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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ RSA 281/2017 & C.M. No.44659/2017 (for stay).
SURINDER BHATIANI Appellant
Through: Mr. Shekhar Nanavaty, Adv.
versus
SOM NATH (DECEASED) THR LRS & ORS Respondents
Through: Ms. Chanchal Sharma, Adv. for R-3.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

% **06.08.2018**

1. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the order [dated 28th July, 2017 in RCA No.1/16 of the Court of Additional Senior Civil Judge (South-West), Dwarka Courts, Delhi] of dismissal of appeal preferred by the appellant against the order [dated 26th April, 2012 in M-126/09 of the Court of Civil Judge-01 (North), Delhi] of dismissal of an application under Order IX Rule 13 of the CPC filed by the appellant/plaintiff for setting aside the *ex parte* order dated 31st August, 2000 and the *ex parte* decree dated 4th November, 2003.
2. Though I was curious about the “*ex parte* decree” against a plaintiff, but a reading of the order dated 26th April, 2012 shows that the defendant no.3, in the suit filed by the appellant/plaintiff, had preferred a Counter Claim and in which a decree against the appellant/plaintiff was passed. As far as the suit filed by the appellant/plaintiff was concerned, the same was dismissed in default.

3. This appeal came up first before this Court on 8th December, 2017, when notice thereof was ordered to be issued and Trial Court record requisitioned. However, only the First Appellate Court record has been received.
4. The counsel for the respondent/defendant no.3 Jagdish Manocha, who had filed the Counter Claim, appears.
5. None appears for the respondents/defendants no.1&2.
6. The Court Master, on enquiry informs that the respondent no.1 has been served but the respondent no.2 has not been served.
7. The counsel for the respondent/defendant no.3/Counter Claimant contends that no substantial question of law arises.
8. I have however enquired from the counsel for the appellant/plaintiff, as to how this Second Appeal, filed invoking Section 100 read with Order XLI Rule 1 of the CPC, is maintainable.
9. The counsel for the appellant/plaintiff is clueless.
10. The counsel for the respondent/defendant no.3/Counter Claimant also has no idea.
11. A Second Appeal under Section 100 lies against a decree passed in appeal by any Court subordinate to this Court. The order dated 28th July, 2017 is not accompanied with any decree. The same should have cautioned the counsel for the appellant/plaintiff. Alas it did not.
12. The First Appeal, dismissed on 28th July, 2017, was preferred by the appellant/plaintiff not against the *ex parte* decree dated 4th November, 2003 but against the order, dated 26th April, 2012 of dismissal of the application under Order IX Rule 13 of the CPC, which is not a decree, for a First Appeal

under Section 96 of the CPC to lie thereagainst.

13. The First Appeal which was preferred against the dismissal of the application under Order IX Rule 13 of the CPC, must have been entertained in exercise of powers under Section 104 read with Order XLIII Rule 1(d) of the CPC.

14. Section 104(2) of the CPC provides, that no appeal shall lie from any order passed in appeal thereunder.

15. Thus, neither is the Second Appeal maintainable, being not against a decree, nor does a Second Appeal lie against the order of dismissal of an appeal against an order of dismissal of an application under Order IX Rule 13 of the CPC.

16. It is expected, that the counsels before filing any appeal, would study the law under which the appeal is maintainable.

17. The Registry also to be careful in future inasmuch as this appeal should not have been entertained.

18. Dismissed.

No costs.

RAJIV SAHAI ENDLAW, J

AUGUST 06, 2018

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