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

+ RSA 295/2017

ASHOK KUMAR MANDAL

..... Appellant

Through: Mr. Karanjeet Kumar and Mr. Firoj  
Khan, Advs.

versus

SUSHIL DEVI KATARIA & ANR

..... Respondents

Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW**

**ORDER**

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**30.07.2018**

1. This Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) has been preferred against the judgment [dated 16<sup>th</sup> September, 2017 in RCA No.5232/16 (25/16) CNR No.DLNW010082332016 of the Court of Additional District Judge-03, North-West District, Rohini Courts, Delhi] of dismissal of First Appeal under Section 96 read with Order XLI of the CPC preferred by the appellant against the (order dated 20<sup>th</sup> September, 2016 of the Civil Judge (North-West) in M. No.53286/2016).

2. This Second Appeal came up first before this Court on 19<sup>th</sup> December, 2017 when, without indicating the substantial question of law which arises therein notice thereof was ordered to be issued.

3. Though the report of service of both the respondents is that they have not been served but the counsel for the appellant has filed affidavit of service and on enquiry as to what is the substantial question of law which this appeal raises, commenced his arguments.

4. However a perusal of the file shows the order dated 20<sup>th</sup> September, 2016 of the Civil Judge to be an order of dismissal of an application under Order IX Rule 9 of the CPC filed by the appellant/plaintiff for restoration of the suit filed by the appellant/plaintiff which was dismissed in default of appearance of the appellant/plaintiff on 18<sup>th</sup> January, 2016.

5. I have enquired from the counsel for the appellant/plaintiff as to how the present Second Appeal lies.

6. The counsel for the appellant/plaintiff has no answer and seeks adjournment.

7. The counsel for the appellant/plaintiff on enquiry as to where is the decree of the First Appellate Court states that no decree has been prepared.

8. A Second Appeal lies against a decree and not against a judgment and the same should have cautioned the counsel for the appellant/plaintiff before preferring this appeal.

9. Not only so, the order dated 20<sup>th</sup> September, 2016 of the Civil Judge of dismissal of the application filed by the appellant/plaintiff under Order IX Rule 9 of the CPC also did not constitute a decree within the meaning of Section 2(2) of the CPC and the filing of the First Appeal under Section 96 read with Order XLI thereagainst also was misconceived.

10. Though the learned Additional District Judge acting as First Appellate Court also does not appear to have gone into the said aspect but I may mention that an appeal before the learned Additional District Judge against the order of dismissal of an application under Order IX Rule 9 of the CPC by the Civil Judge was otherwise appealable under Section 104 read with Order XLIII Rule 1(c) of the CPC which makes an

order under Rule 9 of the Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit appealable. However, Section 104(2) of the CPC bars any further appeal from an order passed in appeal thereunder.

11. Thus, not only is this appeal been given wrong nomenclature as a ‘Second Appeal’ but even otherwise it is not maintainable.

12. Dismissed.

13. A copy of this order be forwarded to the learned Additional District Judge who has passed the impugned judgment.

No costs.

**RAJIV SAHAI ENDLAW, J**

**JULY 30, 2018**

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