



Cross Objection (MD)No.28 of 2008

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 28.04.2023

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Cross. Obj(MD)No.28 of 2008

in

S.A.No.451 of 2001

1.Singarayan
2.Vimala (Died)
3.S.V.Malarvizhi
4.S.V.Kayalvizhi
5.S.V.Arul Jayasingh Raj
(Cross Objectors 3 to 5 are brought on
record as Lrs of the deceased 2nd cross
objector vide Court order dated
28.02.2023)

... Cross Objectors

Vs

Sarasam (Died)
2.Anlin Rose
3.Anitha Radhakrishnan
4.Tamil Araasi
5.Tamizhithazh
6.Tamil Kani Bhaskar

... Respondents



Cross Objection (MD)No.28 of 2008

PRAYER: Cross Objection (MD) filed under Order 41 Rule 22 of Civil Procedure Code, against the order and decree dated 11.10.2000 made in A.S.No.85 of 1996 on the file of the Sub-Court, Kuzhithurai, insofar as it is against the cross-objector is concerned.

For Cross-Objectors: Mr.T.R.Rajaraman

For Respondents : No appearance

J U D G M E N T

Since the second appeal has already dismissed for non-prosecution and the cross-appeal is taken up for hearing and the respondents in the cross-appeal not appeared and set ex-parte.

2. Originally, the appellant in the second appeal has filed the suit in O.S.No.283 of 1984, on the file of the Principal District Munsif Court, Kuzhithurai for the relief of declaration and injunction. The trial Court dismissed the suit. Against which, the plaintiff has filed an appeal in A.S.No.85 of 1996, on the file of the Sub-Court, Kuzhithurai. Even though



the appellate Court had dismissed the appeal and confirmed the judgment and decree of the trial Court, it had made some observations irrespective of the findings given by the trial Court.

3. Aggrieved by the dismissal of the appeal, the plaintiff has filed a second appeal in S.A.No.451 of 2001, therefore, the present cross-objector has filed the cross-objection against the adverse findings given by the first appellate Court while dismissing the appeal and confirming the findings given by the trial Court.

4. Heard the learned counsel appearing for the appellant.

5. Though the appellant filed the suit for declaration and permanent injunction, the trial Court found that the suit properties with larger extent are ancestral property, the vendor, who is the father of the defendants/cross-objectors has got 5 cents along and among the 5 cents, he was entitled to only $1/6^{\text{th}}$ share since it is an ancestral property. Therefore,



the claim of the appellant is that the Chellappan Nadar executed the Will in favour of his two sons is not valid and therefore, the suit filed a declaration based on the Will was not accepted by the trial Court and dismissed the suit. Therefore, she filed an appeal and the appellate Court also dismissed the appeal.

6. During the pendency of the second appeal, the defendants have filed the cross-objection in respect of the adverse findings given by the appellate Court.

7. The case of the cross objector before the trial Court is that the suit properties belonged to one Chellappan Nadar's family. The Chellappan Nadar has got the ancestral right and he is entitled to have a share along with other sons as a coparcener, since it is an ancestral property. Therefore, each coparcener is entitled to equal share. Therefore, they have denied the Will said to have been executed by the Chellappan Nadar dated 17.07.1976. The Chellappan Nadar was not competent to make a Will. Due to the fraud



practised by Gopalan Nadar, the Will was brought about without the knowledge and free consent of Chellappan Nadar. In continuation of the fraud practised by him in making the Will, Gopalan Nadar was able to bring into existence some documents executed by his brothers and mother reciting the Will. After the demise of the Chellappan Nadar, the Will being void, the widow and sons of Chellappan Nadar became entitled to his properties by succession as per the provisions of the Hindu Succession Act and not under the Will. The plaintiff and other claimants have no right to plead that the sons of persons claiming right under them are estopped because there can be no estoppel under law. Chellappan Nadar left 5 sons and a widow as his heirs. Chellappan Nadar would be entitled to $\frac{1}{6}^{\text{th}}$ of the family properties and his sons 5 in number would get $\frac{1}{6}^{\text{th}}$ each. The share of Chellappan Nadar which has to be deemed to be $\frac{1}{6}^{\text{th}}$ devolved on his 5 sons and widow in equal sharers. Thus, the widow has got $\frac{1}{36}^{\text{th}}$ of the property and the sons each got $\frac{7}{36}$ shares in the suit properties. The sale deeds executed by Rathinasamy and Thanga Nadar on 21.01.1981 are also void. They were brought by Gopalan Nadar in furtherance of the fraud practised on



Chellappan Nadar. Those sale deeds are not supported by consideration. The Rathinasamy and Thanga Nadar are entitled to have the absolute right in the family property of Thanga Nadar and as such, Gopalan Nadar is not entitled to any absolute right in the said property. Even in the sale deed mentioned the small extent either the entire property or 1/6th share specifically.

8. The cross-objectors purchased the property under Ex.A1 and they are enjoying the suit property. The plot of 13 cents scheduled as suit property lies in between the Channel on the south and the house compound of the defendants on the north. The suit plot lies on a lower level. The house of the cross-objectors 1 and 2 is surrounded by a rubble compound wall on all the four sides. This house compound abuts the Trivandrum-Nagercoil National Highway on the north. In the southern, compound Wall of the cross-objectors, a gate is fixed up and through this gate, the defendants get into the suit property and through the suit plot have access to the channel for taking water and for taking bath, washing clothes and articles and for bathing cattle. Steps are constructed from the ground level



of suit plot up to the ground level of the cross-objectors house compound to enable easy passage for both men and cattle. The cross-objectors 1 & 2 and their predecessors have been using the space at the western end of suit plot to a width of about 15 links as a pathway for the last more than 30 years and the cross-objectors have acquired an easement right over this space. The cross-objectors 1 and 2 and their predecessors in interest have been using this space as a pathway as if right to the knowledge of Chellappan Nadar and his collateral and all the members of the common family and they all acquiesced in it.

9. The house of the cross-objectors 1 and 2 is situate in S.No.346 and 345. The southern compound wall has a length of 130 links. The space in between this 130 links and the channel covers an area of 12 cents. In pursuance of a prior agreement Thanga Nadar sold these 12 cents to the first defendant/1st cross-objector as per sale deed, dated 09.08.1984 and accordingly, the first cross-objector obtained title and possession to 14 cents. These 12 cents along with the pathway portion cover the 13 cents



scheduled to the plaint as suit property. As such, the defendants are entitled to and in possession of suit property. Therefore, the observation made by the lower appellate Court is erroneous.

10. The learned counsel for the cross-objectors would submit that the suit property originally belonged to the ancestral properties of the families of the Chellappan Nadar. He got 5 sons and one daughter. Since it is an ancestral property, Chellappan Nadar and his 5 sons each entitled to get $1/6^{\text{th}}$ share. The Will, dated 17.07.1976 is not valid. After the death of the Chellappan Nadar, his 5 sons, daughter and wife each are entitled to $1/7^{\text{th}}$ share. His vendor Thanga Nadar has got $1/6^{\text{th}}$ share. The Chellappan Nadar had purchased the property by sale deed, dated 19.08.1984 under Ex.B1 and from the date of purchase, they are enjoying the property and therefore, the Will is not valid and it will not bound his vendor Thanga Nadar's share. Though the trial Court has rightly dismissed the suit and the appellate Court also dismissed the appeal, however, the appellate Court has given an adverse finding. Therefore, the defendants have filed the present



cross-objection. Though the second appeal is filed by the appellant challenging the findings of the appellate Court, there is no representation for the appellant. Hence, the appeal is dismissed for non-prosecution.

11. Admittedly, the vendor of the cross-objectors was the coparcener. He enjoyed the property as ancestral property. Admittedly, Chellappan Nadar has 5 sons including the vendor of the cross-objectors. The Will said to have been executed by the Chellappan Nadar would not have any binding on the other legal heirs more than 1/6th share. Though the Will was proved but, however, the Will is not valid for more than 1/6th share and the Will is valid in respect of 1/6th share in the family properties. However, the other 5 sons each are entitled to 1/6th share. Therefore, nowhere it is stated that either during the life time of the Chellappan Nadar or after the life time of the Chellappan Nadar, the co-parcener have divided the properties or without making division separately by metes and bounds. Therefore, on the date of filing the suit, the suit properties are undivided properties and even after the death of the Chellappan Nadar, they have not



shown that the properties were divided and they were mutated in the revenue records and enjoying the property as their own with a specific extent and boundaries. Therefore, the trial Court has rightly observed that since the properties are ancestral properties, Chellappan Nadar and his sons are only co-parceners and they are each entitled to 1/6th share in the property. Whatever the Will and whatever the extent executed by the sale deed will not have any binding on the other coparcener, since it is an undivided ancestral property. Therefore, the trial Court has made an observation that they have the right to go for a partition and not otherwise and the lower appellate Court had also accepted the findings of the trial Court. The findings regarding the Will and also the possession of the properties which leads the present cross-objection. As far as the Will is concerned, since the cross-objectors are third parties, they cannot challenge the genuineness of the same. Since none of the legal heirs of the Chellappan Nadar challenged the Will that the said will is forged and not binding on them, though cross-objection/written statement stated that the Will was forged but not proved that the Will was forged and all the legal



heirs of the Chellappan Nadar changed the Will. But however the findings given by the both the Courts below that it is an ancestral property and it is an undivided ancestral property and got 1/6th share, they have to go for a partition. Now the question is whether the vendor of the cross-objectors when the will is genuine and valid in respect of 1/6th share and only the vendor of cross objectors, is entitled to 1/6th share in the ancestral property. However, in the cross-objection also admitted that the vendor of the cross-objectors sold a portion of the property under Ex.A3 to one Gopalan on 21.01.1981 and his sale deed is prior to the sale deed of the cross-objectors. Therefore, as a stranger, who purchased the property from the undivided share of the ancestral properties, he cannot have the right of possession over the ancestral property and he has got only a right to get partition and therefore without adopting the method as if the cross-objectors had taken possession of the property exclusively and enjoying the property and they are only questioning now the rights of the coparcener.



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12. Therefore, under these circumstances, this Court does not find any perversity in the observation made by the lower appellate Court at the best since the parties are directed to work out their remedy in the manner known to law.

13. With the above observation, the cross-objection stands dismissed. No costs.

Index : Yes / No

Speaking Order : Yes / No
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To

1. The Sub-Court, Kuzhithurai.
2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN, J.

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