



S.A.(MD) Nos.125 & 126 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.06.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) Nos.125 & 126 of 2011

S.A.(MD) No.125 of 2011 :-

1.Rathinammal
2.Senthilkumar
3.R.K.Murugesan ... Appellants/Appellants/Plaintiffs
*[The name of the 1st appellant is amended vide
Court order dated 31.01.2017 made in C.M.P.(MD)
No.746 of 2017 in S.A.(MD) No.125 of 2011]*

Vs

Nagarajan ... Respondent/Respondent/Defendant

S.A.(MD) No.126 of 2011 :-

1.Rathinammal
2.Senthilkumar
3.R.K.Murugesan ... Appellants/Appellants/Defendants
*[The name of the 1st appellant is amended vide Court
order dated 31.01.2017 made in C.M.P.(MD) No.748
of 2017 in S.A.(MD) No.126 of 2011]*

Vs

Nagarajan ... Respondent/Respondent/Plaintiff

Prayer in both Appeals:- Appeals filed under Section 100 of Civil Procedure Code to set aside the judgments and decrees of the lower appellate Court



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dated 01.09.2009 passed in A.S.Nos.172 and 173 of 2008 on the file of the I Additional Subordinate Court, Madurai, confirming the judgments and decrees of the trial Court dated 08.04.2008 passed in O.S.Nos.19 of 2003 and 145 of 2002 on the file of District Munsif Court, Melur respectively.

In both Appeals

For Appellants : Mr.N.Rahamadullah

For Respondent : Mr.K.Baalasundharam

COMMON JUDGMENT

1.1. O.S.No.145 of 2002 was laid for declaration of title and recovery of possession. The defendants therein have filed a Cross Suit in O.S.No.19 of 2003 for declaration of title to the same property and for prohibitory injunction. While the suit in O.S.No.145 of 2002 came to be decreed, the other suit in O.S.No.19 of 2003 was dismissed. Aggrieved by the same, first appeals were preferred and that came to be dismissed. These second appeals arise out of the decrees of the first appellate Court. To be specific, the second appeal in S.A.(MD) No.126 of 2011 is preferred by the defendants 1 to 3 in O.S.No.145 of 2002 and S.A.(MD) No.125 of 2011 is filed by the plaintiff in O.S.No.19 of 2003.



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1.2. Both suits were tried together and were disposed of by a common judgment and so were the first appeals preferred against them. The trial Court has treated O.S.No.145 of 2002 as a main case and recorded the finding in that. For narrative convenience, the parties are referred to by their rank before the trial Court.

2. The dispute falls within a very narrow campus. For the sake of convenience, the facts are stated as below:

- A certain Ramasamy Pillai was entitled to a block of land with the residential building therein. According to the plaintiff, on the demise of Ramasamy Pillai, the property devolved equally on his 5 sons namely, Nagaraja Pillai (plaintiff), Nataraja Pillai, Kathirvelu Pillai, Chockalingam Pillai, and Shanmugam Pillai.
- According to the plaintiff, the entire property which Ramasamy Pillai possessed of had a residential building in the far west. Abutting on the east was a vacant site. To the south of this vacant site, there is a



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common well. Further south lies another vacant plot measuring 75 feet x 75 feet. On the north of this plot of property is earmarked a west to east pathway for providing access to the original building referred to above, to panchayat road on the far east. To the further north lies a vacant site and also a tiled roof building. This tiled roof building is approximately opposite to the original building referred to above.

- According to the plaintiff, some time in 1997, an oral partition took place in which the northern portion of the ground floor portion of the residential building was allotted to Shanmugam Pillai and the southern portion was allotted to Kathirvelu Pillai under whom the defendants claim a right. The first four portion was allotted to Chockalingam Pillai, who was stated to be then residing abroad. Nataraja Pillai was allotted some vacant land on the north of the pathway and almost opposite to the vacant site on to the east of the residential building. The plaintiff was allotted the very vacant site on



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the east of the residential building. The plot stated to have been allotted to the plaintiff in 1997 partition, is the suit property in both suits.

- Prior to the partition, Kathirvelu Pillai was using a toilet and kitchen in the suit property and after partition, the suit property came to be in exclusive possession of the plaintiff. As the defendants, who claim under Kathirvelu Pillai, refused to deliver vacant possession and also asserted title contrary to the partition, the suit in O.S.No.145 of 2002 came to be filed for declaration of title and for recovery of possession.

3. The contention of the defendants is that there was an earlier partition that took place some 30 years prior to the institution of the suit, and in that partition the suit property was allotted to the share of Kathirvelu Pillai, and after his demise the defendants are in possession and enjoyment of the same. Indeed, Kathirvelu Pillai after this oral partition had improved the property



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allotted to him by putting up kitchen and toilet referred to by the plaintiff.

This kitchen and toilet have become an eyesore for the plaintiff, who now seeks to disturb the possession and enjoyment of the same by the defendants. Hence, the defendants have laid the suit in O.S.No.19 of 2003 for declaration and their title over the suit property and for prohibitory injunction.

4.1. The disputed fact in this case is, was there a partition among the co-sharers prior to 1997, and if not, was there a partition in 1997 as alleged by the plaintiff?

4.2. The dispute went to trial and before the trial court, the respondent herein examined himself as P.W.1, and he has also examined two of his brothers namely Shanmugam Pillai and Chockalingam Pillai as P.W.3 and P.W.4. Besides, he examined P.W.2, who is stated to be a mediator of 1997 partition. For the defendants, they examined the 1st defendant as D.W.1 and the 2nd defendant as D.W.2 and examined an independent witness as D.W.3.



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While the plaintiff in O.S.No.145 of 2002 produced Ext.A1 to Ext.A10, the defendants have produced Ext.B1 to Ext.B27. Of them, Ext.A10 is a partition deed dated 24.07.1997. It is neither signed by all of defendants 1 to 3, nor was it registered. D.W.3 indeed is an attester to Ext.A10.

4.3. The trial Court has framed necessary issues in both the suits, but the critical point is whether the plaintiff could establish his entitlement to declaration and recovery of possession of the suit property. The trial Court first negotiated an objection to the admissibility of Ext.A10, the partition deed on which the plaintiff has rested his cause of action, and has come to the conclusion that it can be admitted. Then it proceeded to rely on the evidence of P.W.2, the attesting witness, who would elaborate about the convening of the *panchayat* at the instance of '*Pillaimar Sangam*', an association of the community to which the parties belong. Ext.A-10 also speak about payment of owelty. The building was valued and owelty too was mutually paid between the parties to adjust the value of the building in the property. Certain owelty which the defendants 1 to 3 are required to



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pay the plaintiff indeed have been paid. Having upheld Ext.A-10 partition, the trial Court proceeded to decree the suit laid by the plaintiff and dismissed the suit filed by the defendants.

4.4. In the twin appeals which the defendants preferred challenging the decrees of the trial court, the first appellate court found no reason to interfere with. Hence, these appeals.

5. The appeals are laid in 2011, but no substantial questions of law are framed. These appeals deserve to be admitted for considering the following substantial question of law:

“Whether the Courts below are correct in decreeing the respondent's suit on the basis of alleged partition deed Ext.A10 dated 24.07.1997 especially when the 1st and 3rd appellant are not parties to the document and on the other hand the Courts below erroneously gave a finding that the appellants have not proved their case that the oral partition was effected 30 years back when the same was admitted by the P.Ws.1 to 4?”



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6. The learned counsel for the appellants contended that Ext.A10 suffers from certain lacunae in law:

(a) That, while defendants 1 to 3 are the heirs of Kathirvelu Pillai, only the 2nd defendant, Senthilkumar has signed the document; and

(b) Contrary to the findings of the courts below that Ext.A10 constituted a memorandum of oral partition, the document when read, only indicates that there is an intention to partition the property under the document and hence, it requires registration, as the value of the property is more than Rs.100/-.

(c) Thirdly, the Courts below have gone wrong in believing that dowry has been paid when no evidence of the same was produced by the plaintiff.

He added that the appellants/defendants are allotted the southern portion of the ground floor of the main residential building put up by Ramasamy Pillai.



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There was no kitchen or toilet available to this. Necessarily, a kitchen and toilet is required for the portion allotted to Kathirvelu Pillai and this was put up on the eastern side of the building, and even if owelty is stated to have been paid, this necessarily has to include both the house as well as the toilet and the kitchen now put up. The plaintiff was allotted the vacant plot to the east of this building. Again if Ext.A10 is taken into consideration, it does not say that these defendants are required to demolish their toilet and kitchen and are required to build a new one at their cost.

7. Per contra, the learned counsel for the respondent in both the appeals would contend that the defendants are given to double speak. Whereas they contend that there was a partition some 30 years prior to the institution of the suit, that having let the second defendant, the eldest son of Kathirvelu Pillai sign Ext.A10, they would now turn around to say that it was obtained on force whereas the second defendant has not preferred any complaint that his signature in Ext.A10 was obtained by force. Thirdly, while D.W.1, the widow of Kathirvelu Pillai pleads ignorance regarding payment of owelty in



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terms of Ext.A10, D.W.2, the one who actually signed Ext.A10 admits that he had paid owelty. This is also repeated by D.W.3, the attesting witness to Ext.A10. He submitted that the plaintiff was entitled to the vacant site to the east of the main building.

8.1. This Court carefully weighed rival submissions. There are two parts to this dispute. First is when did the partition take place and if so, what are its terms? and (b) what precisely is a dispute in this litigation and how it needs to be resolved?

8.2. The evidence on record does indicate something, where this Court finds considerable unanimity on both sides, is that Kathirvelu Pillai was allotted a share in the southern portion of the main residential building put up by Ramasamy Pillai. D.W.1 during her cross examination, has made a statement that the building was divided into three parts, (a) a northern part; (b) southern part; and (c) and an upstairs portion, that the northern portion has a kitchen, the upstairs portion is also provided with an exclusive kitchen



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whereas, the southern portion was not provided with any kitchen or toilet.

While in the written statement, the appellants/defendants 1 to 3 have pleaded that the kitchen and toilet to the portion allotted to Kathirvelu Pillai was put up by him, D.W.1 in her cross examination would say that this portion was actually put up by Ramasamy Pillai himself. As already indicated, the area occupied by the kitchen and toilet attached to the southern portion has now become a bone of contention. Whether this must be included as part of the property allotted to Kathirvelu Pillai's share, or should it be read as part of the property allotted to the plaintiff.

9. Here, this Court has to first negotiate Ext.A10. Contrary to the statements or findings entered by the Courts below, this Court finds that every ounce of the statement in Ext.A10 indicates that a partition indeed has taken place under Ext.A10 and hence, it required registration. This document, therefore, cannot be admitted in evidence, but still that does not necessarily imply that parties must be driven to a fresh suit for partition, since they have acted on some of the terms of partition. Indeed, the dispute



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is not related to division of all the properties or entire estate of Ramasamy Pillai, but only regarding the portion occupied by the kitchen and toilet attached to the southern portion of the main residential building of Ramasamy Pillai, which admittedly was allotted to Kathirvelu Pillai's share in the partition. Therefore, this Court does not intend to disturb whatever arrangement that the parties have already entered into, no matter whether it is routed in Ext.A10 or not.

10.1. Now comes the all critical question whether the kitchen and the toilet portion of Kathirvelu Pillai's share must be read as part of the building. It is not the case of the plaintiff/respondent that pursuant to the partition, the defendants were under an obligation to demolish their toilet and kitchen. This now indicates that the intent was to treat the kitchen and the toilet as part of the property allotted to Kathirvelu's share, and that there might not have been any intention to demolish it after the partition which the plaintiff alleges.



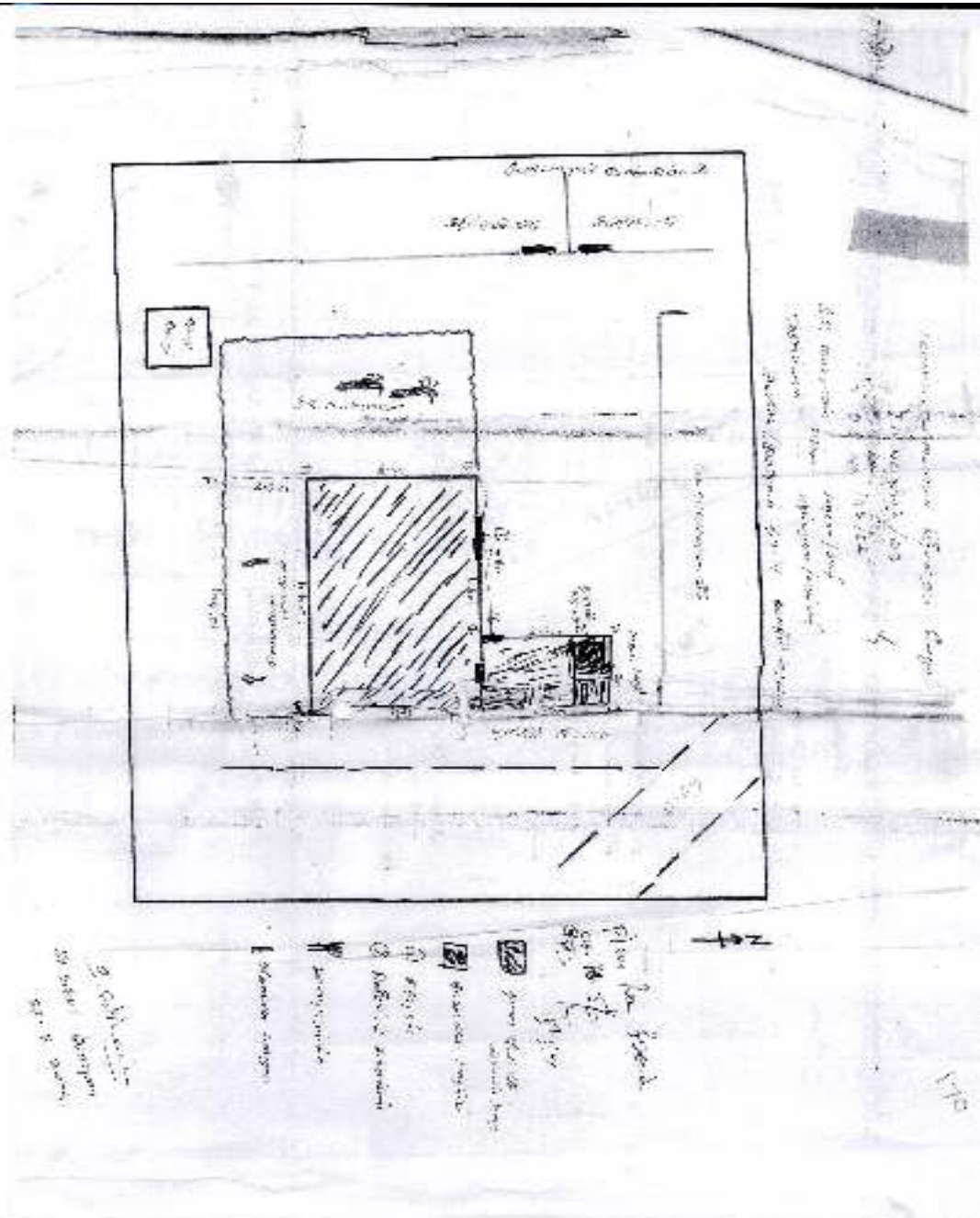
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10.2. There is ample evidence on record that would reflect what the parties might have intended, and this will stand clarified by a conjoint reading of Ext.A1 and Ext.C2. Ext.A1 is a rough sketch which the plaintiff has provided to explain the dispute. This rough sketch would show that the plaintiff was allotted a plot measuring 48.75 feet East-West x 14.75 feet North-South to the immediate west of the panchayat road. Further immediate west of the plot allotted to the plaintiff, a six feet wide pathway has been set apart. This is the admitted case of the plaintiff. To re-emphasize this aspect, the plaintiff claim right over a specific plot that lies to the east of this 6ft wide pathway. Now, if Ext.C2 is referred to, it would show that the kitchen and toilet of Kathirvelu Pillai's share lie to the west of the pathway. After all, Kathirvelu Pillai's portion requires an access, and the 6 feet pathway might have been provided for this purpose. Ext.C2 also indicates that the protruding portion of the toilet and kitchen is either to the west of the pathway or perhaps on the pathway, and at any rate, plaintiff is not entitled to any extent of land beyond the western boundary of his 48.75 feet long plot. For better appreciation, the scanned copy of Ext.A1 and



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WEB COPY **Ext.C-2:**





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11. There is no doubt in the mind of the Court that the plaintiff now wants to stretch his property beyond the pathway on the west and up to the eastern boundary of the main residential building put up by Ramasami Pillai. This is impermissible.

12. In conclusion, this Court finds that the Courts below have missed the critical point, overstretched themselves into a terrain which they need not have travelled and complicated the issue. The decisions of the Courts below run contrary to the evidence available on record which has the potential to generate, if not perpetuate litigations. This Court therefore is constrained to interfere with the findings of the Courts below and chooses to reverse it.

13. Accordingly, S.A.(MD) No.125 of 2011 and S.A.(MD) No.126 of 2011 are allowed and the judgments and decrees of the lower appellate Court dated 01.09.2009 passed in A.S.Nos.172 and 173 of 2008 on the file of the I Additional Subordinate Court, Madurai, confirming the judgments and decrees of the trial Court dated 08.04.2008 passed in O.S.Nos.19 of 2003



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and 145 of 2002 on the file of District Munsif Court, Melur, are set aside, and decree of the first appellate court is modified to the following extent:

The appellants' title over the suit property to the extent occupied by the kitchen and toilet is declared and there shall be a decree of injunction against the plaintiff/respondent herein that he would not travel anything beyond his western boundary and into the common pathway which he himself has indicated in Ext.A1. So far as the suit laid by the plaintiff in O.S.145 of 2002 is concerned, the same is liable to be decreed, but only up to the portion that lies to the east of the 6 feet pathway in Ext.A1. Ext.A1 plan and Ext.C2 plan are directed to be made part of the decree. No costs.

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Internet: Yes
Index: Yes/No

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To

- 1.The I Additional Subordinate Court,
Madurai.
- 2.The District Munsif Court,
Melur.



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