Appellate Jurisdiction (a)

Special Appeals Nos. 387, 388, 393, *and* 394 *of* 1868.

RANGASAMY MUDELLIAR... *Special Appellant (Plaintiff.)*

SIRANGAN .... *Special Respondent in No.* 387 *(Defendant.)*

THANDRAYA GOUNDEN..... *Special Respondent in Nos.* 388 *and* 393 *(2nd Defendant's heir.)*

SITHAIYAN..................... *Special Respondent in No.* 394 *(Defendant.)*

The parties to a suit appeared on the day fixed for the first hearing. On the application of the defendants' vakil, the hearing was adjourned in order to enable them to obtain certain documents from the Collector's Office and afterwards put in written statements. This they failed to do on the day to which the hearing was adjourned, and when the suit came on for final hearing they were still in default and also failed to appear in person or by vakil. A decree was given for the plaintiff.

Held, that the decree of the Original Court was not an *ex-parte* decree under Section 147 of the Code of Civil Procedure for non-appearance, but a decree under Section 148 and was therefore appealable.

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THIS was a Special Appeal against the decision of C. F. Chamier, the Civil Judge of Salem, in Regular Appeals Nos. 42, 41, 43, and 40 of 1868, reversing the decrees of the Court of the District Munsif of Salem in Original Suits Nos. 325, 324, 326, and 322 of 1866, respectively.

Johnstone, for the Special Appellant in No. 387.

Rama Rao, for the Special Respondent in No. 387.

Johnstone, for the Special Appellant in No. 388.

Rama Rao, for the Special Respondent in No. 388.

Scharlieb, for the Special Appellant in No. 393.

Rama Rao, for the Special Respondent in No. 393.

Scharlieb, for *Miller*, for the Special Appellant in No. 394.

Rama Rao, for the Special Respondent in No. 394.

This was a suit, the object of which was to enforce the acceptance of a new puttah by the defendant for an enhanced rate of rent from the year 1861, on the ground

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that the defendant had improved his land, and to treat the excess as arrears and to enforce acceptance of another puttah for 1865.

The District Munsif, treating the defendant as *ex-parte*, gave plaintiff a decree for the amount sued for. The defendant appealed to the Civil Judge, among others, on the following grounds :—

I. The defendant had obtained two months' time from the Lower Court for the purpose of procuring copies of certain accounts connected with the measurement of the disputed lands by the Revenue authorities and which were essential to his case and then filing his written statement.

II. As he was not furnished with the abovementioned copies, he was prevented from putting in his written statement within time. The *ex-parte* judgment passed by the Lower Court during the absence of defendant's vakil on leave, without adjourning the date of hearing, is therefore unjust.

III. The defendant's application on this subject to the Lower Court has been rejected.

The Civil Judge, reversing the decree of the District Munsif, dismissed the suit with costs.

The plaintiff appealed specially to the High Court against the decree of the Civil Court upon the ground that—

The Civil Judge ought not to have admitted the defendant's appeal, inasmuch as defendant allowed the case to go *ex-parte* against him in the Court of First Instance.

The Court delivered the following

JUDGMENT :—In these cases the decrees of the Original Court in favor of the plaintiff were passed, in the absence of the defendants, on the evidence adduced by the plaintiff, and, on appeal, the Civil Court has reversed those decrees and dismissed the suits. From the decrees of the Civil Court the plaintiff has appealed, and the objection to be considered is that the decrees of the Original Court are *ex-parte* decrees to which Section 119 of the Code of Civil Procedure is applicable and therefore not open to an appeal to the Civil Court.

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It appears from the record that the day fixed for the first hearing of the suits was the 8th November 1866, and on that day both parties appeared by their respective vakils; but the hearing was adjourned to the 26th of January 1867 on the application of the defendants' vakils in order to give them time to obtain and peruse certain documents on record in the Collector's Office and afterwards put in the defendants' written statements. This they failed to do on the day appointed, and when the suits came on for final hearing on the 30th September 1867 they were still in default and also failed to appear in person or by vakil and decrees were passed against them.

It thus appears clearly that the defendants failed to do that for which time had been allowed them, and that the hearing of the suits had been adjourned. There was therefore such a default as is provided for in Section 148, and it has not been contested that the Original Court rightly proceeded to a decision of the suits on the record and evidence and passed decrees which were open to ordinary regular appeals, if the fact of the defendants' non-appearance either in person or by a vakil did not prevent the application of that Section. The argument on behalf of the appellant has been that when a party to a suit fails to appear on a day to which the hearing had been adjourned, Section 147 applies, whatever may have been the reason for the adjournment, and consequently the decrees must be considered as having been passed *ex-parte* for non-appearance and only open to a proceeding to set them aside under Section 119.

We are of opinion that Section 147 was not intended to have this general operation. The three Sections relating to adjournments, 146, 147, 148, must be read together and, so considered, we think the two latter Sections were meant to apply, the one to the case of a party whose only default is non-appearance after an adjournment of the hearing by the Court, and the other to the case of a party who, having obtained a special adjournment on good cause being shewn for granting him time, makes default in regard to the purpose for which the time had been allowed. Section 146 gives the power to grant time and to adjourn.

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Then Section 147 provides for the case of failure to appear on adjournment and points out a mode of proceeding which is strictly applicable to non-appearance, and Section 148 provides in quite general terms that on default by a party to whom time has been allowed the Court shall proceed to a decision. There is no reason why Section 147 any more than Section 148 should apply when a party has committed both the defaults mentioned in the Sections, and it could not be given that operation without detracting from the plain language of Section 148. The Legislature could not have intended that in case of default by reason of failure to perform the act for which time had been allowed, the proceeding should be different when the party appeared from that when he did not appear. In the latter instance, the non-appearance is really but a part of the default, and it is made obligatory on the Court to proceed under Section 148 by terms which include every case of such default.

For these reasons we are of opinion that the decrees of the Original Court are not *ex-parte* decrees for non-appearance passed under Section 147 but are decrees under Section 148. They were therefore appealable to the Civil Court and these special appeals must be dismissed with costs.

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Civil Miscellaneous Special Appeal No. 290 *of* 1868.

SUBBA VENKATARAMAIYAN.........*Petitioner.*

SUBRAYA AIYAN and 2 others....*Counter Petitioners.*

Where no liability to mesne profits is imposed by a decree Section 11 of Act XXIII of 1861 does not give a power to extend the relief granted by the decree in respect of the right to mesne profits, but only to determine questions regarding the amount thereof when the right thereto has been ascertained by the decree.

1869.
February 12.
C. M. S. A. No. 290 *of* 1868.

THIS was a petition against the order of G. Muttusami Chetti, Principal Sadr Amin of Madura, dated 20th August 1868.

(a) Present: Scotland, C. J. and Collett, J.