

HON'BLE SRI JUSTICE M.S.K.JAI SWAL

SECOND APPEAL No.434 of 2017

JUDGMENT:-

This second appeal is filed by the defendant of the suit being aggrieved by the Judgment and decree in A.S.No.11 of 2016 on the file of the Special Judge for Trial of Cases under SCs&STs (POA) Act, 1989-cum-Addl.District Judge at Srikakulam, dated 02.02.2017 confirming the Judgment and decree in O.S.No.269 of 2009 dated 26.10.2015 on the file of the Principal Senior Civil Judge, Srikakulam.

The suit was filed seeking eviction of the defendant from the suit schedule property and for recovery of arrears of rent. After contest, the suit was decreed directing the defendant to vacate the suit schedule property within three months and also to pay the arrears mentioned therein.

Aggrieved thereby, the defendant preferred A.S.No.11/2006 which was dismissed. Hence, the present Second Appeal. At the stage of admission, the Second Appeal is taken up for disposal and the record of the Court below also has been called for and perused. After hearing the submissions of the learned counsel appearing for both sides elaborately, I am of the opinion that the matter needs to be remanded back to the trial Court for the limited purpose of recalling PW.1 and allowing the appellant/defendant to cross-examine him and the trial Court should dispose of the suit afresh thereafter. The reasons for the remand are that both the Courts below have not properly appreciated the effect of the incomplete examination of the plaintiff as PW.1. The trial Court in its Judgment has proceeded on the ground that the evidence of the plaintiff as PW.1 remained unchallenged since he was not cross-examined by the appellant/defendant. The discussion on this aspect is found in paras 11 and 12 of the Judgment of the trial Court.

The appellate Court also proceeded on the same premise observing that PW.1 was not available for being cross-examined and that the trial Court did not eschew the evidence of PW.1 from consideration.

In my opinion, the observations of both the Courts below are erroneous which is manifest from a perusal of the proceeding sheet of the trial Court and also the deposition of PW.1.

The affidavit in chief in lieu of the evidence of the plaintiff as PW.1 was filed on 21.07.2014. On the said date, Exs.A.1 to A.6 were also marked. On 19.08.2014, the endorsement on the deposition of PW.1 is to the following effect:-

“This matter is kept aside from 10.30 to 5 p.m., for cross-examination but the Counsel for the defendant has not turn up and offered by his junior Counsel for adjournment. The same is not accepted and the cross-examination of witness is treated as NIL. Since the witness on the way coming from Vijayawada and in the last adjournment also it was intimated to the learned Counsel for getting ready for cross-examination besides costs were also imposed he did not turn up for cross examine the witness. The petition for adjournment is dismissed.”

In the proceeding sheet of the trial Court, the relevant endorsements of the trial Court on the relevant dates are as under:-

“21.07.2014

Chief Affidavit of PW.1 is filed. PW.1 is examined in Chief. Exs.A.1 to A.6 are marked. For cross examination, at request, call on 24.07.2014.

24.07.2014

PW.1 is called present. For cross examination, at request on payment of costs of Rs.100/- to PW.1. At request of PW.1, call on 19.08.2014.

19.08.2014

Costs paid. Memo filed. Petition filed under Order 17 Rule 1 CPC is dismissed. PW.1 is examined for further evidence. Call on 26.08.2014.”

Thereafter it appears that the defendant filed I.A.No.1228 of 2014 for recalling PW.1 for which the suit underwent some adjournments and ultimately on 24.09.2014 the said application was allowed on condition to pay Rs.100/- and cross examine PW.1 who was directed to be present on 15.10.2014.

On 15.10.2014, PW.1 was absent. Costs were paid and the matter was adjourned to 20.10.2014.

On 20.10.2014, the endorsement is that the plaintiff is called absent. Witness absent. Hence, the plaintiff's evidence closed and the matter was adjourned for the evidence of defendant to 28.10.2014.

It is manifest from the above that the trial Court proceeded on the premise that PW.1 was not subjected to cross examination and his evidence was taken into consideration as being unchallenged. However, there is no order of the trial Court to the effect that the evidence of PW.1 which was by way of affidavit in lieu of chief examination was eschewed from consideration as has been observed by the appellate Court. Similarly, the right of the defendant to cross examine PW.1 was not forfeited. The application filed by the defendant to recall PW.1 was allowed on 24.09.2014 and costs of Rs.100/- was paid and the plaintiff was specifically directed to be present in the Court on 15.10.2014. On 15.10.2014 and on the next date of adjournment i.e., on 20.10.2014, PW.1 was absent which amounts to PW.1 not appearing before the Court inspite of he being directed. Therefore, it cannot be said that the defendant is in any way responsible for non-cross examination of PW.1 but on the other hand it is the absence of PW.1 which

resulted in the non-cross examination of PW.1 by the defendant. Both the Courts below have erroneously put the blame on the defendant for non-cross examination of PW.1 which as a matter of fact is incorrect since it is PW.1 who did not make himself available for cross-examination even though he was specifically directed to appear for being cross-examined. In view of the above, it is a clear case where both the Courts below erred in appreciating the conduct of the parties in true perspective and erroneously drawn an adverse inference against the appellant/defendant and treated the evidence of PW.1 as being unchallenged due to the fault of the defendant, which, in fact, is not correct.

There is no gain saying the fact that if a witness has been examined in chief and was directed to be present for being cross examined, and if such witness does not make himself available for being cross examined, the evidence that has been adduced which remain incomplete can be eschewed from consideration. On the other hand, if a witness is present and the party who got summoned the witness for purpose of cross examination, does not proceed with the cross examination of the witness, or if the Court finds that the defendant having been shown indulgence by the court to get the witness recalled for being cross examined, and when the witness is present, seeks adjournment on flimsy ground, then it is open to the court to order that the right of the defendant to cross examine the witness to whom he summoned is forfeited. For either of the above, there should be a specific order of the Court. Neither of these things appears in the case on hand.

In the result, the Second Appeal is disposed of remanding the matter back to the trial Court for the limited purpose of recalling PW.1 and allowing the appellant/defendant to cross examine him and the trial Court should dispose of the suit afresh thereafter within one month from the date of

receipt of records which the Registry is directed to transmit within one week from today. No order as to costs.

Miscellaneous petitions, if any, pending in this Second Appeal shall stand closed.

M.S.K.Jaiswal, J

08th September, 2017

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