Firm Ishar Das Devichand and Another

Vs

R. B. Prakash Chand and Another

Civil Appeal No. 1709 of 1968

(S.M. Sikri, R.S. Bachawat, K.S. Hegde JJ)

13.02.1969

JUDGMENT

SIKRI, J. -

1. This appeal by special leave arises out of the order, dated July 20, 1967, of Sub-Judge, Amritsar, dismissing an application under Order XXXIX, Rules 1 and 2, C.P.C. and Section 151, C.P.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 respondent that no appeal lay against that order on the ground that the order was passed under Section 151, C.P.C. and not under Order XXXIX, Rules 1 and 2. The High Court dismissed the revision filed by the appellants in limine. The appellants having obtained special leave the matter is before us.

2. 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 dismissed 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 February 22, 1967. It appears that Ishar Das, partner of the firm called Tara Chand Ishar Das, had executed 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.

3. It appears that in the eviction application filed by the respondent the appellants had filed an application under Section 4 of the East 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.

4. It was contended before the learned Sub-Judge that the respondent 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/-. According to the appellants, this acceptance of the rent made them tenants under the respondent.

5. The learned Sub-Judge went into these facts and came to the conclusion that the appellants had no made out a prima facie case. According to the learned Sub-Judge, even if the payment had been received, as alleged by the appellant, then it would not mean that the landlord accepted the occupiers of the premises as his tenants. Following Hemant Kumar v. Ayodhya Prasad (AIR 1957 MB 95) and Abdul Hamid Khan v. Tridip Kumar Chanda (AIR 1953 Ass 104) he held that the

appellants were sub-tenants, and that the liability to be rejected in execution of a valid order could not be said to be an "injury" within Order XXXIX, Rule 2. The Trial Court thought 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 appealable under Order XLIII, Rule 1, C.P.C., Order XLIII, inter alia provides :

> "Order XLIII, Rule 1. - An Appeal shall die from the following orders under the provisions of Section 104, namely :
>
> # X X X X##
>
> (r) an order under Rule 1, Rule 2, Rule 4 or Rule 10 of Order XXIX".

6. It is common ground that the appellants filed an application under Order XXXIX, Rules 1 and 2 and Section 151, C.P.C. The learned Sub-Judge had to consider whether this application was competent or not competent under Rule 2 of Order XXXIX. In deciding that no such application lay under Order XXXIX, Rule 2 on the ground that what the appellants were complaining of was not an injury within Order XXXIX, Rule 2, he was passing an order under Order XXXIX, Rule 2 itself. In appeal the appellants could contend that the learned Sub-Judge had misconstrued Order XXXIX, Rule 2, intending the word "injury".

7. 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 Section 151, C.P.C., and not under Order XXXIX, Rules 1 and 2, C.P.C. is not sound because in holding that Order XXXIX, Rule 2 did not apply the learned Sub-Judge was not exercising his inherent powers. What the learned District Judge seems to have done is to hold that the application for temporary injunction did not fall within Order XXXIX, Rule 2 and, therefore, no appeal lay. This reasoning is really on the merits of the case and not relevant to the preliminary objection raised by the respondent.

8. 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.

9. 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.

10. It seems to us that in exercise of the powers under Article 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 Section 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.

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

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