

written statement does not controvert this fact. In fact the relevant brochures of these Institutions have been perused by me today.

8. We now live in a scientifically advanced age. Medical science has had phenomenal progress in the Course for the last one decade. If with medical aid and particularly by provision of glasses or contact lenses the vision can be corrected to the standard prescribed, there is no earthly reason why the candidate with the vision so corrected should be denied admission to the Engineering Course. Instances are not lacking where students who are totally blind are being admitted to different Courses, of course not to the Engineering Courses, but they are allowed admission to various Arts Faculties right upto the Doctorate so that they acquire necessary qualification to harness their inherent qualities for the progress and well being of the Society and at the same time to earn their livelihood. Since no reason has been assigned by respondent No. 2 why a candidate with power glasses above 2.5 power should be denied admission to the Engineering Course when such power glasses correct the defective vision upto the required standard, I have no hesitation to hold that the provision to this effect in the Brochure which have been impugned herein is altogether arbitrary, unconstitutional and unsustainable. This part of the provision is, therefore, quashed.

9. Consequently, I allow both these writ petitions. I quash the order Annexure P/3 in Civil Writ Petition No. 8864 of 1987. I direct respondent No. 2 to allow both the petitioners to continue with their studies in the Engineering Course to which they were admitted by treating them medically fit.

The petitioners shall also get the costs of these writ petitions which are fixed at Rs. 500 in each writ petition.

P. C. G.

Before M. R. Agnihotri, J.
HARBANS SINGH,—Petitioner
versus

RAJINDER RAJAN AND ANOTHER,—Respondents.

Civil Revision No. 284 of 1988

February 23, 1988

Civil Procedure Code (V of 1908)—O. 43, Rl. 1(r)—Application for grant of ad interim injunction—Ex parte order on said application—Appeal against such order—Maintainability of such appeal.

Harbans Singh v. Rajinder Rajan and another (M. R. Agnihotri, J.)

Held, that an appeal against the *ex parte* order of the trial Court granting *ad-interim* injunction was maintainable under Order 43 Rule (r) of the Code of Civil Procedure, 1908 as it was infact an order under Rule 1 or Rule 2 of Order 39.

(Para 7)

Petition under section 115 C.P.C. for revision of the order of the Court of Shri T. S. Cheema, District Judge, Ludhiana, dated 11th January, 1988 reversing that of Shri H. P. S. Mahal, S.J.I.C. Ludhiana, dated 12th December, 1987 with no order as to costs and directing the parties to appear in the lower Court on 27th January, 1988.

N. C. Jain, Sr. Advocate (S. K. Vij, Advocate with him), for the Petitioner.

Hira Lal Sibal, Sr. Advocate (V. K. Jhanji, Advocate with him), for the Respondents.

JUDGMENT

M. R. Agnihotri, J.

1. Harbans Singh plaintiff (Petitioner in this revision petition) owns certain land situated in village Dakha, Tehsil and District Ludhiana, over which he has built a residential house as well as has planted a mango orchard. Respondent Rajinder Rajan proposes to instal a brick-kiln for the manufacture of bricks in the land belonging to Mal Singh, respondent No. 2 which is in the vicinity of the plaintiff's land. According to the plaintiff, the said defendant-respondents has already applied to the District Food and Supplies Controller, Ludhiana for the grant of necessary licence for installation of the brick-kiln.

2. Feeling aggrieved against the proposed installation of the brick-kiln, the plaintiff filed a suit in the Court of the Subordinate Judge 1st Class, Ludhiana on 12th December, 1987 for the grant of permanent injunction restraining Respondent No. 1 from installing the brick-kiln in the land of respondent No. 2. An application for the grant of temporary injunction against the said respondent was also submitted by the plaintiff stating therein that according to the statutory provisions contained in the Punjab Control of Bricks Supplies Order, 1972, no brick-kiln could be installed in the locality having residential houses and within a distance of 700 metres from mango orchards or mango plantation and 100 metres from a garden or nursery.

3. The learned Subordinate Judge by his order dated 12th December, 1987 appointed a Local Commissioner to visit the spot in order to give the exact picture about the existing nature of the property and also ordered that "the parties should maintain *status quo* with regard to the land in dispute till further order."

4. Since this was an *ex parte* order passed by the learned Subordinate Judge on 12th December, 1987 at the time of registering the suit, Rajinder Rajan defendant-respondent filed an appeal against the same before the District Judge, Ludhiana on 14th December, 1987. The learned District Judge sent for the lower court file as well as the file pertaining to the application for the grant of license from the office of the District Food and Supplies Controller, Ludhiana. After perusal of the same and after hearing both the parties, the learned District Judge was of the view that, "if the impugned *ex parte ad interim* order is allowed to stand, it shall result in stalling the proceedings before the District Food and Supplies Controller, the authority competent in law to go into the merits of appellant's application for grant of licence and pass appropriate orders thereon. The District Food and Supplies Controller, as required by the relevant provisions of the order issued under the Punjab Control of Bricks Supplies Order 1972, for the reasons to be recorded in writing, either refuse to grant the licence supplied for or grant it, subject to general or special instructions notified by the State Government, from time to time in this regard and after considering in particular whether the site of the kiln is or is not detrimental to the health of the general public or to the crops, gardens or nurseries, in the close proximity of the site of the kiln. Thus, I find, in the first instance, it is the authority competent to grant or refuse the licence which has to apply its mind to the whole gamut, relevant factors and circumstances. The stage for scrutinising or reviewing the order of the authority by the Court shall arrive only thereafter. Such stage, in the instant case, has not arrived, the same is decidedly premature and as such, the Court has no jurisdiction to intervene. The Court's intervention at this stage indeed tantamounts restraining a lawful authority from discharging functions, the law has enjoined on it." Taking the aforesaid view, the learned District Judge accepted the appeal and set aside the interim order passed by the learned Subordinate Judge on 12th December, 1987.

5. Mr. N. C. Jain, learned Senior Advocate, appearing on behalf of the plaintiff-petitioner, has challenged the order of the

Harbans Singh v. Rajinder Rajan and another (M. R. Agnihotri, J.)

learned District Judge on two grounds. Firstly, that against the *ex parte* order passed by the learned Subordinate Judge no appeal was maintainable before the District Judge. Hence, the impugned order passed by the learned District Judge in appeal was without jurisdiction. Secondly, that a *prima facie* case had been made out for the grant of an interim injunction restraining the defendant-respondent from installing the brick-kiln and therefore, the order passed by the learned Subordinate Judge should not have been set aside by the learned District Judge in appeal. According to the learned counsel, the order passed by the learned Subordinate Judge was based on the report of the Halqa Patwari dated 3rd December, 1987, according to which 66 mango trees were standing, besides the wheat crop sown at a distance of 2 Killas from the house and tubewell of the plaintiff-petitioner. Therefore, according to the learned counsel if "mango orchards" stood planted, no brick-kiln could be installed within 100 metres from the garden or 700 metres from the mango orchard.

6. Elaborating his first contention, Mr. Jain has referred to the provisions of Order 39, Rules 3 and 4 of the Code of Civil Procedure. The crux of the argument advanced is that in a case where the *ex parte* injunction has been granted by Court under Order 39, Rule 3, the remedy to the defendant is provided in Rule 4 *ibid* as the interim order for an injunction can be discharged, varied or set aside by that Court itself on an application made thereto by a party dissatisfied by such an order. Taking the argument further, the learned counsel contends that under Order 43, Rule 1, clause (r), no appeal shall lie against an Order passed under Order 39, Rule 3 as appeal has been provided only against an order under Rule 1, Rule 2, Rule 2A, Rule 4 or Rule 10 of Order 39. In support of his submission, reliance has been placed by the learned counsel on the judgments reported as *Abdul Shukoor Sahib v. Umachander and others* (1) *M/s Parijatha and another v. Kamalaksha Nayak and others*, (2) and *Vasant Diwakar Patrikar and others v. Union of India and others*, (3).

7. Meeting the aforesaid contention, Mr. Hira Lal Sibal, learned Senior Advocate, appearing on behalf of the respondents has placed reliance on the Single Bench judgment of this Court

(1) AIR 1976 Mad. 350

(2) AIR 1982 Karnatka 105

(3) AIR 1983 M.P. 129.

reported as *Iqbal Singh and others v. Chanan Singh and others*, (4) in which R. S. Narula, J., as his Lordship then was, had taken the view that appeal against the *ex parte* order of the trial court was maintainable under Order 43, Rule 1 (r) of the Code of Civil Procedure as it was in fact an order under Rule 1 or Rule 2 of Order 39. To the same effect is the view taken by various other High Courts in their judgments reported as *Akmal Ali and others v. State of Assam and others*, (5) *Raja Ramakaran v. B. Ramulu*, (6) *Patel Jasmat Sangaji Padalia v. Gujarat Electricity Board, Baroda and others*, (7) *E. Mangamma v. A. Muniswamy Naidu*, (8) *In Re: Sankar Kumar Ghosh*, (9) and *Sayam Ranjan Bhowmik v. Tripura Public Service Commission*, (10).

8. Being in respectful agreement with, and feeling bound by the decision of this Court in, *Iqbal Singh's case* (supra), I hold that the appeal against the order of the learned Subordinate Judge was certainly maintainable before the District Judge. Thus, the first contention of the learned counsel stands repelled.

9. Refuting the second contention, Mr. Sibal, learned counsel for the respondents, vehemently contended that the report of the Halqa Patwari on which reliance had been placed by the plaintiff-petitioner, did not represent the correct factual position, inasmuch as the mango plants referred to in the report had only been planted hardly a couple of months back. However, I do not want to express any opinion whatsoever about the merits of the case at this stage. Suffice to say, that I have not found any legal infirmity in the order passed by the learned District Judge, nor do I consider that the discretion has been exercised in an illegal or irregular manner. Thus, the second contention also fails.

10. Consequently, the revision petition is dismissed with no order as to costs.

S.C.K.

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- (4) AIR 1966 Pb. 165.
 - (5) AIR 1984 Gauhati 86 (F.B.)
 - (6) AIR 1982 A.P. 256.
 - (7) AIR 1982 Guja, 264.
 - (8) AIR 1983 A.P. 128.
 - (9) AIR 1983 Cal. 250
 - (10) AIR 1983 Gauhati 46.