A **FIRM ISHARDAS DEVI CHAND & ANR.**

v.

R. B. PARKASH CHAND & ANR.

February 13, 1969

B [S. M. SIKRI, R. S. BACHAWAT AND K. S. HEGDE, JJ.]

Code of Civil Procedure, O. XXXIX r. 2 and O. XLIII r. 1—Order of trial court dismissing an application for temporary injunction on the ground that it did not satisfy the terms of O. XXXIX r. 2 was an order under that rule—It was appealable under O. XLIII r. 1.

The appellants who claimed to be tenants of the respondents in respect
C of certain premises in Amritsar brought a suit for a permanent injunction restraining the latter from taking possession of the said premises in execution of an eviction order obtained by the respondent against the appellant and another, as per Rent Controller's order dated February 22, 1967. They also filed a petition purporting to be under O. 39 r. 2 and s. 151 of the Code of Civil Procedure for grant of a temporary injunction till the disposal of the suit. The trial court, namely the sub-Judge, found that the appellants were sub-tenants and not tenants and that the liability to be
D ejected in execution of a valid order could not be said to be an 'injury' within O. 39, r. 2. On this view the trial court dismissed the application for temporary injunction. The appellants filed an appeal before the District Judge which was dismissed on the preliminary ground that no appeal lay. The High Court dismissed the revision filed by the appellants in *limine*. With special leave the appellants came to this Court.

HELD : (i) The order of the trial court was clearly appealable under
E O. XLIII r. 1 C.P.C. which provides *inter alia* for an appeal against an order under O. XXXIX r. 2. [679 D]

It was common ground that the appellants filed an application under O. XXXIX rr. 1 and 2 and s. 151 C.P.C. The learned Sub-Judge had to consider whether this application was competent or not competent under r. 2 of O. XXXIX. In deciding that no such application lay under O. XXXIX r. 2 on the ground that what the appellants were complaining
F of was not an injury within O. XXXIX r. 2 he was passing an order under O. XXXIX r. 2 itself. In appeal the appellants could contend that the learned Sub-Judge had misconstrued O. XXXIX r. 2 including the word 'injury'. [679 F]

The preliminary objection of the respondent before the learned District Judge that the order of the Sub-Judge was passed under s. 151 C.P.C. and not under O. XXXIX rr. 1 and 2 C.P.C. was not sound because in
G holding that O. XXXIX r. 2 did not apply the learned Sub-Judge was not exercising his inherent powers. [679 G-H]

Hemant Kumar v. *Ayodhya Prasad*, A.I.R. 1957 M.B. 95 and *Abdul Hamid Khan* v. *Tridip Kumar Chanda*, A.I.R. 1953 Ass. 104, referred to.

H (ii) On merits however the appeal had to be dismissed as there was not much to be said in favour of issuing a temporary injunction because the appellants had not made out a *prima facie* case. In the exercise of its powers under Art. 136 interference by this Court with the order of the district Judge would not be justified. [680 D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1709 of 1968. A

Appeal by special leave from the judgment and order dated May 22, 1968 of the Punjab and Haryana High Court in Civil Revision No. 422 of 1968.

Bishan Narain, B. Datta and *O. C. Mathur,* for the appellants. B

M. S. Gupta and *S. K. Dhingra,* for respondent No. 1.

The Judgment of the Court was delivered by

Sikri, J. This appeal by special leave arises out of the order dated July 20, 1967, of Sub-Judge, Amritsar, dismissing an application under O. XXXIX rr. 1 & 2, C.P.C., and s. 151, C.P.C., C filed by the appellants for grant of a temporary injunction till the disposal of the suit brought by the appellants. The appellants filed an appeal against that order to the District Judge, Amritsar, who upheld the preliminary objection of the respondents that no appeal lay against that order on the ground that the order was passed under s. 151, C.P.C., and not under O. XXXIX rr. 1 & 2. D The High Court dismissed the revision filed by the appellants *in limine.* The appellants having obtained special leave the matter is before us.

The relevant facts may be shortly stated. Firm Ishar Das Devi Chand and its two partners, Devi Chand and Manohar Lal, brought a suit for a permanent injunction restraining R. B. Parkash Chand, respondent before us, from taking possession of the E demised premises, namely, No. 1045/II-13, Katra Ahluwalia, Amritsar, in execution of an eviction order obtained by the respondent against the appellants and one Shri Ishar Das, as per Rent Controller's order dated Feb. 22, 1967. It appears that Ishar Das, partner of the firm called Tara Chand Ishar Das, had exe- F cuted a rent note, dated May 1, 1948, in favour of the respondent. On February 22, 1967, the Rent Controller passed an order of ejectment against the firm Tara Chand Ishar Das and Shri Ishar Das.

It appears that in the eviction application filed by the respondent the appellants had filed an application under s. 4 of the East G Punjab Urban Rent Restriction Act, 1949, which was dismissed. In that application an issue was raised as to whether any relationship of landlord and tenant existed between the appellants and the respondent.

It was contended before the learned Sub Judge that the res- H pondent had accepted payment of three cheques, one on March 13, 1963, for Rs. 1,175/-, second on April 2, 1964, for Rs. 1,875/- and the third cheque on June 17, 1965, for Rs. 1,500/-.

A According to the appellants, this acceptance of the rent made them tenants under the respondent.

The learned Sub Judge went into these facts and came to the conclusion that the appellants had not made out a *prima facie* case. According to the learned Sub-Judge, even if the payment had been received, as alleged by the appellants, then
B it would not mean that the landlord accepted the occupiers of the premises as his tenants. Following *Hemant Kumar* v. *Ayodhya Prasad*(1) and *Abdul Hamid Khan* v. *Tridip Kumar Chandra*(2) he held that the appellants were sub-tenants, and that the liability to be ejected in execution of a valid order could not be said to be an "injury" within O. XXXIX r. 2. The Trial Court thought
C that the appellants could have other efficacious remedies to obstruct possession under the provisions of Civil Procedure Code. According to the Trial Court, however, unless the ejectment order was set aside its execution could not be an "injury" as contemplated by law.

It seems to us that this order dated July 20, 1967 was clearly
D appealable under O. XLIII r. 1, C.P.C. Order XLIII *inter alia* provides :

> "O. XLIII r. 1. An appeal shall lie from the following orders under the provisions of section 104, namely, :
>
> E .....
>
> (r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX."

It is common ground that the appellants filed an application under O. XXXIX rr. 1 & 2, and s. 151, C.P.C. The learned Sub Judge had to consider whether this application was compe-
F tent or not competent under r. 2 of O. XXXIX. In deciding that no such application lay under O. XXXIX r. 2 on the ground that what the appellants were complaining of was not an injury within O. XXXIX r. 2 he was passing an order under O. XXXIX r. 2 itself. In appeal the appellants could contend that the learned Sub Judge had misconstrued O. XXXIX r. 2, including the word "injury".

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The preliminary objection of the respondent before the learned District Judge that the order dated July 20, 1967, of the Sub-Judge was passed under s. 151, C.P.C., and not under O. XXXIX rr. 1 & 2, C.P.C., is not sound because in holding that O. XXXIX r. 2 did not apply the learned Sub Judge was not exercising his inherent powers. What the learned District Judge seems to have
H done is to hold that the application for temporary injunction did not fall within O. XXXIX r. 2 and, therefore, no appeal lay. This

(1) A.I.R. 1957 M.B. 95. (2) A.I.R. 1953 Ass. 104.

reasoning is really on the merits of the case and not relevant to the preliminary objection raised by the respondent. A

We must, therefore, hold that the District Judge and the High Court erred in holding that no appeal lay against the order of the Trial Court, dated July 20, 1967.

Two courses are now open to us; one, that we should set aside the order of the District Judge and direct him to decide the appeal on the merits, and the other, that we should dispose of the matter here. We were informed by the learned counsel for the respondent that the ejectment order dated February 22, 1967, had been set aside and the application for temporary injunction had become infructuous. But the learned counsel for the appellants says that the High Court, in appeal, might restore that order, and the matter should be remitted to the District Judge. B C

It seems to us that in exercise of the powers under Art. 136 we should not interfere with the order of the District Judge. On the merits there is not much to be said in favour of issuing a temporary injunction because the appellants have not made out a *prima facie* case. The application of the appellants under s. 4 of the East Punjab Urban Rent Restriction Act stood dismissed and the order dismissing that application has not been challenged by the appellants up-to-date. In the proceedings the respondent had denied that there was any relationship of landlord and tenant existing between the appellants and the respondent. Further the learned Sub Judge, after holding that the appellants had been guilty of laches and delays, came to the conclusion that the balance of convenience was more in favour of the respondent than in favour of the appellants. The learned Sub Judge does not seem to have exercised his discretion capriciously or arbitrarily and no case for interference has been made out. D E F

In the result the appeal fails and is dismissed, but under the circumstances there will be no order as to costs.

G.C. *Appeal dismissed.*