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S.A.No.212 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 27.06.2024

Pronounced on : 04.07.2024

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

S.A. No.212 of 2021 and C.M.P. No.4234 of 2021

A.Manivannan

.. Appellant

VS.

Thariq

.. Respondent

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code, 1908 against the judgment and decree dated 30.01.2020 made in A.S. No.21 of 2019 on the file of the Principal District Judge, Vellore, reversing the judgment and decree dated 27.03.2019 made in O.S. No.245 of 2012 on the file of the Principal Subordinate Judge, Vellore District.

For Appellant : Mr.M.S.Subramanian

For Respondent : Mr.N.C.Ashok Kumar

JUDGMENT

The defendant in the suit in O.S.No.245 of 2012 on the file of the



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Principal Sub-Court, Vellore, has filed this second appeal challenging the judgment and decree passed by the Principal District Court, Vellore, in A.S.No.21 of 2019, dated 30.01.2020.

2. In the suit, the appellant herein is the defendant and the respondent herein is the plaintiff. In the forthcoming paragraphs, the parties will be referred to as per their litigative status in the suit.

3. The plaintiff had filed the suit seeking for a declaration that he is entitled to use the staircase from the first floor to the terrace, morefully, described in the suit 'B' schedule, and he has also sought for a consequential injunction to restrain the defendant from interfering with his peaceful possession and enjoyment of the staircase and also terrace and also for a permanent injunction to restrain the defendant from demolishing the staircase.

4. The plaintiff had purchased the suit 'A' schedule property, namely, ground floor and first floor of the building consisting of 3 shops



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in each floor from one Kanthammal under a sale deed dated 23.09.2005.

The plaintiff 'B' schedule property is only a staircase in the building to reach the first floor as well as open terrace on top of the first floor, which according to the plaintiff, was enjoyed by his vendor Kanthammal, even prior to the sale of the property to the plaintiff under the sale deed dated 23.09.2005.

5. According to the plaintiff, the defendant, after purchasing the property under the sale deed dated 30.04.2010, was creating problems for the plaintiff by preventing him from using the common staircase as well as from using his terrace by having access through the common staircase. According to the plaintiff, only under those circumstances, a suit in O.S.No.245 of 2012 on the file of the Principal Sub-Court, Vellore, came to be filed by the plaintiff seeking for the reliefs against the defendant as stated supra.

6. However, according to the defendant, as seen from the written statement, only upto the first floor, the plaintiff was granted right to use the staircase and he does not have any legal right to use the staircase for



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reaching the terrace on top of his three shops located in the first floor.

According to the defendant, under the sale deed dated 30.04.2010, by which the defendant had purchased his property, the right to use the terrace, having access through the staircase, was vested exclusively with the defendant. Therefore, according to the defendant, only upto the first floor, the plaintiff can use the staircase and he cannot use it for entering the terrace on top of the plaintiff's shops in the first floor.

7. Before the Trial Court, the plaintiff had filed three documents, which were marked as Exs.A1 to A3; Ex.A1 is the sale deed dated 23.09.2005 standing in the name of the plaintiff for the suit 'A' schedule property; Ex.A2 are the property tax receipts; and Ex.A3 are the photocopies with CD. On the side of the plaintiff, the plaintiff himself was examined as PW1. On the side of the defendant, two documents were filed, which were marked as Exs.B1 and B2; Ex.B1 are the photographs; and Ex.B2 is the sale deed dated 30.04.2010 standing in the name of the defendant. The defendant himself was examined as DW1.

8. The Trial Court, in its judgment and decree dated 27.03.2019 passed in O.S.No.245 of 2012, partly decreed the suit in favour of the



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plaintiff. The Trial Court held that the sale deed dated 23.09.2005 (Ex.A1), under which, the plaintiff had purchased 'six' shops, contains the recitals granting permission to use the staircase upto the first floor and no permission was granted to use the staircase to reach the terrace. The Trial Court further held that in the plaint, there is no pleadings with regard to easementary right claimed by the plaintiff. According to the Trial Court, there was no express grant given to the plaintiff to use the terrace portion on top of the first floor under the sale deed dated 23.09.2005 (Ex.A1). According to the Trial Court, when the specific right to use the terrace has not been given to the plaintiff and without there being any pleading made by the plaintiff that under the sale deed dated 23.09.2005 (Ex.A1), he was granted the right to use the staircase by his vendor, the plaintiff is not entitled for a declaration in respect of easementary right to use the terrace over and above his shops in the first floor. After giving the aforementioned findings, the Trial Court partly decreed the suit filed by the plaintiff by granting the following reliefs:-

- (a) The plaintiff is entitled for declaration with respect to easementary right in the staircase situated in the 'B' schedule property to the limited extent of reaching the shops located in the first floor alone.



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(b) Permanent injunction is granted not to disturb the plaintiff's enjoyment and easementary right to reach his shops located in the first floor.

(c) Permanent injunction is granted not to demolish the staircase situated in the 'B' schedule property.

(d) The Trial Court further refused to grant the relief claimed by the plaintiff to use the staircase for the purpose of reaching his terrace located over and above his shops in the first floor.

9. Since the relief to use the terrace as stated supra was not granted, the plaintiff had filed a first appeal in A.S.No.21 of 2019 on the file of the Principal District Court, Vellore. The Lower Appellate Court, by its judgment and decree dated 30.01.2020, modified the findings of the Trial Court by holding that the plaintiff is entitled for having access through the common staircase for reaching his terrace, which is located over and above his shops in the first floor, and has decreed the suit in entirety as prayed for by the plaintiff. Aggrieved by the findings of the Lower Appellate Court, the defendant has filed this second appeal.



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WEB COPY 10. This Court, while admitting this appeal on 09.03.2021, formulated the following substantial questions of law:-

(i) When the plaintiff claims by a grant an easement of access Ex.A1 sale deed to the first floor to reach the 3 shops in the first floor through the staircase owned and possessed by the defendant can it be extended beyond the first floor?

(ii) When the plaintiff himself has not even pleaded an easement of necessity to reach the second floor (terrace) (open space), can the Court grant a relief?

11. Heard Mr.M.S.Subramanian, learned counsel for the appellant; and Mr.N.C.Ashok kumar, learned counsel for the defendant.

12. The learned counsel for the appellant/defendant drew the attention of the Court to Ex.A1 sale deed dated 23.09.2005; and Ex.B2 sale deed dated 30.04.2010, and would submit that as seen from the same, the plaintiff was not granted easementary right to use the terrace, which is located over and above his shops in the first floor. According to



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him, as per Ex.A1 sale deed dated 23.09.2005 standing in the name of the plaintiff, the plaintiff had purchased only 567 sq.ft. of land together with three shops in the ground floor and three shops in the first floor, in which, staircase is not included. According to him, under Ex.B2 sale deed dated 30.04.2010, which stands in the name of the defendant, the defendant had purchased 394 sq.ft with staircase portion and 645 sq.ft. in the rear and another 815 sq.ft. with building thereon. Therefore, according to him, the staircase portion is owned by the defendant and the title is vested only with the defendant. According to him, the findings rendered by the Lower Appellate Court in respect of right to access given under the sale deed dated 23.09.2005 (Ex.A1) are inconsistent with the relief of declaration sought for in the suit filed by the plaintiff.

13. The learned counsel for the appellant would contend that the Lower Appellate Court has misconstrued the claim of the plaintiff and has proceeded to give a finding as though the plaintiff was claiming relief to reach the second floor using staircase by way of easement of necessity, which is neither claimed nor pleaded in the plaint. According to him, the Lower Appellate Court, in the impugned judgment and decree, without any pleadings and evidence, has, on its own, granted the relief not sought



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for on the surmise that the plaintiff is having easementary right and is having necessity to reach the second floor.

14. The learned counsel for the appellant also relied upon Sections 20 and 21 of the Indian Easements Act, 1882, and would submit that an easement cannot be used for any purpose not connected with the enjoyment of dominant heritage and therefore, the right to access the first floor, as an easement, as a dominant heritage can be used only to reach three shops in the ground floor and three shops in the first floor and not beyond the first floor.

15. On the other hand, the learned counsel for the respondent/plaintiff would submit as follows:-

(a) The defendant had purchased the other portion of the property under the sale deed dated 30.04.2010 (Ex.B2) from the common vendor Kanthammal and had become the joint owner with common interest in the staircase, namely, the plaint 'B' schedule staircase.

(b) Though the word 'easement' is not used in the plaint, there are sufficient pleadings to claim right over the staircase to reach terrace portion. The deposition of the defendant (DW1), during his cross-examination, also infers that the plaintiff is having the right to access



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staircase for reaching his terrace.

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16. The learned counsel for the respondent would further submit that the plaintiff is the owner of three shops in the ground floor and three shops in the first floor. There is an implied grant to use the terrace portion above the first floor. Merely because the same is not mentioned in the sale deed dated 23.09.2005 (Ex.A1), it cannot be said that the right to use the staircase for reaching the terrace was not granted to the plaintiff. In the absence of the pleadings in the plaint in respect of the word 'easement', it is not fatal to the case of the plaintiff, because the parties have understood their respective case.

17. In support of his contention, the learned counsel for the respondent drew the attention of this Court to a decision of the Hon'ble Supreme Court in the case of *Sree Swayam Prakash Ashramam and another Vs. G.Anandavally Amma and others [2010 (2) SCC 689]* and would submit that once the parties have understood their case with regard to easementary right, there is no necessity to specifically plead easementary right in the plaint. It is settled legal proposition that pleadings need not contain the exact language or expression. The



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pleadings in the plaint has been rightly considered by the Lower Appellate Court. The sale deed dated 23.09.2005 (Ex.A1) clearly says that all the rights of the vendor are transferred to the plaintiff. As per Section 8 of the Transfer of Property Act, 1882, unless different intention is expressed, transferee gets all rights and interest in the property and no specific restriction is imposed. As per Section 11 of the Transfer of Property Act, no restriction repugnant to interest could be created.

18. The learned counsel for the respondent also referred to the legal maxim "*Cujus est solum, ejus est usque ad coelum*", which means that "a person, who owns the soil, owns upto the sky". Since the plaintiff has purchased three shops in the ground floor and three shops in the first floor and having the right to use the staircase for reaching the first floor, there is an implied right for the plaintiff to use the terrace also. The recitals in Ex.B2 sale deed dated 30.04.2010 standing in the name of the defendant cannot be put against the plaintiff as the plaintiff is not a party to the said document. According to him, the restriction imposed in Ex.B2 on the plaintiff is void and the same is not binding on the plaintiff.

DISCUSSION:-

19. The concept of easement has been defined under Section 4 of



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The Indian Easements Act, 1882. According to the said provision, an easementary right is a right possessed by the owner or occupier of the land on some other land, not his own, and the purpose of which is to provide the beneficial enjoyment of the land. This right is granted, because without the existence of this right, an occupier or owner cannot fully enjoy his own property. It includes the right to do or continue to do something or to prevent or to continue to prevent something in connection with or in respect of some other land, which is not his own, for the enjoyment of his own land. The word 'land' refers to everything permanently attached to the earth and the words 'beneficial enjoyment' denotes convenience, advantage or any amenity or any necessity. The owner or occupier referred to in the provision is known as the Dominant Owner and the land for the benefit of which the easementary right exists is called Dominant Heritage. Whereas the owner upon whose land the liability is imposed is known as the Servient Owner and the land on which such a liability is imposed to do or prevent something, is known as the Servient Heritage. The right of easement is basically a form of privilege, the integral part of which is to do an act or prevent certain acts on some other land for enjoyment of one's own land.



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20. Easements can be both positive or negative. Former refers to a right through which the dominant owner does some act to exercise the right over the land of the servient owner. Whereas, the latter denotes an act of prevention. In a negative easement, the dominant owner prevents or restricts the servient owner from doing certain act or acts. The easementary right exists only when two heritages are adjacent to each other. It is a right *in-rem*, which means a right available against the whole world. Easement as a right is always annexed to the dominant tenement. It is a right of re-aliena which means a right over a servient tenement and not on one's own land.

21. The easement can be acquired through express grant made by inserting the clause of granting such a right in the deed of sale, mortgage or through any other form of transfer. This involves by expression by the grantor of his clear intention. Easementary right can be acquired in implied circumstances in the following ways:-

Easement of Necessity:-

Section 13 of the Indian Easements Act, 1882, deals with this subject. It consists of the circumstances where the owner or occupier cannot use his property without exercising the right of easement over the



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servient heritage. Thus, absolute necessity is the test and the convenience.

22. Easements are quasi as those are arising out of circumstances, i.e., when common properties are converted into tenements by way of sale, mortgage, partition or through any other form of transfer, in such a case, there is an implied grant of right of easement.

Prescriptive Easements:-

23. Section 15 of the Indian Easements Act provides for this type of easement. The following are the requisites:-

- (a) Right must be definite and certain,
- (b) Right must have been independently enjoyed without any agreement with the servient owner,
- (c) Must be enjoyed openly, peacefully and as of a right without any interruption for a continuous period of 20 years and in respect of any government land the period of non-interruption shall be 30 years.



Customary easements:-

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24. An easement right can be acquired by virtue of a local custom.

This is known as customary easements. Section 18 of the Indian Easements Act provides for it. For example, people living in a particular city or town having a right to bury the dead in a particular area or riparian right to use water.

25. Insofar as the case on hand is concerned, though the plaintiff has not specifically used the word 'easement' in the plaint, it is clear from the averments contained in the plaint that the plaintiff is claiming easementary right to use the staircase as well as the terrace located over and above his shops by way of easement through necessity as provided under Section 13 of the Indian Easements Act, which reads as follows:-

“13. Easements of necessity and quasi-easements--Where one person transfers or bequeaths immovable property to another,---

(a)if an easement in other immovable property of the transferor or testator is necessary for enjoying the subject of the transfer or bequest, the transferee or legatee shall be entitled to such easement; or

(b)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

(c)if an easement in the subject of the transfer or bequest is necessary, for enjoying other immovable property of the transferor or testator, the transferor or the legal representative of the testator shall be entitled to such easement;or

(d)if such an easement is apparent and continuous and necessary for enjoying the said property as it was enjoyed when the transfer or bequest took effect, the transferor, or the legal representative of the testator, shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.

Where a partition is made of the joint property of several persons,

(e)if an easement over the share of one of them is necessary for enjoying the share of another of them, the latter shall be entitled to such easement, or

(f)if such an easement is apparent and continuous and necessary for enjoying the share of the latter as it was enjoyed when the partition took effect, he shall, unless a different intention is expressed or necessarily implied, be entitled to such easement.



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The easements mentioned in this section, clauses (a), (c) and (e), are called easements of necessity.

Where immovable property passes by operation of law, the persons from and to whom it so passes are, for the purpose of this section, to be deemed, respectively, the transferor and transferee.”

26. The following are the undisputed facts:-

(a) The terrace over and above the plaintiff's shops in the first floor can be accessed only through the staircase commonly enjoyed by both the plaintiff and the defendant.

(b) The defendant has no objection for usage of the staircase by the plaintiff for reaching his three shops in the first floor.

(c) The defendant has raised objections only with regard to the plaintiff using the staircase for reaching the terrace over and above the first floor shops belonging to the plaintiff.

(d) By the obstruction caused by the defendant, the terrace located over and above the plaintiff's three shops in the first floor, will become useless.

(e) The sale deed dated 23.09.2005 (Ex.A1) executed in favour of the plaintiff by the same vendor Kanthammal is prior in point of time to



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the sale deed dated 30.04.2010 executed in favour of the defendant.

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(f) The right to use the staircase by the plaintiff is conveyed under the sale deed dated 23.09.2005 (Ex.A1) standing in the name of the plaintiff.

27. In the plaint, though the word 'easement' is not used, there are sufficient pleadings to claim right over the staircase to reach the terrace portion. It is an admitted fact that only access available to the plaintiff to reach the terrace over and above his three shops in the first floor is through the staircase. Therefore, there has become a necessity for the plaintiff to use the staircase for reaching the terrace located over and above his three shops in the first floor. Merely because the right to use the terrace by having access through the staircase is not disclosed in the sale deed dated 23.09.2005(Ex.A1) standing in the name of the plaintiff, it cannot be inferred that the said right was not granted to the plaintiff. There is an implied grant given by the plaintiff's vendor under Ex.A1 to use the terrace portion above the first floor. The absence of the pleadings in the plaint in respect to the word 'easement' is not fatal to the case of the plaintiff, as both the parties have understood that since the plaintiff has purchased three shops in the first floor, he is also entitled to use the



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terrace by having access through the common staircase.

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28. A decision relied upon by the learned counsel for the respondent/plaintiff in *Sree Swayam Prakash Ashramam case (cited supra)* also makes it clear that once the parties have understood their respective rights, there is no necessity to expressly grant those rights and it can also be through an implied grant. In the case on hand, there is an implied grant given to the plaintiff to use the staircase located over and above his three shops in the first floor, since he has already been granted easementary rights to use the common staircase to the first floor under Ex.A1.

29. It is also well settled law that pleadings need not contain the exact statutory language or expression. Though the plaintiff has not mentioned the word 'easement' in the plaint, it can be inferred from the pleadings that the plaintiff is claiming only easementary rights from the defendant. The Hon'ble Supreme Court in the case of *Ram Sarup Gupta Vs. Bishun Narain Inter College and others [1987 (2) SCC 555]* also supports the contention of the learned counsel for the respondent that pleadings need not contain the exact statutory language or expression and



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it would suffice if the pleadings infer that the plaintiff is claiming such a statutory right.

30. The sale deed dated 23.09.2005 (Ex.A1) standing in the name of the plaintiff clearly states that all the rights of the vendor are transferred to the plaintiff. As per Section 8 of the Transfer of Property Act, unless different intention is expressed, transferee gets all rights and interest in the property. Section 8 of the Transfer of Property Act is extracted hereunder:-

“8. Operation of transfer.—

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, where the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth;

and, where the property is machinery attached to the earth, the moveable parts thereof;

and, where the property is a house, the easements annexed thereto, the rent thereof accruing



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after the transfer, and the locks, keys, bars, doors, windows, and all other things provided for permanent use therewith;

and, where the property is a debt or other actionable claim, the securities therefor (except where they are also for other debts or claims not transferred to the transferee), but not arrears of interest accrued before the transfer;

and, where the property is money or other property yielding income, the interest or income thereof accruing after the transfer takes effect.”

31. In the sale deed dated 23.09.2005 (Ex.A1) standing in the name of the plaintiff, no restriction is imposed on the plaintiff from using the staircase in reaching the terrace over and above his three shops in the first floor. Hence, the plaintiff is entitled to use the staircase for reaching the terrace located over and above his shops in the first floor, as the same was enjoyed by his vendor Kanthammal earlier, prior to the sale effected to the plaintiff under Ex.A1.

32. It is also clear from Section 11 of the Transfer of Property Act that no restriction repugnant to interest could be created. Section 11 of the Act reads as follows:-



11. Restriction repugnant to interest created.—

Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immoveable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy which he may have in respect of a breach thereof.

33. The vendor of the plaintiff, who is also the vendor of the defendant, before effecting the respective sales, had enjoyed the right to use the staircase for the purpose of reaching the terrace located over and above the three shops purchased by the plaintiff in the first floor. There is also no restriction imposed under the sale deed dated 23.09.2005 (Ex.A1) standing in the name of the plaintiff that the plaintiff cannot use staircase for the purpose of reaching the terrace over and above his three shops in the first floor. Therefore, the obstruction caused by the



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defendant to the plaintiff to use the staircase for reaching the terrace is in violation of Section 11 of the Transfer of Property Act.

34. The legal maxim relied upon by the learned counsel for the respondent “*Cujus est solum, ejus est usque ad coelum*” squarely applies to the case on hand. It means that “a person, who owns the soil, owns upto the sky”. Admittedly, the plaintiff is the owner of the three shops in the ground floor and three shops in the first floor. He was also having the right to use staircase to reach the first floor. While that be so, there is an implied right given to him to use the terrace as well by applying the aforesaid legal maxim.

35. The plaintiff is not a party to Ex.B2-sale deed dated 30.04.2010 standing in the name of the defendant, who had purchased his property from one Kanthammal, the same vendor as that of the plaintiff. When the plaintiff is not a party to Ex.B2, he is not bound by any of the covenants contained in Ex.B2. Any restriction imposed in Ex.B2 cannot legally bind the plaintiff.

36. The Lower Appellate Court has rightly appreciated the



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pleadings and the evidence available on record and has rightly modified the findings of the Trial Court by granting the easementary right to the plaintiff for reaching the terrace through the staircase to be enjoyed in common by both the plaintiff and the defendant. The Lower Appellate court has rightly allowed the appeal filed by the plaintiff by granting the suit reliefs in favour of the plaintiff in entirety.

37. For the foregoing reasons, the substantial questions of law formulated by this Court are answered against the appellant/defendant by holding that the Lower Appellate Court, only based on the pleadings and the evidence available on record, has decreed the suit in favour of the plaintiff in entirety. The plaintiff is having easementary right to enter the terrace located over and above his three shops in the first floor by having access through the common staircase as seen from the evidence available on record and as seen from the provisions of the Indian Easements Act, which enables the plaintiff to claim easementary right by way of necessity. In the result, there is no merit in this second appeal and accordingly, this second appeal is dismissed. No Costs. C.M.P.No.4234 of 2021 is closed.



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To



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1.Principal Sub-Court,
Vellore.

2.Principal District Court,
Vellore.

ABDUL QUDDHOSE, J.

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Pre-delivery in
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