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the land, they have installed the structure and, therefore, the petitioners are not the persons aggrieved competent to maintain the writ petition. I am afraid, I cannot accede to this argument. It is the right of the petitioners to carry on trade that is being affected and if their contention that the structure is not a building be correct, the respondent will have no authority to interfere therewith. They can, therefore, legitimately claim to be the persons aggrieved and consequently entitled to ask for the relief.

In the result, the petition fails and is dismissed with no order as to costs.

Dulat, J.

S. S. DULAT, J.—I agree.

B. R. T.

APPELLATE CIVIL

Before Harbans Singh, J.

HARI KISHAN AND OTHERS,—*Appellants.*

versus

MST. GAINDI AND OTHERS,—*Respondents.*

Regular Second Appeal No. 274 of 1958.

1966.

February 2nd

Punjab Pre-emption Act (I of 1913) as amended by Punjab Pre-emption (Amendment)Act (X of 1960)—S. 31—Effect of, on pending suits and appeals—Suit of one rival pre-emptor decreed—Other rival pre-emptor filing appeal against decree but not the vendee—Amending Act taking away right of pre-emption of both the rival pre-emptors—Decree passed in favour of one of the pre-emptors—Whether has to be set aside—Code of Civil Procedure (Act V of 1908)—Order XLI Rule 33—Whether applicable.

Held, that the provisions of section 31 of the Punjab Pre-emption Act are retrospective and no decree can be passed which is inconsistent with the provisions of the Act. The Punjab Pre-emption (Amendment) Act, 1960, has taken away the right of pre-emption of both the rival pre-emptors and obviously any decree passed in favour of either of them would be inconsistent with the provisions of the Act. Even if the vendee has not filed any appeal against the decree the appellate

Court will set aside the decree in the appeal filed by the rival pre-emptor by having recourse to its powers under Order XLI Rule 33 of the Code of Civil Procedure, for the reason that an appeal is a rehearing of the suit and any change in law that takes place during the pendency of the appeal has to be taken into account while deciding the appeal.

Second Appeal from the decree of the Court of Shri Sant Ram Garg, District Judge, Sangrur (Camp Narnaul), dated the 18th day of December, 1957, affirming that of Shri Vishnu Dutt, Sub-Judge, 1st Class. Narnaul, dated the 13th October, 1957, granting the plaintiff a decree for possession by the land in suit by pre-emption on payment of Rs 1,265 to the vendors by 30th November, 1957, failing which her suit would stand dismissed and further ordering that in the event of the dismissal of her suit, the plainiffs of the other suit, Hari Kishan, Om Parkash and Jagdish Parshad were granted a decree for possession of the land in suit on payment of Rs 1,265 by 31st December, 1957 to the vendors against the defendants, failing which their suit would also stand dismissed and further ordering that in all events the parties would bear their own costs and further ordering that one-fifth of the sale price as already deposited by either of the two sets of plaintiffs could be adjusted while depositing the balance amount by that set of plaintiffs who had deposited that amount of one-fifth of the sale price.

RAM NIWAS SANGHHI, ADVOCATE, for the Appellants.

C. L. LAKHANPAL, ADVOCATE, for the Respondents.

JUDGMENT.

HARBANS SINGH, J.—Facts giving rise to this second appeal may briefly be stated as under :— Harbans Singh, J

By a sale-deed registered on 21st May, 1956, some 2 *bighas* and 17 *biswas* of land was sold by two brothers Amar Chand and Rameshwar Dayal for a sum of Rs. 1,265 to Murli and others. Two suits for possession by pre-emption were filed:—one by Mst. Gaindi claiming superior right of pre-emption as the mother of the vendors and the other by Hari Kishan and others claiming superior right as collaterals of vendors. Plaintiffs in both the suits impleaded each other in their respective suits. These suits were consolidated and by one judgment it was held that Mst. Gaindi had a superior right and as such she was

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granted a decree for possession by pre-emption on payment of Rs. 1,265 before 30th November, 1957 failing which her suit would stand dismissed and in the event of dismissal of her suit plaintiffs Hari Kishan, etc., were granted decree for possession of land in suit on payment of the same amount by 31st December, 1957, failing which their suit was also to stand dismissed. Hari Kishan, etc., went up in appeal to the Court of the District Judge against the decree granted in favour of Mst. Gaindi in the suit filed by her. That appeal was also dismissed and Hari Kishan and others filed this second appeal. In the present appeal, therefore, Hari Kishan etc., have challenged the finality of the decree for possession by pre-emption passed in favour of Mst. Gaindi vendees having been impleaded as respondents. This appeal was filed in 1958 and during the pendency of this appeal section 15 of the Pre-emption Act was amended by the Punjab Pre-emption (Amendment) Act, 1960. By section 4 of the amending act, section 15 of the parent Act was repealed and in its place was substituted a new section which omitted to confer a right of pre-emption in the case of persons of the category in which both Mst. Gaindi and Hari Kishan, etc., fall. The amending Act also inserted a new section 31 in the Parent Act which runs as follows:—

> "No Court shall pass a decree in a suit for pre-emption whether instituted before or after the commencement of the Punjab Pre-emption (Amendment) Act, 1960, which is inconsistent with the provisions of the said Act."

The interesting position that has arisen, therefore, is that, in view of the provisions of section 31 which are obviously retrospective, no decree can be passed by this Court which is inconsistent with the provisions of that Act. It is further clear that at present neither the appellant nor the respondent rival pre-emptor Mst. Gaindi have a right of pre-emption and any decree passed in favour of either of them, would be inconsistent with the provisions of the Act. There is, however, no appeal filed by the vendees seeking to set aside the decree passed against them in favour of Mst. Gaindi. On behalf of Mst. Gaindi, therefore, it was urged that in the absence of any appeal filed by Mst. Gaindi, the appeal filed by Hari Kishan should just be dismissed leaving the decree in favour of Mst. Gaindi intact. On the other hand it was urged on behalf of the

appellants that though in view of the change in law, the appellants cannot claim any decree in their favour, yet in view of the provisions of section 31, the decree already passed in favour of Mst, Gaindi cannot also be affirmed.

Harbans Singh, J.

It is well-settled that an appeal is a rehearing and any change in law that has taken place has to be taken into account. (See *Lachmeshwar Prasad* v. *Keshwar Lal* (1). Following the above-mentioned ruling Supreme Court in *Ram Sarup* v. *Munshi* (2), observed as follows:—

> "Considering the fact that the nature of an appeal under the Indian Procedural law as a rehearing and a court of appeal being not a Court of error merely, and the view expressed that when an appeal is filed the finality which attaches to the decree of the trial Court disappears, all these lines of reasoning point to the fact that even when an appellate Court dismisses an appeal it also is passing a decree." (see head-note f).

In view of the above, the appeal having been filed even by a rival pre-emptor challenging the decree passed in favour of Mst. Gaindi, the finality of that decree has disappeared and it cannot be said that the finality has disappeased only *qua* rival pre-emptor and not *qua* the vendees. The decree is one for possession by pre-emption and its finality is under challenge. If the appeal is accepted, the decree is liable to be set aside or modified and if the appeal is dismissed, the decree shall have to be confirmed. In either case this Court shall be passing a "decree." Admittedly the appeal filed by the rival pre-emports cannot be accepted because they have no right of pre-emption by virtue of the amended provisions of the Pre-emption Act. The appeal shall have to be dismissed. However, as a result of the dismissal of the appeal, this Court cannot affirm the decree in favour of Mst. Gaindi because of the provisions of Section 31. In order that the decree passed by this Court may conform to the provisions of the law as amended, recourse shall have to be had to the provisions of Order XLI, Rule 4 and Rule 33 of the

(1) A.I.R. 1941 F.C. 5.
(2) A.I.R. 1963 S.C. 553.

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Code of Civil Procedure. Order XLI, Rule 4 runs as follows:—

> "Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants as the case may be."

The argument of the learned counsel for the appellant was that both the rival pre-emptors as well as the vendees were co-defendants in the suit filed by Mst. Gaindi, out of which the present appeal has arisen. Both the vendees and the rival pre-emptors disputed the superior right or pre-emption of Mst. Gaindi and consequently an appeal filed by the rival pre-emptors challenging the right of pre-emption of Mst. Gaindi would endure for the benefit of the vendees as well. It is, however, not necessary to go into this question because Order XLI Rule 33 is wide enough to enable this Court to pass any decree that may be proper. Rule 33 runs as follows:—

> "The appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection."

According to this, therefore, the appellate Court has power to make such further or other decree or order as the case may require and this power may be exercised even in favour of any of the respondents although such respondents may not have filed any appeal or objection. The result is that this Court, in view of section 31 of the Pre-emption Act, cannot affirm the decree in favour of Mst. Gaindi. Consequently the decree passed against the

vendees who are respondents and have not filed any appeal, has to be set aside.

Reference on behalf of Mst. Gaindi, respondent, was made to a decision of Mr. Justice Mahajan, reported as *Thakar Singh* v. *Partap Singh and others* (3). That was also a suit for pre-emption by a collateral of the fifth degree in whose favour the trial Court had passed a decree. The vendee filed an appeal against that decree merely asking for an addition of a sum of Rs. 200 on account of compensation for improvements. During the pendency of the appeal aforesaid amendment had come into force with the result that the fifth degree collaterals had lost their right of pre-emption. The vendee appellant made an application to the Court to permit him to amend the grounds of appeal in view of the amendment in the law. This was disallowed and the appeal was dismissed because the vendee could not prove any improvement. In second appeal Mr. Justice Mahajan, held that "the order of the lower appellate Court could not be interfered with merely on the ground that the law on which pre-emption decree was passed has undergone a change. There has to be a proper appeal pending before the change in law can be given effect to and proper appeal will only be pending if the matter in which the change in law is sought to be given effect to is properly before the appellate Court.".

In the above-mentioned case the lower appellate Court had exercised its discretion and the learned Judge felt that exercise of that discretion should not be interfered with. In the second appeal there was no challenge to the decree as a whole. All that was asked for was an addition of Rs. 200. In the present case, the entire decree is under challenge though at the instance of one of the defendants, that is the rival pre-emptors, and furthermore, I feel that in view of the pronouncement of their Lordships of the Supreme Court that even the dismissal of the appeal would amount to passing of the decree, it is not possible to hold that this Court can legally affirm the decree in favour of Mst. Gaindi after dismissing this appeal because that would run counter to section 31.

(3) 1960 P.L.R. 732.

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For the reasons given above, while dismissing the appeal of the appellants, I further direct that the decree passed in favour of Mst. Gaindi is hereby set aside and the suit filed by Mst. Gaindi shall also stand dismissed. In the peculiar circumstances of the case there will be no order as to costs throughout.

It was stated at the bar by the learned counsel for the respondents that the vendees have since withdrawn the money and the possession is with Mst. Gaindi. The possession shall be obtained back by the vendees only on payment of the aforesaid amount and otherwise paying any compensation that may be due to them as provided under section 144 of Civil Procedure Code.

B. R. T.

APPELLATE CIVIL

Before S. S. Dulat and S. K. Kapur, JJ.

THE CENTRAL BANK OF INDIA LTD.,—*Appellant.*

versus

GOKAL CHAND,—*Respondent*

S.A.O. 182-D of 1965.

1966.

February 8th

Delhi Rent Control Act (LIX of 1958)—S. 38—Ambit and scope of—Orders that are appealable under the Act stated—Statutes giving right of appeal—Construction of.

Held, that whether or not an order is appealable under the Code of Civil Procedure does not have much bearing on the scope of section 38 of the Delhi Rent Control Act, 1958. The right of appeal having been conferred by section 38, it cannot be pertinent to enquire whether or not the order under consideration is appealable under the Code of Civil Procedure. The effect of section 37(2) of the said Act is to incorporate certain provisions of the Code of Civil Procedure into the Delhi Rent Control Act. If full effect is given to the provisions of section 37(2), it must be taken as if the procedural provisions of the Code of Civil Procedure as applicable to a Court of Small Causes are written with pen and ink in the Delhi Rent Control Act, 1958. It must, therefore, be held that subject to any rules that may be made under the Delhi Rent Control Act, 1958,