dated 12.9.1981 as the respondent was a chronic defaulter. We do not find any merit in this argument. In his evidence, the respondent asserted that when he paid Rs.50,000/- on 31.3.1981, the appellants orally agreed to extend the time for payment of Rs.75,000/- from 18.4.1981 to 30.9.1981; that at that time there was no agreement to make time the essence of the contract. This assertion has not been rebutted by the appellants. No evidence in rebuttal has been led by the appellants. Further, as rightly held by the Courts below, the conduct of the respondent was not a gross conduct so as to justify giving of notice making time of the essence of the contract. That on the contrary, time was extended by the appellants in furtherance of clause (8) of the agreement up to 31.12.1981. In the circumstances, we are in agreement with the conclusion that time was not of the essence."

14. In the light of the aforesaid judgment, time is not essence of contract. Further, distinguished judgment of the Hon'ble Supreme Court in A.K.LAKSHMIPATHY (DEAD) & OTHERS VS. RAJ SAHEB PANNALAL H.LAHOTI CHARITABLE TRUST & OTHERS [2010(1) MWN (Civil) 101] wherein it was held that time is essence of contract. The learned counsel for the respondent would submit that it is clear from the recital of the sale agreement Ex.A3, time has been fixed for execution of the sale agreement on or before 12.5.2006. The respondent has denied the averments that the respondent has not come forward to perform the contract by not furnishing the documents viz., death certificate and legal heir certificate of Varadharaj. The contention of the respondents/defendants that in all the three sale agreements under Ex.A1, A2 and A3 were entered into between the parties, there is no recital for furnishing those documents to the plaintiff/appellant. Therefore, as the sale agreement period expires on 16.2.2005 telegram and notice were sent on 19.8.2006 to the appellant/plaintiff by informing that in view of the appellant/plaintiff having not come forward to perform his part of the contract within the time stipulated in the sale agreement, the sale agreement stands cancelled and the amount paid towards advance for sale consideration has been forfeited.

Therefore, it is clear from the facts that the plaintiff/appellant has not come forward to perform his part of the contract within the time as stipulated in the sale agreement. Therefore, the appellate court has rightly considered the issues elaborately in the aforesaid judgment and allowed the appeal.

15 On perusal of the Ex.A3 sale agreement entered into between the parties, under Ex.A3, where time for execution of sale deed was fixed as, on or before 15.2.2005, the contention of the appellant/ plaintiff that the time is not essence of contract cannot be accepted. Admittedly, sale agreement under Ex.A1 was entered into between the parties. Subsequently, it was extended under Ex.A2 and Ex.A3. The contention of the appellant/plaintiff that the respondents/defendants have not come forward with the documents viz., death certificate, legal heir certificate of Varadharaj to the appellant/plaintiff. On perusal of Ex.B1 and B2, death certificate in the name of Varadharaj was issued in the year 1995. Admittedly, Ex.A1 was entered into between the parties on 12.11.2003 and subsequently, time was extended finally till 16.2.2005 under Ex.A3. Admittedly, there is no recital in the aforesaid agreement to furnish death certificate and legal heir certificate in respect of the deceased Varadharaj to the appellant/plaintiff. Further, when the sale agreement has been extended from time to time for the aforesaid bonafide reason, the plaintiff/appellant ought to have performed his part of the contract in the sale agreement by sending documents for performing the contract, no material has been produced to show his bonafide for performing his obligation in the contract.

16 In the light of the decision cited supra as well as the facts and circumstances of the case on hand, as per Ex.A1, time is essence of contract. Therefore, the question of law is answered in favour of the respondents/defendants and the judgment and decree of the appellate court is confirmed.

In the result, the Second appeal fails and accordingly dismissed. No costs. सत्यमेव जयते

Sd/-

Assistant Registrar(CS II)

//True copy//

Sub Assistant Registrar

vaan

To

1 The 1st Additional Sub Judge,
Coimbatore

2 II Additional District Munsif,
Coimbatore.

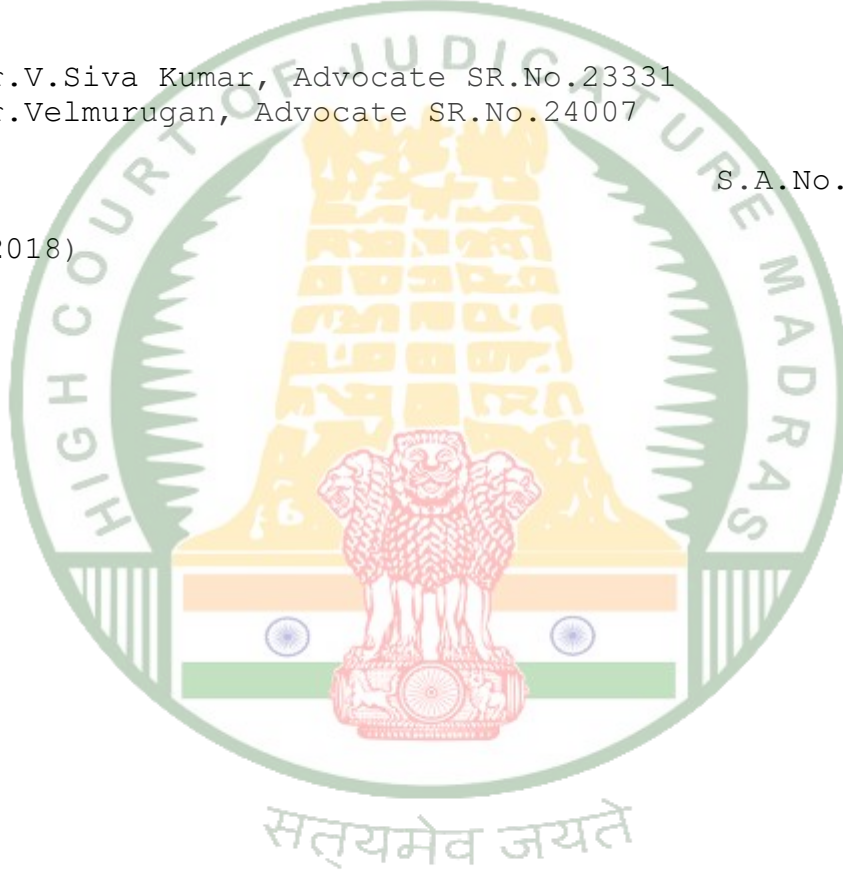
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+1cc to Mr.V.Siva Kumar, Advocate SR.No.23331
+1cc to Mr.Velmurugan, Advocate SR.No.24007

S.A.No.169 of 2014

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