

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

SECOND APPEAL No.606 of 2000

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JUDGMENT:

This Second Appeal, under Section 100 of the Code of Civil Procedure, 1908 ('the Code', for brevity) by the unsuccessful appellant/sole plaintiff is directed against the judgment dated 24.04.2000 of the learned V Additional District Judge, Tirupati, passed in A.S.No.108 of 1996. The learned V Additional District Judge while dismissing the aforementioned first appeal had confirmed the decree and judgment dated 06.09.1996 of the learned Principal District Munsif, Tirupati passed in O.S.No.376 of 1989.

2. I have heard the submissions of the learned counsel for the appellant/plaintiff ('the plaintiff', for brevity). There is no representation for the respondent/defendant ('the defendant', for brevity). No submissions were made on the side of the defendant. I have perused the material record.

3. The facts which are necessary for consideration, in brief, are as follows:-

The sole plaintiff had brought the suit against the sole defendant for declaration of plaintiff's right to enjoy the plaint 'A' schedule property with absolute rights till he is evicted under due process of law and for a mandatory injunction directing the defendant to remove the constructions made over the plaint 'A' schedule property. The defendant filed a written statement and resisted the suit raising various contentions. Having considered the pleadings, the trial Court had framed a number of issues and additional issues. At trial, the plaintiff and a supporting witness were examined as PWs 1 and 2 and exhibits A1 to A32 were marked on the side of the plaintiff. On the side of the defendant, the defendant and a supporting witness were examined as DWs 1 and 2 and exhibits B1 to B15 were marked. Exhibit C1 – the Commissioner's Report and exhibit C2 – the Commissioner's plan were also marked. After full-fledged trial, the trial Court had dismissed the suit. Feeling

aggrieved, the plaintiff had preferred the first appeal. During the pendency of the first appeal before the Court below, the learned counsel for the plaintiff had reported no instructions before the Court below. The Court below had ultimately did not hear the submissions on the side of the plaintiff. Neither the submissions of the plaintiff in person nor his learned counsel who had reported no instructions were heard by the Court below as they both were absent on the dates of hearing. However, the Court below, having heard the submissions of the learned counsel for the respondent/defendant, had proceeded to dispose of the first appeal on merits and had dismissed the first appeal confirming the decree and judgment of the trial Court. Therefore, the aggrieved plaintiff is before this Court.

4. At the time of admission of this second appeal, this Court had formulated the following substantial questions of law.

1. **Whether the judgment of the first appellate Court dismissing the appeal on merits without hearing the party and at the same time dismissing his petition for permission to engage a counsel on the ground of non-appearance is sustainable?**
2. **Whether the judgment of the lower appellate Court delivered on merits is correct when the appellant did not appear and his counsel reported no instructions on earlier occasions?**

5. In view of the narrow compass of the substantial questions of law and the settled legal position, this second appeal need not detain this Court for long. Order XLI Rule 17 of the Code stipulates that where on the day fixed, or on any other day, to which the hearing may be adjourned, the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed. However, this provision of law does not empower the Court of first appeal to dismiss the appeal on merits. Contrary to the directive in the said provision, the Court below decided the first appeal on merits inspite of the appellant's default.

6. In this regard, it is necessary to refer to the paragraph no.11 of the judgment of the Court below which reads as follows:-

“When the appeal was came up for hearing the appeal was dismissed on 15.2.99 for default and also restored to file on 9.7.99 on the petition filed by the appellant. On 19.1.2000 the appellant reported not ready and again it is posted to 24.1.2000 and on the said date the respondent reported ready and heard the arguments for the respondent's counsel and appellant's counsel requested

time. Hence, it was posted to 25.1.2000 and it was time and again adjourned for appellant's arguments and on 17.4.2000 the appellant's counsel not present. Even after passing over the matter till after the lunch and thereby appellants arguments are closed and the respondent's counsel further argued the matter. Again the appellant filed a petition in I.A.No.412/2000 to reopen the matter by himself and his counsel reported no instructions. After giving notice, the petition is allowed subject to be ready by 21.4.2000 otherwise the said petition shall stands dismissed and on 21.4.2000, the appellant called absent in I.A.No.412/2000 and no representation was made to the appellant. Hence, I.A.No.412/2000 was dismissed for default."

(Reproduced verbatim)

7. A plain reading of the above paragraph from the judgment of the Court below would make it clear that no arguments were advanced on behalf of the plaintiff, by either the party in person or his learned counsel, who had earlier reported no instructions. In spite of plaintiff's non-appearance and default, when the appeal was called on for hearing, the Court below, without making an order of dismissal of the appeal for default, went on to decide the appeal on merits. The explanation to Rule 17 of Order XLI commands that nothing in that sub-rule shall be construed as empowering the Court to dismiss the appeal on merits. When there was a default on the part of the plaintiff/appellant, the Court below ought to have dismissed the first appeal for default instead of deciding the appeal on merits. Therefore, the judgment of the first appellate Court, which is impugned and which is made on merits in spite of default on the part of the appellant/plaintiff, is unsustainable in the facts and circumstances of the case and in view of the settled legal position. Having regard to the above reasons, this Court finds that there is substance in the substantial questions of law raised in this second appeal and that the second appeal deserves to be allowed, as the first appeal requires a fresh hearing before a decision is made on merits.

8. In the result, the second appeal is allowed and the decree and the judgment of the Court below are set aside. Accordingly, the first appeal is remanded to the Court below for a fresh decision on merits in case the plaintiff appears before the Court below and makes his submissions either in person or through a new counsel engaged by him or in the alternative for disposal in accordance with the procedure established by law. Considering the fact that the first appeal is of the year 1996, the Court below is directed to issue notices to both the parties through Court and by

registered post with acknowledgments due and dispose of the first appeal, as directed in this judgment as expeditiously as possible and preferably within a period of two (02) months from the date of receipt of a copy of this judgment. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in the appeal, shall stand closed.

M.Seetharama Murti, J

28th September, 2015

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