



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 06.07.2020	Pronounced on:17.07.2020
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Coram::

The Honourable Dr.Justice G.Jayachandran

S.A.No.178 of 2007

1. Rahman Beevi (deceased)
W/o.Packir Mohammed.
2. Jainudeen,
S/o.Packir Mohammed.
3. Jamalludhin,
S/o.Packir Mohammed.
4. Zafrullah,
S/o.Packir Mohammed.

All are residing at Main Road,
Nidur, Mayiladuthurai Taluk,
Nagapattinam District.

...Appellants 1 to 4/
Defendants 2 to 5

Memo Dated 10.12.2018 (present in Court) is recorded.
Appellants 2 to 4 are recorded as LR's of the Deceased 1st
Appellant viz., Rahman Beevi vide order of Court Dated
10.12.2018 made in S.A.No.178 of 2007 (RPAJ)

/versus/

Kalimoorthy,
S/o.Natesa Padayachi,
Vellalar Street, Kanganambuthur Village,
Mayiladuthurai Taluk,
Nagapattinam District.

... Respondent/Plaintiff

Prayer: Second Appeal is filed under Section 100 of Civil
Procedure Code, praying against the judgment and decree of
Principal Sub Court, Mayiladuthurai, dated 25.04.2006 made in
A.S.No.177 of 2005 confirming the Judgment and Decree of the
Principal District Munsif Court, Mayiladuthurai, dated 30.09.2005
made in O.S.No.169 of 2001.

For Appellants : Mr.S.Sounthar
For Respondent : Mr.A.Muthukumar

J U D G M E N T

(The case has been heard through video conference)

This Second Appeal is against the concurrent finding of the Courts below.

2. The appellants are the Legal representatives of the deceased first defendant Late Packir Mohammed. The suit laid by Kalimoorthy/plaintiff is for recovery of possession on the plea that he borrowed a total sum of Rs 16,000/- from Packir Mohammed/defendant on different occasions. On 17.05.1993, a document was obtained from the plaintiff by the defendant in the nature of usufructary mortgage. The possession of the suit schedule property was given to Packir Mohammed. The document executed by the plaintiff was retained by the defendant. When the plaintiff offered the money borrowed and sought back the possession of the property, the defendant refused to handover the possession.

BACKGROUND FACTS:

3. Prior to the suit which is subject matter of this appeal, the defendant Packir Mohammed filed O.S.No.309 of 1995, on the file of District Munsif, Mayiladuthurai against Kalimoorthy and his son Ramesh, for permanent injunction on the premise that Kalimoorthy received Rs.16,000/- from Packir Mohammed on 17.05.1993 and handed over the possession of the suit property with a promise to repay the money and get back the property on or before 31.03.1994. Failing which he will execute a sale deed. Kaliamoorthy neither repaid the money by 31.03.1994 nor executed sale deed. Instead, started demanding more money for the property contrary to the written agreement dated 17.05.1993. In the breach of the agreement, Kalimoorthy and his son Ramesh on 19.03.1995 illegally trespassed into the land and tried to forcibly dispossess him. Hence, sought for permanent injunction restraining Kalimoorthy and his son Ramesh from disturbing the peaceful possession.

4. In the said suit O.S.No.309 of 1995 (hereinafter to be referred as earlier suit), Kalimoorthy filed written statement denying the execution of the sale agreement on 17.05.1993. According to Kalimoorthy, he borrowed Rs.10,000/- from Packir Mohammed on 21.07.1992. For the said purpose, the

parties agreed for a term of usufructuary mortgage of the suit property. As per the understanding, Packir Mohammed should enjoy the property for two years and thereafter, return back the property to Kalimoorthy on payment of Rs.6,000/-. Subsequently, on 22.07.1992 Packir Mohammed advanced a further loan of Rs.4,000/-. Since Kalimoorthy was unable to pay back the loan, Packir Mohammed obtained a written document on 07.05.1993 in the nature of usufructuary mortgage. Though, Kalimoorthy was ready to pay back Rs.16,000/- to retrieve the property, Packir Mohammed taking advantage of his possession, has filed suit for permanent injunction relying upon the document executed by Kalimoorthy in favour of Packir Mohammed on 17.05.1993. Therefore the suit for injunction not maintainable.

5. In the said suit, after considering the rival submission, the Learned District Munsif, Mayiladuthurai, allowed the suit for permanent injunction in favour of Packir Mohammed. Regarding the nature of the document dated 17.05.1993, (which was marked as Ex.A1) the Learned District Munsif, Mayiladuthurai, left open the issue undecided observing that the suit being only for permanent injunction, decision regarding the character of Ex.A1, whether it is deed of usufructuary mortgage or agreement for sale and whether there was any consideration involved in that transaction is needless to determine in the said suit. Further, the Learned District Munsif, has also taken note of the reply notice dated 07.04.1999 issued on behalf of Kalimoorthy and had observed that Kalimoorthy in the said reply notice marked as Ex.A.2, admits that the property was mortgaged to Packir Mohammed and possession was given to him for a consideration of Rs.16,000/- and he is ready to return the money and redeem the mortgage. Therefore, the trial Court has observed that having admitted the handing over of the possession to Packir Mohammed, the defendant Kalimoorthy cannot question the document Ex.A.1 on the ground that insufficiently stamped and not duly registered. The trial court passed a decree of restraint against Kalimoorthy and others from interfering the peaceful possession of the suit property. Also gave liberty to Kalimoorthy to file suit for recovery of the property. Neither of the parties had preferred appeal against this judgment. Hence it has become final.

GIST OF THE SUIT UNDER APPEAL:

6. In the above said circumstances, Kalimoorthy has filed O.S.No.169 of 2001 for recovery of possession of the suit property based on title. It is specifically averred in the plaint that the defendants cannot claim adverse possession since he has admitted the title of the plaintiff.

7. The defendants in his written statement contended that the plaintiff Kalimoorthy has not come to the Court with clean hands. He has deliberately suppressed many material facts. The reasons stated in the plaint for non-possession of the original mortgage deed dated 17.05.1993 questioned by the defendant Packir Mohammed alleging that the said plea is only to avoid the stamp duty penalty. However, the defendant has admitted in the written statement that, the said document dated 17.05.1993 executed by Kalimoorthy was filed as an Exhibit in O.S.No.309 of 1995 filed by him. The subsequent suit laid without production of the document dated 17.05.1993 and relying upon the judgment and decree copy rendered in O.S.No.309 of 1993 is the deliberate attempt to avoid stamp duty penalty. The defendant Packir Mohammed has reiterated that the agreement between him and Kalimoorthy was an arrangement to convey the property after a specific period and it was not an usufructuary mortgage as pleaded in the plaint. Hence, Kalimoorthy is not entitled to redeem the suit property based on the recital found in the document dated 17.05.1993. The observation of the trial Court in the judgment O.S.No.309 of 1995 regarding the right of Kalimoorthy to seek redemption of the property is only an obiter dictum and it will not give rise to any right or cause of action for the plaintiff Kalimoorthy to sustain the suit.

8. Packir Mohammed in the written statement has pleaded that he was put in possession of the suit property as a part performance of the agreement dated 17.05.1993. The plaintiff Kalimoorthy was not ready to performance his part of contract, though defendant Packir Mohammed was ready to performance his part of contract and offered to pay the balance consideration due to the plaintiff.

9. Before the trial Court, the plaintiff Kalimoorthy and his wife Radha were examined as P.W.1 & P.W.2. Four exhibits were marked. On behalf of the defendant one Arunachalam was examined as D.W.1. The deposition of Kalimoorthy recorded in O.S.No.309 of 1995 was marked as Ex.D.1.

10. Pending disposal of the suit Packir Mohammed died, hence his wife and children were brought on record. The trial judge, after appreciating the evidence before him, allowed the suit for recovery of possession. Aggrieved by the judgment and decree passed by the Trial Court, Appeal was preferred by the legal representatives of the deceased first defendant before the Learned Principal Sub Judge, Mayiladuthurai in A.S.No.177 of 2005.

11. The Lower Appellate Court after framing the points for determination and on re-appreciating the evidence in the light of the grounds raised in the appeal, dismissed the appeal, confirmed the trial Court judgment and decree. Challenging the concurrent findings of the courts below, the second appeal is filed. Pending second appeal, Packir Mohammed wife died and her sons were recorded as the legal heirs. They are the appellants now pursuing the second appeal.

12. In the Second Appeal, this Court has framed the following substantial questions of law for consideration.

(i). Whether the respondent herein who filed a suit based on document dated 17.05.1993 is entitled to succeed without marking the said document inspite of direction by lower Appellate Court before order of remand?

(ii). Whether the Courts below are erred in not drawing adverse inference against the respondent for his failure to mark best evidence available?

(iii). Whether the judgments of the Courts below are liable to be set aside in its ignoring well settled proposition of law that the plaintiff must succeed on his own strength and he cannot rely on weakness of defence?

APPELLANTS SUBMISSIONS:

13. The Learned Counsel appearing for the appellants would submit that admittedly the plaintiff has preferred the suit for recovery of possession based on title. Whereas, during the examination of the plaintiff, he has admitted that the property stands in the name of his wife. His wife was examined as P.W.2. She has also admitted on oath that the property stands in her name. Besides, Ex.A.4 the tax receipt also fortifies the fact that the property stands in the name of Radha and not the name of Kalimoorthy the plaintiff. In such circumstances, the suit for recovery of possession based on title ought to have been filed by the title holder and not by third party. On this score, the suit ought to have been dismissed.

14. Further, the Learned Counsel for the appellants would submit that the Courts below have erred in accepting the plea of the plaintiff regarding the character of the document dated 17.05.1993, even without the production of the document.

In fact, the appeal preferred against the trial Court judgment was earlier heard and remanded back, on this score of non-marking of the alleged usufructuary mortgage deed dated 17.05.1993. In spite of granting liberty to the plaintiff, to produce the document relied by him for recovery of possession, the plaintiff failed to produce the document even after the remand. After withholding the best evidence available, the preponderance of probability of the case ought to have been held in favour of the defendant. Unfortunately, the Courts below have failed to consider this vital omission and failure on the part of the plaintiff.

15. The Learned Counsel appearing for the Appellant would submit that the judgment and decree of the Courts below are improper and contrary to the settled legal preposition of law. The plaintiff failed to produce the best evidence available namely the alleged usufructuary mortgage deed dated 17.05.1993. Further, the Learned Counsel would also submit that the plaintiff has taken a contrary stand in the present suit from what he was agitating in the earlier round of litigation between the parties. Therefore, the plaintiff is estopped from shifting his stand and relying upon the defendant's case. Referring Ex.A.1, Ex.A.4 and Ex.B.1, the learned Counsel submit that the plaintiff who failed to prove his case cannot harp on the defendant weakness. The litigant cannot abandon his own case and adopt that of the defendant and claim relief on that footing.

16. In support of his submission, the Learned Counsel rely upon the judgment of this Court rendered in Kandasamay Udayar Vs. T.S.Karuppudayar reported in (1969) 2 MLJ 22.

"This raises the interesting question, whether, when the case of the plaintiff is rejected by a trial Court, on merits, in a substantial sense, the Court can nevertheless afford relief on the basis of the version of the defendant. Long ago, the learned Judges of the Calcutta High Court pointed out in Ramdoyal Vs. Junmenjoy Coondoo (1887) I.L.R 14 Cal. 791 (F.B), that it would certainly be very unusual to permit a plaintiff, who has alleged one state of facts as against the defendant, who has denied that case and alleged another state of facts, to turn round and ask to be allowed to carry on the suit and claim relief on the state of facts alleged by the defendant, abandoning his own case. This was pointed out by Rajagopala Ayyangar, J.,

in Govindaraj V. Kandaswami Goundar I.L.R., and the Learned Judge stressed that a plaintiff cannot be allowed to abandon his case and adopt that of the defendant and to claim relief on that footing. This decision was relied on and followed by Somasundram, J., in Subramania Mudaliar Vs. Ammapet Co-operative Society."

And judgment rendered in Pravin Kumar Vs.P.Rajeswaran and Ors. reported in (1987) IIMLJ 481.

" I am of the opinion that it is not open to the plaintiff to raise such an argument. The plaintiff came to Court with a definite case that Jimmarammal was a Hindu. The burden is on him to prove the same. If he fails to do so, he cannot abandon his own case and turn round to adopt that of the defendant for claiming the relief. (Vide Govindaraj Vs. Kandaswamy Gounder, and Subramanaia Mudaliar v. Ammapet Co-operative Weavers' Production and Sales Society)"

RESPONDENT'S SUBMISSIONS:

17. Per contra, the Learned Counsel appearing for the respondents would submit that it is incorrect to say that the plaintiff has abandoned his stand taken in the previous suit and had adopted the stand of the defendants to suit his convenience. Similarly, it is incorrect to say that the plaintiff has withheld the best evidence available with him. As far as the document in dispute was in possession of the defendant/Packir Mohammed and he had marked the said document as Ex.A1, in his suit in O.S.No.309 of 1995 filed for permanent injunction. The said document admitted in evidence for collateral purpose in the previous suit and same has been considered by the Learned Judge in the judgment marked as Ex.A1 in the subsequent suit which is the subject matter of the present appeal.

18. In respect of the locus of Kalimoorthy to sustain the suit for recovery of possession based on title, the Learned Counsel for the respondent would submit that admittedly the property stands in the name of the plaintiff's wife and she was examined as P.W.2. She has also stated on oath that, she has no objection in passing a decree in favour of his husband in respect of the property stands in her name. The admitted case of the defendant is that the possession of the suit property was given to him pursuant to the arrangement between him and the plaintiff. Having taken the possession from the plaintiff,

recognising him as the owner of the property, the defendant is estopped from denying the title of the plaintiff. Under Section 116 of the Indian Evidence Act, the defendant is estopped from taking such defence.

19. The Learned Counsel would further submit that the Courts below after appreciating the evidence let in by the both the parties have found in favour of the plaintiff since the case of the plaintiff is more probable. There is no question of law involved in this appeal, much less substantial question of law and therefore, the appeal is liable to be dismissed.

20. In support of his submission, the Learned Counsel for the respondent would rely upon the judgment of Hon'ble Supreme Court rendered in Tara Chand Vs. Sagarbai @ Chaiyalibai reported in (2007) 4 MLJ 521 (SC).

"15. The right of a Usufructuary Mortgagor to redeem the mortgage and recover possession is well known, and with a view to enforce the same, a mortgagor may file a suit for redemption or may take recourse to the summary process of deposit and notice under Section 83 of the Transfer of Property Act.

16. A suit for redemption is essentially a suit for recovery of possession. When a debt is satisfied out of the usufructs of the property or otherwise, the mortgagor recovers possession on his title."

And judgment rendered in Achal Reddy Vs. Ramakrishna Reddiar and others reported in 1991 (1) MLJ 32 (SC).

"In the case of an agreement of sale the party who obtains possession, acknowledges title of the vendor even though the agreement of sale may be invalid. It is an acknowledgement and recognition of the title of the vendor which excludes the theory of adverse possession. The well-settled rule of law is that if person is in actual possession and has a right to possession under a title involving a due recognition of the owner's title his possession will not be regarded as adverse in law, even though he claims under another

title having regard to the well recognised policy of law that possession is never considered adverse if it is referable to a lawful title."

21. Heard the Learned Counsel for the Appellants and Learned Counsel for the respondent. Perused the records and judgment of the Courts below.

22. The Learned Counsel appearing for the appellants contented that the appeal preferred by the plaintiff was remanded back for de novo trial to permit the plaintiff to mark the disputed document dated 17.05.1993, despite that the plaintiff failed to mark that document. In a suit for redemption, the mortgage deed is the essential document. Omission to mark the said document should disentitled the plaintiff for the relief sought.

23. In response to the above contention, the Learned Counsel for the respondent would state that the specific averment of the plaintiff in the plaint regarding the said document has to be taken into consideration. In the plaint itself, the plaintiff has specifically stated that the original document is with the defendant. The defendant, in fact, produced that document in the suit which was marked as Ex.A.1. While so, the defendant cannot withhold the document and take advantage of the same to contend that the original document dated 17.05.1993 was not produced. In this regard, it is to be stated that the defendant though claims that the disputed document dated 17.05.1993 is an agreement for a sale, he did not initiate any proceedings for specific performance. Based on the said document, he initiated O.S.No.309 of 1995 for bare injunction. Though, he has said that he was ready and willing to performance his part of contract and the property was given to him as part performance, he has not resort to legal remedy for specific performance of the sale agreement. Contrarily, the plaintiff herein who claims that document as usufructuary mortgage deed has approached the Court for redemption and recovery of possession. This leave has been implicitly granted by the trial Court in O.S.No.309 of 1995.

24. The judgment in O.S.No.309 of 1995 which has reached the finality between parties is exhibited as plaintiff document Ex.A-1. As far as the relevancy and probative value of the document Ex.A.1 namely the judgment in the earlier suit. Section 43 of the Indian Evidence Act has to be referred.

Section 43 of Indian Evidence Act:-

"43. Judgments, etc., other than those mentioned in Sections 40 to 42, when relevant - Judgments, orders or decrees, other than those mentioned in sections 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree, is a fact in issue, or is relevant under some other provisions of this Act."

25. More than a century ago, Five Judges Bench of the Allahabad High Court had an occasion in Palakhdhari Singh Vs. The Collector of Gorakhpur and others reported in (1890) ILR 12All1, to deal with Section 43 of Indian Evidence Act in connection with admissibility of former judgment. The following observation of Justice Douglas Straight., beside providing the facts in brief explain the legal position. Hence, extracted:-

"In my opinion the suit of 1873 between the plaintiff and Musammat Pan Kuar was a "transaction," in which the right of the defendant as the living son of Hanuman Singh was asserted and recognised, and the judgments and decrees of 1874 are the best evidence of that transaction. I should also have no difficulty, if it were necessary to do so, in holding that the defendant is entitled to put forward the suit of 1873 as an "instance" in which the right of which I have spoken was claimed and recognised. I do not think that in taking this view I am doing any violence to the language of Section 43 of the Evidence Act, which, if I understand it aright, declares that judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 are of themselves irrelevant, that is, in the sense that they can have any such effect or operation as mentioned in those recited sections qua judgments, orders and decrees. But I do not take this to make them absolutely inadmissible, when they are the best evidence of something that may be proved aliunde. As I have remarked before, the question is not as to the existence of the judgments and decrees of 1874 as a fact in issue or a relevant fact under some other provision of the Evidence Act, but whether there was a "transaction" or "instance," in

which the right of the defendant was asserted and recognised, of which transaction or instance they are the best evidence." (emphasis added)

26. The Learned Counsel for the appellant would contend that the plaintiff has to stand on his own strength and not based on the defendant's weakness. As far as the case in hand is concerned, the defendant admits both in this case instituted against him as well as in the previous case instituted by him against the respondent herein is that, he was put in possession by Kaliamoorthy with the specific understanding that by one year time if Kaliamoorthy fails to repay the loan amount, then he should execute sale deed in favour of the defendant. The witness to the said document Arunachalam who was examined as D.W.1 also admits that, the plaintiff Kalimoorthy borrowed Rs.16,000/- and gave his property as usufructuary mortgage with the specific understanding that he will pay back the money within one year period and redeem the same. If he fails to repay the debt he will execute the sale deed. Ex.B.1 is the copy of the deposition of Kalimoorthy recorded in O.S.No.309 of 1995. In this document, the plaintiff admits that the land belongs to his wife. However, his wife knows that Kalimoorthy has mortgage the property with Packir Mohammed and borrowed money. It is pertinent to note that the plaintiff has caused notice to the defendant Packir Mohammed on 07.04.1999 calling upon Packir Mohammed to receive Rs.16,000/- and give back the possession of the property. This notice has been marked as Ex.A.2 by Packir Mohammed himself in his suit O.S.No.309 of 1995. This would indicate that the plaintiff was consistently holding that the property was given in possession to the defendant Packir Mohammed only on an understanding that it could be retrieved back on payment of the loan amount. It is the defendant who has earlier taken a stand that the document is an agreement for sale but not filed a suit for specific performance but restricted his claim for permanent injunction. Later, in this case, he is questioning the right of the executant, the validity and content of the document which he has relied in the previous proceedings. After withholding the original document and being exhibited as a document in the previous case, the appellants cannot find fault with the plaintiff for not producing the original. Admitted facts need not be proved. No doubt, the document dated 17.05.1993 being a document relating to transfer of right in a property and need necessary stamp and registration. But then, the non-production of the document in this case is not fatal to the plaintiff since this document has already been scrutinised in a judicial process in a different context and same has not produced by the

adversary who holds the document. The presumption under Section 114 of the Evidence Act works against the appellant.

27. The character of the alleged document dated 17.03.1993 was disputed and per se the document is inadmissible in evidence for want of stamp and registration. However, that document has been taken for consideration for a collateral purpose to determine possession. In the absence of the document, the case has to be decided based on the evidence available. The facts admitted by both the parties probabilities that the land was initially given to the defendant for the loan borrowed by the plaintiff with a specific understanding that it can be retrieved by the plaintiff if he repay the loan amount within the time specified. In this case, plaintiff has established his willingness to redeem through the notice dated 17.05.1993 as well as by filing the present suit.

28. Admission of a party is admissible in evidence under Section 18 subject to Section 23 of the Indian Evidence Act. Packir Mohammed in his plaint filed in O.S.No.309 of 1995 has admitted the title of Kaliamoorthy and the agreement entered with him on 17.03.1993 in respect of the suit property. His own witness Arunachalam (D.W.1) had spoken about this document and admits the plaintiff's right to retrieve the property within a year. In this context, the observation of the Hon'ble Supreme Court in Basant Singh Vs. Janki Singh and others reported in AIR 1967 SC 341, is apt to be quoted.

"Pleadings, although admissible in other actions, to show the institution of the suit and the nature of the case put forward, are regarded merely as the suggestion of counsel, and are not receivable against a party as admissions, unless sworn, signed, or otherwise adopted by the party himself."

"Thus, even under the English law, a statement in a pleading sworn, signed or otherwise adopted by a party is admissible against him in other actions. In *Marianski v. Cairns* (1852) 1 Macq 212, the House of Lords decided that an admission in a pleading signed by a party was evidence against him in another suit not only with regard to a different subject-matter but also against a different opponent. Moreover, we are not concerned with the technicalities

of the English law. Section 17 of the Indian Evidence Act, 1872 makes no distinction between an admission made by a party in a pleading and other admissions. Under the Indian law, an admission made by a party in a plaint signed and verified by him may be used as evidence against him in other suits. In other suits, this admission cannot be regarded as conclusive, and it is open to the party to show that it is not true." (emphasis added)

And Sitaramacharya Vs. Gururajacharya reported in AIR 1997 SC 806, the Hon'ble Supreme Court has held below:-

"Under Section 18 of the Evidence Act the admission made by the party would be relevant evidence. Section 31 provides that "admissions are not conclusive proof of the matters admitted but they may operate as estoppel under the provisions hereinafter contained"

29. In this connection, it is also pertinent to note the defendants have not taken any initiative to enforce the contract based on the alleged deed of sale agreement. Contrarily had filed suit only for permanent injunction and succeeded. Having failed to seek remedy of specific performance, the appellant/defendant is prohibited from seeking any further relief. He can neither claim adverse possession nor ouster since he was admittedly put in possession by virtue of the document. The fact that the suit property is with the possession of the defendants/appellants herein since 17.05.1993 is not in dispute. The fact that on the date of handing over the possession to the defendant, the plaintiff owe a sum of Rs.16,000/- to the defendant also not in dispute. The Court in the earlier proceedings in O.S.No.309 of 1995 granted liberty to the plaintiff in this suit to file suit for recovery and that judgment not challenged. Therefore the observation made by the court in the previous suit is an essential part of the judgment and it cannot be termed as obiter dictum.

30. In Pravin Kumar Vs. P.Rajeswaran and others case cited supra by the Learned Counsel for the appellant, it is stated that the plaintiff cannot abandon his own case and turn around to adopt the defendant case and get relief.

31. In the case in hand, this Court does not find any abandonment of claim by the plaintiff. i) in the written statement filed by the plaintiff Kalimoorhty in O.S.No.309 of 1993, ii) the notice issued by him and marked as Ex.A.2 in the previous suit and iii) the pleadings in this present case are consistently made to the effect that the defendant was put in possession of the property with an understanding that the property can be retrieved on repayment of money borrowed. The defendant and the witness to the document Arunachalam candidately admits this fact. Therefore, soon after the plaintiff failed to redeem the property within given time, the defendant gets the right to purchase the property. The defendant should have initiated action for purchase of the property, Instead and surprisingly, he has not sought for such relief. He has filed suit for injunction to protect his possession given to him on condition. Therefore, the principle laid down in the judgment cited supra is not applicable to the facts of the case in hand.

32. The plaintiff has filed the suit specifically with the averment that the suit based on title. Later, in the course of cross examination, the plaintiff has admitted that he is not the title holder but only his wife is the owner of the property. But any tenant or any person who came upon any immovable property by the license of the person in possession thereof, shall not be permitted to deny such person's title. It is trite principle of law well settled by this time, "that no person who come upon any immovable property by the license of the person in possession thereof, shall be permitted to deny that such person had a title to such possession at the time when such licence was given". The principle of estoppel enumerated in Section 116 of Indian Evidence Act, stands against the appellant herein since he was put in possession by the plaintiff and the litigation was only between the plaintiff and defendant. Whether entered upon the property either as a prospective buyer or under an usufructuary mortgage deed, the defendant has entered into the property admitting the title of the plaintiff. Therefore, when the suit for recovery is filed by the plaintiff, the defendant cannot take a defence denying the title. More so, when the real owner has entered the witness box and supported the case of the plaintiff and agreed upon for a decree in favour of the plaintiff. Still more so, the title holder being the wife of the plaintiff and the property has been handled and managed by the plaintiff with the implicit consent and knowledge of the real owner. For the above said reason, this court finds no merit in the appeal. The substantial questions of law framed are answered accordingly, holding against the appellant.

As a result the Second Appeal is dismissed. No costs.

-s/d-
Assistant Registrar

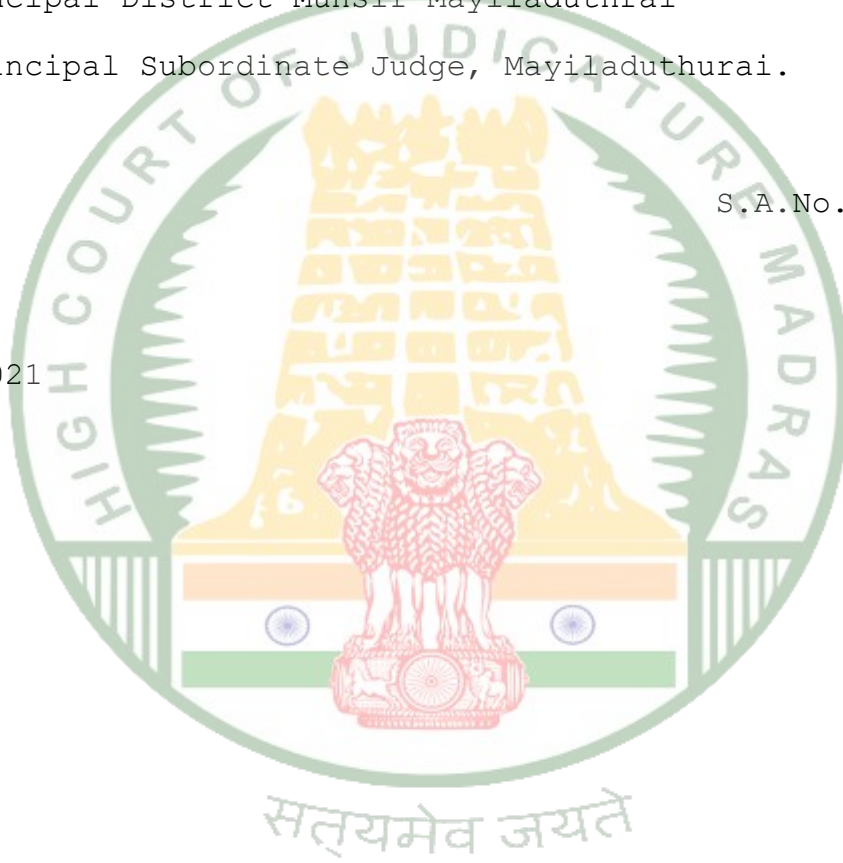
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Sub-Assistant Registrar

To

- 1.The Principal District Munsif Mayiladuthrai
- 2.The Principal Subordinate Judge, Mayiladuthurai.

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