

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

RSA No.4954 of 2015 (O&M)

Date of decision: 05.04.2019

Rajbir

... Appellant

Versus

Raj Kumar

... Respondent

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present : Mr. Sumit Sangwan, Advocate for the appellant.
Mr. RA Sheoran, Advocate for the respondent.

REKHA MITTAL, J. (Oral)

The present appeal directs challenge against order/judgment and decree dated 29.08.2013 passed by the Additional Civil Judge (Sr. Div.), Charkhi Dadri (hereinafter referred to as 'the trial Court') and dated 26.05.2015 by the District Judge, Bhiwani whereby suit filed by the plaintiff/appellant for recovery of Rs.56,490/- i.e. principal amount of Rs.42,000/- on the basis of bahi entry was dismissed under Order 17 Rule 3 CPC and judgment of the trial Court was affirmed in appeal.

Perusal of the records of the trial Court would reveal that this suit was instituted by the plaintiff on 07.12.2010. On completion of pleadings of the parties, issues were framed on 27.09.2011 and the case was adjourned to 13.03.2012 for evidence of the plaintiff/appellant. Subsequent thereto, the case was adjourned on a number of occasions for evidence of the plaintiff but during the interregnum from 13.03.2012 till 29.08.2013,

the appellant examined himself and one witness namely Satbir Singh whose cross examination was not completed. On 29.04.2013, the Court adjourned the case to 25.05.2013 subject to payment of costs of Rs.200/- with last opportunity for adducing evidence. On the adjourned date, costs were paid and the case was again adjourned to 24.08.2013 for evidence of the plaintiff subject to payment of Rs.300/-. Again on 24.08.2013 case was adjourned to 29.08.2013 for evidence of the plaintiff with a direction that costs of Rs.300/- shall be paid on the next date. Eventually on 29.08.2013, the trial Court closed evidence of the plaintiff and the suit was dismissed under Order 17 Rule 3 CPC.

Counsel for the appellant would argue that Satbir Singh PW was examined in chief on 08.11.2012 and his cross examination was deferred on the request of counsel for the respondent/defendant but the witness was bound down for the date fixed i.e. 10.12.2012. It is further argued that once a witness bound down by the Court failed to cause appearance on the adjourned date, it was the duty of the Court to secure his presence by adopting coercive steps. Another submission made by counsel is that even if the trial Court has closed evidence of the plaintiff by order, the Court has not adverted to the evidence already adduced by the plaintiff to prove his case, therefore, committed a serious error rather illegality in dismissing the suit merely by referring to Order 17 Rule 3 CPC. It is prayed that the judgments and decrees passed by the Courts may be set aside and the matter is remitted to the trial Court for decision of the case afresh, in

accordance with law.

Counsel representing the respondent, on the contrary, would argue that as the appellant/plaintiff failed to pay costs of Rs.300/- imposed vide order dated 25.05.2013, the appellant was not entitled to proceed with the case and his suit is liable to be dismissed on this score alone. In support of his contention, he has referred to the provisions of Section 35-B of the Code of Civil Procedure, 1908 (in short 'the Code').

I have heard counsel for the parties, perused the paper book and records of the trial Court.

Before advertng to the submissions made by counsel for the parties, it is appropriate to extract order dated 29.08.2013 passed by the trial Court, reads thus:-

No PW is present. Adjournment sought. A perusal of file reveals that plaintiff has failed to adduce evidence despite availing sufficient opportunities including last opportunity. However, a cost of Rs.300/- has also not been paid by the plaintiff, therefore, I find no justification in further adjourning the case for the same purpose. Hence, evidence of plaintiff is hereby closed by Court order. Hence, the present suit is hereby dismissed under Order 17 Rule 3 CPC. xx xx

Perusal of the aforesaid order makes it evident that though the order aforesaid makes reference of non-payment of costs of Rs.300/- but the trial Court has not dismissed the suit on account of failure of the plaintiff to pay costs of Rs.300/- by invoking Section 35 of the Code. I

would hasten to add that costs of Rs.300/- was initially imposed on 25.05.2013 and despite failure of the plaintiff to deposit those costs on the adjourned date i.e. 24.08.2013 the Court accepted requests of counsel for the plaintiff therein and adjourned the case to 29.08.2013 for evidence of the plaintiff. Meaning thereby that the Court has not taken a serious view of failure of the plaintiff to pay costs of Rs.300/-. This apart, perusal of the records would reveal that respondent/defendant was never present in person before the Court in view of the zimini orders recorded by the trial Court and the costs under Section 35-B of the Code are imposed to reimburse the other party in respect of the expenses incurred by him in attending the Court on the date fixed. Analysed from any angle, it is difficult to accept contention of the respondent that since the plaintiff/appellant failed to pay costs of Rs.300/-, he has deprived himself of an opportunity being heard on merits of the case, in the light of evidence already adduced by him. As is evident from the order aforesaid, the trial Court did not advert to the evidence already adduced by the appellant nor provided an opportunity to the respondent to lead evidence in rebuttal, if any. In this view of the matter, it can safely be held that order dated 29.08.2013 passed by the trial Court suffers from a serious legal flaw and cannot stand the test of judicial scrutiny. The Appellate Court without examining the order impugned in right perspective and in the light of relevant provisions of CPC has committed another error by affirming the decree passed by the trial Court. In this view of the matter, the judgments and decrees passed by the Courts

are liable to be set aside and the matter needs remittance to the trial Court for decision of suit afresh on the basis of evidence already adduced by the appellant/plaintiff with an opportunity to the respondent to adduce evidence in rebuttal, subject however, to payment of costs of Rs.5000/- including costs of Rs.300/- imposed by the trial Court, to be paid by way of demand draft in the name of respondent/defendant on 29.04.2019.

For the foregoing reasons, the appeal is allowed. The judgments and decrees passed by the Courts are set aside and the matter is remitted to the trial Court for decision of the suit afresh in the aforesaid terms. It is clarified that the appellant/plaintiff shall not be entitle to further opportunity for adducing evidence and the case would be decided on the basis of evidence already adduced by the appellant and evidence in rebuttal to be led by the respondent. Failure of the appellant to pay costs on the stipulated date would entail dismissal of the appeal. Parties through their counsel are directed to appear before the trial Court on 29.04.2019.

05.04.2019
ashok

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned:	Yes / No
Whether reportable:	Yes / No