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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **RSA 31/2020 & CM Nos. 6722/2020 & 6723/2020**

ANIL KUMAR

..... Appellant

Through: Mr.N.K. Gupta, Adv.

versus

ASHOK KUMAR & ORS

..... Respondents

Through: None.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

ORDER

% **19.02.2020**

1. This appeal has been filed challenging the judgment and order dated 14.11.2019 passed by the learned Additional District Judge-06, West District, Tis Hazari Courts, Delhi in RCA No. 01/2016 titled ***Ashok Kumar v/s Sh.Anil Kumar & others.***
2. By the said judgment/order the learned Appellate Court was pleased to set aside the judgment and order dated 23.11.2016 passed by the learned Civil Judge in Suit No. 8191/2016 titled ***Sh. Ashok Kumar v/s Sh. Anil Kumar & Others.***
3. The learned Trial Court had dismissed the Suit filed by the respondent no. 1 primarily on the ground that the respondent no. 1 did not enter the witness box and his testimony was essential to prove the case. It was held that resultantly, the pleadings of the respondent no. 1/plaintiff were not proved.
4. The learned Appellate Court, after perusal of the entire Trial Court

record has observed as under:-

“10. It is apparent that one of the ground for dismissal of the suit was non examination of plaintiff before the Ld Trial Court. Upon perusing the proceedings of the Ld Trial Court, it is clearly reflected that in most of the dates of hearing, it is plaintiff who was appearing before the Ld. Court. On 29.07.2004, issues in the present case were framed and thereafter two witnesses were examined on behalf of plaintiff/appellant and later on, on subsequent date an application for review of order dated 15.09.2005 where cost imposed on plaintiff was sought to be reviewed. On 11.11.2005, evidence by way of affidavit of plaintiff was filed and case was fixed for PE and for cross examination for 09.12.2005. On 09.12.2005, evidence of plaintiff was not recorded and thereafter on the next date of hearing, the plaintiff was present but cross-examination of plaintiff was not done and opportunity was given to defendant to cross examine the plaintiff (it is pertinent to mention that evidence by way of affidavit was still not tendered by the plaintiff although same was available on record). Thereafter, on 09.12.2006, case was adjourned for cross-examination of plaintiff as last and final opportunity. From 02.07.2007 to 01.04.2009, case was adjourned for one reason and another primarily due to the pendency of certain miscellaneous application. On 01.04.2009, the case was fixed for PE however application for contempt against defendant no. 1, 2 and 4 was filed and a request for an adjournment was made on behalf of defendant for cross-examination of the plaintiff and case was adjourned for PE for 01.10.2009. On 04.05.2010, an application for substitution of heir of defendant no.4 was moved and case was fixed for PE on 26.08.2010. On 26.08.2010, by taking note of the continuous default of the defendant, the request for an adjournment was declined and PE was closed and case was fixed for DE. Various proceedings were held from 2010 to 2016, the case was fixed for DE or for some pending miscellaneous application such as

application for substitution of LRs. In most of the dates of hearing, it is plaintiff who was appearing before the Court and on some occasion, counsel appeared on behalf of plaintiff. It is not one of those cases, where plaintiff/appellant took adjournments by not leading the evidence. It appears to be lapse on the part of plaintiff that despite filing his evidence by way of affidavit dated 07.11.2005, affidavit has not tendered.”

5. The learned counsel for the appellant submits that it remains a fact that the respondent no. 1 had only filed an affidavit of evidence and not tendered the same in evidence. In light thereof, the learned Trial Court has rightly held that the respondent no. 1 did not enter the witness box or lead his own evidence.

6. I am unable to agree with the submission made by the learned counsel for the appellant. A perusal of the finding of the learned Appellate Court regarding the record of the learned Trial Court reveals after the filing of the affidavit of evidence by the respondent no.1, the case was inadvertently fixed for the cross-examination of the respondent no. 1 without realising that the affidavit of evidence was not formally tendered by the respondent no. 1 in evidence. This state continued from 09.12.2006 till 26.08.2010, when taking note of the continuous default of the appellant/defendant, his right to cross-examine the respondent no. 1 was closed and the Suit was fixed for defendant's evidence. Though it may be correct that the affidavit of evidence filed by the respondent no. 1 was never formally tendered by him in evidence, this would be also an oversight by the Court when it closed the plaintiff's evidence as the defendant had failed to cross-examine the plaintiff inspite of repeated opportunity. It is a settled principle of law that no party can be prejudiced by fault of the Court. This is expressed by the maxim

‘actus curiae neminem gravabit’.

7. The learned counsel for the appellant further submits that instead of remanding the Suit for fresh consideration, the Appellate Court could have decided the same. He places reliance on the judgment of the Supreme Court in *Ashwinkumar K. Patel vs. Upendra J. Patel & Ors.*, 1999 II AD (S.C.) 501 and *State of Punjab and Another vs. Gram Panchayat and Others*, AIR 2002 SC 1365.

8. In the peculiar facts of the present case, I am unable to agree with the submission made by the learned counsel for the appellant. As observed, the learned Trial Court has dismissed the Suit primarily on the ground that the respondent no. 1 did not enter the witness box. As this finding was incorrect, in my opinion, the learned Appellate Court has rightly remanded the matter back for fresh consideration by the learned Trial Court.

9. Having considered the above, it is noted that the Suit has been pending adjudication since 1998.

10. In view of the above, the learned Trial Court is requested to expedite the remand and decide the Suit afresh as expeditiously as possible.

11. The Appeal is disposed of with the above direction.

NAVIN CHAWLA, J

FEBRUARY 19, 2020/rv