

(1951) 07 MAD CK 0003
In the Madras High Court
Case No : Second Appeal No. 1065 of 1948

Krishna Pillai

APPELLANT

Vs

Thekke Valia Veetil Parukutty Ammal

RESPONDENT

Date of Decision : 20-07-1951

Acts Referred:

Constitution of India, 1950 — Article 14
Evidence Act, 1872 — Section 114
Partition Act, 1893 — Section 4

Citation : AIR 1952 Mad 33 : (1951) 2 MLJ 496(2)

Hon'ble Judges : Panchapakesa Ayyar, J

Bench : Single Bench

Advocate : S. Venkatachala Sastry, for the Appellant; A. Krishnaswami Iyer and D.H. Nambudripad, for the Respondent

Final Decision : Dismissed

Judgement

Panchapakesh Ayyar, J.—This second appeal raises an important and interesting point of law regarding the meaning and bearing of Section

4 of the Partition Act. The facts are briefly these.

2. The appellant, Krishna Pillai, is the mother's sister's son of the first defendant, Parukutty Ammal of Nagaram Amsom, Kozhikode taluk.

Parukutty Ammal and her sister, Thangammal, were living in the suit house, as tenants-in-common, having inherited it from their mother, and had

not divided it. On 29th August 1940, Krishna Pillai bought the half share of Thangammal in that house and obtained a decree for partition of his

half share. Parukutty filed an application u/s 4 of the Partition Act to buy out Krishna Pillai's share. Krishna Pillai contended that the house in

question did not belong to "an undivided family", as Parukutty and Thangammal were sisters in a "Mitakshara" family, and so would belong to

"different families", and not to one joint family or coparcenary, and that he himself, though an alienee, was ""a member of the family"" and could not

be deemed to be ""not a member of the family"", u/s 4, and that an order u/s 4, giving the right to Parukutty to buy out his share and giving him no

right to buy out Parubutty's share would be "unjust and inequitable." The principal District Munsiff of Calicut, by his order dated the 28th

November 1946, in I.A. No. 6057 of 1946, in O.S. No. 493 of 1943, the application put In by Parukutty u/s 4, held that Parukutty was entitled

to the benefit conferred by Section 4, and overruled all the objections of Krishna Pillai. Krishna Pillai took the matter in appeal. The District Judge

of South Malabar, who heard the appeal, confirmed the order of the District Munsiff by his judgment and decree dated 29th September 1947 in

A. S. No. 108 of 1947, and dismissed the appeal with costs. Hence this second appeal by Krishna Pillai.

3. I have perused the records and heard the learned counsel on both sides. Mr. Venkatachala Sastri, for the appellant, raised the same three

contentions before me. He stated that it was wrong to hold Parukutty and Thangammal, sisters in a Hindu "Mitakshara" family owning the house in

common, to belong to ""an undivided family"", as they could never be deemed members of the same "joint Hindu family." But there are many rulings

holding that the phrase ""dwelling house belonging to an undivided family"" in Section 4 should be construed in "a liberal and comprehensive way"

and should not be confined to the dwelling house of "a joint Hindu family," but should include a house where a group of persons related by blood

live," and that it is not necessary that they should be descendants from a common ancestor, or that they should constantly reside in the dwelling

house, or that they should be joint in mess, and that the fact that the dwelling house has been "blown down, either by wind or in War, will not make

it any the less a dwelling house of an undivided family so long as the members have not abandoned it or at any rate given up the idea of using it as

such. It is enough to quote the rulings in "Sivaramayya v. Kappa Venkatasubbamma" 53 Mad 417 "Sultan Begum v. Dehi Prasad" 30 All 324

"Babulal Tiwari v. Hullah Mullah" AIR (25) 1938 Pat 13 and "Nilkamal v. Kamakshya Charan", 109 Ind Cas 67 where several other rulings also

have been referred to and discussed. It is clear in the light of these rulings that the house in question was rightly considered by both the Courts

below to be ""a dwelling house belonging to an undivided family"", even though Parukutty and Thangammal were undoubtedly not members of a

Hindu joint family. These two were closely related by blood and were living in the same house. Such sisters, even in a "Mitakshara family, will be

termed by all people as ""members of the same family"" though not of the same joint Hindu family, and when these sisters have been living for years

and years in that undivided house, inherited by them from their mother, it is obvious that Section 4 will apply.

4. The next contention of Mr. Venkatachala Sastry was that the " appellant, Krishna Pillai, could not be termed to be a person who was ""not a

member of the family"", as he was the mother's sister's son of Parukutty, the first defendant and as, by virtue of his purchase, the undivided house

in question belonged to him also along with Parukutty. I cannot agree. The ruling in Mt. Shafian Begam Vs. Mt. Kifiato, was relied on by Mr.

Venkatachala Sastry, and it was urged that when a Muslim widow was held to be ""a member of the family"" regarding her first husband's family

after she had remarried, a mother's sister's son, like Krishna Pillai, would also be ""a member of the family."" That ruling will not. in my opinion,

apply to this case. There, the widow was living for years and years in that house and continued to live there even after remarriage, with her son and

two daughters by her first husband. No doubt, her second husband also joined her there, as a second wife may join a Hindu living in his deceased

first Wife's house with his son and daughters by her. So she was considered to be ""a member of the family"" regarding her first husband's family,

and she was undoubtedly a member of his family, namely, his wife -- widow, and continued to live in the same dwelling house even after his death.

Here, Krishna Pillai, a mother's sister's son of Parukutty, was "never" a member of her family, and never lived in this dwelling house. No sane man

or woman would have considered him and Parukutty to be members of the "same family", let alone "the same undivided family." It is crystal clear

that Krishna Pillai never lived in this dwelling house along with Parukutty as a member of an undivided family. The lower appellate Court has, in

paragraph 1 of its judgment, stated as below: ""It is also not disputed that the first respondent has been residing in the dwelling house and that the

appellant has been residing elsewhere.

This recital in the lower appellate Court's Judgment has been challenged before me by Mr. Venkatachala Sastry as incorrect. Sri Alladi

Krishnaswami Aiyar, on the other side, rightly urged that a recital in the judgment of a judicial officer, like a District Judge, cannot be challenged as

incorrect and must be taken to be correct in all events and circumstances, there being an "absolute and irrebuttable" presumption to that effect.

There is no need to discuss that extreme position here, It may be that there may be some exceptional cases, of "proved" accidental slips and

statements in judgments; where a challenge is "possible." But, in the absence of "conclusive proof of such erroneous statements" creeping in

judgments, by affidavits of vakils and parties, I am of opinion that the recitals in a judgment of a judicial officer must be taken to be correct as

regards the facts said to have been admitted or conceded before him. To hold otherwise will be to prolong the hearing of cases and to drag

Judicial officers into unnecessary vexatious and undignified controversies. So I take the above recital by the learned District Judge in his Judgment

to be correct, all the more readily because Krishna Pillai never stepped into the box and spoke to his living in the dwelling house at any time. Nor

did he even file an affidavit about any such living there, thus confirming the correctness of the recital in the learned District Judge's Judgment.

5. Now the question remains whether a man like Krishna Pillai, a mere mother's sister's son, can, by purchasing a share in the dwelling house from

a member of the undivided family enjoying the dwelling house in common with other members, resist the application of Section v to him on the

ground that he is also "a member of the family", especially when he never lived in the dwelling house himself at any time as a member of the family. I

am of opinion that he cannot. The case may be slightly different where such a relative has been living in the dwelling house for years as a member of

the undivided family and has been treated as such, even though he is not a close relative, like a foster-son brought up in the family, or an

"abhimanapura." Of course, the term "family" has been variously interpreted in various countries. In England it will not include even the father and

the mother of a person, and that is the interpretation also, for most purposes, in the Madras Travelling Allowance Rules. In India, in many places,

even distant cousins may form members of the "family" when they are living in the undivided joint family house and are enjoying the properties in

common. But nowhere, to my knowledge, has a man like Krishna Pillai, a mother's sister's son who never lived in the dwelling house for any time as a member of the family and has never been treated as a member of the family, been considered to be "a member of the family" simply because he is a distant relative and has subsequently bought the share of a member of the family. If Mr. Venkatachala Sastry's interpretation of Section 4 is correct, even cousins in the 50th degree may purchase a share in an undivided house and resist the application of Section 4 and prevent the object of Section 4, viz., to ensure that other members owning shares in the dwelling house belonging to the undivided family and living there for years should have their privacy and peace of mind ensured without strangers and outsiders, like this individual, thrusting themselves into their midst. It was urged that Krishna Pillai was a relative, and not a utter stranger, but the word "stranger" has been used by Venkatasubba Rao, J., and others, in the judgments relied on by Mr. Venkatachala Sastry, only in the sense that they are not members of the family, within the meaning of Section 4, and not in the sense that they belong to a totally different caste or sect or country.

6. The last contention was that it will be inequitable, and will be "Illegal discrimination", to enable Parukutty to buy the share of Krishna Pillai at a valuation by the Court and deny the same right to Krishna Pillai to buy the share of Parukutty at a valuation by the Court. I cannot agree. Any discrimination the law allows cannot be illegal or unjust or inequitable, and must be taken to be legal, just and equitable. Nor will this come under the term "discrimination" discountenanced by the -Constitution of India. There are certain classes and institutions, like temples, trusts, charities, orphans, infants, lunatics and family members, which are given "special privileges and protection under the law" by enacting provisions for their benefit, as it considered to be in the interests of the country to do so. Such provisions cannot, in my opinion, be termed, discriminatory or unjust or inequitable, and no Court has got the right to hold them to be void or unenforceable because they amount to giving, in fact, some "discrimination. Courts, which can never represent the will of the people to the same extent as the Legislature elected by the people, will never interfere with the will of the Legislature and the provisions of Acts passed by it unless they are proved to be "ultra vires" the Constitution, which is not the case here.

7. All the contentions of the appellant have failed. This second appeal deserves to be and is hereby dismissed with costs.

(Leave refused.)