

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :15.11.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

S.A. No.1467 of 2007

1.P.S.Sivanandham
2.Maniyammal
3.R.Pannerselvam
4.Baby Rajeswari
5.R.Senthilkumar
6.R.Kadhiravan

.... Appellants

Vs

1.Dhandapani
2.Sampath
3.Panneerselvam
4.Krishnan
5.President
Panchayat Board,
Perampattu.

6.Commissioner,
Panchayat Union,
Kandhili

7.Pattammal
8.Lakshmi
9.Vimala
10.Manjula
11.N.Sornam
12.N.Tamizharasan
13.N.Tamizhselvi
14.N.Venmathi

... Respondents

(No notice to
respondents 11 to 14,
since they have been
set exparte in
A.S.No.53 of 2006)

PRAYER: Second Appeal filed under Section 100 C.P.C.
against the judgment and decree dated 21.07.2007 passed in
the Appeal Suit No.53 of 2006 on the file of the Court of

Subordinate Judge's Court, Tirupattur, Vellore District and confirming the Judgment and decree dated 06.04.2006 in O.S.No.782 of 1995 on the file of the District Munsif Court, Tirupattur, Vellore District.

For Appellants : Mr.M.V.Krishnan

For Respondents 1 to 4 &
7 to 10 : Mr.T.R.Rajaraman

For Respondent 6 : Mrs.R.Revathy

For Respondent 5 : No appearance

JUDGMENT

This second appeal has been filed challenging the Judgement and decree dated 21.07.2007 passed by the Sub Court, Tirupattur, Vellore District in A.S.No.53 of 2006 confirmed the Judgment and decree dated 06.04.2006 passed by the District Munsif Court, Tirupattur, Vellore District in O.S.No.782 of 1995.

Brief facts leading to the filing of the appeal:

2. The Appellants are the plaintiffs 2 and 7 to 11, the respondents 1 to 10 are the defendants 2 to 11 and the respondents 11 to 14 are the plaintiffs 3 to 6 in the suit O.S.No.782 of 1995 on the file of the Sub court, Tirupattur, Vellore District.

3. For the purpose of convenience, the parties are referred to as per their ranking before the Trial Court.

4. Originally the plaintiffs filed a suit for declaration in O.S.No.782 of 1995 on the file of the Sub court, Tirupattur, Vellore District seeking for a declaration and an injunction against the defendants. The suit was dismissed by the Trial Court by its Judgment and Decree dated 06.04.2006 passed in O.S.No.782 of 1995. Aggrieved by the same, the plaintiffs 2 and 7 to 11 preferred an appeal before the lower appellate court viz., District Munsif Court, Tirupattur, Vellore District in A.S.No.53 of 2006. The lower appellate court confirmed the findings of the Trial Court and dismissed the appeal filed by the plaintiffs 2 to 7. Aggrieved by the same, this second appeal has been filed by the plaintiffs 2 and 7 to 11.

5. Heard Mr.M.V.Krishnan, learned counsel appearing for the Appellants, Mr.T.R.Rajaraman, learned counsel for the respondents 1 to 4 and 7 to 10 and Mrs.R.Revathy, learned counsel for the respondent 6.

6. Admittedly, before the lower appellate court, the counsel on record for the Appellants reported no instruction and an affidavit dated 11.07.2010 to that effect was also filed by the counsel on record before the lower appellate court. However, the lower appellate court has decided the appeal on merits under Order XLI Rule 17 CPC. The explanation to Order XLI Rule 17 CPC makes it clear that when the Appellant does not appear when the appeal is called for hearing, the appellate court cannot dismiss the appeal on merits. In the case on hand, the lower appellate court by its judgement and decree dated 21.07.2007 passed in A.S.No.53 of 2006 has dismissed the appeal on merits, despite the absence of the counsel on record for the Appellant or the Appellant. This fact is not disputed by the learned counsel for the respondents.

7. The Hon'ble Supreme Court in the case of Desa Singh vs. Ajit Singh and others reported in (2007) 15 SCC 235 following the Order XLI Rule 17 (1) CPC has held that when the Appellant is not represented, the appellate court can dismiss the appeal for default only but not decide the appeal on merits.

8. In view of the settled propositions of law, the submission made by the learned counsel for the Appellants that the lower appellate court ought not to have dismissed the appeal on merits in the absence of the counsel for the Appellant or the Appellant is absolutely correct.

9. This court at the time of admission of this second appeal has formulated the following substantial questions of law:

"a. Whether having declared that the appellant plaintiffs counsel had reported no instructions and the appellants were absent the appeal should have been dismissed for default and not decided on merits?

b. Whether the learned Subordinate Judge had no jurisdiction to impose compensatory costs in the appeal since appeals are excluded under Section 35-A C.P.C.?

c. Whether the learned Subordinate Judge ought to have held that the suit was not barred by res judicata?

d. Whether the plaintiffs possession personally and through their cultivating tenant adverse to the plaintiffs and the plaintiffs had acquired title by prescreption and the plaintiffs' uninterrupted possession was proved by Exhibits A.5, A.6, A12 and A.20?"

10. The substantial question of law (a) alone is taken up for consideration and it is answered in favour of the Appellants. The substantial questions of law (b), (c) and (d) are concerned, it is not necessary to answer as they will have to be decided by the lower appellate court while deciding the appeal on merits after hearing both the parties. Accordingly, the second appeal shall stand allowed by remanding the matter back to the lower appellate court for fresh consideration on merits after hearing the parties to the dispute and the lower appellate court namely Sub Court, Tirupattur, Vellore District shall dispose of the appeal within a period of three months from the date of receipt of a copy of this Judgement and the same shall be reported to this Court. No costs.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge's Court, Tirupattur, Vellore District
2. The District Munsif Court, Tirupattur, Vellore District.

+1cc to Mr.Krishnan , Advocate SR.No. 94983
+1cc to Mrs.R.Revathy , Advocate SR.No. 94884
+1cc to Mr.R.Rajaram , Advocate SR.No. 95300

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A.SK(19/11/2019)

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