



S.A.No.587 of 2007

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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.02.2023

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.587 of 2007

1.A.Pasupathi
2.M.Kamalanathan (Died)
...Appellants
[A2 Died, A1 already on record is
recorded as the Legal Representative
of the deceased 2nd Appellant vide Court Order
dated 06/12/2022 made in C.M.P.No.20880 of 2022
in SA.No.587/2007 (PTAJ)]

Vs

Vijayakumari

... Respondent

Prayer: Second Appeal is filed under Section 100 of C.P.C against the Judgement and Decree dated 31.08.2006 made in A.S.No.25 of 2005 on the file of the Court of the Additional District Judge, Pondicherry at Karaikal, setting aside the Judgment and Decree dated 21.03.2005 made in O.S.No.114 of 2005 on the file of the Court of the



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Principal District Munsif at Karaikal.

For Appellants : Mr.T.P.Manoharan, Senior Counsel
for Mr.T.M.Naveen

For Respondent : Mr.Saikrishnan

JUDGEMENT

The defendants have filed the above second appeal which has been admitted on the following substantial questions of law:

"1) Whether the suit filed by the respondent, namely, one of the co-owners, for the relief of permanent injunction restraining the other co-owners from interfering with her alleged possession of a portion of the property, is maintainable.

2) Whether admittedly, pursuant to the preliminary decree for partition made in O.S.No.33/1997, final decree was not made, the



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property was not divided by metes and bounds, specific portions were not allotted and possession was not delivered to each of the three sharers, whether the claim made by the respondent, namely, the daughter of one of the sharers, that she is the absolute owner and also in exclusive possession of the specific western portion, namely, the suit property, is legal and sustainable.

3) When the second appellant has cancelled Exs.A4 and A5 under Exs.B12 and B13 and released his 1/3 share in favour of the first appellant under Ex.B22 and such cancellations and release have not even been challenged, much less, set aside by a competent court, was the Court below right in ignoring Exs.B12, B13 and B22 relying on the cancelled Exs.A4 and A5, holding that the respondent is the owner and possessor



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of the suit property and granting a decree for permanent injunction in her favour.

4) Whether, in view of the failure of the respondent/plaintiff to prove her claim of village custom and implied consent from other co-owners for division of the suit property, her claim of absolute ownership and exclusive possession of the specific western portion, namely, the suit property, made based on the same, can be accepted and decree for permanent injunction granted in her favour for protecting such alleged possession."

2. The facts which gives rise to the above second appeal are herein below set out and the parties are referred to in the same ranking as before the Principal District Munsif, Karaikal, where the



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plaintiff had instituted the suit O.S.No.114 of 2004.

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3. The suit had been instituted by the plaintiff for a bare injunction restraining the defendants, their men, servants and agents etc., from in any way interfering with the peaceful possession and enjoyment of the suit property by the plaintiff as its absolute owner.

4. The suit schedule property is described as follows:

SCHEDULE OF PROPERTIES

In Pondicherry Registration District, Karaikal Sub-Registration District, Neravy Sub-Registry, Neravy Commune Panjayat, No.19, Vizhidiyur Village, at East Street ; R.S.No.143/6, O.S.No.933, Patta No.76, Total Extent 10 Acres and 50 Ca. In this total extent, an extent

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of 7 Acres on the Western side of this R.S.No. is the Suit Property.

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BOUNDARIES:

SOUTH OF THE EAST STREET ;

NORTH OF THE NAJAI LANDS BELONGING TO DHANALAKSHMI;

EAST OF THE HOUSE BELONGING TO DHANALAKSHMI AND

WEST OF THE 1ST DEFENDANT'S NEWLY CONSTRUCTED HOUSE

within these boundaries an old dilapidated house which is partly demolished and existing without any roofs.

5. It is the case of the plaintiff, that the plaintiff and the defendants are cousins (Pangalis). The property measuring a larger extent of 10 Ares and 50 Ca in R.S.No.143/6 belonged to one V.Muthusamy Pillai. Muthusamy Pillai was married to one Kunjammal, through her he had three daughters namely

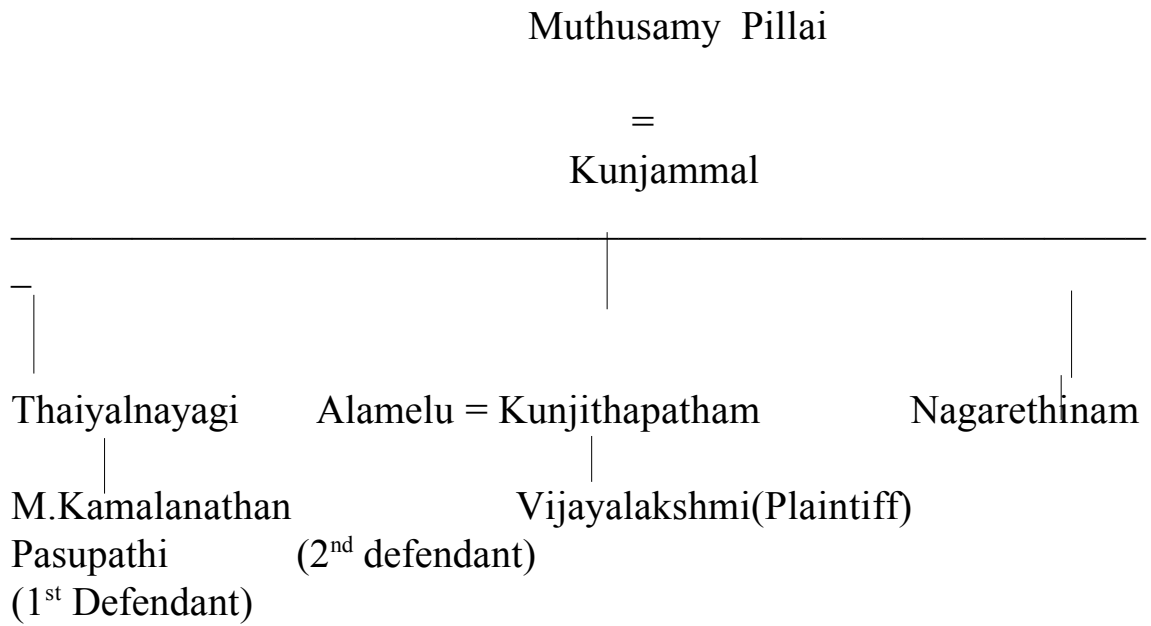
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Thaiyalnayagi, Alamelu and Nagarethinam. A genealogy is herein below appended to show the relationship between the parties to the *lis*:-



6. The plaintiff is the daughter of Alamelu. The 1st defendant is the son of Nagarethinam and the 2nd defendant is the son of Thaiyalnayagi. Muthusamy Pillai had bequeathed the property on his wife Kunjammal under a Will and he had given enjoyment right to the

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plaintiff's father Kunjithapadham, who was his son-in-law. The 1st defendant's father was working in Mayiladuthurai and the family was residing there. The 2nd defendant was working at Cuddalore and was settled there. The plaintiff's father who was an agriculturist had settled in the suit village therefore, he was given absolute right of enjoyment over the extent covered under R.S.No.143/6, i.e., 10 Ares and 50 Ca, the patta for that stood in his name. The suit property is an extent of 7 Ares and forms part of R.S.No.143/6, on its western side. In the year 1979, Nagarethinam, one of the daughter of Muthusami Pillai had filed a suit for partition in respect of her 1/3rd share before the Sub-Court, Karaikal in O.S.No.33 of 1979 against the plaintiff's mother, Alamelu and the 2nd defendant since his mother, Thaiyalnayagi had died and had left behind her surviving the 2nd defendant as the legal heir. The suit was decreed against which, Alamelu had preferred an appeal in A.S.No.95 of 1981 on the file of the Principal District Court, Pondicherry. The said appeal was filed

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since Alamelu claimed that a larger extent was in her occupation. The appeal was dismissed on 20.01.1982 and Alamelu had preferred an appeal to this Court in S.A.No.478 of 1982. This second appeal was dismissed on 17.02.1989, against which no appeal has been preferred and therefore, the judgment and decree in O.S.No.33 of 1979 had attained finality. However, none of the sharers had taken steps to file a final decree petition for partitioning the property by metes and bounds.

7. The plaintiff would contend that as per the custom in the village, the elders of the family was to take western most portion and the middle share was to go to the next born and the youngest was to take the eastern most portion. To give effect to this custom, the 1st defendant's mother Nagarethinam, who was the youngest had conveyed her 1/3rd share under a registered settlement deed dated 05.02.2003 in favour of her son, the 1st defendant. However,

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erroneously the extent was measured as 2 Ares and 94 Ca. equivalent to 22 kuzhies instead of 3 Ares and 50 Centiares equivalent to 26 and 10/64 kuzhies on the eastern most portion. The plaintiff's mother Alamelu was given the western most $\frac{1}{3}^{\text{rd}}$ portion in the suit property. Since there was implied consent from the 1st defendant's mother for division of the property. As per village custom and as the plaintiff's mother was in possession and enjoyment of the western most $\frac{1}{3}^{\text{rd}}$ portion in the suit Re-Survey number, she, her husband and the 2nd defendant had entered into a written agreement on 10.04.2003, mutually agreeing with each other that the 2nd defendant would take the middle $\frac{1}{3}^{\text{rd}}$ portion and the plaintiff's mother would take the western most $\frac{1}{3}^{\text{rd}}$ portion. The plaintiff's father and mother had settled their absolute right and enjoyment in the western most $\frac{1}{3}^{\text{rd}}$ share in favour of their daughter, the plaintiff under a registered settlement deed dated 13.05.2003 and possession was also handed over to her together with the tiled house. The 2nd defendant had

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promised the plaintiff that he would convey his right in the middle 1/3rd portion of the suit Re-Survey Number in her favour under a gift deed as she has had a bad marriage. Since the 2nd defendant was working at Cuddalore he had constituted the plaintiff's father as his special Power Agent to register the gift deed of his middle portion on the suit survey number in favour of the plaintiff. Accordingly a gift deed dated 22.10.2003 came to be executed by the Power Agent in favour of the plaintiff. The plaintiff would contend that therefore she became the absolute owner of the suit property. The 1st defendant had constructed a house upon the property that was conveyed to him by his mother Nagarethinam under a registered settlement deed dated 05.02.2003 and the 1st defendant has been residing there for the last two years. The 1st defendant thereafter encroached two metres into the plaintiff's property. The plaintiff had reserved her right to file a suit for recovery of possession against the 1st defendant. The 2nd defendant is permanently residing at Cuddalore. The plaintiff would

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submit that the defendants have no right, title or interest in the suit property. In the 2nd week of May 2004, the plaintiff had demolished the western half of the old tiled house in the suit property, wherein, she was residing with her family. The 1st defendant has attempted to enter into the suit property which attempt was successfully prevented by the plaintiff. However, the plaintiff would submit that she is working as a teacher, away from the suit property and therefore, she would not able to withstand the defendants who have political as well as money power if they attempt to enter into the possession of the plaintiff. Therefore, the plaintiff has come forward with the present suit.

8. The 1st defendant had filed a written statement *inter-alia* denying the claim of the plaintiff and would suggest that the suit was neither maintainable in law nor on facts as the value of the suit property was not less than Rs.2,00,000/-(Rupees two lakhs). They

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would submit the same is under valued for the purpose of court fee and jurisdiction. The defendants would further submit that Alamelu Ammal attempts to get a decree for a larger extent has been negated both before the Appellate Court as well as this Court. The village custom pleaded by the plaintiff was totally denied. The defendant would submit that it was the plaintiff who attempted to disturb their possession and enjoyment of the suit property. They had further contended that the plaintiff's father had misused the confidence reposed on him by executing the gift deed in favour of the plaintiff and therefore, the 2nd defendant had cancelled both the gift deed as well as the power deed. The defendants had pleaded that the suit was bad for non-joinder of necessary parties and they would also contend that there was no balance of convenience in favour of the plaintiff for obtaining a decree for injunction.

9. On considering the pleadings, the trial Court had framed the



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following issues:

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"1. Whether the suit property in its entirety covered under R.S.No.143/6 to an extent of 10 Ares 50 Centiares belonged to Muthusamy Pillai and during life time the said Muthusamy bequeathed the said property in favour of the plaintiff's grand mother namely Kunjammal and his three daughters namely Thailnayagi, Alamelu and Nagarethinam under a Notarial Will and gave the enjoyment right over it to the plaintiff's father Kunjithapatham?

2. Whether the plaintiff mother and father conveyed their right and enjoyment of their 1/3rd share in favour of plaintiff herein under a Registered Settlement sale dated 13.5.2003 and gave the possession to her along with the tiled house?



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3. *Whether the plaintiff is in possession and enjoyment as derived by the deed of Settlement and she demolished western of the title house situate in suit property and the defendant without having any manner of right obstructed to carry out the construction? If, so, the plaintiff is entitled to a judgment and decree as prayed for?*

4. *Whether the suit for bare injunction against co-owner is not maintainable?*

5. *Whether the plaintiff has no cause of action to maintain this suit?*

6. *Whether the legal heirs of deceased Nagarethinam and Alamelu are necessary parties to the suit? If so, the suit bad for non joinder of necessary*



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parties?

7. To what other relief the parties are entitled?"

10. The following additional issues are framed:

"1. Whether the suit has been properly valued and correct court fee has been paid?

2. Whether the subject matter of this suit is directly and subsequently in issue in a former suit between the parties under whom they claim titled hence, the suit is hit by the principles of Res judicata?"

11. Before the Trial Court, the plaintiff had examined PWs 1 to 4 and Exs.A1 to A13 were marked. The defendant examined DW1 to DW4 and Exs.B1 to B26 were marked and Ex.X1 to X4 were marked through third party witnesses.

12. On considering the evidence on record, the learned Principal



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District Munsif had arrived at a finding that the construction by the plaintiff was only upon the portion settled on her vide the deed dated 13.05.2003, ultimately, the learned Judge proceeded to dismiss the suit. The learned Judge observed that the remedy of the plaintiff was only to file a suit for declaration against which the plaintiff has filed A.S.No.25 of 2005 before the learned Additional District Judge at Pondicherry at Karaikkal.

13. The learned Appellate Judge allowed the appeal and set aside the judgment and decree of the trial Court in O.S.No.114 of 2004. Challenging the reversing judgment, the defendants are before this Court.

14. This Court had heard the learned counsel on either side on 01.02.2023 and perused the materials on record. Initially this Court had, on hearing the counsels partly allowed the second appeal.

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However, on once again going through the records, this Court required a clarification regarding the description of the 4 boundaries in Ex.A1 therefore, the matter was once again listed on 15.02.2023, under the caption "For Clarification". The submissions originally made and the submissions made for clarifying the doubt raised by this Court is herein below set out.

15. Mr.T.P.Manoharan, learned Senior Counsel appearing on behalf of the appellants / defendants would place his arguments primarily on the fact that the disputed middle portion even according to the plaintiff and as evidenced by Ex.A1 falls to the share of the 2nd defendant. Ex.A2 has come into existence after Ex.A1 and therefore, the reliance of the respondent/plaintiff on the boundaries in Ex.A1 cannot be taken into consideration. It is also his case that the Power of Attorney-Ex.A3 does not grant possession to the Power Agent and further under Ex.A4-Settlement Deed, the Power Agent has exceeded

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the Power given to him by claiming himself to be the Owner. He would further contend that under Exs.B17,18,20 and 21, the possession has been proved by the defendant. He would also further contend that the plaintiff's mother, in the earlier round of litigation had claimed a right to the larger extent, which has been denied and the plaintiff is now seeking to reiterate the claim in a different form. He would therefore submit that the lower appellate Court has committed a grave error in decreeing the suit in toto.

16. Per contra, Mr.Saikrishnan, learned counsel for the respondent/ plaintiff would submit it is no doubt true that Ex.A1 has come into existence prior to Ex.A2, but however subsequent to Ex.A1, A2, the 2nd defendant had himself granted a specific power to the father of the plaintiff to execute a gift deed in her favour, pursuant to which, the gift deed has been executed. The recitals contained in the

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gift deed has to be read only in conjunction with the power of attorney and any statement made beyond that does not confer right upon the plaintiff's father. He would submit that Exs.B17 and B18 does not by any stretch of imagination show that the 2nd defendant is in possession of the suit property. He therefore prayed for a dismissal of the second appeal.

17. The suit is one for a bare injunction with reference to the suit property which is 2/3rd of the total extent of the property that was the subject matter of the suit O.S.No.33 of 1979 filed by the 1st defendant's mother, Nagarethinam against her sisters Alamelu and Thaiyalnayagi. Ex.B8 is the preliminary decree that has been pronounced in the said suit in O.S.No.33 of 1979. In the said suit, the property that was the subject matter was an extent of 10 Ares and 50 Ca. Under Ex.B8, a preliminary decree was passed allotting a 1/3rd



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share each to the three daughters of Muthusamy Pillai, Thaiyalnayagi (2nd defendant's mother), Alamelu (plaintiff's mother) and Nagarethinam (1st defendant's mother). The plaintiff's father was managing the affairs of the property as he was given a right to enjoy the property by the father-in-law under a Will. He had filed a suit for declaration in respect of the suit schedule property which is evident from a perusal of Exs.B2 and B3, judgment and decree in O.S.No.398 of 1982. His right was declined and this judgment has been confirmed right upto this Court in S.A.No.478 of 1982.

18. Under Ex.A4, the son of Thaiyalnayagi has executed a power of Attorney in favour of the said Kunjithapatham, authorising him to execute a gift deed in favour of the plaintiff with reference to his share measuring 3 Ares and 50 Centiares. On the basis of this Power of



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Attorney, Alamelu and Kunjithapadham have executed a settlement deed bequeathing an extent of 3 acres 50 Ca that is 26 10/64 kuzhies out of the total extent of 10 Ares 50 Centiares, suit on the west of R.S.No.143/6 in favour of the plaintiff. Alamelu had bequeathed her 1/3rd share and Kunjithapadham as Power Agent of the 2nd defendant had executed the 2nd defendant's share as well. However, this settlement deed as well as the power deed was cancelled by the 2nd defendant under Exs.B12 and B13. The plaintiff has not sought to set aside these deeds. Under Ex.A1, Nagarethinam had settled her share on her son, the 1st defendant. She had taken the eastern most portion under Ex.A2, unregistered agreement dated 10.04.2003. In the description of properties given thereunder, the western boundary has been clearly mentioned as the property of Alamelu and others and the settlement deed is with reference to her 1/3rd share in the property comprised in R.S.No.143/6 which is the subject matter of the suit



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தமிழ்நாடு உயர் நீதிமன்றம்
O.S.No.33 of 1979
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O.S.No.33 of 1979 as evidenced by Ex.B8. The evidence would further show that the 1st defendant has constructed a house in the property that has been settled on him in which the property shown to the west of the property settled is the property belonging to the plaintiff. Therefore, the possession of the property on his west by the plaintiff is recognised by the 1st defendant himself. The middle portion fell to the share of the 2nd defendant as the legal heir of Thaiyalnayagi. This is evident from the perusal of Ex.A4, Power of Attorney executed by the 2nd defendant in favour of the plaintiff's father Kunjithapatham authorising him to execute and register the settlement deed in favour of the plaintiff in respect of his 1/3rd share. In this deed, the western boundary is shown as the property of Alamelu. Therefore, from a perusal of Exs.A3 and A4, it is clear that the eastern most portion was allotted to the Nagarethinam who in turn had settled on her son, the 1st defendant and the middle portion was



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allotted to the 2nd defendant, as the legal representative of Thaiyalnayagi and extreme western portion to the plaintiff as the legal representative of Alamelu. The middle portion has thereafter been settled by the 2nd defendant through his power agent on the plaintiff thereby she has been put in possession of the middle portion under Ex.A5-Gift Deed, and enjoys the extreme western portion under the settlement deed executed by her parents Ex.A3.

19. The plaintiff is therefore in possession and enjoyment of the suit schedule property. The defendants have not let in any evidence to show their enjoyment of the middle portion. As regards the extreme western portion, the Trial Court had decreed the plaintiff's relief in respect of the same and this was not challenged by the defendants. Therefore, the substantial questions of law Nos.1 and 2 are answered against the defendants. As regards 3rd question of law, after the Power



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of Attorney was executed for the specific purpose of executing and registering the settlement deed in favour of the plaintiff for a specific property and the Power of Attorney having been used to execute such settlement deed (Ex.A3), the cancellation of the deeds is questionable, however the plaintiff had not sought to question the same. Therefore, substantial question of law No.3 is also answered giving the defendants liberty to raise such defense as in law is available to them in the event of any further or other proceedings being initiated. As regards Substantial question of law No.4, by conduct of the parties, it appears that the parties have not strictly followed the village custom but have partitioned the properties as per their convenience. This question of law is answered against the defendants and in favour of the plaintiff.

20. In the result, this Second Appeal is dismissed and the Judgement and Decree dated 31.08.2006 made in A.S.No.25 of 2005

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on the file of the Court of the Additional District Judge, Pondicherry at Karaikal, setting aside the Judgment and Decree dated 21.03.2005 made in O.S.No.114 of 2005 on the file of the Court of the Principal District Munsif at Karaikal, is confirmed. It is open to the parties to work out their remedies with reference to the documents filed. No costs.

15.02.2023

Index : Yes/No

Speaking order/non-speaking order
ssn/srn

To

1. The Additional District Judge,
Pondicherry at Karaikal.
2. The Principal District Munsif,
Karaikal.
3. The Section Officer,
V.R.Section,
High Court, Madras.

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