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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: November 28, 2016*

+ **RSA 249/2016**

PARMINDER SINGH Appellant

Through : Mr.J.Burman, Advocate.

versus

INDERJEET SINGH & ANR Respondents

Through : Mr.Mohd.Imran and Mr.Rizwan,
Advocates for R-1.
Mr.B.L.Chawla, Advocate for R-2.

CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI

JUDGMENT (Oral)

1. This Regular Second Appeal has been preferred by the appellant/plaintiff impugning the order dated May 30, 2015 passed in RCA No.2/2016 whereby the First Appellate Court upheld the judgment dated November 23, 2015 passed by the learned Trial Court in Civil Suit No.523/2013 dismissing the suit for non-production of evidence by the plaintiff.

2. I have heard learned counsel for the appellant/plaintiff as well as learned counsel for respondent No.2 – the contesting respondent.

3. Mr.B.L.Chawla, learned counsel for the respondent No.2 has submitted that since no substantial question of law arises in this appeal, the same may be dismissed.

4. The submissions made by learned counsel for respondent No.2 has to

be negated in view of the observations made by this Court in the proceedings dated September 09, 2016 to the following effect:-

'1. It is noted that the judgment of the first appellate Court notes that 18 opportunities were given to the plaintiff, but I have seen the order sheets and the opportunities are 8 in number and in some of which some evidence was left on behalf of the appellant/plaintiff.'

5. The following substantial question of law is formulated in this appeal:-

'Whether the order dated November 23, 2015 closing plaintiff's evidence and resultantly dismissing the suit as upheld by the First Appellate Court suffers from perversity?'

6. Learned counsel for the appellant/plaintiff has drawn the attention of this Court to the fact that the appellant had filed his affidavit and also placed the copy of the same on record to be received by the defendant No.1 which fact is duly mentioned in the proceedings dated March 29, 2011. The advance copy of the same had already been supplied to defendant No.2. In that circumstance, the learned Trial Court could not have noted in the proceedings dated November 24, 2011 that neither the evidence affidavit has been filed on record nor advance copy of the same supplied to the defendants. Attention of this Court has also been drawn by learned counsel for the appellant/plaintiff to the proceedings dated October 17, 2013 which records that two witnesses namely PW-1 Sh.R.K.Thakur, LCD from the Office of Sub-Registrar, Basai Darapur was present and partly examined and another witness Sh.Hardeep Kumr, LDC from Building Department, West Zone, Rajouri Garden was also present and he was discharged unexamined and bound down for the next date of hearing.

7. The grievance of the appellant/plaintiff is that once the witness is bound down the appellant/plaintiff was not required to summon him for the

next date of hearing. Thus, the order dated November 23, 2015 by learned Trial Court closing plaintiff's evidence as well as defence evidence on the same day and dismissing the suit at 4.00 pm, which has been affirmed by the First Appellate Court, being perverse, needs to be set aside.

8. Learned counsel for the respondent No.2 (the contesting respondent) has submitted that there is no illegality or perversity in the impugned order as when the appellant failed to lead any evidence despite ample opportunities being given, the Court was left with no option but to close the plaintiff's evidence and dispose of the suit.

9. The proceedings recorded by the learned Trial Court on November 23, 2015 when the suit was dismissed appear in two parts and are extracted hereunder:-

'23.11.2015

*Present: None is present for the plaintiff on call.
Defendant no.1 in person.
Sh. Pankaj Chawla, Ld. Counsel for the defendant
no.2.*

No PW is present. Nor steps taken for summoning of PW-1 R K Thakur, Sh. Chawla submits that the matter is being listed for PE since 22.01.2014 and plaintiff is not taking steps. In view of above PE is hereby closed.

Defendant no.1 closes DE.

Sh. Chawla, too closes DE and his submission is that the suit must be dismissed as there is no evidence on record for the plaintiff.

Put up at 4:00 pm for further consideration.

*Sd/-
Civil Judge-04 (West)
THC, Delhi/23.11.2015*

23.11.2015

At 4:00 PM

Present: Defendant no.1 in person.

Vide separate judgment the suits of the plaintiff is dismissed with no order as to cost.

Decree sheet be prepared accordingly,

File be consigned to record room.

Sd/-

Civil Judge-04 (West)

THC, Delhi/23.11.2015'

10. Since Civil Suit No.523/2013 has been dismissed on failure of the appellant/plaintiff to lead evidence, it is necessary to refer to the issues settled by learned Trial Court which are extracted in para 6 of the impugned judgment as under:-

- 1. Whether the plaintiff has no locus-standi to file the present suit? OPD*
- 2. Whether the suit is without cause of action? OPD*
- 3. Whether the suit is not maintainable in its present form? OPD*
- 4. Whether the suit is barred by law of limitation? OPD*
- 5. Whether the suit is barred U/o 2 R2 CPC? OPD*
- 6. Whether the plaintiff is entitled to a decree for declaration against the defendant as prayed for? OPP*
- 7. Whether the plaintiff is entitled to a decree for permanent injunction against the defendant as prayed for? OPP*
- 8. Whether the plaintiff is entitled to a decree for mandatory injunction against the defendant as prayed for? OPP*
- 9. Relief.*

11. The above issues show that the onus to prove issue No.1 to 5 was on the defendants. On November 23, 2015 the case was not listed for

defendants' evidence. On failure of the appellant/plaintiff to appear or produce any witness on November 23, 2015 the Court could have proceeded under Order IX or under Order XVII of the Code of Civil Procedure. Instead of that, the learned Trial Court has not only closed the plaintiff's evidence but also the defendants' evidence on the same day and without hearing even learned counsel for the defendants fixed the case for 4.00 PM for consideration.

12. At 4.00 PM instead of 'consideration' the judgment, running into 11 pages, has been pronounced dismissing the suit mainly on the ground that no evidence has been led by the plaintiff.

13. The First Appellate Court dismissed the appeal observing that eighteen opportunities have been given to the plaintiff but no other witness has been examined. The order passed by the learned Trial Court dismissing the suit was upheld observing that there was no evidence produced by the plaintiff to support the case.

14. The learned Trial Court and the First Appellate Court had failed to take note of the fact that when the witness was bound down by the Court it was for the witness to appear of his/her own and on his/her failure to appear, to secure his/her presence. The manner in which the suit has been hurriedly disposed of at the stage of plaintiff's evidence i.e. by closing the plaintiff's evidence as well as defendants' evidence on the same day despite the fact that burden to prove issues No.1 to 5 was on the defendants. Even without hearing learned counsel for the defendants on those issues, the judgment was pronounced on the same day at 4.00 PM. Such practice and procedure followed by learned Trial Court in great haste appears to be just with a view to add a figure to the disposal statement which is not in accordance

with the law and procedure prescribed. The illegality committed by the learned Trial Court remained unrectified even at the stage of first appeal.

15. In view of the aforesaid discussion, the substantial question of law is answered in favour of the appellant/plaintiff. The impugned judgments of Courts below; dated November 23, 2015 by the learned Trial Court and dated May 30, 2016 by the First Appellate Court, are set aside.

16. The trial in Civil Suit No.523/2013 stands revived to the stage where it was on the date of its dismissal on November 23, 2015 i.e. plaintiff's evidence.

17. The parties are directed to appear before the learned Trial Court on December 07, 2016 on which date the learned Trial Court shall fix a date, as per convenience of learned counsel for the parties which shall not be beyond three months from the date of receipt of this order, granting only one opportunity to the appellant/plaintiff for leading his entire evidence.

18. To compensate the contesting respondent No.2/defendant No.2, it is directed that before availing the opportunity to lead evidence, the appellant/plaintiff shall pay ₹20,000/- to the contesting respondent No.2/defendant No.2. If he is not willing to accept the cost then the same shall be deposited with Delhi Legal Services Authority of the concerned District.

19. The Regular Second Appeal is allowed in above terms.

20. A copy of this order be sent to the learned Trial Court through concerned District Judge.

21. As prayed, copy of the order be given dasti to learned counsel for the parties under the signature of Court Master.

NOVEMBER 28, 2016/ 'st'

PRATIBHA RANI, J.