



S.A(MD).No.1082 of 2011

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 01.07.2022

CORAM: JUSTICE N.SESHASAYEE

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- 1.P.Arunachalam
- 2.P.Natrayan
- Palanichamy Gounder (died)
- 3.Thirumalaisamy (died)
- 4.Chellammal
- 5.Ponnammal
- 6.Muthulakshmi
- 7.T.Sureshkumar
- 8.T.Muthuramakrishnan

...Appellants/Appellants
/Plaintiffs

(cause-title accepted vide order dated 19.10.2011 made in MP(MD).No.1 of 2011 in SA(MD)SR.No.22039 of 2011)

(Appellants 6 to 8 are impleaded vide Court order dated 13.06.2022 in CMP(MD).Nos.11136 to 1138 of 2018 in SA(MD).No.1082 of 2011)

Vs.

- 1.M.Kaliammal
- 2.Amsavalli

....Respondents/ Respondents
/Defendants

Prayer : Second Appeal filed under Section 100 of Code of Civil Procedure, against the judgment and decree of the Subordinate Judge, Palani dated 22.11.2010 in A.S.No.27 of 2006 confirming the judgment and decree passed by the District Munsif, Palani dated 31.01.2006 in O.S.No. 877 of 1990.



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For Appellants : Mr.Anand Chandrasekar

For Respondents : Mr.Babu Rajendran

J U D G M E N T

The plaintiffs, who laid a suit for partition in O.S.No.877 of 1990, for partitioning four items of properties, having lost it successively both before the trial Court and before the first appellate Court in A.S.No.27 of 2006, are the appellants herein. For narrative convenience, the parties would be referred to as per their rank before the trial Court.

Pleadings:

2.1 There is hardly any difference between the parties on the material facts on which the plaintiffs have found the cause for their action. They are as below:

- ◆ Certain Karupanna Gounder and Nallappa Gounder were brothers. Their ancestors owned items 1 to 3 properties described in the plaint. These are agricultural lands. This apart there are other properties that these brothers owned, regarding which there was an oral partition between them. In this partition, suit item 4 property comprises of a house plus vacant site in which Karuppanna Gounder had ½ share.



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- ◆ Karuppana Gounder was married to one Karuppayee and they had five children, of whom three were their sons. The two daughters are the plaintiffs here.
- ◆ Both Karuppana Gounder and Karuppayee had died prior to the commencement of the Hindu Succession Act. This is an admitted fact. Consequent to their demise, the 4th item of property and Karuppana Gounder's share in items 1 to 3 devolved on his three sons, namely, Muthusamy, Kumar and Palanisamy *alias* Palaniappan.
- ◆ On 12.09.1961 under Ext.A.1, Kumar sold his share in these 4 items of properties to his brother Palanisamy.
- ◆ Of the three brothers, Muthusamy pre-deceased Palanisamy. Palanisamy also died without any direct lineal descendants as his issues, or in other words without any Class I heirs. And, since Muthusamy had died by then, the share of Palanisamy devolved equally on his two sisters, the plaintiffs herein as the latter's Class II heirs.
- ◆ Muthusamy's wife is the first defendant and their daughter is the second defendant. The defendants 3 to 5 are descendants of Nallappa Gounder, the other undivided branch pertaining to items 1 to 3.



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2.2 The suit is laid for partition of plaintiffs' share after exchange of notices, and the specific shares of each of the plaintiffs in each of the items of the properties are detailed in paragraph 14 below.

3.1 The suit was contested only by the defendants 1 and 2. Nallappa Gounder's branch represented by the defendants 3 to 5 chose to remain *ex-parte*. In their written statement, defendants 1 and 2 took up two contentions: (a) that after the demise of Muthusamy Gounder, there was an oral family partition between the defendants on the one hand, and Palaniappa Gounder on the other hand, in which all the shares of Palaniappa Gounder in the suit properties came to be allotted to these defendants; (b) that there lies a plot measuring 1,417 sq.ft, a vacant site, adjacent to item No.4. This property was not included in the suit. This apart, there is yet another property comprised in S.No.600/2A. This was also not included and hence, the suit is bad for seeking partial partition.

3.2 The plaintiffs now filed a re-joinder in which they would plea and clarify that even though item 4 comprises of house on a site measuring 1,417 sq.ft, only 630 sq.ft is as shown in the plaint is available and the balance is not available. Turning to the other property in S.No.600/2A, this



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property is in the name of a third party and therefore, it is not available for partition too.

4.1 The dispute went to trial. By now both the plaintiffs had passed away and their legal representatives were impleaded as the plaintiffs 3 to 8 and one such heir, who did not join the other heirs of the plaintiffs came to be impleaded as 7th defendant.

Approach of the Courts below:

4.2 During trial, the 6th plaintiff examined himself as P.W.1. For the contesting defendants, the first defendant was examined as D.W.1. Both sides produced documentary evidence. While those produced by the plaintiffs were marked as Ext.A.1 to Ext.A.7, and that which the defendants had produced came to be marked as Ext.B.1 to Ext.B.5.

5.1 After appreciating the evidence before it, the trial Court rejected the defendants plea of oral family arrangement/partition between the defendants 1 and 2 and Palanisamy Gounder, but proceeded to accept the other defence founded on a plea of partial partition. As already indicated, the plea of partial partition is pivoted on two properties, of which one is alleged to be



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an addition to item No.4. According to the defendants, the 4th item of property has a larger area but the plaintiffs had shown only a smaller area.

To disprove this plea of the defendants, the plaintiffs had produced Ext.A.4, sale deed dated 30.10.1979, which was executed by Nallappa Gounder's son of Palanisamy to a certain Chellappa Gounder. In this document, the side measurement of the plots sold is given in cubit. However, the trial Court appeared to have been in error in reading the same as feet and held that there is an area discrepancy in the plaint. Turning to the property in Survey No. 600/2A, the trial Court ignored the statement of the plaintiffs that this property stood in the name of a third party. On a limited question of not including some extent in item No.4, which would be around 800 sq.ft., the suit came to be dismissed on the ground of partial partition.

5.2 Promptly the plaintiffs preferred a first appeal. Before the first appellate Court, the plaintiffs produced additional documentary evidence to show that the property in Survey No. 600/2A stands in the name of another party and produced a copy of the patta as an additional document to show that this property stands not in the name of Karuppanna Gounder, but in the name of a third party. This document though was admitted in evidence and marked as Ext.A.8, the first appellate Court held that it is a *post litem motam*



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document, and preferred to rely on the admission of P.W.1 about the availability of this additional extent of property, and dismissed the appeal fundamentally on the ground that the suit is bad for seeking partial partition. Hence this second appeal at the instance of the plaintiffs.

6. The appeal is now admitted for considering the following substantial questions of law:

i) Was not the first appellate Court in error in shifting the burden of proving that property in Survey No.600/2A on the plaintiff when its existence is alleged only by the defendants?

ii) Has not the Court below erred in misreading Ext.A.4 and more particularly, the unit of measurement given in Ext.A.4 and finding a non-existent 800 sq.ft., as forming part of item No.4?

Iii) Has not the first appellate Court egregiously erred in denying partition to the plaintiffs?

The Arguments

7.1 The issue falls under a narrow compass, and it can be addressed straight away. The learned counsel for the plaintiffs/appellants contended that the



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plea of partial partition though was raised by the defendants, yet there was no attempt to prove the same. The plaintiffs have filed a rejoinder/additional pleadings denying the existence of any such properties, as alleged by the defendants 1 and 2. With the burden now on the defendants to establish the availability of the properties that he alleges as omitted in the suit, till date he did little to prove the same. He also submitted that the first appellate court has gone wrong in ignoring Ext.A-8 patta pertaining to S.No:600/2A and in treating the same as available.

7.2 The learned counsel for the contesting defendants/respondents adopted the line of reasoning of the courts below, more particularly that of the first appellate court. Elaborating his submissions, he argued that there are two items of properties which according to the defendants have been omitted. One of the items is in Sy.No:600/2A and the other is an additional extent available in item 4. So far as this additional extent is concerned, P.W.1 has conceded to the availability of this property in his cross examination and also has proceeded to admit that this is in the possession of the contesting defendants. Necessarily, the suit is bad for seeking partial partition.



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A Preludial Statement

8. A preliminary statement may now be made: As submitted by the counsel for the defendants 1 and 2 /respondents 1 and 2, the allegation is about the omission of two items of properties. Of them, Ext.A-8 pertains to the property in S.No:600/2A, and the other is an additional extent relatable to item 4. So far the latter mentioned property is concerned, P.W.1 has conceded to the availability of this property. And, turning to the other property in S.No:600/2A, its availability appears doubtful with Ext.A8 showing it to be standing in the name of a third person. It also involves an aspect on the burden of proving its availability, which is essentially on the defendants to discharge, and not on the plaintiffs. However, an inference that could be instantly and logically deduced from the stands of the plaintiffs is that they are plainly uninterested in claiming a share in these two items of properties, irrespective of their availability.

Partial Partition – The Principle

9. In approaching the issue, it is necessary to remember that the conceptual defense of partial partition need not, and hence does not, operate uniformly. Before addressing it, it is necessary to restate why a suit for partial partition is not encouraged, or rather not permitted. The underlying principle is that



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in a suit for metes and bounds partition of an estate held in common as in co-sharership or co-ownership, Courts are required to adjust the equities as between the co-sharers/co-owners based on the character and value of the properties. Courts are required to factor in the divisibility of the property, the value of the property, provision for convenient enjoyment of a specific property to be allotted to parties, and if there are alienees of whole or any portion of any such property or properties, as the case may be, from any of the co-sharers or co-owners, then to transfer such equities that their vendors would be entitled to. Therefore, unless all the properties are before the Court, adjusting *inter se* equities between the parties vis-à-vis the properties required to be partitioned may not be possible. This describes the ground rule against suits for partial partition.

Partial Partition - Need for Change

10.1 The outcome of this appeal now clings on to the decision on a solitary point: Is the suit bad for seeking partial partition? An easy course open to this Court is to adopt the approach which the Courts below had adopted: To dismiss the suit. It is after all a ready-reckoner solution with realms of printed literature on the point to support. But it leaves certain implications that may go far beyond finding a solution (or is it no solution?) to this case.



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It will now make a second suit for partition now inevitable since the cause of action for a suit for partition is recurring and continuous. And when happens, it will substantially be an action replay of the earlier drama which the court has already seen, and in this case, at multiple levels. Will not the time which the Court has spent thus far go utterly wasted? And, has the Court time for a second suit for partition and to go through the procedural grind all over again? Answer is to state the obvious.

10.2 An intellectual solution readily available to a legal question does not leave its imprint in the virtual space, but in the real space and in real time. Therefore, when the existing rule on partial partition threatens to sap the judicial time with a possibility of a second suit, and affects Courts' efficiency in the real space, it becomes the duty of the Court not to ignore to weigh what weighs it down in this country: the docket pendency; the burgeoning explosion of litigations; and its eternal struggle in dealing with it. This, to this Court, is the bottom line, and it forces it to look beyond the templates.

10.3 Principles of law are not *Euclid's theorems* that they are not incapable of change, for law is not an artifact from a studio of pure intellectualism, but



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rules that man has made for his own peaceful living. Life and its quests have always refused to remain static, and they force the law and the legal principles, both legislated and judicially evolved, to change, though the latter invariably lags behind the societal change and aspirations. It then becomes the duty of the Courts to step in to bridge the distance between where the law is and what the societal changes and expectations are. It is a delicate act from which emerges newer principles to negotiate both familiar and newer challenges. The kinetics of judicial dynamics rarely tolerates the forces of inertia hamstringing its internal efficiency. At least it is under a compulsion not to ignore it. The efficacy of a time-tested principle therefore, may have to be retested whenever required not only for its ability to resolve an issue before the Court, but also for its impact on the judicial time. A classic example of this variety can be seen in the ratio of the Hon'ble Supreme Court in ***Kattukandi Edathil Krishnan and another Vs Kattukandi Edathil Valsan and others*** [AIR 2022 SC 2841], where the Court unsettled '*a settled principle*', and declared that in suits for partition, Courts that pass a preliminary decree should *suo motu* follow it up with a proceeding to pass a final decree, as the division between the two stages of the same suit is fundamentally artificial. A rule waiting to be broken was broken for enhancing the comfort of the litigant and the institutional



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efficiency of the Court. Seen in the context, does not the template-principle barring a suit for partition on grounds of partial partition likely to work in the opposite direction?

11.1 Turning to the specifics of this suit, it is thirty-two years since this case was instituted, and eleven years since this appeal was admitted. Even if the property in Sy.No:600/2A is kept aside, still there is the other additional extent omitted to be included along with Item 4. And, the plaintiffs remain unmoved and unruffled despite successive defeats before the Courts below on the solitary ground of seeking partial partition. But, haven't they, by their conduct, conveyed to the Court of their disinclination to seek their share over an alleged additional extent of property through the judicial process? Hence, even though an option to dismiss this suit is available in law, yet it does not appear to be warranted in the circumstances, for it makes a second suit for partition unavoidable. Alongside, it holds the potential to ingest the judicial time (which the Courts are under a pressure to ration it out for all the litigations) for resolving substantially the same cause.

11.2 The solution to this malady is not beyond reach: The judicial patronage, a sort of a freebie of judicial time, hitherto provided for



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preserving the rule on partial partition must be revisited and redesigned to address the contemporary challenges facing judiciary. If judiciary has to acquire a certain degree of professionalism, it must start with a plan of action for conserving its time, and spending it well. This will provide the cutting-edge to its efficiency. Therefore, the present rule on partial partition is re-visited and modified, and it is as follows: ***Where the plaintiff has the notice about the availability of certain properties not included in a suit for partition, and faces resistance to the suit with a defense founded on the rule of partial partition, and still omits to include the omitted properties, then in appropriate cases, the Courts must, instead of dismissing the suit, pass a decree for partition of those properties which are before the Court, and simultaneously foreclose all options for a suit for partition of the properties omitted in the first suit.*** A shade of this idea is available in the doctrine of *res judicata*, more particularly in the rule of constructive *res judicata*, and also in Order II Rule 2 CPC. The point is, should the psyche that rejects the respect for judicial time be conferred with the honours of a second opportunity for wasting the first opportunity? Nothing can be more grandiose a blunder than an opportunity that the Court itself grants for re-litigation to aid the abuse of its own process. The puritans of the traditional view may have their moments of discomfort here,



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but the contemporary judicial system no longer has the time to extend its generosity to a defaulting plaintiff to re-litigate substantially on the same cause of action. A litigant must be respected and not pampered; his rights must be respected, not his indiscipline. Let judicial time be saved even if it is in ounces.

Working the Plea of Partial Partition:

12.1 As would be seen later, a defense founded in a plea of partial partition can produce different consequences, and not necessarily the same. But, before addressing it, it is necessary to categorise the situations where issue of partial partition may arise:

- a) Where the co-sharers or co-owners, as the case may be, do not know about the existence or availability of properties other than those litigated upon.
- b) Where the plaintiff is in actual physical possession or in exclusive management of the partible properties, holding them also for the benefit of the other co-sharers.
- c) Where the plaintiff is not in actual physical possession of the estate, enjoys it constructively with the co-sharer in possession, or where the defendant is in an identical position as the plaintiff in situation (b).



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d) Where a suit is laid or defended by an alienee of a co-sharer or a co-owner.

As stated earlier, each of these situation may produce different consequences, and they are explained in the subsequent paragraphs.

12.2 In the case of situation (a) above, a suit for partition *stricto sensu* cannot be termed as a suit for partial partition since the parties themselves do not know about the availability of some of the properties. Therefore a second suit for partition of the properties not included in the first suit is maintainable. This may instantly indicate that a plea resisting a suit for partial partition is available only for the first suit for partition, and not for the second suit for partition of those properties which are omitted to be included in the first suit. To this may be added another category of cases where the co-sharers of one generation might have kept aside some properties, though available for partition, as common properties, which another generation may want to alter. But it largely depends on the facts of the particular case. What this category of cases signify is that a suit for partial partition is not *per se* bad in law, and that it is only bad in terms of the principle that the Courts have evolved. This aspect however, cannot be stretched to other circumstances and has to be appreciated contextually.



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12.3 Before dealing with situations (b) and (c), it is necessary to make a preudial statement/ instruction: In all cases where a plea of partial partition is made with necessary particulars, Court may require the plaintiff to amend the plaint, and if the defendant has also paid the court fee and seeks a preliminary decree for partition, then it may require either of the parties to amend their respective pleadings to include the omitted properties. The situations in (b) and (c) will arise only if both parties fail to amend their pleadings. Having stated thus, it is underscored that when the plaintiff faces a plea challenging the maintainability of the suit for seeking partial partition, the duty to seek amendment of the pleadings is principally on the plaintiff and it is not hinged to, or dependent on the Court exercising its residuary powers to direct an amendment of the pleadings.

12.3 (i) In situation (b), the plaintiff is in possession or management of the properties for all the co-sharers. Here, if the defendant indicates about the availability of any properties left over by the plaintiff specifically and later such properties are proved to exist, then the Court may have to non-suit the plaintiff if these properties are not included. It is not just because it is a case for partial partition, but also because the Court could not resolve the dispute completely despite it investing its time. There cannot be a premium



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on the plaintiff's own inequity in approaching the Court, for the Court does not countenance any attempt at unfairness. However, a second suit for partition cannot be avoided.

The solution: The Court while dismissing the first suit for partition is required to slap a cost on the plaintiff for wasting its time proportionate to the value of the plaintiff's share in the properties and may create a charge for the cost on the share of the plaintiff, and it must also have the decree registered. It is also recommended that the legislature may step in to make the second suit costlier for the plaintiff than the first suit. It may discipline the plaintiff, make him realize that the Courts are professionalized institutions created for dispute-resolution and not casinos for him to gamble on its time.

12.3 (ii) In situation (c), the plaintiff is not in possession or in management of the estate held in co-sharership. Here, if the defendant indicates about the omission of any particular property which is available for partition between the parties, and the plaintiff chooses not to include that property in the suit even thereafter, then the suit need not be dismissed. A fundamental difference between situation (b) and situation (c) now requires to be



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appreciated. In situation (b) where neither side opted to amend their pleadings, and with the plaintiff approaching the Court for obtaining a share in the properties, he in effect has prevented the Court from passing an effective decree for partition by adjusting all equities, where as in situation (c) the plaintiff by his or her conduct has indicated to the Court of his or her disinterest in seeking partition of the properties that are omitted to be asked through the judicial process. Courts are under no duty to bend backwards to shed a concern for the litigants than the concern the litigants are required to possess in defending their interests. After all it is not a fundamental right of the party to require the Court to travel an extra distance to protect it. This paves way for applying the alternate option explained in paragraph 11.2 above. For the details of the solution, paragraph 11.2 above is required to be referred.

12.3 (iii) The last of the category of suits for partition are those involving an alienee of a co-sharer. The right of a purchaser of an undivided share in a property held in co-sharership is to seek partition of the specific share in the specific property concerned merely. Therefore an alienee of a co-sharer cannot institute a suit for partition of all the properties held in co-sharership. Nor can there be a plea of partial partition in defence of a suit for partition.



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However, in all suits for partition where the alienee or a purchaser of a co-sharer figures as a defendant, he is entitled to the same equity which his or her vendor is entitled to, provided that possession of the property purchased by him or her was not accompanied by the passing of title.

13. The present suit, with least complication, falls under category (c) above. When the plaintiffs have indicated to this court, not in the opening year of the litigation but over the last thirty-two years that they are not interested in seeking a share in the properties alleged to have been omitted, why should the court bend backwards to force the plaintiffs to take a share in them? It is plainly not its duty. It is therefore, only appropriate that the suit is decreed to the extent the plaintiffs have proved their right to their share in the properties now available before the court, and to foreclose their right to involve the judicial process for staking a claim over the alleged omitted properties. This rule can be extended to every situation where the plaintiff falls under category discussed in paragraph 12.3(c). Therefore, the plea of partial partition fails.

14. The conclusion is to state the obvious. The suit has to be decreed with a rider barring the plaintiffs from instituting any further suit for the



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partition of any properties not included in the present suit, as it would amount to abuse of judicial process.

The shares:

15.1 Turning to the specific shares to which the plaintiffs are entitled to in each of the four items of properties, it must be stated that both the plaintiffs have now passed away and they are substituted by the legal representatives. While the plaintiffs 5 to 8 are the heirs of the first plaintiff, plaintiffs 3,4 and the 7th defendant are the heirs of the second plaintiff.

15.2 The plaintiff's right to partition is pivoted on their right as Class II heir of their brother Palanisamy. And he is one among the three sons of his parents. One of his brothers was Kumar, who Vide Ext.A-1 had conveyed his share in all the properties to Palanisamy. The other brother is Muthusamy under whom defendants 1 and 2 claim a share. Thus, Palanisamy is entitled to 2/3 shares in all the four items of properties, and Muthusamy was entitled to the balance 1/3 shares.

(a) Item 1:

16.1 The total extent available in this survey number is 1.60 acres and it



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jointly belonged to Karuppanna Gounder and his brother Nallappa Gounder. In this Karuppanna Gounder is entitled to $\frac{1}{2}$ share. The other $\frac{1}{2}$ goes to Nallappa Gounder's branch which represented in this suit by defendants 3 to 6. With Ext.A-1 adding to his share, Palanisamy's share in this item is $\frac{2}{6}$ share or $\frac{1}{3}$ share. This devolved on both the plaintiffs equally with each taking $\frac{1}{6}$ share. In this Plaintiffs 5 to 8, as heirs of the first plaintiff, are entitled to $\frac{1}{24}$ share each, and plaintiffs 3,4 and the 7th defendant, as the heirs of the second plaintiff, are entitled to $\frac{1}{18}$ shares.

(b) Items 2 and 3

16.2 In items 2 and 3, Karuppanna Gounder had an undivided $\frac{1}{4}$ share. Including the share obtained under Ext.A-1, Palanisamy's share will be $\frac{2}{12}$ or $\frac{1}{6}$. This $\frac{1}{6}$ share devolved on the heirs of the plaintiffs equally, with each branch taking $\frac{1}{12}$ share. Accordingly, the four heirs of the first plaintiff (plaintiffs 5 to 8) would be entitled to $\frac{1}{48}$ shares each, and the legal representatives of the second plaintiff (plaintiffs 3 and 4 and defendant 7) would be entitled to $\frac{1}{36}$ share each.



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(c) Item 4:

16.3 Item No. 4 of the suit comprised of a larger extent. And the issue of partial partition essentially relates to this property. In this Karupanna Gounder and his brother Nallappa Gounder had half share each. The allegation was that sometime prior to 1980 there was an oral partition between the two branches in which the western $\frac{1}{2}$ was allotted to Muthusamy and Palanisamy. This western half is item 4 plus some omitted property. By virtue of Ext.A-1 Palanisamy would be entitled to $\frac{2}{6}$ share or $\frac{1}{3}$ share in it. The other $\frac{1}{6}$ share belonged to Muthusamy. In this the plaintiffs 3,4 and the 7th defendant are entitled to $\frac{1}{9}$ share each while the plaintiffs 5 to 8 will be entitled to $\frac{1}{12}$ share each.

The Result:

17. In the result this second appeal is allowed without costs, and the judgement and the decree of the first appellate court dated 22-11-2010 in A.S.27 of 2006 is set side and the plaintiffs share in each of the itmes of the properties is declared as shown in the table hereinbelow, but subject to the rider that the plaintiffs' right to seek partition of any omitted items of properties in this suit will stand foreclosed.



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Item No	Shares available for partition	Share of plaintiffs 5 to 8 (share of the First Plaintiff)	Share of the plaintiffs 3,4 & defendant 7 (Share of the second plaintiff)
1	1/2	1/24 each	1/18 each
2 & 3	1/4	1/48 each	1/36 share each
4	1/2	1/12 each	1/9 each

01.07.2022

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Internet: Yes/No

rmk/CM

To

1. The Subordinate Judge, Palani.

2. The District Munsif, Palani.

3. The Section Officer,

VR Section,

Madurai Bench of Madras High Court,

Madurai.



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N.SESHASAYEE, J.,

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