

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 26.07.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

S.A.No.60 of 2016
and C.M.P.No.1771 of 2016

Rajapunnisa

.. Appellant

Vs.

1.Meharajan Begum
2.K.Narayanan

.. Respondents

PRAYER: Second Appeal is filed under Section 100 of C.P.C against the Judgment and decree dated 20.02.2015 made in A.S.No.445 of 2008 on the file of XVIII Additional City Civil Court, Chennai confirming the Judgment and Decree dated 29.01.2008 made in O.S.No.339 of 2003 on the file of XIV Assistant City Civil Court, Chennai.

For Appellant : Mr.B.Vijay
For R1 : Mr.K.S.Viswanathan
For R2 : No appearance

J U D G M E N T

Second Appeal is filed under Section 100 of C.P.C against the judgment and decree dated 20.02.2015 made in A.S.No.445 of 2008 on the file of XVIII Additional City Civil Court, Chennai confirming the judgment and decree dated 29.01.2008 made in O.S.No.339 of 2003 on the file of XIV Assistant City Civil Court, Chennai.

2. The appellant is plaintiff in O.S.No.339 of 2003 on the file of XIV Assistant City Civil Court, Chennai and appellant in A.S.No.445 of 2008 on the file of XVIII Additional City Civil Court, Chennai. The respondents are defendants in O.S.No.339 of 2003 and respondents in A.S.No.445 of 2008. The appellant filed said suit for declaration of title and permanent injunction restraining the respondents from in any way interfering with the possession and enjoyment of the property. After contest, the suit was decreed for declaration of title and dismissed for relief of injunction. The appellant filed A.S.No.445 of 2008,

challenging the judgment rejecting the relief of injunction. The said appeal was dismissed, against which the present Second Appeal.

3. The second respondent filed cross appeal in the first appeal filed by the appellant. The second respondent also filed A.S.No.165 of 2010, challenging the Judgment and Decree in O.S.No.339 of 2003. Both the appeals viz., A.S.Nos.445 of 2008 and 165 of 2010 filed by the appellant and second respondent and the cross appeal filed by the second respondent were dismissed. The learned First Appellate Judge confirmed the decree of declaration granted by the Trial Court.

4. Case of the appellant :

Originally, the suit property belonged to one Vittal Rao who had purchased the same from one Thiruvengada Mudaliar. The said Vittal Rao sold the superstructure to Abdul Rahman Saheb under a registered sale deed dated 30.11.1925 bearing Document No.1669 of 1925. The said Abdul Rahman Saheb sold the superstructure along with leasehold right to Thirumalai Mudaliar and his wife Muniammal under a sale deed dated 01.05.1929. They borrowed money from Madras Co-operative Bank by mortgaging the suit property vide mortgage deed dated 23.01.1933. They defaulted in payment of amount borrowed from the bank. The bank filed a suit based on the mortgage and brought the leasehold right and superstructure to sale by auction. The Madras Co-operative bank purchased the property and sale certificate was also issued in favour of the bank.

4 a). In the meanwhile, in the year 1937, the owner of the land namely Balakrishna Mudaliar and Audikesava Mudaliar have filed O.S.No.221 of 1937 for eviction against Thiruvengada Mudaliar. The said Thiruvengada Mudaliar filed an application under Section 9 of the City Tenants Protection Act to purchase the land. The Madras Co-operative Bank filed application to implead in the said suit and compromise was recorded and the bank purchased the land. The bank become absolute owner of the land and superstructure by purchasing the same by the sale deed dated 30.04.1940. The bank sold the suit property to Badsha Saheb and Hassina Begum by sale deed dated 12.04.1945. The said Badsha Saheb released his share in the suit property by release deed dated 14.05.1956 to his wife Hassina Begum. The said Hassina Begum sold the suit property to Meenakshi Ammal by sale deed dated 18.10.1957. The said Meenakshi Ammal filed eviction petition in H.R.C.No.1293 of 1958 and 1290 of 1958 against tenants C.Balasundaram and Muniammal. By the order dated 22.04.1958, eviction was ordered. The said Meenakshi Ammal died leaving behind his son T.Namasivayam to succeed the suit property. He obtained patta and mutation was carried on in the

revenue records in the name of T.Namasivayam. The appellant by the sale deed dated 27.03.1997 purchased the suit property from T.Namasivayam and she become the absolute owner of the suit property and was in possession and enjoyment of the suit property. When she was out of station, the second respondent attempted to put up construction in the suit property, for which she gave a complaint to the police. The second respondent disputed the title of the appellant based on a fraudulent sale deed. Hence, the above suit is filed for declaration and injunction.

4 b).The appellant also filed I.A.No.1279 of 2003 for interim injunction restraining the respondents from proceeding with the construction in the suit property. The interim injunction was granted. The second respondent filed affidavit of undertaking seeking permission to put up construction in the ground floor and specifically gave an undertaking that if the appellant succeeds in the suit, he will not claim any right in the superstructure put up by him in the suit property. The second respondent also undertook that he will not create any third party interest in the suit property till the finality of the suit.

The Trial Court recorded the said undertaking and the second respondent was permitted to put up superstructure in the ground floor alone and modified the interim injunction already granted restraining the second respondent from raising any further construction over and the above ground floor.

5. Case of first respondent :

The first respondent filed the written statement and denied all the averments made by the appellant. According to the first respondent, the appellant and her vendor are not owners of the suit property and they were not in possession of the suit property. In E.A.No2 of 1964 in E.P.No.305 of 1963 in H.R.C.No.1293 of 1958, it was held that one Elumalai and his wife were in possession and enjoyment of the suit property. No further proceedings was taken against the said order. Elumalai and his wife gifted the suit property to Muniammal, wife of Thirumalai Mudaliar. The said Muniammal was in possession and enjoyment of the suit property till her death. After her death, her legal heirs inherited the property and were in possession and enjoyment of the shares. The first respondent purchased the same by the sale deed dated 04.06.1992 from the legal heirs of Durai Kannan and another and she is in possession and enjoyment of the same. The first respondent sold to the second respondent by the sale deed dated 27.12.2002. From the date of sale, the second respondent is in possession and enjoyment of the suit property and it is not correct to state that when the appellant was not in station, the second respondent tried to put up

superstructure in the suit property. It is also not correct to state that the second respondent with the help of rowdy elements tried to trespass into the suit property. No cause of action arose for the suit and the suit property is not valued properly and correct Court fee is not paid and prayed for dismissal of the suit. The suit is bad for non joinder of necessary parties.

6. The case of second respondent

The second respondent filed written statement and contended that he purchased the suit property for valuable consideration and he is in possession and enjoyment of the suit property from the date of purchase. According to the second respondent, land purchased by bank is only a paper transaction and the bank did not take possession of the suit property and the sale in favour of the bank is private sale and without including other owners Thulasingham Mudaliar and his heirs, sale in favour of the bank is invalid. To overcome the infirmity the bank sold the property to Badsha Saheb and his wife Hassina Begum and the said sale and subsequent sale are not valid. In addition to that the second respondent also made similar averments as that of the first respondent in his written statement.

7. Based on the above pleadings, necessary issues were framed. Before the learned Trial Judge, the father of the appellant was examined as P.W.1 and thirteen documents were marked as Exs.A1 to A13. The second respondent examined himself as D.W.1 and two documents were marked as Exs.B1 and B2. The first respondent did not let in any oral and documentary evidence.

8. The learned Trial Judge considering the pleadings and oral and documentary evidence, granted the relief of declaration of title to the appellant and rejected the relief of injunction. Against which the appellant filed A.S.No.445 of 2008. The second respondent filed Cross Appeal No.25 of 2009 in A.S.No.445 of 2008 and also filed A.S.No.165 of 2010. In the appeal, the appellant filed C.M.P.No.8 of 2009 under Order 6 Rule 17 of CPC to amend the plaint to include the relief of recovery of possession. The First Appellate Court dismissed the C.M.P.No.8 of 2009 in A.S.No.445 of 2008. Challenging the said order, the appellant filed CRP.NPD.No.3759 of 2011. This Court by order dated 26.09.2013, allowed the CRP setting aside the order of dismissal in C.M.P.No.8 of 2009 and permitted to the appellant to carry out the amendment.

9. The appellant filed C.M.P.No.42 of 2014 under Order 6 Rule 18 of CPC to extend the time to carry out the amendment. The appellant filed application and amended the plaint in O.S.No.339 of 2003 and relief of recovery of possession was included. The second respondent filed additional written

statement and contended that the relief of possession is barred by limitation. The appellant has not properly valued the relief of possession and has not paid proper Court fee contemplated under Section 30 of the Tamil Nadu Court Fee and Suit Valuation Act 1955. The appellant has not amended the grounds of appeal raising grounds with regard to relief of possession. The second respondent did not file any additional written statement after the amendment.

10. The learned First Appellate Judge framed necessary points for consideration. The learned First Appellate Judge took both the appeals filed by the appellant and the second respondent and cross appeal filed by the second respondent jointly and framed points for consideration. Considering the materials available on record, judgment of the Trial Court, by common judgment dated 20.02.2015 dismissed the appeal in A.S.No.445 of 2008 filed by the appellant and cross appeal filed by the second respondent and also the Appeal filed by the second respondent in A.S.No.165 of 2010.

11. Against the dismissal of the appeal in A.S.No.445 of 2008, the appellant has come out with the present Second Appeal.

12. At the time of admission, the following substantial question of law was framed:

"Whether the lower appellate Court correct in law in not taking note of amendment of plaint seeking recovery of possession of the suit property"

13. The learned counsel appearing for the appellant contended that in the first appeal, the appellant filed C.M.P.No.8 of 2009 for amendment of the plaint to include alternative relief of possession. The First Appellate Court dismissed the said application and this Court allowed the C.R.P (NPD).No.3759 of 2011 filed by the appellant, challenging the order of dismissal of the CMP and ordered amendment. The appellant filed C.M.P.No.42 of 2014 seeking extension of time to carry out the amendment and carried out amendment to include the relief of possession. The First Appellate Court failed to consider the order of this Court in CRP and inclusion of relief of possession. The second respondent, as per permission granted by the Trial Court, on his affidavit of undertaking put up superstructure and is in possession of ground floor. In the affidavit of undertaking, the second respondent undertook not to claim any right over the suit property, in case the appellant succeeds in the suit. In view of such undertaking, even without the relief of mandatory injunction, the second respondent has to vacate and deliver the vacant possession to the appellant. The

Courts below having held that the appellant is absolute owner of the suit property, ought to have granted the relief of injunction as well as possession in addition to relief of declaration of title. The learned counsel for the appellant relied on the following decisions, in support of his contentions:

(i) H.Lakshmi Shankar Vs J.Anand Kumar reported in MANU/TN/0708/2017. The relevant portion is extracted hereunder:

"21. In view of the said submission, the contention of the learned counsel for the appellants/defendants that the plaintiff did not acquire any title as per Ex.A3, is without any merit. The learned first appellate Judge has considered all the facts in proper perspective and by giving valid reasons held that Vairavan Chettiar got possession of the property from the legal heirs of Kalimuthu Asari. The learned first appellate Judge has rightly held that the court auction purchaser can take possession of the property, purchased in court auction also. There is no necessity to take possession only through Court. There is no error in the said finding.

.....

23. The contention of the appellants/defendants that the plaintiff did not examine either the scribe, Ponnusamy or witnesses to Ex.A2 or Attestor of any independent witness to prove Ex.A2, even though Ponnusamy is the relative of the Plaintiff, has no merits. In view of Ex.A.6, the genuineness of Ex.A2 is proved. It is pertinent to note that the first defendant has also did not examine Ponnusamy and Valliammal, the vendors in Ex.B1. They are also relatives of the first defendant. The vendors of the first defendant did not have any

right or interest or title to the suit property, when they sold the property to the first defendant by Ex.B1 Sale Deed. The property was sold earlier in Court auction and Ponnusamy and Valliammal had surrendered the possession to Vairavan Chettiar as evidenced by Ex.A2 In view of Exs.A1 and A2, the first defendant had not acquired any title to the suit property by Ex.B1-Sale deed.

27. The defendants have not proved their title and possession to suit property. Even if they claim title by adverse possession, they have not alleged and proved their hostile possession for statutory period to the knowledge of the rightful owner.

29. The right of Vairavan Chettiar, the Court auction purchaser, never extinguished and the legal heirs of Kalimuthu Asari surrendered possession to Vairavan Chettiar, who sold the property to the plaintiff. The title of Vairavan Chettiar was not an issue in the suit filed by the husband of the plaintiff in O.S.No.2 of 1969."

(ii)K.Gopalan(died) and others Vs. Muthulakshmi reported in 2011 (6) CTC 21. The relevant portion is extracted hereunder:

"14. In a suit for recovery of possession based on title, once the plaintiff proves his title to the suit property, he is entitled to the decree and recovery possession, unless the defendant pleads and proves adverse possession. Once the plaintiff establishes his title a duty is cast upon the defendant to prove that he has prescribed title by adverse possession over the suit property. To prove adverse possession, the conduct of the defendant and the treatment of the suit property by the defendant are important. If the defendant has enjoyed

the suit property as owner of the suit property, he cannot claim adverse possession. Similarly, if the defendant is enjoying the suit property for more than a statutory period, but did not enjoy the property to the knowledge of the true owner, in that case also, he cannot claim adverse possession.

(iii) L.N.Aswathama and Another Vs. P.Prakash reported in 2009 13 SCC 229. The relevant portion is extracted hereunder:

"8. The first appellate court can re-appreciate evidence and record findings different from those recorded by the trial court. It is well settled that if the appraisal of evidence by the trial court suffers from material irregularity, as for example when its decision is based on mere conjectures and surmises, or when its decision relies upon inadmissible evidence or ignores material evidence or when it draws inferences and conclusions which do not naturally or logically flow from the proved facts, the appellate court is bound to interfere with the findings of the trial court. It is equally well settled that where the trial court has considered the entire evidence and recorded several material findings, the first appellate court would not reverse them on the basis of conjectures and surmises or without analysing the relevant evidence in entirety. As the final court of facts, if the first appellate court is reversing the judgment of the trial court, it is bound to independently consider the entire evidence.

13. In law, possession follows title. The plaintiffs having established title to the suit property, will be entitled to decree for possession, unless their right to the suit property was extinguished, by reason of defendant

being in adverse possession for a period of twelve years prior to the suit.

....

17.....It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. (Vide : Periasami vs. P. Periathambi - 1995 (6) SCC 523, Md. Mohammad Ali (dead) by LRs. vs. Jagdish Kalita - 2004 (1) SCC 271 and P.T. Munichikkanna Reddy vs. Revamma - 2007 (6) SCC 59).

...

25. When defendant claimed title and that was proved to be false or fabricated, then the burden is heavy upon him to prove actual, exclusive, open, uninterrupted possession for 12 years. In this case we have already held that he did not make out such possession for 12 years prior to the suit. While the plaintiffs have made out a clear and absolute title of the property, the defendant has not been able to make out title or adverse possession for more than 12 years.

.....

(iv) Sebastiano Luis Fernandes (Dead) Vs. K.V.P. Shastri (Dead) through LRs and others reported in 2013 15 SCC 161. The relevant portion is extracted hereunder:

"33.After careful scrutiny of the finding of fact and reasons recorded by the courts below with reference to the

substantial questions of law framed by the High Court at the time of admission of the second appeal filed by the defendants, we are satisfied that the ratio laid down by this Court in Hira Lal's case (supra) and other decisions referred to supra upon which defendants' counsel placed reliance in justification of the findings and reasons recorded by the High Court in the impugned judgment are applicable to the fact situation of this case as the courts below have erred in assuming certain facts which are not in existence to come to the erroneous conclusion in the absence of title document in justification of the claim of the plaintiff in respect of the suit schedule property and ignored the pleadings of the defendants though they have specifically denied the ownership right claimed by the plaintiff in respect of the suit schedule property and on wrong assumption of the facts which are pleaded on the contentious issues, they have been answered in favour of the plaintiff, therefore, the High Court has rightly exercised its appellate jurisdiction by framing the correct substantial questions of law with reference to the legal position and applied the same to the fact situation of case on hand.

34..... Therefore, the answers to the said substantial questions of law by the High Court by recording cogent and valid reasons to annul the concurrent findings that the non-appreciation of the pleadings and evidence on record by the courts below rendered their finding on the contentions issues/points as perverse and arbitrary, and therefore the same have been rightly set aside by answering the substantial questions of law in favour of the defendants."

(v) K.S.Chidambaram Vs. Gomathi Ammal and others reported in

"7. On the other hand, having found title to the property in the plaintiffs, both the courts below rejected the claim of the defendant on the ground of estoppel and observed that in the teeth of declaration of title and even on the case pleaded by the plaintiffs that they put up the superstructure only in the year 1972 after the purchase of the property, there is no scope for claiming perfection of title by adverse possession and therefore, as a consequence of declaration of title.

9..... It is by now well settled that recovery of possession can be granted by courts on declaring title of the plaintiffs and such recovery of possession can be enforced even after removing the superstructure, if any, put up without any separate decree in the form of mandatory injunction in that regard. Consequently, I do not see any infirmity in law in the relief of recovery of possession granted by the Courts below, as a consequence of declaration of title in favour of the plaintiffs. The second appeal, therefore, fails and shall stand dismissed. There will be no order as to costs."

14. The learned counsel appearing for the first respondent contended that the first respondent purchased the suit property from lawful owner Duraikannu and others and from the date of purchase on 04.06.1992, the first respondent was in possession and enjoyment of the suit property till she sold the suit property to the second respondent. The appellant or her predecessor in title was never in possession of the suit property. In E.A.No.2 of 1964 in E.P.No.305 of 1963 in H.R.C.No.1293 of 1958, it was held that Elumalai was in possession of the suit property. The said order has become final. The first respondent has proved her title by furnishing the particulars of transaction by Elumalai and others till she purchased from Duraikannu and Others. The learned counsel for the first respondent also contended that the appellant herself admitted that the second respondent is in possession and

enjoyment of the suit property. The second respondent has proved her title and possession by marking Exs.B1 and B2, sale deeds in favour of his vendor and in his favour. The appellant is not entitled to decree of possession as she failed to prove her possession as well as possession of predecessor in title. The bank when purchased the lease hold right and superstructure, did not take possession of the suit property. Similarly, when the bank purchased the land, they have not included other owners. Therefore, purchase by bank is not valid and prayed for dismissal of the second appeal.

15. Heard the learned counsel for the appellant as well as the first respondent. Though second respondent entered appearance through counsel and appeared on 24.07.2018 and took time for engaging a senior counsel. Again at her request the Second Appeal was adjourned to today. Today there is no representation for him.

16. The only substantial question of law to be decided is Whether the lower appellate Court correct in law in not taking note of amendment of plaint seeking recovery of possession of the suit property?

17. Originally, the appellant filed suit for declaration of title to the suit property and for permanent injunction restraining the respondents from interfering with her peaceful possession and enjoyment of the suit property. The plaint was amended in the First Appellate Court and relief of possession was included. According to the appellant, the second respondent taking advantage of absence of appellant, started construction in the suit property illegally. On coming to know of the illegal activities of second respondent and his construction, the appellant gave a complaint to the concerned police and after enquiry by the police, the appellant filed a suit for the relief stated above. The learned Trial Judge also granted interim injunction restraining the respondents from interfering with the possession of the appellant.

18. From the materials on record, it is seen that the application for interim injunction was not contested on merits by the respondents. On the other hand, the second respondent filed Affidavit of Undertaking, seeking permission to put up ground floor superstructure and undertook not to claim any right over the suit property, if appellant succeeds in the suit. Based on such undertaking only, the Trial Court permitted the second respondent to be in possession and put up ground floor superstructure.

19. P.W.1, the father of the appellant deposed and D.W.1,

the second respondent had admitted these facts. The Courts below have not properly appreciated the affidavit of undertaking, evidence of P.W.1 and D.W.1 with regard to nature of possession by the second respondent. The respondents claimed title to the suit property based on the order passed in E.A.No.2 of 1964 in E.P.No.305 of 1963 in H.R.C.No.1293 of 1958 filed by one Meekshmi Ammal who was predecessor in title to the suit property. According to the respondents, in the E.A.No.2 of 1964 in E.P.No.305 of 1963 in H.R.C.No.1293 of 1958, it was held that one Elumalai and Muniammal were in possession of the suit property. The respondents have not produced and marked the said order.

20. The second respondent as D.W.1 has deposed that he has paid property tax and previously the first respondent paid property tax and handed over patta to him. These documents were not produced by the respondents. The Courts below considering the documents filed by the appellant and second respondent, came to the conclusion that the appellant is the owner of the suit property and she has proved her title and on such conclusion, granted relief of declaration of title. It is well settled that possession follows title.

21. In the present case, the respondents have not produced any document to show that they were in possession of the suit property before filing of the suit. The appellant has contended that the second respondent taking advantage of absence of the appellant, started construction. From the materials available on record, it is seen that the second respondent is in possession as per the permission granted by the Trial Court on his affidavit of undertaking. The First Appellate Court failed to take note of the amendment of plaint and inclusion of prayer of possession as per the order of this Court in CRP.(NPD).No.3759 of 2011. The First Appellate Court also failed to take note of evidence of P.W.1 and D.W.1 wherein, it has been specifically stated that the second respondent is in possession of the suit property only on the permission given by the Trial Court on his affidavit of undertaking. The First Appellate Court also failed to take note of the fact that the second respondent has failed to produce any document to show that he was in possession of the suit property before the suit and permission was granted by the Trial Court. The First Appellate Court rejected the relief of possession to the appellant on the ground that the grounds raised by the appellant are not satisfactory and in view of the findings, the appellant is not entitled to the relief of injunction and rejected the relief of possession to the appellant. The First Appellate Court is final Court of facts and has to consider the materials on records independently and come to the conclusion while disposing the first appeal.

22. In the present case, the First Appellate Court failed to consider the relief of possession as claimed by the appellant by appreciating the pleadings, oral and documentary evidence and order of the Trial Court permitting the second respondent to put up superstructure on his undertaking. The appellant is claiming possession only because the second respondent continued to be in possession as per the order of the Court. The rejection of relief of injunction will not be a ground for rejection of relief of possession. Once, the declaration of title is granted, the appellant is entitled to the decree of possession as possession follows title. The First Appellate Court failed to consider these aspects and on erroneous grounds, rejected the relief of possession. The reasoning given by the First Appellate Court that in view of the rejection of injunction, the appellant is not entitled to any other relief, is erroneous. The First Appellate Court having framed points for consideration, whether appellant is entitled to relief as prayed for in the appeal ought to have considered the amendment for possession and all the materials on record and ought to have given findings on merits.

23. The respondents have not only produced the order alleged to have been made in E.A.No.2 of 1964 in E.P.No.305 of 1963 in H.R.C.No.1293 of 1958, but also have not stated in what capacity Elumalai was in possession of suit property. It is not the case of the respondents that Elumalai was in possession as owner to the knowledge of Meenakshi Ammal and others for more than statutory period and perfected his title. The respondents except producing Exs.B1 and B2 have not produced any earlier document of title. The Judgments relied on by the counsel for appellant are squarely applicable to the facts of the present case.

24. The materials on record clearly show that the appellant is entitled to relief of possession and the First Appellate Court failed to consider these facts, much less giving the findings on merits. The findings of the First Appellate Court rejecting the relief of possession is liable to be set aside and is hereby set aside and the second appeal is allowed. The appellant is entitled to decree of possession. The Judgment of the First Appellate Court is modified, granting the decree of possession to the appellant, in addition to declaration of title as already granted by both the Courts below.

25. In the result, the Second Appeal is allowed. No Costs.
Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

LPP/arr

To

1.The XVIII Additional Judge, City Civil Court, Chennai.

2.The XIV Assistant Judge, City Civil Court, Chennai.

Copy to

The Section Officer,
VR Section, High Court, Madras.

+3cc to Mr.B.Vijay, Advocate, S.R.No.50200

+1cc to Mr.V.Suthakar, Advocate, S.R.No.50656

S.A.No.60 of 2016
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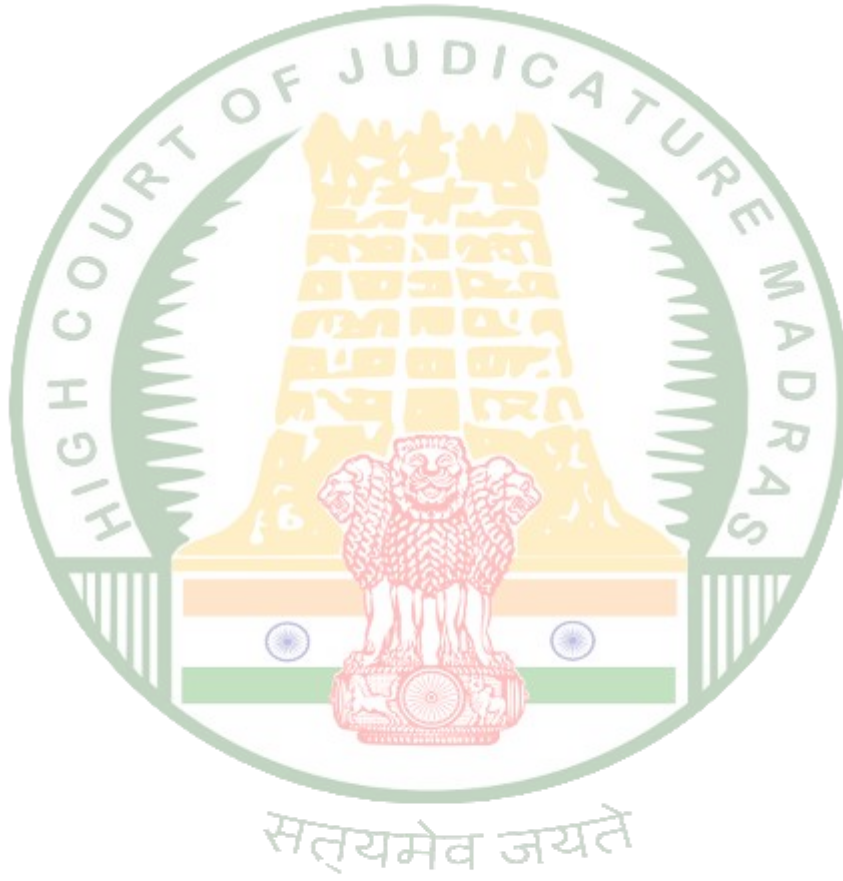
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V.M.VELUMANI, J.

LPP



26.07.2018

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