

says that the share itself belonged to the assessee and by the deed (Exhibit B), the assessee merely agreed with certain other persons to divide the profit from that share among ten persons including himself. Mr. Bajaj, on the other hand, contends that the true meaning of the deed (Exhibit B) is that the share itself was the property of the ten persons named in that document. The deed (Exhibit B), in my opinion, says clearly that the persons named there were the owners of that share and if that is correct, then the income from the share must be taken to be the income of not only the assessee but of all the ten persons in proportion to the shares mentioned in the deed. I thus find myself of the same opinion, and if I may say so for the same reasons, as mentioned by the Bombay High Court, in *Ratilal B. Daftari's case*. On the assumption, therefore, that the deed (Exhibit B), dated the 30th March, 1951, is genuine, I would, in answer to the question posed by the Income-tax Appellate Tribunal, say that on the facts of the case, the entire sum of Rs. 1,34,944 cannot be included in the computation of the assessee's total income but only 15/47.25 of it. The assessee will get his costs of the reference assessed at Rs. 250.

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SHAMSHER BAHADUR, J.—I agree.

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B.R.T.

REVISIONAL CIVIL

Before R. S. Narula, J.

IQBAL SINGH AND OTHERS.—Petitioners.

versus

CHANAN SINGH AND OTHERS.—Respondents.

Civil Revision No. 639 of 1965.

Code of Civil Procedure (V of 1908)—Order 43, Rule 1(r) and Order 39, Rules 1 to 3—Application for temporary injunction—Order declining to pass any order under Rule 1 or 2 of Order 39 and merely issuing notice of the application to defendants—Whether appealable.

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Held, that the order granting an injunction, whether *ex parte* or after hearing the parties which falls within the scope of rule 1 or 2 of Order 39 of the Code of Civil Procedure, 1908, is appealable under clause (r) of rule 1 of Order 43 of the Code irrespective of whether a notice of the application is also directed to issue to the defendants or not. But an order declining to pass any order under rule 1 or rule 2 of Order 39 of the Code and merely issuing a notice of the application for temporary injunction to the defendant is not an order under rule 1 or rule 2 of Order

39 and is therefore, not appealable under clause (r) of rule 1 of Order 43 of the Code. An order declining to pass an *ex parte* temporary injunction is an order under rule 3. The exceptional case in which an *ex parte* injunction can be granted before complying with the said restriction is contained in that rule. In the circumstances enumerated in that rule the bar of rule 3 is taken away. The temporary injunction can then be issued under rule 1 or 2 without complying with the provisions regarding notice contained in rule 3. Rule 3 has been excluded from the array of appealable orders. To hold that an *ex parte* order permitted under rule 3 of Order 39 is appealable would amount to adding rule 3 to clause 'r' of Rule 1 of Order 43 of the Code. There is no warrant in law for adopting such an extraordinary course. Right of appeal is the creation of a statute and there is nothing unfair and unjust in no appeal being provided against an *ex parte* order refusing to pass an order of restraint without hearing the other side. Unless an injunction is either granted or refused under rules 1, 2 or 4 of Order 39, no appeal lies against such an order.

Petition under Section 115 of the Code of Civil Procedure for revision of the order of Shri B. S. Yadav, Senior Sub-Judge, with Enhanced Appellate Powers, Karnal, dated the 7th May, 1965, reversing that of Shri V. K. Kaushal, Sub-Judge, Ist Class, Kaithal, dated the 24th December, 1964, and granting an ad interim injunction to the plaintiffs as prayed for subject to the condition that the plaintiff-appellants deposit Rs. 2,000 in cash in the trial Court within one month from the date of the order, failing which the injunction order shall stand vacated and leaving the parties to bear their own costs.

P. S. JAIN AND NARESH CHANDER JAIN, ADVOCATES, for the Petitioner.

RAM RANG, ADVOCATE, for the Respondent.

JUDGMENT

Narula, J.

NARULA, J.—The only question arising in this revision petition is whether an appeal under clause (r) of rule 1 of Order 43 of the Code of Civil Procedure lies or not against an order declining to grant an *ex parte* temporary injunction on an application under Order 39, rule 1 or rule 2 of the Code. It is needless to go into the detailed facts of the case for deciding the above question. In December, 1964, Chanan Singh, etc., respondents, who were the tenants, filed a suit for a permanent injunction restraining Iqbal Singh and others, the landlords, from interfering with the possession of the tenants in the land in dispute under an order of ejectment, which had been obtained by the landlords against the tenants from the Court of the Revenue

Assistant concerned or otherwise, as they claimed to be the lessees in occupation of the land. Alongwith the petition of plaint, they filed an application for a temporary injunction *pendente lite*. The application does not show under what provision of law it was made, but I have read the same and it is obvious that the temporary injunction was prayed for under rule 2 of Order 39 of the Code. This application, dated 23rd December, 1964, came up before the trial Court on 24th December, 1964, and after hearing the counsel for the plaintiffs-respondents, the Court of Shri V. K. Kaushal, Subordinate Judge, First Class, Kaithal, passed the following order on it:—

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“No ground for *ex parte* interim stay. Notice be given for 2nd January, 1965.”

Though the word used in the above order is ‘stay’, I will have to take it that what the learned Subordinate Judge really declined was an *ex parte* temporary injunction, as there was no question of his staying any proceedings before the Revenue Assistant.

The tenants-plaintiffs preferred an appeal against the abovesaid order of the trial Court in so far as it declined to grant them *ex-parte* relief. That appeal was accepted by the Court of Shri B. S. Yadav, Senior Subordinate Judge, Karnal, on 7th May, 1965. In this revision petition filed by the landlords, it has been urged by Shri Pritam Singh Jain, the learned counsel appearing for them, that the appeal before the Senior Subordinate Judge, Karnal, was not competent and the appellate order should be set aside and quashed by me on that solitary ground.

Order 43, rule 1, clause (r) reads as follows—

“ORDER 43

1. An appeal shall lie from the following orders under the provisions of section 104, namely :—

* * * * *

(r) an order under rule 1, rule 2, rule 4 or rule 10 of Order XXXIX;

* * * * *

It is admitted on both sides that if the order of the Subordinate Judge, First Class, Kaithal, dated 24th December,

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1964, refusing to grant *ex parte* injunction fell within the scope of rule 2 of Order 39 of the Code, the appeal before the learned Senior Subordinate Judge was competent. There is equally no dispute about the fact that if the order of the trial Court, dated 24th December, 1964, does not fall within the scope of rule 2 of Order 39 of the Code, the appeal was wholly incompetent and the order of the Senior Subordinate Judge under revision has to be set aside as being without jurisdiction.

The scheme of rules 1, 2 and 3 of Order 39 of the Code is this. In the circumstances enumerated in rule 1 of Order 39 of the Code, the Court under that provision of law has three courses open to it; it may dismiss an application; it may grant an application; or it may merely give notice of the same to the defendants. Similar is the case under rule 2 of Order 39 of the Code. But on the powers vested in a civil Court under rules 1 and 2 of the Code, is superimposed a restriction by rule 3. The said restriction is applicable to all cases except those for which an exception is incorporated in that rule itself. Rule 3 of Order 39 reads as follows:—

“3. The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.”

The above rule makes it abundantly clear that no Court can pass an order granting an injunction either under rule 1 or rule 2 of Order 39 without first directing notice of the application to be given to the opposite party. The only exception to that rule provided by the Code is where it appears to the Court concerned that the object of granting the injunction would be defeated by the delay in serving the defendants with a notice of the application. There is no doubt that an order, whether granting or declining to grant an injunction under Order 39, rule 1 or 2, is appealable and it makes no difference whether at the time of granting an injunction a notice of the application is also issued to the defendants or not. But there is a third contingency. This is where the Court declines to pass any order at all on the application under rule 1 or 2

of Order 39 and merely issues a notice of the application to the defendants. It may do so by passing an order to the effect that notice of the application shall issue to the defendants or it may do so by adding to the order for notice, the further clarification to the effect that no *ex parte* order is being made. The last intention may also be expressed by the words that the '*ex parte injunction* is declined'. In my opinion the order granting an injunction whether *ex parte* or after hearing the parties, which falls within the scope of rule 1 or 2 of Order 39 of the Code, shall be appealable under clause (r) of rule 1 of Order 43 of the Code irrespective of whether a notice of the application is also directed to issue to the defendants or not. But an order declining to pass any order under rule 1 or rule 2 of Order 39 of the Code and merely issuing a notice of the application for temporary injunction to the defendants does not appear to be an order under rule 1 or rule 2 of Order 39 and would not, therefore, be appealable under clause (r) of rule 1 of Order 43 of the Code

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The learned counsel for the petitioners has firstly relied on a judgment of the Madras High Court in *S. D. Annamalai Desikar v. M. R. Govinda Rao* (1). This judgment does not render any assistance to the petitioners, as the only order which had been passed by the Subordinate Judge in that case was of issuing a notice as required by rule 3 of Order 39 of the Code. There was no order at all, even declining an *ex parte* injunction, passed in that case and it could not possibly have been argued that any order under rule 1 or 2 of Order 39 of the Code had been passed. In these circumstances, it was held that no appeal against an order merely issuing a notice lies. There is, however, force in the contention of the learned counsel for the petitioners based on the judgment of the Allahabad High Court in *H. Bevis and Company, Kanpur v. Ram Behari and others* (2). In that case, an application under Order 39, rule 1 of the Code had been filed by the plaintiff. At the *ex parte* stage, the following order was passed by the trial Court on that application:—

“In this case intricate questions of law are involved
and I cannot issue even *ex parte* injunction off

(1) A.I.R. 1924 Mad. 857.

(2) A.I.R. 1951 All. 8.

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hand. Both the parties are to be heard on the date to be fixed for hearing of injunction application. The applicant wants an injunction against the Government's award. Order rejected."

The appeal against the above said order was preferred under Order 43, rule 1 (r) of the Code to the Allahabad High Court. It came up before a Division Bench of that Court consisting of Mushtaq Ahmad and Desai, JJ. The learned Judges differed on the question whether the appeal was competent or not. Mushtaq Ahmad, J., expressed an opinion to the effect that the order was appealable. His opinion in this respect was couched in the following words—

"A preliminary objection was taken by the learned counsel for the respondents that the order, not being a final order on the application for temporary injunction but only a preliminary order refusing to issue an *ad interim* injunction, was not appealable under Order 43, rule 1(r) of the Code. Now Order 39, rule 1 of the Code allows the Court in which the suit is filed to 'grant a temporary injunction.....until the disposal of the suit or until further order', and in rule 3 of that Order it is provided that the Court shall direct notice of the application to be given to the opposite party, except where it appears that the object of granting the injunction would be defeated by the delay. That is to say, it may not issue notice to the opposite party, where there is a danger of this object being lost, and issues an injunction, of course *ad interim*, straight away. Such an order, in my opinion, would be covered by the words 'until further order', with which rule 1 of Order 39 concludes. It was argued that an order of this character could not be conceived to be one on the application for temporary injunction. Where an application purporting to be for such injunction is filed, there are three alternative orders that may possibly be made by the Court on that application. Firstly, it may be rejected forthwith, secondly, its final disposal may be postponed until after the opposite party has been heard, no

ad interim injunction being granted, and lastly, an order granting an *ad interim* injunction, and then, after the Court has heard the opposite party, disposing of the application finally. In all these cases, it would be an order essentially on the application for temporary injunction, there being no other application at the time for that purpose. If the order is to take effect not for the period of the pendency of the suit, that is to say, to use the words of rule 1, Order 39, not 'until the disposal of the suit', it may take effect only 'until further orders' if it is one only for an *ad interim* injunction, having the effect of a stay order. In all these cases, it would be an order under rule 1, Order 39 and not outside that rule. This being so, again in all these cases, it would be appealable under Order 43, rule 1(r) of the Code. It was contended by the learned counsel for the respondents that it was only the final order on an application for temporary injunction, that was appealable and not an order allowing or refusing an *ad interim* injunction. This necessarily meant that, where a Court, howsoever urgent a matter may be from the point of view of the plaintiff, once took a fancy that there was no urgency, and refused to issue an *ad interim* injunction, that order was final, and no higher Court could pretend to touch it, although admittedly the same Court could, in appeal, reverse the order, if it was one finally disposing of the application. I see no juristic basis for such a discrimination, nor any legal explanation for such a policy underlying the law. If the High Court had an appellate jurisdiction to consider the merits of a final order on an application made for temporary injunction before a Civil Judge, it would, by parity of reasoning, have a similar jurisdiction in respect of an order of a similar character, which is to take effect not for the period of the pendency of this suit but for a smaller duration. Any other view, I am inclined to think, would lead to a highly anomalous situation; granting jurisdiction to the appellate Court in one respect and denying it altogether in the other although both

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may relate to a common subject. I, therefore, think that the order passed by the Court below is appealable to this Court."

The words 'until further orders' used in rule 1 of Order 39 do not appear in rule 2 of that order. I think that it is inconceivable that an *ex parte* order under rule 1 is appealable, but one under rule 2 is not. Rule 1(r) of Order 43 draws no distinction of any kind between those two sets of cases. Regarding the possible hardship in some cases, it is for the legislature or the other appropriate authorities to redress the same. So long as the language of the relevant rule is clear and unambiguous, it is neither possible nor proper to stretch the language of the rules in question to relieve against possible hardship. Desai, J., on the other hand, held in the above-said Allahabad case that the order in question was not appealable. The learned Judge observed:—

"The trial court has expressly stated that on account of intricate questions of law being involved, it would not grant *ex parte* injunction and that it would hear the opposite party on the date to be fixed for hearing the injunction application. This means that it has elected to follow the normal procedure and far from disposing of the application by refusing it, has kept it pending and ordered a notice of it to be given to the opposite party. Such an order is not an order passed under rule 1 or rule 2, and no appeal can lie from it. An appeal can lie only when it has refused to pass an order under rule 1 or rule 2. Refusing to grant *ex parte* injunction does not amount to refusing to grant it altogether. If the trial Court had granted *ex parte* injunction, the opposite party would have been entitled to appeal from it, because, as I stated earlier, an *ex parte* injunction is still an injunction under rules 1 and 2, and does not require to be followed up by another injunction after hearing the opposite party. But if *ex parte* injunction is refused, the applicant has no remedy by way of an appeal. I am not concerned with the reason why the Legislature has thought fit not to provide a remedy; I am concerned with the fact that it has not done so. Rules 1 and 2

are subject to rule 3 which lays down the procedure and so long as that procedure is followed and final orders are not passed on the application, it cannot possibly be said that an order is passed under either of the rules. The words, 'until further orders' in rule 1, have no bearing on the point under discussion; they only mean that the court has full liberty over the duration of temporary injunction. It can grant injunction either for the whole duration of the suit or upto a certain date. I have already said that if injunction is granted, it will be an injunction granted under rules 1 and 2 regardless of whether it is *ex parte* or not."

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On account of difference of opinion between the two learned Judges, they framed three questions, out of which question No. 1 is reproduced below, and directed that the questions may be answered by a third learned Judge—

"Is an order refusing to issue an *ad interim* injunction as allowed by rule 3 of Order 39, Civil Procedure Code, appealable?"

Agarwala, J., to whom the matter went to resolve the difference of opinion, held that 'when the Court refuses to grant an *ex parte* injunction and issues notice to the other side of the application for injunction, it has passed no order under rule 1 or rule 2, and, therefore, no appeal can lie from such an order'. While holding to the above effect the learned Judge made it clear that if an *ex parte* injunction is granted under either of the above-said two rules, then an appeal would lie even if a notice is also issued to the defendants. I am in respectful agreement with the view of Desai, J. and of Agarwala, J., expressed in the above-said case and I regret that I have not been able to see eye to eye with the view of Mushtaq Ahmad, J. A mere reading of the three rules in question makes it clear that rule 3 bars the passing of an order under rules 1 and 2 without notice to the defendants. An order declining to pass an *ex parte* temporary injunction is an order under rule 3. The exceptional case in which an *ex parte* injunction can be granted before complying with the said restriction is contained in that rule. In the circumstances enumerated in that rule the bar of rule 3 is taken away. The temporary injunction can then be issued under

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rule 1 or 2 without complying with the provisions regarding notice contained in rule 3. Rule 3 has been excluded from the array of appealable orders. To hold that an *ex parte* order permitted under rule 3 of Order 39 is appealable would amount to adding rule 3 to clause 'r' of Rule 1 of Order 43 of the Code. There is no warrant in law for adopting such an extraordinary course. Right of appeal is the creation of a statute and there is nothing unfair and unjust in no appeal being provided against an *ex parte* order refusing to pass an order of restraint without hearing the other side. Unless an injunction is either granted or refused under rules 1, 2 or 4 of Order 39, no appeal lies against such an order.

Shri Ram Rang, the learned counsel appearing for the plaintiffs-respondents, has urged that Order 43, rule 1 (r) does not at all distinguish between an order granting a temporary injunction and an order declining to grant one. He, therefore, contends that whenever a civil Court passes an order either granting or declining to grant an injunction, whether *ex parte* or not and whether with or without notice to the other side, the order must fall under rule 1 or rule 2 of Order 39 of the Code and no order granting or declining to grant an injunction can be passed under rule 3 of Order 39 independently of rule 1 or 2. Shri Ram Rang further contends that the intention of clause (r) of rule 1 of Order 43 is that whenever a Court passes an order granting or declining to grant an injunction, a right of appeal is provided to the aggrieved party. He has relied in this connection on a large number of cases. The first case is *Kamal Tobacco Company and others v. A. G. Hajee A. Rahim* (3). This was not a case where *ex parte* injunction had been declined. On the contrary, an *ex parte* injunction had been granted and it was held that the order was appealable. Reliance has next been placed on a judgment of Agarwala, J., in *L. D. Meston School Society v. Kashi Nath Misra* (4). This judgment was given by the learned Judge only nine days before his opinion expressed in the earlier case cited by Shri Pitam Singh Jain on a difference of opinion between the two other learned Judges was given. The reasoning of both the judgments of the learned Judge is the same and there is no inconsistency between them. In the case of *L. D. Meston School Society*, the *ex parte* temporary injunction had

(3) A.I.R., 1937 Rangoon 150.

(4) A.I.R. 1951 All. 558.

been granted and it was held by the learned Judge that whenever a Court passes an *ex parte* order of injunction, it is to be construed as an order passed under rule 1 or rule 2 and, as such, an appeal lies under Order 43, rule 1 (r) of the Code. There is no quarrel with that proposition. The learned Judge had held to the same effect in the other case also. It cannot be argued that an order declining to grant an *ex parte* injunction is 'an order of injunction'. In the last case cited by Shri Ram Rang, that is *United Club, Nowgong v. Nowgong Football Association of Nowgong and others* (5), it was held that merely because a notice had been issued while granting an *ex parte* injunction, it does not follow that the order was not under rule 1 or rule 2 of Order 39 of the Code. The judgment in that case does not offend against the reasoning denying the right of an appeal against an order refusing *ex parte* injunction. I asked the learned counsel for the plaintiffs-respondents if he could cite a single case in which an order declining the grant of an *ex parte* temporary injunction, while issuing a notice of an application for a temporary injunction, had been held to be appealable under Order 43, rule 1 (r) of the Code. The answer was in the negative.

I, therefore, hold that the appeal filed by the plaintiffs-Respondents before the Learned Senior Subordinate Judge, Karnal, against the order of the trial Court, dated 24th December, 1964, was not competent and, therefore, the order under revision passed by the Senior Subordinate Judge, Karnal, on 7th May, 1965, is wholly without jurisdiction and cannot be sustained.

This revision petition is accordingly accepted and the order under revision is set aside. The trial Court will now dispose of the application for temporary injunction after hearing both the sides in pursuance of its order, dated 24th December, 1964. Nothing contained in this order will be deemed to indicate in any manner as to what should be the decision on the application for temporary injunction on merits. In the peculiar circumstances of the case, the parties are left to bear their own costs of the proceedings before me.

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