

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.03.2021

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S.A.No.1548 of 2008

1.Murugesu
2.Ramesh
3.Maniammal

...

Appellants

Vs.

1.Thulasiammal
2.Palaniammal

...

Respondent

Prayer: The second appeal has been filed under Section 100 of C.P.C. against the judgment and decree dated 11.10.2001 passed in A.S.No.14 of 2001 on the file of the Subordinate Court, Cuddalore, setting aside the judgment and decree dated 01.11.2000 passed in O.S.No.187 of 1997 on the file of the District Munsif, Cuddalore.

For Appellants

: Mr.R.Gururaj

For Respondents

: Mr.R.Muralidharan

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 11.10.2001 passed in A.S.No.14 of 2001 on the file of the Subordinate Court, Cuddalore, setting aside the judgment and decree dated 01.11.2000 passed in O.S.No.187 of 1997 on the file of the District Munsif Court, Cuddalore.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.The plaintiffs in O.S.No.187 of 1997 are the appellants in this second appeal.

4.Suffice to state that the suit has been laid by the plaintiffs for the relief of declaration.

5.The plaintiffs' suit had been contested by the defendants by filing the written statement.

6.In support of the plaintiffs' case, PWs1 and 2 were examined and

Exs.A1 to A8 were marked. On the side of the defendants, DWs1 to 3 were examined and Exs.B1 to B18 were marked.

7.On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions put forth, the trial Court was pleased to decree the suit in favour of the plaintiffs as prayed for. Impugning the judgment and decree of the trial Court, the first appeal has been preferred by the defendants.

8.The first appellate Court, on the footing that when the appeal had been taken up for hearing, inasmuch as the respondents in the appeal viz., the plaintiffs had remained absent and as there had been no representation on the their part, resultantly, straightaway allowed the appeal without going into the merits of the case in any manner and the impugned judgment of the appellate Court reads as follows:

"Today, when the appeal was taken up for hearing, respondents 1 to 3 called absent. No representation. Appeal allowed."

9.Challenging the above judgment and decree of the first appellate Court, the second appeal has been preferred.

10.At the time of admission of the second appeal, the following substantial questions of law were formulated for consideration:

“ a.Whether the lower appellate Court was right in allowing the appeal merely because the respondents had not appeared?

b.Whether the 1st appellate Court was right in not passing a judgment on merits”

11.On a reading of the judgment rendered by the first appellate Court, it is evident that the same cannot be upheld in the eyes of law. When aggrieved over the judgment and decree of the trial Court granting the relief in favour of the plaintiffs, the defendants have preferred the first appeal, being the final Court of facts, the first appellate Court should have disposed of the appeal, after considering the materials placed on record by the respective parties, both oral and documentary and after analysing the same in detail as per law and also considering the points of law projected by the

respective parties with reference to their contentions, in all, should proceed to dispose of the appeal on merits in accordance with law.

12.In so far as this case is concerned, the first appellate Court had straightaway allowed the appeal preferred by the defendants without considering the materials placed on record put forth by the respective parties, both oral and documentary as well as the points of law raised by the respective parties qua their contentions and only on the footing that as the respondents/plaintiffs had remained absent, when the appeal was taken up for hearing, straightaway allowed the appeal. The abovesaid approach of the first appellate Court is found to be totally fallacious and untenable in the eyes of law.

13.In the scheme of things as contemplated under Order 41 of the Code of Civil Procedure Code pertaining to the appeals from the original decrees, as per Order 41 Rule 16, it is found that on the date fixed or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal and the Court shall then, if it does not dismiss

the appeal at once, hear the respondent against the appeal and in such case, the appellant shall be entitled to reply.

14.Further as per Order 41, Rule 17(1), 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 the appeal be dismissed. The Explanation appended to the abovesaid Rule is not applicable to the case at hand.

15.In so far as the present case is concerned, according to the appellate Court on the date when the first appeal was taken up for hearing, the appellants viz., the defendants were represented. However, according to the appellate Court, on that date, there was no representation for the respondents/plaintiffs and they had remained absent.

16.In such circumstances, the procedure which should have been adopted by the first appellate Court is that the first appellate Court should have proceeded to set the respondents/plaintiffs exparte in the appeal

proceedings and thereafter, hear the appeal preferred by the defendants and dispose of the same on merits as contemplated under Order 41 Rule 17(2) CPC.

17. Without advertent to the abovesaid procedure, the appellate Court as above pointed out, only on the premise that the respondents/plaintiffs had remained absent, when the appeal was taken up for hearing, simpliciter straightaway allowed the appeal without considering the materials placed on record by the respective parties before the trial Court. It is thus found that the first appellate Court has not disposed of the appeal in accordance with law and on merits and resultantly, the judgment and decree of the first appellate Court are liable to be set aside.

18. It has been fairly considered by the respondents' counsel also that the disposal of the first appeal by the first appellate Court is not in accordance with the procedures contemplated under Order 41 of the Civil Procedure Code and prayed that the matter may be remitted back to the first appellate Court for the consideration of the appeal on merits and disposal of

the same in accordance with law.

19.In the light of the abovesaid discussions, the judgment and decree dated 11.10.2001 passed in A.S.No.14 of 2001 on the file of the Subordinate Court, Cuddalore, are set aside and the matter is remitted back to the first appellate Court with the direction to the first appellate Court to rehear the appeal after issuing proper notice to both the parties and dispose of the same on merits and in accordance with law as expeditiously as possible. Accordingly, the second appeal is disposed of. No costs. Consequently, connected miscellaneous petition, if any, is closed.

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Internet: Yes/No
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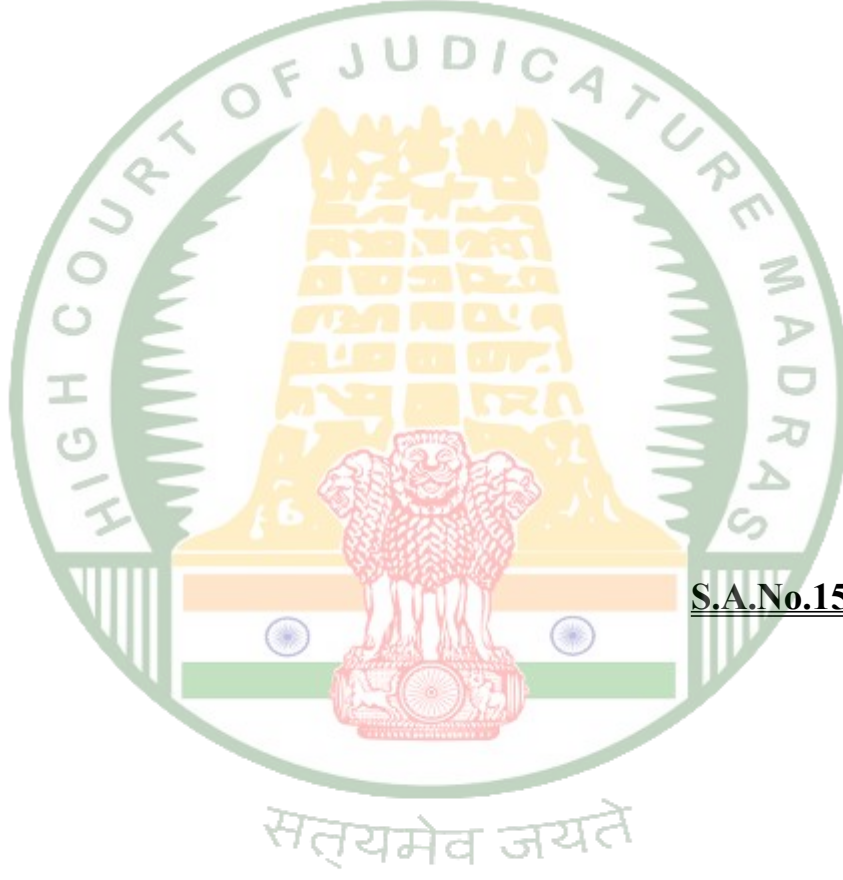
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After hearing the counsel for the appellants at some length, I feel satisfied that the substantial questions of law arises for consideration in this second appeal. Accordingly, the Second Appeal is admitted and the following substantial questions of law are formulated for consideration in this Second Appeal:

“ a.Whether the lower appellate Court was right in allowing the appeal merely because the respondents had not appeared?

b.Whether the 1st appellate Court was right in not passing a judgment on merits”

2. Further arguments of the counsel for the appellants heard. Arguments of the respondents' counsel Heard. Judgment in the course of the day.

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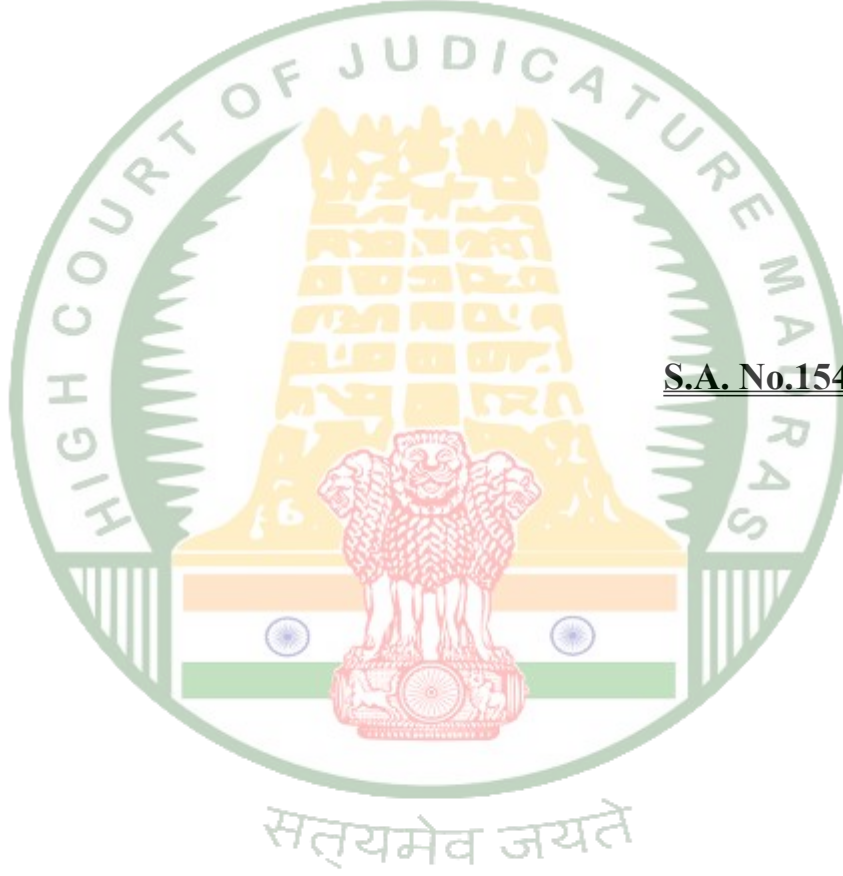
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