

(2002) 10 MAD CK 0059
In the Madras High Court
Case No : S.A. No. 1606 of 1990

Neelaka Pillai alias Sarojiniamma

APPELLANT

Vs

K. Velu Pillai, V. Subramania Pillai, Peruma Pillai alias
Saraswathy Amma, Velamma alias Devika, M. Chittaranjan,
Mathamma alias Geethanjali, Suresh Mohan and M. Ramesh

RESPONDENT

Date of Decision : 09-10-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, 11

Citation : (2002) 3 MLJ 728 : (2003) 3 RCR(Civil) 167

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : Chitra Sampath, for the Appellant; T.S. Sivagnanam, for the Respondent

Final Decision : Dismissed

Judgement

K. Sampath, J.—The substantial questions of law raised for decision in the second appeal are as follows:

(1) Whether the widow governed by Nanjilnad Vellala Regulation No. 6 of 1101 ME (1926), who has no right to a share in the properties of her

deceased husband but having come into possession of one out of 18 items of the husband's property and having continued to possess the same

property even after a partition suit filed in 1942 by one of the legal heirs of her deceased husband in respect of only 18 items of properties can be

said to possess the present suit property, namely, the one item and acquire a right of adverse possession or prescribed title by way of adverse

possession as against all the legal heirs of her deceased husband?

(2) Whether a Hindu female who was only entitled to maintenance and not to possession obtained possession such possession can be held to be

adverse to those entitled to possession so as to enable her to prescribe for an absolute title unless they could show that the possession was the result of some arrangement between them?

(3) Whether the present suit for partition is hit by Section 11, Order 2 Rule 2 of the CPC in view of the earlier partition in O.S.No. 66/1117

(1942)?

2. The parties are related as follows:

There is one Madhavan Pillai. His son is Velu Pillai, who died in 1928. His wife is Deviya Pillai alias Chellammal. One of their sons is Madhavan

Pillai who died in 1957. His wife is Bagavathi, the third defendant in the suit and their children are defendants 4 to 8. Subramaniam, the first

defendant, is another son of Velu Pillai and Deviya Pillai alias Chellammal. Their third son is Krishnamurthy, who died in 1948. Krishnamurthy's

son Velu Pillai is the present plaintiff. The fourth born daughter of Velu Pillai is Peruma Pillai, the second defendant. Peruma Pillai died in 2000.

The last born daughter of Velu Pillai Neelaka Pillai alias Sarojini Amma is the ninth defendant in the suit.

3. The plaintiff's case is that the suit property belonged to Velu Pillai, his grandfather, and that he is entitled to 1/5th share as the only heir of

Krishnamurthy.

4. Defendants 1 and 3 to 8 remained ex parte. The second defendant supported the case of the plaintiff and further stated that she is entitled to

have her 1/5th share and that she is paying Court fee in respect of the same.

5. The ninth defendant who contested the case filed a written statement to the following effect:

She is the full and absolute owner and in possession of the suit property in continuation of the possession of her predecessors in interest for more

than 40 years. Patta stands in her name and she is paying tax. The suit property never vested in the children of Velu Pillai on his death. It stood

registered in the name of a stranger from whom Neelaka Pillai Deviya Pillai alias Chellammal got possession of the property and she was in

possession of the same for more than 40 years and perfected title over the same by her adverse possession against the interest of all concerned.

She was not given sufficient maintenance taking into consideration her status as the widow of Velu Pillai and the amount of wealth to the tune of

Rs.5 lakhs. None of the heirs of the deceased Velu Pillai is entitled to the suit property. The suit property was rightly excluded in the partition suit in

O.S. No. 66/1117 on the file of the District Court, Nagercoil. The plaintiff and defendants 1 to 8 are estopped from laying claim to the plaint

property. Madhavan Pillai has another heir, his mother Neelaka Pillai alias Chellammal and she is entitled to an equal share in the properties of

Madhavan Pillai, son of Velu Pillai. The plaintiff and defendants 1 and 3 to 8 cannot claim any share. The right, if any of the plaintiff and defendants

has been extinguished by the adverse possession of the ninth defendant and the adverse possession of her predecessor in interest. The suit is

barred by Section 11 and Order 2 Rule 2 of the Code of Civil Procedure. The suit is not maintainable by virtue of the judgment and decree in O.S.

No. 66/1117 on the file of the District Court, Nagercoil.

6. It would appear that originally the suit was decreed. There was an appeal. The trial Court decree was confirmed. The matter came to this Court

by way of second appeal and there was a remand directing the impleading of Neelaka Pillai Deviya Pillai alias Chellammal. She was impleaded.

However, she died subsequently.

7. On the pleadings, the trial Court framed the necessary issues and on the oral and the documentary evidence, accepted the case of the plaintiff

and decreed the suit by judgment and decree dated 19-2-1988. This was confirmed in the appeal by the ninth defendant in A.S. No. 27/88 by the

Subordinate Judge, Nagercoil, by judgment and decree dated 3-7-1990.

8. It is as against that, the present second appeal has been filed.

9. The learned Counsel for the appellant submitted that when a partition takes place, the legal presumption is that it is in respect of all the

properties belonging to the family and if any item is left out and a fresh partition is asked for with respect to the left out item, it is incumbent on the

party seeking partition to satisfactorily explain as to how and why the suit item was left out in the earlier partition. In the earlier partition suit filed by

the first defendant, the suit item was not included and it would mean that it was not a property belonging to the family available for partition. The

first defendant, who had filed the earlier suit, has deliberately remained ex parte in the present suit and in the absence of any explanation by him, the

present suit for partition does not lie. The plaintiff himself was a party in the

earlier partition suit and he having not raised any objection with regard to the non-inclusion of the item in the earlier suit, the present proceedings are hit by Section 11 and Order 2 Rule 2 of the Code of Civil Procedure. Even otherwise, admittedly, the mother/Deviya Pillai alias Chellammal was in possession and she executed a document in favour of the ninth defendant pursuant to which, she entered into possession of the property and by long possession by herself and prior to her, her mother, she must be deemed to have prescribed for title by adverse possession. The learned Counsel relied on a number of judgments, which will be referred to in due course.

10. Per contra, the learned Counsel for the contesting respondent, submitted that the ninth defendant chose to deny the title of the family and at the same time, put forward a case that having regard to the status of Velu Pillai and his affluence, it was thought that the mother Deviya Pillai alias Chellammal should be given the suit property and these are two inconsistent pleas and the claim of the ninth defendant should be rejected on this score. Even otherwise, the ninth defendant had not pursued the point relating to non-inclusion of the suit item in the earlier suit for partition before the lower appellate Court and it must be deemed that she had given up that plea. As regards adverse possession, absolutely no document has been produced by the appellant to prove her possession and that of her mother for over the statutory period.

11. The decisions relied on by the learned Counsel for the appellant may be dealt with now.

12. In *Narmadabai Tulsiram Shet Agarwal Vs. Rupsing Bhila*, , it has been held that,

when a partition is admitted or proved, the presumption is that all the property was divided, and a person alleging that family property in the exclusive possession of one of the members after the partition is joint and is liable to be partitioned, has to prove his case.

13. Again, in *Rudragouda Venkangouda Patil Vs. Basangouda Danappagouda Patil*, , it has been held that,

the presumption according to Hindu law is that if a partition has taken place, then the burden of proof lies upon the person who alleges that certain family property was excluded at that partition. If he succeeds in proving that

there was partial partition only, that fact is insufficient in itself to establish that certain other parcels of property claimed as common must partake of the character of common property. It is a matter of proof and not presumption that such property was excluded and kept common.

14. Again, in *Kaulesari Singh and Others Vs. Ambika Dutt Singh and Others*, , the principle is reiterated.

Whenever a partial partition is proved or admitted to have taken place, the presumption arises that there has been an entire partition with reference to all the rights and all the properties.

Where, however, at a partition some of the properties were left joint and there is neither any satisfactory explanation on the record as to why these properties were left joint, nor any agreement keeping these properties as joint, the Court cannot reject the claim for partition with regard to these properties.

15. In *Chhatradhari Mahton and Others Vs. Akleshwar Mahton and Others*, it has been held that,

Where there has been once a partition either proved or admitted, the presumption is that it was a complete partition both as to parties and as to property and there is no presumption in such a case that any property was excluded from partition. The presumption, however, is rebuttable and its strength must necessarily depend upon the circumstances of each case.

16. In *TEJRAJ AND ANOTHER VS. MOHANLAL AND OTHERS* AIR 1955 Raj 157, it is stated that,

where a partition is admitted or proved, the presumption is that all the property was divided; and it is for the person, who alleges that any part of the family property in the exclusive possession of one of the members after the partition is still joint, to prove it do be so.

17. The principle so far as it goes is well established. But the question is whether the appellant can raise this objection. The property according to

the plaintiff, belonged to Velu Pillai. The parties are governed by Nanjilnad Vellala Regulation No. 6 of 1101 ME. The widow does not get any

right in the property. There is nothing to show as contended on behalf of the appellant in the written statement that the property stood registered in

the name of a stranger from whom Neelaka Pillai Deviya Pillai alias Chellammal got possession. When such a stand has been taken that the

property belonged to a stranger from whom she got possession, it is up to her to prove as to when she took possession and in what capacity. This

the appellant has not established. She takes an inconsistent plea that Deviya Pillai alias Chellammal was not given sufficient maintenance having

regard to her status as the widow of Velu Pillai. The purpose for which this averment is made is not very clear. Does it mean that the suit property

belonged to Velu Pillai and his widow Deviya Pillai alias Chellammal was in possession of the suit item towards maintenance? It is not open to her,

in the absence of proof of this plea of hers in the written statement, to contend that the suit property was not included in the prior partition and

therefore, the present suit for partition is not maintainable. She is not a sharer. In my view, only a sharer can take up such a stand. In the instant

case, she has taken an inconsistent stand. Apparently, realising this, this was not pursued before the lower Appellate Court.

18. There was a rejoinder filed by the plaintiff to the effect that Deviya Pillai alias Chellammal had no right to the plaint property and that she was

never in possession and enjoyment of it. The patta was in the name of the deceased Velu Pillai and the ninth defendant can claim only an 1/5th

share. She has to choose as a sharer or a stranger. She cannot have both. If she claims as a stranger, then it is not open to her to contend that she

has got a share. On the other hand, if she wants an inference to be made that her mother was in possession in lieu of maintenance, it must be

substantiated. This, in my view, has not been done by her.

19. The next question relates to adverse possession. It is seen that the documents relied on by the ninth defendant in support of her case of adverse

possession, do not really prove her case. From 1948 to 1954 the Thandapar account was in the name of Madhavan Pillai and the tax was being

paid by Deviya Pillai alias Chellammal on his behalf. That would not prove her possession. The ninth defendant has paid tax from 1960 to 1970

under Ex.B-10. The case of the appellant is that Deviya Pillai alias Chellammal was in possession for 40 years and there is absolutely no proof for

the same. Ex.B-8 Thandapar account is in the name of Madhavan Pillai, eldest son of Velu Pillai. Madhavan Pillai had paid tax till 1954. After

Madhavan Pillai's death, his son the first defendant Subramaniam Pillai, had paid tax. That would be evident from Ex.A-3. He had paid tax till

1959. Under Ex.B-9 Deviya Pillai alias Chellammal had paid tax till 1970 in the name of her son Madhavan Pillai. In Ex.B-10 Thandapar account

the name of Madhavan Pillai had been removed and the name of Chellammal had been included and afterwards Chellammal's name was removed

and Sarojini Amma, the ninth defendant's name was included. Till 1970 the mother had paid the kist on behalf of her son Madhavan Pillai. Her title

by adverse possession has been rightly rejected. Only in 1967 under Ex.B-10 the name of Madhavan Pillai had been removed and Deviya Pillai

alias Chellammal's name had been included. The suit came to be filed in 1972. There is no question of any adverse possession in favour of the

appellant.

20. The decision of the Supreme Court relied on by the learned Counsel for the appellant reported in PARSINNI ETC. VS. SUKHI AND

OTHERS 1994 (1) LW 211 SC does not help the case of the appellant at all.

21. If it is a case of co-owner, proof of ouster is necessary. If the appellant claims to be a co-owner, she must plead and prove ouster, which has

not been done. Mere mutation in the Revenue records in the name of the co-owners in possession cannot by itself amount to adverse possession,

unless there is pleading and proof that their possession and enjoyment of the property is in derogation of the right, title and interest till then held by

the other co-owners.

22. Consequently, the substantial questions of law are answered against the appellant. The second appeal fails and the same is dismissed. There

will, however, be no order as to costs.