

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2018

CORAM : THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

S.A.No.725 of 2008  
and Cros.Obj.No.102 of 2009

S.A.No.725 of 2008

Shahul Hammed

.... Appellant/Respondent/Defendant

Vs

Mohaideen Abdul Kadher Maracayar Dharma Trust  
Rep by Jainambugani  
W/o. Mohammed Badusha  
444, Kottagam Public Road  
Nagore, Nagapattinam Taluk. .... Respondent/Appellant/Plaintiff

Cros.Obj.No.102 of 2009

Mohaideen Abdul Kadher Maracayar Dharma Trust  
Rep by Jainambugani  
W/o. Mohammed Badusha  
444, Kottagam Public Road  
Nagore, Nagapattinam Taluk. .... Cross Objector / Respondents

Vs

Shahul Hameed

.... Respondent in Cros.Obj. /Appellant

Prayer in SA.No.725 of 2008: Second Appeal filed under Section 100 of CPC against the judgment and decree of the Additional District Judge cum Chief Judicial Magistrate Court, Nagapattinam passed in A.S.No.30 of 1997 dated 14.03.2000, confirming the decree and judgment of the Principal Subordinate Judges Court, Nagapattinam passed in O.S.No.175 of 1995 dated 20.11.1997.

Prayer in Cros.Obj.No.102 of 2009: Cross Objection filed under Section 22 CPC, to allow the above Cross Objection, setting aside the judgment and decree of the learned Additional District Judge cum Chief Judicial Magistrate, Nagapattinam, dated 14.03.2000 made in A.S.No.30 of 1999, confirming the judgement and decree of the learned Principal Subordinate Judge, Nagapattinam, dated 20.11.1997 in O.S.No.175 of 1995 and to decree the said suit.

In SA.No.725 of 2008 :

For Appellant : Mr.S.Sounthar  
For Respondent : Mr.T.M.Hariharan

In Cros.Obj.No.102 of 2009 :

For Cross Objector : Mr.T.M.Hariharan  
For Respondent : Mr.S.Sounthar

#### COMMON JUDGMENT

1. The defendant in O.S.No.175 of 1995 is the appellant herein. The suit is laid before the Additional District Judge cum Chief Judicial Magistrate, Nagapattinam by the plaintiff seeking declaration of her title and for recovery of vacant possession from the defendant.

2. The brief facts are: A certain Moideen Abdul Kadar Maricar had constituted a Trust vide a Trust Deed dated 28.09.1929. He was the founder of the Trust and in the course of succession to the Office of the trustee, a certain Sathak Thambi Maricar came to be the trustee. On 11.12.1988, Sathak Thambi Marakair had executed a registered document, which he styled as a Trust Transfer Deed, transferring the properties in favour of his daughter, the plaintiff. According to the plaintiff, the defendant has no rights, whatsoever in the property, that has put up a thatched shed and was doing some business there. As she wanted to put up a residential building in that place, she had issued a suit notice dated 28.12.1994, requiring the defendant to hand over possession. In the reply notice, the defendant has taken up a contention that he has perfected title by adverse possession. It is in these circumstances, the suit was laid for declaration of title and for consequential decree for recovery of vacant possession of the suit property. Parties would be referred to by their rank before the trial Court.

3. In the written statement, the defendant has primarily taken up two pleas: (a) That he had perfected title by adverse possession; and, (b) that the suit is not maintainable since as per the trust deed dated 28.09.1929, devolution of office of trusteeship can be only along the male line of the founder, and inasmuch as the plaintiff, who claims to represent the Trust is a female, the suit is incompetent.

4.1 The Trial Court has upheld both the contentions of the defendant and dismissed the Suit. On appeal in A.S.No.30 of 1999 preferred against the said decree, the first Appellate Court partially modified the judgment of the trial Court, in that the

first Appellate Court had rejected the case of the defendant on the issue of adverse possession, but, concurred with the finding of the trial Court on the aspect of maintainability of the suit.

4.2 Challenging the finding on the issue of adverse possession the defendant has come forward with this appeal.

5. The learned counsel appearing for the appellant/defendant fairly submitted that since the appeal is preferred only against a finding and not against a decree, the appeal is not maintainable. However, insofar as the cross-objection filed by the plaintiff on the aspect of maintainability of the suit is concerned, when an appeal itself is not maintainable, cross objection too is not maintainable since it falls outside the two exceptions provided in Order 41 Rule 22 (4) CPC. According to the exceptions provided to Order XLI Rule 22(4) a cross-objection can be sustained independent of the main appeal only where the appeal was dismissed for default or dismissed as withdrawn. In other words, where the appeal itself is not maintainable, then the cross-objection cannot have an independent existence. He placed reliance on Municipal Corporation of Delhi and Others Vs. International Security & Intelligence Agency Ltd., [(2004) 3 SCC 250], wherein the Court has relied on the judgment of Full Bench of this Court in A.L.A.Alagappa Chettiar Vs. Chockalingam Chetty and Ors. [(1918) 35 MLJ 236] and held that the cross-objector cannot seek a right of independent maintainability in situations not covered by Order 41 Rule 22 (4) CPC.

6. Mr.T.M.Hariharan, the learned counsel appearing for the cross-objector submitted that neither of the Courts below have held that the suit is not maintainable, but have only entered a finding that the plaintiff is incompetent to represent the Trust and the suit is held maintainable, not because, there is no cause of action for filing the suit, but the person who represented the Trust was found to be incompetent in terms of the Trust Deed.

7. The merit of the submissions of the learned counsel for the respondent/cross-objector cannot be dismissed as without merit. However the statement of law on maintainability of the cross objection now before this Court is candid, and this Court necessarily has to hold it as not maintainable. Having held thus, this Court clarifies that there is no bar for the plaintiff Trust, seeking such remedies as are open to it for obtaining reliefs that it now seeks, if it is so desirous.

8. To conclude, both the appeal and the cross-objection are dismissed. No costs.

Sd/-  
Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

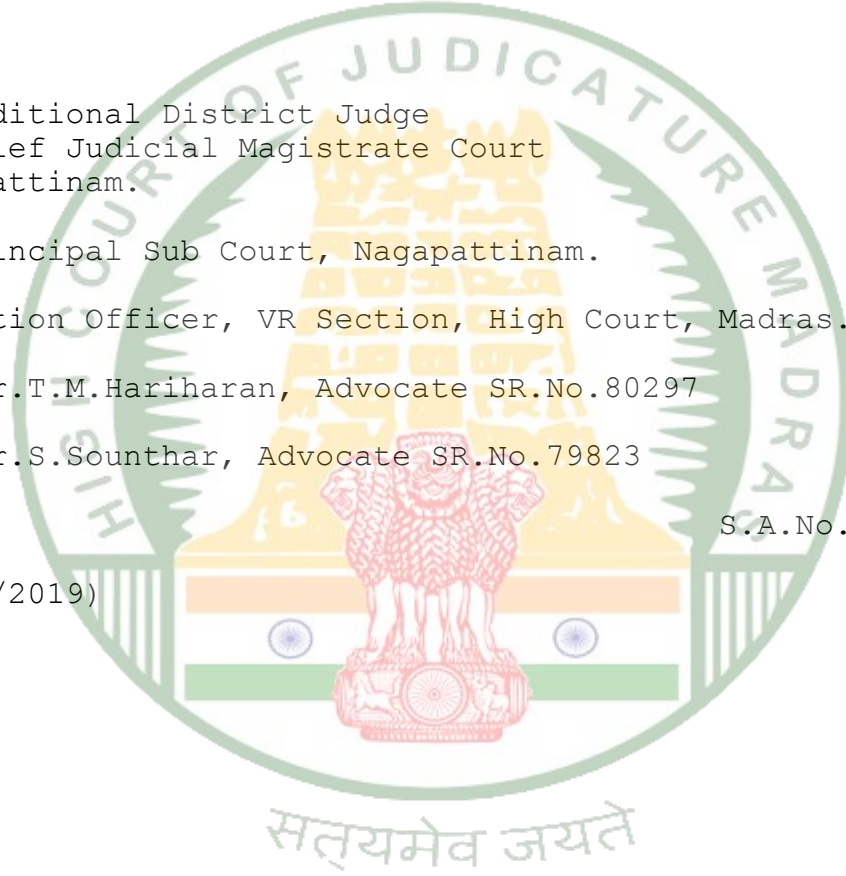
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To:

1. The Additional District Judge  
cum Chief Judicial Magistrate Court  
Nagapattinam.
  2. The Principal Sub Court, Nagapattinam.
  3. The Section Officer, VR Section, High Court, Madras.
- +1cc to Mr.T.M.Hariharan, Advocate SR.No.80297  
+1cc to Mr.S.Sounthar, Advocate SR.No.79823

S.A.No.725 of 2008

RJ(CO)  
GMY (28/03/2019)



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