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

Date of Order: October 16, 2018

\+ **CM(M) 281/2014 & CM 14048/2016**

SMT MEENA GUPTA & ANR. .....Petitioners
Through: Mr. Gaurav Mitra and Ms. Deepali Dwivedi, Advocates

versus

SHRI ANIL SHARMA & ORS .....Respondents
Through: Mr. Ashok Bhalla, Advocate for respondents No. 1 to 4

CORAM:
HON'BLE MR. JUSTICE SUNIL GAUR

O R D E R
(ORAL)

1. The challenge to impugned orders of 13th November, 2013 and 1st February, 2014 is on the ground that application under Order IX, Rule 13 of CPC was filed prior in time and so, it should have been decided first.

2. Vide order of 13th November, 2013, petitioners' appeal against rejection of application under Order IX, Rule 13 of CPC has been dismissed as not pressed because on numerous dates of hearing in the appeal, adjournments were sought by petitioners, on one ground or the other and on the day of passing of the impugned order, the ground put forth for adjournment was personal difficulty of the main counsel- *P.K.Rawal, Advocate.* Vide impugned order of 1st February, 2014, petitioners' application seeking review of order of 13th November, 2013 has been dismissed by the Appellate Court.

3. Learned counsel for petitioners assails impugned orders of 13th November, 2013 and 1st February, 2014 on the ground that in review petition, it was stated that adjournment on 13th November, 2013 was taken because of death anniversary/*barsi* of counsel's father and copy of the obituary published in the newspaper was also filed alongwith the said petition and so, the order of 13th November, 2013 ought to have been reviewed by the Appellate Court. Reliance is placed upon Supreme Court's decision in *Secretary, Department of Horticulture, Chandigarh and Another v. Raghu Raj,* (2008) 13 SCC 395 to submit that appeal against rejection of application under Order IX, Rule 13 of CPC ought to have been decided on merits. It is pointed out that there was no objection by opposite side to the adjournment on 13th November, 2013 and so, there was no justification for the Appellate Court to have dismissed the appeal as not pressed. It is also pointed out that on few occasions, even the respondents had sought adjournments and so, petitioners' appeal ought to have been decided on merits. Lastly, it is submitted that there was a valid ground to take adjournment on 13th November, 2013 and in any case, the Appellate Court ought to have granted one opportunity to petitioners to argue the appeal on merits, while putting petitioners to terms.

4. On the contrary, learned counsel for respondents supports the impugned orders and relies upon Supreme Court's decision in *Bhanu Kumar Jain v. Archana Kumar and Anr.*, (2005) 1 SCC 787 to submit that once the substantive appeal is decided, then the application under Order IX, Rule 13 of CPC does not lie and so, dismissal of this petition is sought.

5. Upon hearing and on perusal of impugned orders, material on record and the decisions cited, I find that there was an interim order of Appellate Court for hearing application under Order IX, Rule 13 of CPC first, but it is matter of record that petitioners' substantive appeal against the decree was dismissed way back in the year 2008 and the order in appeal against dismissal of above application, was passed in November, 2013. Reliance placed by petitioners' counsel upon decision in *Raghu Raj (supra)* is of no assistance as in the said decision, it was held that an appeal cannot be dismissed on merits in absence of counsel but it can be dismissed in default. In the instant case, the impugned order of 13th November, 2013 dismissing petitioners' appeal is in fact an order dismissing the appeal in default. In *Bhanu Kumar (Supra),* Supreme Court has held as under:-

> *"When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an application for setting aside the order in terms of Order 9 Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the trial court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9 Rule 13 of the Code a petition under Order 9 Rule 13 would not be maintainable. However, Explanation I appended to the said provision does not suggest that the converse is also true."*

6. Recently, Supreme Court in *Neerja Realtors Private Limited vs.*

Janglu (dead) through legal representative, (2018) 2 SCC 649 has reiterated that once a substantive appeal against a decree is dismissed, then the *ex parte* decree merges with the order of Appellate Court and so, an application under Order IX, Rule 13 of CPC would not be maintainable.

7. Applying the afore-noted dictum to the facts of the instant case, it is held that since petitioners' substantive appeal already stood dismissed way back in the year 2008 and the appeal against rejection of application under Order IX, Rule 13 of CPC was dismissed in the year 2013, therefore, rejection of petitioners' application under Order IX, Rule 13 of CPC is not required to be tested on merits in the appeal, as the said application was not maintainable due to dismissal of petitioners' substantive appeal against the *ex parte* decree.

8. In view of the aforesaid, impugned orders are not required to be interfered with. As such, this petition alongwith the pending application is accordingly dismissed.

(SUNIL GAUR)
JUDGE

OCTOBER 16, 2018
v