



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 04.02.2020

PRONOUNCED ON : 12.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A. (MD) No.836 of 2014

and

M.P. (MD) Nos.2 of 2014, 3 and 4 of 2015 and

C.M.P. (MD) No.6561 of 2019

1.Rathinakumar

2.Leela Bai ... Appellants 1 and 2 / Respondents 1 and 2 /
Plaintiffs

3.Rajasekaran Nair

4.Priyanga ... Appellants 3 and 4 / Respondents 3 and 4 /
Nil

Vs.

M.Abbukuttan ... Respondent / Appellant / Defendant

PRAYER: This Second Appeal filed under Section 100 of Civil Procedure Code, to set aside the judgment and decree 28.04.2009 made in A.S.No.82 of 2007 on the file of the 1st Additional Sub Court, Nagercoil, reversing the judgment and decree dated 29.06.2007 made in O.S.No.353 of 2006 on the file of the Principal District Munsif Court, Padmanabhapuram.

(Preamble and prayer portion amended vide Order dated 13.07.2015 made in M.P. (MD) No.5 of 2015 in S.A. (MD) No.836 of 2014)

For A1, A2 & A4 : No Appearance

For A3 : Mrs.L.Victoria Gowri

For Respondent : Mr.V.Raghavachari,
For Mr.Vijaya Mohankumar.

JUDGMENT

Aggrieved over the reversal finding of the First Appellate Court, the present Second Appeal is filed.

2.The parties are referred to as per their rank before the trial Court.

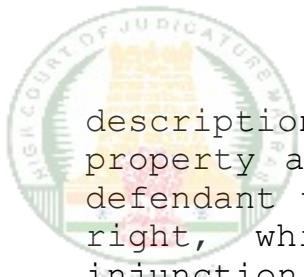
3.The brief fact, leading to file this Second Appeal, reads as follows:-

The plaintiffs are the husband and wife. The A schedule property originally belonged to one George Abraham, son of M.D.Abraham as per the gift deeds executed in his favour. The



said George Abraham sold the property to one P.J.Prasanna Kumari, wife of Sri Kumar. The first plaintiff has purchased the property from the said P.J.Prasanna Kumari. The said George Abraham originally sold the property along with right over the B schedule property namely, pathway. Therefore, the plaintiffs became entitled to use the pathway, which is shown as B schedule property. The B schedule pathway has been provided for the personal and vehicular moment of the vendees. It is the further contention that the original owner namely, M.D.Abraham in his Will dated 16.09.1988 has also stated that the B schedule pathway could be used for the benefit of all owners. The suit property form part of "Moolamannil Estate". Therefore, the plaintiffs ever since the date of purchase are enjoying the B schedule property as a motorable road for gaining access to the plaint A schedule property. Besides, they also got right over the B schedule property by way of easement of necessity. The defendant has purchased the shares of other sons of original owner M.D.Abraham and his wife. Subject to the right of pathway over the B schedule property of the plaintiffs, the defendant has no right to make any exclusive absolute right over the B schedule property. The B schedule pathway has been provided for the beneficial enjoyment of the respective shares of the original sharers and their assignees. Without the plaint B schedule property, A schedule properties cannot be beneficially enjoyed and the same will be rendered isolated and made unfit. With the ulterior motive of annexing the plaint A schedule properties with the remaining properties, the defendant made demands to the plaintiffs and their predecessor in title for the sale of the same to him. As the same has not been done, the defendant is trying to make attempt to obstruct the plaintiffs' personal and vehicular moment through the plaint B schedule property. At the entrance of the plaint B schedule property pathway on A and B as shown in the plan filed with the plaint, there is a gate with iron doors, provided by the original owners, so as to bar the entry of outsiders and strangers. Now, the defendant is trying to lock the entrance gate, so as to prevent the plaintiffs from entering through the gate. Such attempt is also made by the defendant on 24.10.2006. Hence, the suit for declaration, declaring that the plaintiffs have right to use the plaint B schedule property as a motorable pathway to the plaint A schedule property and for permanent injunction, restraining the defendant from anyway closing and blocking the user of the plaint B schedule property as pathway.

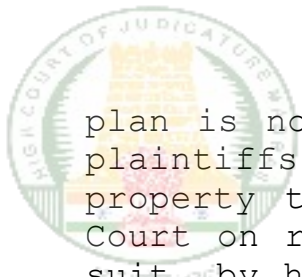
4.Denying the allegations, it is the contention of the defendant that the sale deed in favour of Prasannakumari and her husband Srikumar did not convey any right of pathway on the B schedule property. In the absence of any grant in the suit property, George Abraham nor Prasannakumari or Srikumar have no right to convey the property. The schedule of property,



description of property and other particulars of A and B schedule property are wrong and misleading. It is the contention of the defendant that an imaginary pathway is being mentioned to create a right, which did not exist. Only after obtaining ex-parte injunction before the visit of the Commissioner, the plaintiffs made attempt to create a new pathway to mislead the Commissioner to show that there had been a pathway. It is the contention that the original owner M.D.Abraham, while dealing the property, had retained 16.11 acres with building and factory etc. This area was bequeathed to his wife with right to sons, wherein he had mentioned a specific pathway to reach the estate bungalow and factory. The pathway pertains only to the said area retained by M.D.Abraham and his legatees. M.D.Abraham had also executed various gift deeds in favour of George Abraham who is the vendor of Prasannakumari and Srikumar. Therefore, George Abraham, who himself had no right, could not create or effect valid transfer of any right by introducing false recitals in the sale deeds, which is being repeated in the subsequent sale deeds. Even M.D.Abraham did not have any right to create a new right in respect of the properties alienated under the sale deeds to the defendant, which is antecedent to the sale in favour of the plaintiffs. It is the contention that after the execution of the gift deeds by M.D.Abraham, the donees enjoyed their respective areas. They had their own alternative way. The plaintiffs and their vendors have also own way to reach the road. They never used the pathway mentioned in the Will deed executed by M.D.Abraham to his wife. It is the contention of the defendant that the whole property is fenced and there is a gate kept under the lock and key of the defendant. The allegation that the plaintiffs' title of possession and enjoyment over the plaint schedule property is denied as false. The plaintiffs have no title of possession. The defendant has obtained the right as stated above. The plaintiffs are trying to create a new road by filing suit and also trying to create evidence after the suit and after obtaining injunction order, hence, prayed for dismissal of the suit.

5. Based on the above pleadings, the trial Court has framed five issues. On the side of the plaintiffs, P.W.1 to P.W.3 were examined and Exs.A.1 to A.13 were marked. On the side of the defendant, D.W.1 was examined and Exs.D.1 to D.13 were marked. Exs.C.1 to C.4 were marked as Court documents and C.W.1 was examined.

6. On careful perusal of the evidence and materials, the trial Court having found that the B schedule property was not granted under sale deeds, however, based on the Commissioner's report and Will executed by the original owner at later point of time, has granted declaration. When the trial Court has clearly recorded finding that the B schedule property shown in the plaint



plan is not available on ground, granted decree in favour of the plaintiffs. In the meanwhile, the plaintiffs have transferred the property to the appellants 3 and 4 herein. The First Appellate Court on re-appreciation of the entire evidence has dismissed the suit, by holding that the B schedule property shown in the plaint is not conveyed to predecessor in title of the plaintiffs and the sale relied upon by the trial Court is confined only to 16.31 acres. Therefore, any road mentioned in the Will is not related to the suit property. The First Appellate Court has also categorically recorded the finding to the effect that only after obtaining interim orders, an attempt has been made to create a new road on the defendant's property and ultimately, dismissed the suit. Against which, the present Second Appeal is filed.

7. While admitting the Second Appeal, the following substantial questions of law have been framed:-

"a. Whether the Lower Appellate Court right in misinterpreting the Ex.A.11-Will and its contents with regard to the existence of the pathway?

b. Whether the findings of the learned Additional Sub Judge, is not perverse with respect to the existence of the pathway, when the Ex.A.11 Will clearly speaks about the roads in the "Moolamannil Estate" and it has been stated there in that the heirs of M.D.Abraham can use the same absolutely without any obstruction from each other and the plaintiffs and the defendant are the purchasers from those heirs of Mr.M.D.Abraham?

c. Whether the Lower Appellate Court is right in reversing the finding of the trial Court with respect to the 'easement of necessity' to have the pathway to reach the 'A' schedule properties as decreed by the Trial Court, in the absence of any other materials available on records to show that there is alternative pathway existing to reach the 'A' schedule properties?."

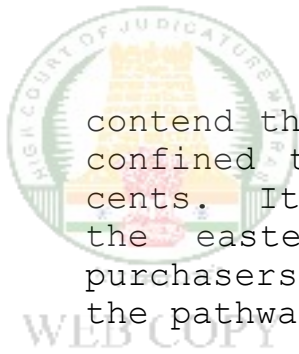
8. The learned counsel appearing for the third appellant submitted that originally the larger extent of land belonged to one M.D.Abraham. He has gifted various gift deeds to his three sons to an extent of 15 acres each. One George Abraham son of M.D.Abraham has sold the property to the plaintiffs' predecessor in title. The Moolamannil Estate is also conveyed to the predecessor in title of the plaintiffs and the plaintiffs have purchased the above property. The appellants 3 and 4 are the subsequent purchasers. They are also entitled to use the road available in the B schedule property. It is the contention that the extent conveyed is out of the larger extent owned by M.D.Abraham. In Ex.A.11, Will dated 16.09.1988, it is clearly mentioned about the availability of the pathway in the Estate known as Moolamannil Estate and it is categorically stated that



the roads running through the Rubber Estate shall belong to his wife and three sons without any obstruction from anyone of the sons. Therefore, merely because the specific grant is not mentioned in the gift deed, it cannot be said that there is no road available in the estate. It is the contention that one of the sons, namely, George Abraham has executed a sale deed to the plaintiffs' predecessor, including B schedule pathway, having a width of four meters and it is the contention that the Commissioner has also clearly found the road available in the Estate to reach the A schedule property. It is the contention that since the A and B schedule property originally are the part of vast extent of land belonging to M.D.Abraham, the right to use the pathway is inherent to reach the part of the property situated in the above extent, hence, submitted that mere fact that the plaint B schedule pathway was not mentioned in the settlement deed, it cannot be held that there is no grant of B schedule property. Hence, it is the further contention that without the B schedule property, the A schedule property cannot be enjoyed and also the B schedule property is absolute necessity, even the Commissioner's report did not indicate any other pathway. Such being the position, the First Appellate Court has not properly appreciated the evidence and dismissed the suit. Hence, it is the contention that the plaintiffs are not only entitled to declare the pathway as a motorable grant but also by easement of necessity to enjoy the property, hence, prayed for allowing the appeal.

9. In support of her submissions, she relied upon the judgment reported in **(2010) 2 SCC 689 (Sree Swayam Prakash Ashramam and another Vs. G.Anandavally Amma and others), (2006) 5 SCC 545 (Hero Vinoth (minor) Vs. Seshammal)** and the judgment in Civil Appeal Nos.8628 and 8629 of 2009 decided on 16.07.2019 in the case of **Dr.S.Kumar and others Vs. S.Ramalingam**.

10. It is the contention of the learned counsel appearing for the respondent that the plaintiffs having purchased the property, later point of time taking advantage of the interim order granted by the trial Court, had tried to create a road to an extent of 1/2 acre belonging to the defendant, who has purchased the remaining property. It is the contention that under Exs.B.1 to B.6 gift deeds, the eastern side of the property originally gifted to all the sons of M.D.Abraham. At that point of time, there was no estate at all. The estate was developed later. Ex.A.11, Will copy relates to the estate created later. The road mentioned in the Will pertains to 16 acres 34 cents retained by M.D.Abraham not beyond that. The Will in fact gives right to all the legatees in whose favour 16 acres have been bequeathed under the Will. Therefore, when the original document did not convey any right of pathway or grant, the plaintiffs cannot now take advantage of the Will of the original owner M.D.Abraham and

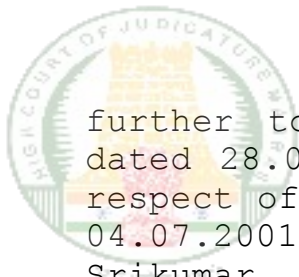


contend that the road is leading to entire area, whereas, road is confined to property retained by M.D.Abraham i.e., 16 acres 34 cents. It is the contention that the suit property is situated in the eastern part. Apart from the plaintiffs, some other purchasers have also purchased the properties. They never used the pathway and they have alternative way.

11.It is the further contention of the respondent that the evidence of P.W.1 and P.W.2 itself clearly indicate that the suit A schedule property has been properly fenced. Next to them, one Doctor is owning the property. These facts clearly prove that there was no road in the Estate leading to the A schedule property. It is the further contention that in the plaint itself one of the boundaries to the suit property is shown as Panchayat road. That itself clearly shows that the plaintiffs have never used the B schedule property and further, the B schedule property is not tallied in ground as per the Commissioner's report. Further, it is the contention that the report of the Commissioner clearly shows that only after obtaining interim orders, trees have been cut in overnight and attempt had been made to show that there is a motorable road. This fact has been clearly analyzed by the First Appellate Court. Hence, he submitted that when there is no grant in respect of the right of pathway in the year 1970, the plaintiffs cannot now take advantage of the recital in the Will, which was confined only to some other property and cannot seek declaration and injunction. The First Appellate Court has properly analyzed the entire evidence and rightly dismissed the suit, hence, prayed for dismissal of the appeal.

12.Heard the learned counsel appearing for the third appellant, the learned counsel appearing for the respondent and perused the materials available on record carefully.

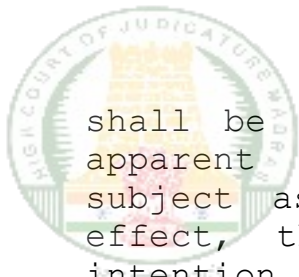
13.In the A schedule property almost 7 acres have been purchased by the plaintiffs' predecessor in title. It is not in dispute that originally, the property was owned by M.D.Abraham and he has settled the properties to all his sons through various gift deeds. Subject matter of the suit property was originally gifted to one of the sons of M.D.Abraham, namely, George Abraham under Exs.B.3 to B.6 in the year 1971 and 1972. In the above gift deeds, absolutely, there is no mention whatsoever with regard to any road available in the Estate. What was the gifts is only the property with specific boundaries to one of the sons, namely, George Abraham. It is also the admitted case of both sides that the said M.D.Abraham has also similarly settled the property to other two sons to an extent of 15 acres each, which is also not in dispute. The above document has not been placed before the Court, but the fact remains that under Exs.B.1 to B.6, there is no mention about any pathway or roads available in the estate. It is



further to be noted that the said George Abraham under Ex.A.1 dated 28.03.2001, has sold the property to one Prasannakumari in respect of 3 acres 56 1/2 cents and similarly, under Ex.A.4 dated 04.07.2001, remaining extent of the suit property was sold to one Srikumar. For the first time, George Abraham, son of M.D.Abraham created a right in respect of 4 meters road, situated in the estate known as Moolamannil Estate. It is further to be noted that such a grant to use the right of pathway never granted or never conveyed in the gift deed executed in favour of George Abraham. Only for the first time in the year 2001, such a right has been created by George Abraham. In fact, he did not have any such right as per the gift deeds under Exs.B.1 to B.6.

14.It is to be noted that when the property was gifted to George Abraham, there is no mention whatsoever with regard to the development of the property as Estate and when the roads are framed, only certain extents have been settled in favour of the defendant. Only for the first time, the roads have been included in the sale deed said to have been executed by George Abraham in favour of the predecessor in title of the plaintiffs. After the will executed by his father in respect of 16.34 acres under Ex.A.11 dated 16.09.1988 only based on the recitals, it appears that the right of A schedule property has been granted in favour of predecessor in title of the plaintiffs. In Ex.A.11, copy of the Will, it is referred that before Will, 3 sons of the said Abraham was settled to an extent of 15 acres each in the Estate known as Moolamannil Estate. The Will recital further indicates that he has retained 16 acres and 34 cents alone. In respect of the above 16 acres and 34 cents, the Will has been made. He has bequeathed entire 16 acres and 34 cents to his wife and also residential building and factory building situated in the above 16 acres and 34 cents to all the three sons and wife. Only in that context, it is written that the roads running through his Rubber Estate shall belong to all legatees. This Will executed in the year 1988. Therefore, it cannot be said that all the roads were actually running in entire estate, which already gifted to the legatees. If such was the case, there should have been a clear mention in the Will itself. What was intended in the Will was to maintain common road leading to factory and residence running through the estate namely, Moolamannil Estate to an extent of 16.34 cents retained by the original owner M.D.Abraham not beyond that. No doubt, larger extent of land has already been sold and gifted. The suit property according to the respondent is situated in the eastern part of the main estate.

15.No doubt, where one person transfers or bequeaths immovable property to another, if an easement in other immovable property of the transferrer or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee



shall be entitled to such easement; or if such an easement is apparent and continuous and necessary for enjoying the said subject as it was enjoyed when the transfer or bequest took effect, the transferee or legatee shall, unless a different intention is expressed or necessarily implied, be entitled to such easement; or if an easement in the subject of the transfer or bequest is necessary for enjoying other immovable property of the transferrer or testator, the transferrer or the legal representative of the testator shall be entitled to such easement, as per Section 13 of the Indian Easements Act, 1882.

16.The fact remains that whether the roads were already leading to separate the properties, there is no evidence, except the Commissioner's report. Further, for the first time, in the document executed by one of the sons of M.D.Abraham, the right has been shown as the pathway right to an extent of four meters by width. The suit schedule property in the plaint shows that such extent comes around approximately, half an acre. There was no evidence to prove that the road was already in existence. Whereas the evidence available on record clearly indicates that the A schedule property was separated and fenced. If really there was a road leading to their property as contended by the plaintiffs, there was no reason as to why the property namely, A schedule property was fenced in all sides.

17.It is also to be noted that the Commissioner has filed report, indicating that the B schedule property shown in the plaint is not at all available in ground, whereas he found out some other route. It is to be noted that the Commissioner has also shown existing road leading to Bungalow and Factory. That apart he has also noted down another area which is shown as red. It is to be noted that the Commissioner's report itself clearly shows that the road has been recently formed when he visited second time. Though he has noted down tyre mark, he has clearly mentioned all the traces about 3 to 4 days before his visit. This report also clearly indicates that several mark of existence of trees have been on the road and it has been closed and the trial Court has clearly found that the B schedule property plan appended to the sale deeds and plaint shown in the plan not tallied on ground.

18.The plan 2 marked as Ex.C.3 submitted by the Commissioner makes it clear that in the B schedule property there were teak trees and also trace of removal was very much found and the same has been filled. Similarly, the Commissioner also clearly noted down that the A schedule property totally fenced by barbed wire. This fact clearly shows that if really the existing road was leading to the A schedule property, there was no reason as to why the A schedule property was fenced separately.



19.P.W.1 in his evidence clearly admitted that north of his property is owned by one Dr.Jastin Don Thomas. However, he has denied as to whether the said Doctor has purchased the property from the legal heirs of M.D.Abraham. The north of the A schedule property was owned by third parties, which is also out of the larger extent owned by M.D.Abraham. Further, the property has been properly fenced and was enjoying separately and it cannot be said that the roads were leading to his property.

20.It is also to be noted that P.W.2 in his evidence clearly admitted that at the time of their purchase, the property was fenced. North and east side fence was already in existence, they have fenced south and west sides. This fact clearly shows that though the A schedule property was part of the larger extent, originally it has been separately enjoyed long back and there is no evidence to show that the roads were leading to the property from entrance. Now, the Commissioner's plan also clearly indicates that an attempt has been made to lay a fresh road over the property of the defendant, who has purchased all other shares to an extent of 31 acres. Admittedly, the roads were available leading to the factory and buildings. The plan-2 of the Commissioner shows that original road found is marked in blue color, which was leading to building and factory. Now, in the plaint B schedule shows in the Yellow Color. The same has been laid in separate route and the same clearly shows that the trees have been removed and attempt has been made to lay a new road. Admittedly, there was originally a road leading to the factory and residential house.

21.If the roads were actually existing, there should not have been any trees on the road. Whereas, the area shown as connected to the A schedule property was full of trees and trees have been removed and pit has been filled. This fact clearly probablised the defendant's case that taking advantage of the subsequent documents, attempt has been made to create a new road on the suit property. It is also relevant to note that one of the boundaries in the suit property is shown as Panchayat road and P.W.1 himself admitted that north of his property is owned by one Doctor, which also said to have been purchased from M.D.Abraham. This fact clearly proved one fact that there is an alternative way, which has been used by the parties and the manner, in which the fence has been covered the A schedule property even prior to the purchase of the property by the plaintiffs as admitted by their evidence clearly indicates that there was no road originally existing to reach the A schedule property. In view of the above facts, implied grant cannot be inferred, when existence of any road at the time of their purchase, is not established.

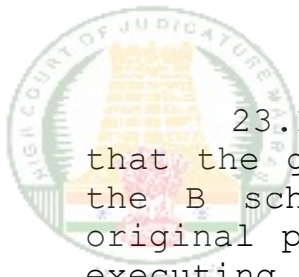


22. In the judgment reported in 2010 2 SCC 689 referred to above, the Hon'ble Apex Court in Paragraph Nos.24 to 26 has held as follows:-

"24. It is not in dispute that the trial Court as well as the First Appellate Court concurrently found on a proper appreciation of the evidence adduced in the case that the B schedule property of the plaint was being used by the original plaintiff (since deceased) and thereafter, by the respondents even after construction of the building in 1940 in A schedule property of the plaint. The appellants also did not dispute the case of the original plaintiff (since deceased) that he was in continuous occupation of the building even after its construction in the year 1940. It is also not in dispute that the appellants were not able to establish that the original plaintiff (since deceased) was using any other pathway for access to a A schedule property of the plaint and the building therein, which was in the occupation of the original plaintiff (since deceased).

25. The case of the appellants that since there was no mention in the deed of settlement enabling the use of B schedule pathway for access to A schedule property and the building therein, cannot be the reason to hold that there was no grant as the grant could be by implication as well. It is not in dispute that the fact of the use of the B schedule property as pathway even after execution of Exhibit A-1, the settlement deed in the year 1982 by the original plaintiff (since deceased) would amply show that there was an implied grant in favour of the original plaintiff (since deceased) relating to B schedule property of the plaint for its use as pathway to A schedule property of the plaint in residential occupation of the original plaintiff (since deceased).

26. In the absence of any evidence being adduced by the appellants to substantiate their contention that the original plaintiff (since deceased) had an alternative pathway for access to the A schedule property, it is difficult to negative the contention of the respondents that since the original plaintiff (since deceased) has been continuously using the said pathway at least from the year 1940 the original plaintiff (since deceased) had acquired an easement right by way of an implied grant in respect of the B schedule property of the plaint."



23. In the above judgment, the Hon'ble Apex Court has held that the grant can be inferred on the basis of the evidence that the B schedule property of the plaintiff was being used by the original plaintiffs and thereafter by the respondents, even after executing the settlement of the year 1988. In such circumstances, the Hon'ble Apex Court has held that the grant could be by implication as well. Whereas, in the case as already discussed above, there was no evidence to show that the roads were laid to the A schedule property and was put in use whereas the evidence clearly shows that A schedule property separately fenced before purchase by the vendors. That apart, north of the property also belongs to some third parties. The Commissioner's report indicates that pathway projected now in the reports is newly laid and there are several traces of removing the trees.

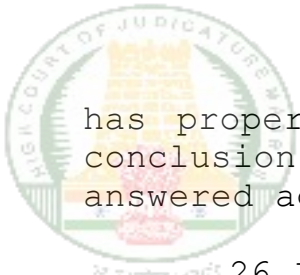
24. In the judgment in Civil Appeal Nos.8628 and 8629 of 2009, Paragraph Nos.14 and 15 read as follows:-

"14. Section 48 of the Transfer of Property Act, 1882, relied upon by the learned counsel for the appellants, reads thus:

48. Priority of rights created by transfer. Where a person purports to create by transfer at different times rights in or over the same immovable property, and such rights cannot all exist or be exercised to their full extent together, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created.

15. The said provision contemplates that where a person, ie., Rajasekaran has created different rights in or over the same property ie., 16 feet wide strip of land and such rights cannot be exercised to their full extent together, then each later created right shall be subject to the rights previously created. The exception is if special contract or reservation binding the earlier transferee is executed. It will mean that the exclusive right conferred on the plaintiff in the sale deed dated May 31, 1988 will not be legal till such time the earlier transferee ie., defendant No.2 has a special contract or reservation which binds her. Since the right of access to defendant No.2 was reserved in the sale deed dated April 1, 1976, therefore, the vendor could not confer exclusive right to the plaintiff vide sale deed dated May 31, 1988."

25. Having regard to the above judgments and as discussed above, this Court is of the view that the First Appellate Court



has properly re-appreciated the entire evidence and come to the conclusion. Accordingly, all the substantial questions of law are answered against the appellants.

26. In the result, this Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2020

Sub Assistant Registrar (CS)

Myr

To

1. The 1st Additional Sub Judge,
Nagercoil.

2. The Principal District Munsif,
Padmanabhapuram.

3. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+2 CC to M/s. S. VIJAYA MOHAN KUMAR, Advocate (SR-5784[F] dated
12/02/2020)

+1 CC to M/s. L. VICTORIA GOWRI, Advocate (SR-5862[F] dated
12/02/2020)

**Judgment made in
S.A. (MD) No.836 of 2014
12.02.2020**

VR (CO)

TR (25.06.2020) 12P 8C