* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 26.02.2021
Date of decision: 22.04.2021

\+ CM(M) 558/2020 & CM APPL. 28639/2020
BATA INDIA LIMITED ..... Petitioner
Through: Mr.Sanjeev Sindhwani, Sr.Adv. with Mr.T.K.Ganjoo, Adv.

versus

SMT. SARLA SHARMA (SINCE DECEASED) THROUGH LRS AND ORS ..... Respondents
Through: Mr.Sandeep Sethi, Sr. Adv. with Mr.Asif, Adv. for R-3, R-4 & R-5.
Mr.Praveen Suri, Adv. for R-1, R-2, R-6, R-7 & R-8.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA

1. This petition has been filed by the petitioner challenging the judgment dated 15.10.2020 passed by the learned Rent Control Tribunal, West District, Tis Hazari Courts, New Delhi in the Appeal, being RCT No. 36 of 2016 titled ***Bata India Ltd.* v. *Smt. Sarla Sharma & Ors.***, holding that an appeal under Section 38 of the Delhi Rent Control Act, 1958 (hereinafter referred to as 'the Act') challenging an order of dismissal of an application under Order IX Rule 13 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') in an eviction petition to which Section 25B of the Act is applicable, is not maintainable.

2. The brief background of the facts, before adverting to the question of law raised with respect to the maintainability of the appeal, is as under:

a) An Eviction Petition, being E. No. 195 of 2008, titled ***Smt. Sarla Sharma* v. *M/s Bata India*** was filed by the respondent under Section 14(1)(e) of the Act.

b) On 23.12.2009, an order of eviction was passed *ex parte* in the abovementioned Eviction Petition against the petitioner and in favour of the respondent.

c) The petitioner filed an application under Order IX Rule 13 of the Code praying for setting aside of the eviction order passed *ex parte*.

d) After deliberating over the abovementioned application of the petitioner, the learned Additional Rent Controller, vide order dated 03.06.2011, passed the following direction:

> *"From the perusal of the documents filed on record it is not clear that who was in the employment of the respondent/applicant at the relevant period of service nor the said fact has been disclosed in the entire application that who was the store Manager or the competent person to receive the summons during that relevant period except the certificate issued by one Mr. AK. Dutta without having any seal wherein it has been mentioned that Mr. B. Kapoor and Mr. Brij Bhushan both salesmen were employed at the branch of the applicant in the suit premises without filing of details of date of their employment or any other document showing their transfer/posting with the respondent at the suit premises. However, since the respondent/applicant denied the service,*

therefore, considering the allegations raised on behalf of the respondent/applicant is being given liberty to lead evidence on the point of service but subject to deposit of the occupation charges at a rate of Rs. 25,000/- per month in view of the judgment of Hon'ble Supreme Court in S.L.P. (C) no. 6319 of 2007, titled as Mohammand Ahmed & Anr. Vs. Atma Ram Chauhan & Ors. reported in 179 (2011) DLT 532 from the month of July 2010 i.e. after expiry of statutory period as provided U/s. 14 (7) of D.R.C. Act upto the month of June 2011 within one month and subject to deposit of the further occupation charges at the said rate from the month of July 2011 on or before the 15th of each English Calender month during the pendency of the present case as the premises is situated in Chandni Chowk area and is consisting of more than about 800 sq. ft. as stated during the course of arguments. It is made clear that the amount so deposited will not be allowed to be withdrawn during the pendency of the present application and in case respondent fails to succeed said amount will be payable to the petitioner without prejudice to his rights and contention and if the applicant will succeed, he will be entitled to withdraw the said amount.

Application is disposed off accordingly. It is further made clear that if applicant fails to comply the condition imposed, the application will be deemed to have been dismissed."

(Emphasis supplied)

e) By a subsequent order dated 04.02.2012, the learned Additional Rent Controller was pleased to direct the release of the amount deposited by the petitioner to the respondent subject to a condition that in case the petitioner succeeds, the amount shall be returned by the respondent.

f) Thereafter, by an order dated 03.01.2013 passed by the learned Additional Rent Controller, the order dated 03.06.2011 was

further modified, directing the petitioner to deposit the user and occupation charges once in three months before the 15th of the next month in which the charges for the last month become due.

g) The application under Order IX Rule 13 of the Code, after recording of evidence, was set down for final arguments. At this stage, the respondent filed an application for issuance of warrants of possession alleging therein that as the petitioner had failed to comply with the condition of deposit in terms of the order dated 03.06.2011, the application filed by the petitioner automatically stood dismissed in terms of the said order itself.

h) The said application filed by the respondent was allowed by the learned Additional Rent Controller vide order dated 29.11.2013. It is important to mention here itself that the merit of this order is not in question in the present petition as only the question of law of the maintainability of an appeal against such order arises for consideration in the present petition.

i) The petitioner thereafter, filed an application seeking recall of the order dated 29.11.2013. The said application was also dismissed by the learned Additional Rent Controller vide order dated 10.03.2014 passed in Ex. No. 34 of 2010. The merit of this order is also not in question before this Court in the present petition.

j) Subsequently, the petitioner filed an Appeal under Section 38 of the Act, being RCT No. 36 of 2016, challenging the orders dated 29.11.2013 and 10.03.2014 before the learned Rent Control Tribunal.

k) Vide order dated 16.04.2014, the learned Rent Control Tribunal was pleased to stay the operation of the eviction order dated 23.12.2009.

l) By the Impugned Order, however, the learned Rent Control Tribunal has dismissed the appeal holding the same to be not maintainable.

3. At the outset, it is noted that the learned Rent Control Tribunal has dismissed the appeal filed by the petitioner only on the question of its maintainability and has expressly stated that it has not considered the merits of the submissions made by the parties on the factual dispute between them. In the present petition as well, the learned counsels for the parties have addressed their arguments before this Court only on the issue of maintainability of the appeal and have not advanced any submissions on the merits of the factual disputes between the parties or on the merit of the orders passed by the learned Additional Rent Controller. This Court shall, therefore, confine its discussion only on the maintainability of the appeal before the learned Rent Control Tribunal, without making any comment on the merit of the factual dispute between the parties.

4. The question of law which arises for consideration before this Court is as follows:

> *Whether an appeal under Section 38 of the Act is maintainable against an order dismissing an application under Order IX Rule 13 of the Code in an Eviction Petition to which the procedure prescribed in Section 25B of the Act*

applies? OR Whether the only remedy available to an aggrieved party is in the form of a petition under Sub-section (8) of Section 25B of the Act before this Court?

5. To answer the above question of law, the relevant provisions of the Code and the Act need consideration.

6. Chapter IIIA of the Act contains provisions for the summary trial of the applications seeking eviction of the tenant on specified grounds. Section 25A of the Act gives primacy to the said procedure over anything inconsistent with the other provisions of the Act or any other law for the time being in force.

7. Section 25B of the Act deals with the procedure for the disposal of the eviction petition filed *inter alia* on the ground specified in clause (e) of the proviso to Section 14(1), or under Section(s) 14A, 14B, 14C or 14D of the Act.

8. Section(s) 25A and 25B of the Act are reproduced hereinunder:

> *"**25A. Provisions of this Chapter to have overriding effect.**– The provisions of this Chapter or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained elsewhere in this Act or in any other law for the time being in force.*
>
> ***25B. Special procedure for the disposal of applications for eviction on the ground of bona fide requirement. –** (1) Every application by a landlord for the recovery of possession of any premises on the ground specified in clause (e) of the proviso to sub-section (1) of section 14, or under section 14A or under section 14B or under section 14C or under section 14D, shall be dealt*

with in accordance with the procedure specified in this section.

(2) The Controller shall issue summons, in relation to every application referred to in sub-section (1), in the form specified in the Third Schedule.

(3) (a) The Controller shall, in addition to, and simultaneously with, the issue of summons for service on the tenant, also direct the summons to be served by registered post, acknowledgement due, addressed to the tenant or his agent empowered to accept the service at the place where the tenant or his agent actually and voluntarily resides or carries on business or personally works for gain and may, if the circumstances of the case so require, also direct the publication of the summons in a newspaper circulating in the locality in which the tenant is last known to have resided or carried on business or personally worked for gain.

(b) When an acknowledgement purporting to be signed by the tenant or his agent is received by the Controller or the registered article containing the summons is received back with an endorsement purporting to have been made by a postal employee to the effect that the tenant or his agent had refused to take delivery of the registered article, the Controller may declare that there has been a valid service of summons.

(4) The tenant on whom the summons is duly served (whether in the ordinary way or by registered post) in the form specified in the Third Schedule shall not contest the prayer for eviction from the premises unless he files an affidavit stating the grounds on which he seeks to contest the application for eviction and obtains leave from the Controller as hereinafter provided; and in default of his appearance in pursuance of the summons or his obtaining such leave, the statement made by the landlord in the application for eviction shall be deemed to be admitted by the

tenant and the applicant shall be entitled to an order for eviction on the ground aforesaid.

(5) The Controller shall give to the tenant leave to contest the application if the affidavit filed by the tenant discloses such facts as would disentitle the landlord from obtaining an order for the recovery of possession of the premises on the ground specified in clause (c) of the proviso to sub-section (1) of section 14, or under section 14A.

(6) Where leave is granted to the tenant to contest the application, the Controller shall commence the hearing of the application as early as practicable.

(7) Notwithstanding anything contained in sub-section (2) of section 37, the Controller shall, while holding an inquiry in a proceeding to which this Chapter applies, follow the practice and procedure of a Court of Small Causes, including the recording of evidence.

(8) No appeal or second appeal shall lie against an order for the recovery of possession of any premises made by the Controller in accordance with the procedure specified in this section:

Provided that the High Court may, for the purpose of satisfying itself that an order made by the Controller under this section is according to law, call for the records of the case and pass such order in respect thereto as it thinks fit.

(9) Where no application has been made to the High Court on revision, the Controller may, exercise the powers of review in accordance with the provisions of Order XLVII of the First Schedule to the Code of Civil Procedure, 1908 (5 of 1908).

(10) Save as otherwise provided in this Chapter, the procedure for the disposal of an application for eviction on the ground specified in clause (e) of the proviso to sub-section (1) of

> *section 14, or under section 14A, shall be the same as the procedure for the disposal of applications by Controllers."*

9. Sub-section (3) of Section 25B of the Act provides for service of summons of the Eviction Petition on the tenant. Sub-section (4) of Section 25B of the Act sets in motion a chain of requirements on the tenant on being duly served with the summons of the petition. The said tenant has to, within the time prescribed, enter appearance and file an affidavit stating the grounds on which he seeks to contest the Eviction Petition and obtain leave of the Controller to defend the Eviction Petition on merit. Default of appearance of the tenant pursuant to the due delivery of the summons or his/her failure to obtain leave to defend, results in the statements made by the landlord in the Eviction Petition to be deemed to be admitted by the tenant, and the Eviction Petition shall be allowed. Therefore, due service of summons of the Eviction Petition gains primacy.

10. A question arose as to whether the Controller is competent to condone the delay in appearance of the tenant and/or his filing the affidavit stating the grounds on which he seeks to contest the application for eviction. The Supreme Court in ***Prithipal Singh* v. *Satpal Singh (Dead) through LRs.***, (2010) 2 SCC 15, after examining the scheme of Section 25B of the Act, held that Section 25B of the Act is a complete Code by which the entire procedure to be adopted for eviction of a tenant on the ground of *bona fide* requirement filed by the landlord in respect of a premises shall be followed. Rule 23 of the Delhi Rent Control Rules, 1959, which provides for the Controller and the Rent Control Tribunal to

be guided by the provisions of the Code of Civil Procedure, 1908, shall have no application. The Court held that therefore, the Rent Controller shall not have the power to entertain an application seeking condonation of delay of the tenant in entering his appearance or filing the affidavit seeking leave to contest the petition.

11. The above decision was considered by this Court in its judgment in ***Sonal Mansingh* v. *Beena Om Prakash***, 2011 SCC OnLine Del 3818, and it was held that where the tenant disputes the due service of summons upon him, the Rent Controller would have the jurisdiction to entertain an application seeking recall of the *ex parte* order of eviction on this ground.

12. This Court again in ***Director Directorate of Education & Anr.* v. *Mohd. Shamim & Ors.***, 2019 SCC OnLine Del 11490, considered the above referred judgment of the Supreme Court in ***Prithipal Singh*** (supra) and held that this Court, if it finds sufficient ground for non-filing of the application seeking leave to defend within the time prescribed, in exercise of its power under Sub-section (8) of Section 25B of the Act, is entitled to set aside an order of eviction passed under Section 14(1)(e) or 14A or 14B or 14C or 14D of the Act and can remand the matter to the Rent Controller to consider the leave to defend application on merit.

13. From the above judgments, it would be apparent that though the learned Rent Controller has no power to condone the delay of the tenant in entering appearance or filing an application seeking leave to defend, it can still go into the question as to whether the tenant was at all served with the summons of the eviction petition.

14. As noted hereinabove, in ***Prithipal Singh*** (supra), the Supreme Court on examining the provisions of the Act held that the learned Controller has no power to condone the delay of the tenant in putting his appearance and/or filing an application seeking leave to defend within the time prescribed. However, this Court in ***Sonal Mansingh*** (supra) has held that the tenant can move the Controller to show that he was not duly served with the summons of the Eviction Petition and therefore, any order of eviction passed against him is liable to be withdrawn.

15. As a bifurcated application of Order IX Rule 13 of the Code to the proceedings under Section 25B could not have been intended by the Court, with one part applying to the proceedings under Section 25B while the other not applying thereto, it has to be held that the application as approved by ***Sonal Mansingh*** (supra) to be maintainable is one under Section 25B(9) of the Act seeking review of the order passed by the Rent Controller.

16. An application filed by the tenant contending that he was not duly served and therefore eviction order could not have been passed against him, would be one of seeking review of the order by which the learned Controller would have recorded that the summons of the Eviction Petition was duly served on the tenant. Such application would therefore, be one under Section 25B(9) of the Act.

17. In fact, the learned senior counsel for the petitioner has submitted that the application filed by the tenant in such circumstances is not one under Order IX Rule 13 of the Code. This submission also fortifies the conclusion that such an application is to be considered as one filed under

Section 25B(9) of the Act and as seeking review of the order of eviction passed *ex parte*.

18. Now coming to the question as to whether an order passed under Section 25B(9) of the Act would be appealable under Section 38 of the Act, certain other provisions of the Act also need notice.

19. Section 37 of the Act gives the procedure to be followed by the learned Controller in general and reads as under:

> *"**37. Procedure to be followed by Controller. –***
>
> *(1) No order which prejudicially affects any person shall be made by the Controller under this Act without giving him a reasonable opportunity of showing cause against the order proposed to be made and until his objection, if any, and any evidence he may produce in support of the same have been considered by the Controller.*
>
> *(2) Subject to any rules that may be made under this Act, the Controller, shall, while holding an inquiry in any proceeding before him, follow as far as may be the practice and procedure of a Court of Small Causes, including the recording of evidence.*
>
> *(3) In all proceedings before him, the Controller shall consider the question of costs and award such costs to or against any party as the Controller considers reasonable."*

20. Section 37 of the Act therefore, mandates compliance with the principles of natural justice and further states that the Controller shall, as far as may be, follow the practice and procedure of a Court of Small Causes.

21. Rule 23 of the Delhi Rent Control Rules, 1959 provides that in deciding any question relating to the procedure not specifically provided by the Act and the said Rules, the Controller and the Rent Control Tribunal shall, as far as possible, be guided by the provisions contained in the Code.

22. Section 38 of the Act provides for an appeal from every order of the learned Controller made under the Act, to the learned Rent Control Tribunal, and reads as under:

> *"**38. Appeal to the Tribunal.** – (1) An appeal shall lie from every order of the Controller made under this Act only on questions of law to the Rent Control Tribunal (hereinafter referred to as the Tribunal) consisting of one person only to be appointed by the Central Government by notification in the Official Gazette:*
>
> *Provided that no appeal shall lie from an order of the Controller made under section 21.*
>
> *(2) An appeal under sub-section (1) shall be preferred within thirty days from the date of the order made by the Controller:*
>
> *Provided that the Tribunal may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.*
>
> *(3) The Tribunal shall have all the power vested in a court under the Code of Civil Procedure, 1908 (5 of 1908), when hearing an appeal.*
>
> *(4) Without prejudice to the provisions of sub-section (3), the Tribunal may, on an application made to it or otherwise, by order transfer any proceeding pending before any Controller or additional Controller to another*

> *Controller or additional Controller and the Controller or additional Controller to whom the proceeding is so transferred may, subject to any special directions in the order of transfer, dispose of the proceeding.*
>
> *(5) A person shall not be qualified for appointment to the Tribunal, unless he is, or has been a district judge or has for at least ten years held a judicial office in India."*

23. In ***Vinod Kumar Chowdhry*** **v.** ***Smt Narain Devi Taneja***, (1980) 2 SCC 120, the Supreme Court considered the issue as to whether an appeal was maintainable against an order of the learned Rent Controller refusing to order eviction in a petition under Section 14(1)(e) of the Act filed by the landlord. The Supreme Court, while answering the question in the negative, observed as under:

> *" **12.** It is in the above background that the question as to whether an appeal to the Tribunal or a revision to the High Court was competent against the order passed in the instant case by the Controller has to be decided, and that brings us directly to the meaning of sub-section (8) of Section 25-B. The proviso to that sub-section gives power to the High Court to revise "an order made by the Controller under this section" which expression is no doubt capable of being construed as any order of whatsoever nature passed by the Controller while acting in accordance with the procedure laid down in Section 25-B. The proviso, however, has to be read as a legislative measure carved out of the sub-section to which it is appended and the order mentioned therein has to be regarded as an order of the type which the sub-section speaks of. i.e., "an order for the recovery of possession of any premises made by the Controller in accordance with the procedure specified in this section". Thus, the order covered*

by sub-section (8) (and therefore, by the proviso also) would be a final order disposing of an application on a conclusion of the proceedings under sub-section (4) or sub-section (7) of Section 25-B. This line of reasoning does not present any difficulty.

13. *Learned counsel for the tenant however argued that for an order to be covered by sub-section (8) of Section 25-B it must be an order* ***for the recovery of possession of any premises*** *made by the Controller. According to him, if an order does not direct recovery of possession by the landlord from the tenant, it is not an order which sub-section (8) would embrace. This contention, though not wholly implausible, runs counter to the decision in Devi Singh v. Chaman Lal [(1977) Rajdhani LR 566] which was followed in Bhagwati Pershad v. Om Perkash [(1979) Rajdhani LR 26] and Mahavir Singh v. Kamal-Narain [(1979) Rajdhani LR 159] and does not find favour with us. Sub-section (8) no doubt in terms speaks only of an order "for the recovery of possession of any premises" and does not mention one which refuses the relief of eviction to the landlord: but then it appears to us that the expression "order for the recovery of possession of any premises" has to be construed, in the context in which it appears, as an order* ***deciding an application*** *for the recovery of the possession of any premises. Our reasons in this behalf are two-fold. Firstly, if an order in favour of the landlord alone was meant to be covered by sub-section (8), an order refusing such relief would be liable to be called in question by way of an appeal or second appeal under Section 38 so that there would be two procedures for the end-product of the Controller's proceedings being called in question; one when the same is in favour of the landlord, and another when it goes against him, which would obviously entail discrimination and make the sub-section suffer from a constitutional invalidity. It is an accepted rule of interpretation that if a provision can be construed in a manner which upholds its legal or constitutional validity it*

should if possible be so construed rather than the other way round. We do feel that the language used is not happy but then it would not be doing violence to it if it is construed as just above stated.

14. *Secondly, the scheme of the Act and the object of the introduction of Section 14-A and Chapter III-A into it by the Amending Act make us form the opinion that sub-section (8) of Section 25-B is exhaustive of the rights of appeal and revision in relation to the proceedings held under that chapter. Before the enforcement of the Amending Act, all disputes between a landlord and his tenant were liable to be dealt with according to a uniform procedure before the Controller as also in appeal and second appeal. No distinction was made between one kind of dispute and another. When it was felt that the procedure prescribed in the Act defeated, by reason of the delay involved, the very purpose of an application made under clause (e) of the proviso to sub-section (1) of Section 14, especially in the case of landlords who themselves held accommodation allotted by the government or a local authority which they were required to vacate, Section 14-A and Chapter III-A were introduced by the Amending Act so as to cut down the time factor drastically, so much so that a tenant was required to obtain leave from the Controller for contesting an application for his eviction before he could put up his defence, and the Controller was given the power to refuse leave and straightway pass an order of eviction if he found that the grounds disclosed by the tenant in support of his right to dispute the landlord's claim were not such as would disentitle the landlord from obtaining an order of eviction. Sub-section (7) further simplified the procedure on contest being allowed, even though sub-section (2) of Section 37 itself provided for a procedure far simpler than ordinarily obtains in proceedings before a civil court. Then there is sub-section (8) which provides for the abolition of the right of appeal and second appeal and replaces it by a power in the High Court to revise an order passed*

by the Controller. That provision, as a part of the overall picture painted, must necessarily be construed as laying down procedure exclusive of that provided in Sections 38 and 39, and we hold that the four cases relied upon by the High Court in rejecting the contention raised on behalf of the tenant were correctly decided.

15. *In the way of the above interpretation of sub-section (8) of Section 25-B, the provisions of sub-section (10) thereof do not pose a hurdle. All that sub-section (10) states is that the procedure for the disposal of an application for eviction covered by sub-section (1) shall be the same as the procedure for disposal of other applications by Controllers,* ***except as provided in Chapter III-A.*** *Sub-section (8) as interpreted by us governs an application covered by sub-section (1) of Section 25-B and expressly takes away the right of appeal or second appeal, while providing the remedy of revision instead. As we have held the provisions of sub-section (8) to be exhaustive of the remedies available to a person aggrieved by an order passed by the Controller in applications triable under Chapter III-A, such applications fall outside the category of those which can be disposed of like other applications under sub-section (10) read with the provisions contained in other chapters of the Act.*

16. *As a result of the above discussion we hold that the remedy of the landlady against the order of the Controller in the present case was by way of revision (and revision only) of that order by the High Court as laid down in the proviso to sub-section (8) of Section 25-B, even though it was an order not directing, but refusing, recovery of possession of the premises in dispute."*

24. The judgment in ***Vinod Kumar Chowdhry*** (supra) was thereafter followed by this Court in ***R.S. Bakshi & Anr* v. *H.K. Malhari & Anr***, 2001 SCC OnLine Del 1344, to hold that even against an order granting

leave to defend to the tenant, the remedy of the landlord was in form of a petition under Sub-section (8) of Section 25B of the Act before this Court and not in form of an appeal under Section 38 of the Act. The said view has been consistently followed by this Court in various subsequent judgments.

25. In ***Miss Santosh Mehta* v. *Om Prakash & Ors.***, (1980) 3 SCC 610, the Supreme Court considered whether an appeal would lie against an order passed under Section 15(7) of the Act in an Eviction Petition to which the summary procedure under Section 25A of the Act otherwise applies. The Supreme Court while holding that such an appeal was maintainable, observed as under:

> *" **9.** An order striking out the defence is appealable under Section 38. So this order is appealable. The reliance on Section 25-B(8) to negative an appeal is inept because this is not an order under that special section but one under Section 15. Moreover, Section 25-B(10) preserves the procedure except to the extent contra-indicated in Section 25-B. Negation of a right of appeal follows from Section 25-B(8) only if the order for recovery is made "in accordance with the procedure specified in this section" (i.e. 25-B). Here the dispossession was not ordered under the special provision in Section 25-B but under Section 15. Nor can the theory of merger salvage the order because the legality of the eviction order depends on the legality of the order under Section 15(7). Once that order is found illegal what follows upon that cannot be sustained."*

26. Relying upon the above judgment, this Court in its judgment in ***Shri Madan Lal Bhatia* v. *Mrs. Rattan Sehgal***, 1980 SCC OnLine Del 301, held that as an order under Section 15(7) of the Act is merely

consequential to an order passed under Section 15(2) of the Act, even the order passed under Section 15(2) of the Act would be appealable under Section 38 of the Act. The Division Bench of this Court disapproved with the earlier decisions of the learned Single Judge of this Court in ***R.K. Parikh* v. *Smt. Uma Verma***, AIR 1979 Del 17; ***Ram Nath & Anr.* v. *O.P. Khadria***, AIR 1980 Del 237; and in ***Pran Nath Kapur* v. *Ram Shiksh Mehta***, (1980) 18 DLT 300, which had taken a contrary view.

27. A reading of the above quoted provisions of the Act as also the above-referred judgments, would clearly show that Section 25A of the Act gives primacy to the procedure contained in Section 25B of the Act for an Eviction Petition filed under Section 14(1)(e), or 14A, 14B, 14C or 14D of the Act, and a remedy of an appeal under Section 38 of the Act would not be available to the parties to such Eviction Petition against any order passed in exercise of such procedure. However, in such a petition, if an order passed by the learned Rent Controller is not traceable to the special procedure prescribed in Section 25B of the Act, a remedy of an appeal under Section 38 of the Act, if otherwise available in Eviction Petitions or proceedings filed under other provisions of the Act, shall be available to the parties.

28. Once it is held that the application seeking recall of the order passed by the Controller holding the tenant to be duly served with the summons of the Eviction Petition is one filed under Section 25B(9) of the Act, the judgment of the Supreme Court in ***Vinod Kumar Chowdhry*** (supra), which having considered the object and scheme of Chapter IIIA and given primacy to such procedure over any general procedure

inconsistent with Chapter IIIA and further holding that Sub-section (8) of Section 25B of the Act is exhaustive of the rights of appeal and revision in relation to the proceedings held under that Chapter IIIA taking away the right of an appeal while providing the remedy of revision instead, would squarely be applicable. The remedy of an appeal under Section 38 of the Act would therefore, not be available to the tenant in such circumstances.

29. In the present case, therefore, it is held that the application of the petitioner, though titled as one filed under Order IX Rule 13 of the Code, was one under Sub-section (9) of Section 25B of the Act and therefore, in terms of Section(s) 25A and 25B of the Act, any order passed thereon shall not be appealable under Section 38 of the Act. The only remedy for the petitioner would be under Sub-section (8) of Section 25B of the Act to this Court.

30. At this stage, I should also refer to the three judgments relied upon by the learned senior counsel for the petitioner, in specific.

31. In ***Central Bank of India* v. *Shri Gokal Chand,*** AIR 1967 SC 799, the Supreme Court was considering whether an appeal under Section 38 of the Act was maintainable against an order refusing to appoint a Local Commissioner to visit the tenanted premises. The Supreme Court held that though the language of Section 38 of the Act may seem to suggest that an appeal lies against all or any order of the learned Rent Controller, however, no appeal would lie against any interlocutory order which are merely procedural and do not affect the rights and liabilities of the parties. Though the Supreme Court held that an order refusing to set aside

an *ex parte* order is subject to appeal to the learned Rent Control Tribunal, it is to be noted that the said judgment was passed prior to the amendment introducing Chapter IIIA of the Act on 01.12.1975. Therefore, there was no occasion for the Supreme Court to consider the effect of Section 25B(8) of the Act on the maintainability of an appeal against an order passed in an eviction petition to which the procedure prescribed in Section 25B applies.

32. In ***Inder Mohan Sachdeva* v. *Usha International Ltd.***, (2012) 189 DLT 5, this Court considered whether an appeal would lie against an order dismissing the eviction petition in default of appearance of the landlord. This Court, relying upon the judgment of the Supreme Court in ***Central Bank of India*** (supra), held that as an order dismissing the petition affects the rights and liabilities of the parties, an appeal under Section 38 of the Act would be maintainable. However, it needs to be emphasised that in the said judgment, this Court again did not consider the effect of Sub-section (8) of Section 25B of the Act, and merely confined its consideration to whether an order dismissing the eviction petition for default can be termed as an interlocutory order.

33. The learned senior counsel for the petitioner submits that in ***Karma Wali* v. *Rajinder Singh***, (1979) 15 DLT 1, this Court has held an appeal to be maintainable against an order dismissing the application under Order IX Rule 13 of the Code in an Eviction Petition filed under Section 25B of the Act. In my view, however, this judgment also cannot be used as a precedent for the above proposition as it was pronounced on the peculiar facts of that case. In the said case, the High Court noted that the

question of lack of jurisdiction of the learned Rent Control Tribunal was never raised before the Tribunal itself. Further, the tenant had earlier filed a revision petition which was opposed by the landlady stating that an appeal was maintainable against the order, and on this plea, the landlady had succeeded in having the revision petition dismissed. The Court, therefore, held that the landlady could not be allowed to approbate and reprobate. This Court did not consider the question as to whether an appeal, indeed, was maintainable against the order dismissing the application under Order IX Rule 13 of the Code in case of an eviction petition filed under Section 25B of the Act.

34. The question of law raised in the present petition also needs to be considered against the general principles applicable to Order IX Rule 13 and Order XLIII Rule 1(d) of the Code.

35. Order IX Rule 13 of the Code reads as under:

> *"**13. Setting aside decree ex parte against defendants.** — In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;*
>
> *Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:*

> *Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.*
>
> *Explanation. — Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."*

36. Order XLIII Rule 1 (d) of the Code provides for an appeal against an order rejecting the application under Order IX Rule 13 of the Code, and reads as under:

> *"**1. Appeal from orders**. —An appeal shall lie from the following orders under the provisions of section 104, namely :–*
>
> *xxx*
>
> *(d) an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an order to set aside a decree passed ex parte"*
>
> (Emphasis supplied)

37. In ***Bhanu Kumar Jain* v. *Archana Kumar & Ors.***, (2005) 1 SCC 787, the Supreme Court held that against an *ex parte* decree, the defendant has two options: to file an appeal under Section 96 of the Code challenging the decree, and/or to file an application under Order IX Rule 13 of the Code seeking setting aside of the decree. The defendant can take recourse to both the options simultaneously, however, if the appeal

is dismissed, the application under Order IX Rule 13 of the Code will not be maintainable. It was held that the converse, however, is not true. The Court observed as under:

> *" **37.** We have, however, no doubt in our mind that when an application under Order 9 Rule 13 of the Code is dismissed, the defendant can only avail a remedy available thereagainst viz. to prefer an appeal in terms of Order 43 Rule 1 of the Code. Once such an appeal is dismissed, the appellant cannot raise the same contention in the first appeal. If it be held that such a contention can be raised both in the first appeal as also in the proceedings arising from an application under Order 9 Rule 13, it may lead to conflict of decisions which is not contemplated in law.*
>
> ***38.** The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the trial court and/or existence of a sufficient case for non-appearance of the defendant before it, it would be open to him to argue in the first appeal filed by him against Section 96(2) of the Code on the merits of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Chaudhari that the "Explanation" appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this court in Rani Choudhury [(1982) 2 SCC 596], P. Kiran Kumar [(2002) 5 SCC 161] and Shyam Sundar Sarma v. Pannalal Jaiswal and Ors., [(2005) 1 SCC 436]."*

38. In ***Bhivchandra Shankar More* v. *Balu Gangaram More & Ors.***, (2019) 6 SCC 387, the Supreme Court explained the difference in the

scope of an application under Order IX Rule 13 of the Code and an appeal under Section 96 of the Code against an *ex parte* decree, as under:

> *" **10.** A conjoint reading of Order 9 Rule 13 CPC and Section 96(2) CPC indicates that the defendant who suffered an ex parte decree has two remedies: (i) either to file an application under Order 9 Rule 13 CPC to set aside the ex parte decree to satisfy the court that summons were not duly served or those served, he was prevented by "sufficient cause" from appearing in the court when the suit was called for hearing; (ii) to file a regular appeal from the original decree to the first appellate court and challenge the ex parte decree on merits.*
>
> ***11.** It is to be pointed out that the scope of Order 9 Rule 13 CPC and Section 96(2) CPC are entirely different. In an application filed under Order 9 Rule 13 CPC, the Court has to see whether the summons were duly served or not or whether the defendant was prevented by any "sufficient cause" from appearing when the suit was called for hearing. If the Court is satisfied that the defendant was not duly served or that he was prevented for "sufficient cause", the court may set aside the ex parte decree and restore the suit to its original position. In terms of Section 96(2) CPC, the appeal lies from an original decree passed ex parte. In the regular appeal filed under Section 96(2) CPC, the appellate court has wide jurisdiction to go into the merits of the decree. The scope of enquiry under two provisions is entirely different. Merely because the defendant pursued the remedy under Order 9 Rule 13 CPC, it does not prohibit the defendant from filing the appeal if his application under Order 9 Rule 13 CPC is dismissed."*

39. In ***M/s Gokul Dairy Farm, Agra & Ors.* v. *Canara Bank & Ors.***, 1996 SCC OnLine All 414, the Allahabad High Court held that where an application under Order IX Rule 13 of the Code is dismissed for non-

fulfilment of the conditions stipulated in the order passed thereon, the remedy of the defendant in the Suit is to file an appeal under Order XLIII Rule 1(d) of the Code.

40. However, another important facet of Order XLIII Rule 1(d) of the Code is that an appeal against an order rejecting an application under Order IX Rule 13 of the Code is maintainable only where the main decree itself is open to an appeal. Where the decree itself is not open to an appeal, an order rejecting an application under Order IX Rule 13 of the Code would equally not be appealable.

41. In ***Nihal Singh & Anr.* v. *Khushhlal Singh***, 1916 SCC OnLine All 174, it was held that the words in Order XLIII Rule 1(d) of the Code are perfectly general; they are "in case open to an appeal." Therefore, what has to be determined is whether in the case the decree is open to an appeal.

42. The Calcutta High Court in ***Mahendra Chandra Datta Ray* v. *Basir Uddin***, 1936 SCC OnLine Cal 99, held that the said phrase means that the case which if admitted to be restored would itself give rise to an appealable order or decree if it was heard and decided on merit.

43. In the present case, the eviction order itself is not appealable in terms of Sub-section (8) of Section 25B of the Act. Therefore, even if the application is treated to be the one under Order IX Rule 13 of the Code, an order dismissing the said application would not be appealable under Section 38 of the Act. To hold otherwise would be to defeat the object of introducing Chapter IIIA to the Act in much as an appeal, which even

otherwise is not maintainable under the Code, would be considered as maintainable under Section 38 of the Act, which itself has been held to be restricted in application. [Refer: ***Central Bank of India*** *(supra)*]

44. The submission of the learned senior counsel for the petitioner that the order passed by the Controller would be appealable under Section 38 of the Act as "every order of the Controller" is appealable, cannot also be accepted. As noted hereinabove, the order passed by the Controller would be one referable to Sub-section (9) of Section 25B of the Act and in terms of Section 25A and Sub-section (8) of 25B, application of Section 38 of the Act would stand excluded.

45. The judgment in ***Miss Santosh Mehta*** (supra) and ***Madan Lal Bhatia*** (supra) would also not come to the aid of the petitioner hererin inasmuch as the orders therein were not passed under Section 25B of the Act but under Section 15 of the Act.

46. In view of the above, the question of law is answered by holding that in an Eviction Petition to which the procedure prescribed under Section 25B of the Act applies, an appeal under Section 38 of the Act is not maintainable against an order dismissing an application under Order IX Rule 13 of the Code/Section 25B(9) of the Act. The only remedy available to the aggrieved tenant is in form of a petition under Sub-section (8) of Section 25B of the Act before the High Court.

47. I, therefore, find no infirmity in the Impugned Order. The petition is dismissed.

48. There shall be no order as to costs.

NAVIN CHAWLA, J

APRIL 22, 2021*/rv/P/ G*