Harjit Singh Uppal vs Anup Bansal on 18 April, 2011

Author: R.M. Lodha

Bench: R.M. Lodha, Aftab Alam

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4416 OF 2011

(Arising out of SLP (Civil) No. 30300 of 2010)

Harjit Singh Uppal .... Appellant

Versus

Anup Bansal .... Respondent

JUDGMENT

R.M. Lodha, J.

Leave granted.

2. The main question for determination in this appeal, by special leave, is: If a tenant does not avail his remedy to challenge the order of the provisional rent fixed under Section 13(2)(i) proviso to the East Punjab Urban Rent Restriction Act, 1949 (for short, `1949 Rent Act') by filing an appeal under Section 15(1)(b) within 15 days from date of such order, whether the order fixing provisional rent

becomes final and cannot be challenged subsequently, particularly, in the appeal challenging the order of eviction.

3. The facts are these. The petition under Section 13 of the 1949 Rent Act was filed by the Respondent (`landlord') to evict the appellant (`tenant') from Komfort Banquet Hall, Zirakpur-Panchkula Road, Zirakpur, Tehsil Dera Bassi, District S.A.S. Nagar (Mohali) (for short, `the premises') before the Court of Rent Controller, Dera Bassi on December 6, 2008. The landlord averred that the premises were leased out to the tenant for a term of five years commencing from August 11, 2003 at the rent of Rs. 1,50,000/- per month. As per the terms of lease, rent would increase at the rate of 5 per cent every year on the last prevailing rent and it was also agreed that the tenant shall pay the rent for every month in advance by the 7th of month. It is the case of the landlord that tenant stopped paying the rent since April, 2007 regularly. Ultimately, after the expiry of the first lease period, the tenant requested for reduction in rent and he agreed to pay the rent of the premises at the rate of Rs. 1,50,000/- per month with effect from August 11, 2008 for the period of 31 months. The tenant also agreed to pay the Service Tax at the rate of 12.5 per cent and also increase the rent at the rate of 5 per cent every year on the last prevailing rent.

4. The claim of eviction, inter alia, was founded on the ground of default. It was averred that the tenant failed to make the payment of rent regularly and has fallen in arrears to the extent of Rs. 27,84,875.04 along with Service Tax at the rate of 12.5 per cent.

5. The tenant filed written statement and traversed the case set up by the landlord in the petition for eviction. He averred that the premises were incomplete at the time of lease and he invested huge amount for its completion by taking loan from the banks amounting to Rs. 58,98,370/-. The tenant claimed adjustment of that amount. He also stated in the written statement that he has been paying rent to the landlord regularly - mostly by cheques- and from 2007 he has paid Rs. 37,00,950/- to the landlord. He raised counter claim and claimed refund of the excess amount paid to the landlord.

6. On June 6, 2009, the tenant filed an affidavit before the Rent Controller setting out in detail the statement of the payment of rent made by him from April, 2007 amounting to Rs. 37,00,950/-.

7. The Rent Controller determined the provisional rent on June 11, 2009 assessing the arrears of rent provisionally at Rs. 27,84,875.04. The Rent Controller directed the tenant to make the payment of arrears of rent as determined with interest at the rate of 6 per cent per annum and costs of Rs. 1,000/- on July 18, 2009.

8. On September 7, 2009, the tenant made an application before the Rent Controller for recalling the order dated June 11, 2009, amongst other grounds, on the ground that his affidavit as well as the written statement that he has also paid Rs. 37,00,950/- to the landlord by way of cheques has not at all been considered.

9. The tenant made another application on February 9, 2010 before the Rent Controller for calling upon the landlord to provide list of his employees along with attendance register. This, the tenant said, was required to prove the factum of payment made by him to the landlord.

10. By yet another application, the tenant annexed copies of cheques which were duly encashed by the Manager of the landlord. He claimed adjustment of those payments while assessing provisional rent.

11. The landlord submitted reply to each of these applications, denied their correctness and submitted that the applications were not maintainable and have been made to delay the eviction proceedings.

12. The Rent Controller considered all these applications together and by her order dated April 7, 2010 rejected each one of these applications. The Rent Controller held that there was no provision of law under which the order dated June 11, 2009 could be recalled/reviewed. It was held, relying upon a decision of this Court in Rakesh Wadhawan and others v. Jagdamba Industrial Corporation and others1, that on the failure of the tenant to comply with the order of the provisional assessment of arrears of rent, nothing remains to be done and order of eviction has to follow. Accordingly, the Rent Controller passed the order of eviction against the tenant on April 7, 2010.

13. The tenant preferred an appeal under Section 15(1)(b) of the 1949 Rent Act before the Appellate Authority assailing the 1 (2002) 5 SCC 440 orders dated April 7, 2010 and June 11, 2009 passed by the Rent Controller.

14. The Appellate Authority heard the parties and held that the provisional assessment order dated June 11, 2009 was patently illegal. The Appellate Authority, accordingly, allowed the appeal by its order dated June 10, 2010, set aside the orders dated April 7, 2010 and June 11, 2009 passed by the Rent Controller and remanded the matter to the Rent Controller with a direction to pass fresh order regarding the provisional assessment of the arrears of rent, interest and costs of the proceedings. The Appellate Authority also directed the Rent Controller to give to the parties an opportunity to produce the documents/affidavits in support of their rival stand in respect of the rent.

15. The landlord challenged the order passed by the Appellate Authority in the revision petition before the High Court of Punjab and Haryana. The Single Judge of that Court held that since the tenant did not avail his remedy to challenge the order fixing provisional rent, during the period between the date of the order and date fixed for payment, the Rent Controller had no choice but to pass an order of eviction. The High Court, accordingly, by its order dated September 23, 2010 allowed the revision petition and set aside the order of the Appellate Authority and restored the order of the Rent Controller.

16. Section 13(2)(i) and the proviso appended thereto of the 1949 Rent Act reads as follows :

> "S. 13. Eviction of tenants.--(1) ..... (2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied-

(i) that the tenant has not paid or tendered the rent due by him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable :

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within the time aforesaid;

(ii) . . . .

(iii) . . . .

(iv) . . . .

(v) . . . . "

17. The provision of appeal from an order passed by the Rent Controller is made in Section 15 of the 1949 Rent Act. To the extent it is relevant, it reads as under :

"S. 15. Vesting of appellate authority on officers by State Government.--

(1)(a) .... (1) (b) Any person aggrieved by an order passed by the Controller may, within fifteen days from the date of such order or such longer period as the appellate authority may allow for reasons to be recorded in writing, prefer an appeal in writing to the appellate authority having jurisdiction. In computing the period of fifteen days the time taken to obtain a certified copy of the order appealed against shall be excluded.

2. . . . .

3. . . . .

4. . . . .

5. . . . . "

18. This Court had an occasion to consider Section 13(2)(i) and the proviso appended thereto in the case of Rakesh Wadhawan1 . The Court summed up the conclusions as follows :

> "30. 1. In Section 13(2)(i) proviso, the words "assessed by the Controller" qualify not merely the words "the cost of application" but the entire preceding part of the sentence i.e. "the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application".

2. The proviso to Section 13(2)(i) of the East Punjab Urban Rent Restriction Act, 1949 casts an obligation on the Controller to make an assessment of (i) arrears of rent, (ii) the interest on such arrears, and (iii) the cost of application and then quantify by way of an interim or provisional order the amount which the tenant must pay or tender on the "first date of hearing" after the passing of such order of "assessment" by the Controller so as to satisfy the requirement of the proviso.

3. Of necessity, "the date of first hearing of the application"

> would mean the date falling after the date of such order by the Controller.

4. On the failure of the tenant to comply, nothing remains to be done and an order for eviction shall follow. If the tenant makes compliance, the inquiry shall continue for finally adjudicating upon the dispute as to the arrears of rent in the light of the contending pleas raised by the landlord and the tenant before the Controller.

5. If the final adjudication by the Controller be at variance with his interim or provisional order passed under the proviso, one of the following two orders may be made depending on the facts situation of a given case. If the amount deposited by the tenant is found to be in excess, the Controller may direct a refund. If, on the other hand, the amount deposited by the tenant is found to be short or deficient, the Controller may pass a conditional order directing the tenant to place the landlord in possession of the premises by giving a reasonable time to the tenant for paying or tendering the deficit amount, failing which alone he shall be liable to be evicted. Compliance shall save him from eviction.

6. While exercising discretion for affording the tenant an opportunity of making good the deficit, one of the relevant factors to be taken into consideration by the Controller would be, whether the tenant has paid or tendered with substantial regularity the rent falling due month by month during the pendency of the proceedings."

19. The decision in Rakesh Wadhawan1 has been affirmed by a 3-Judge Bench decision of this Court in the case of Vinod Kumar v. Prem Lata2.

20. Mr. Rishi Malhotra, learned counsel for the tenant argued that the High Court was in error in setting aside the order of the Appellate Authority whereby matter was remanded to the Rent Controller for re-fixation of the provisional rent. He would submit that the Appellate Authority after considering the bank statements submitted by the tenant held that the landlord had concealed various payments which were tendered by the tenant. He referred to the finding of the Appellate Authority that the Rent Controller did not apply her mind while fixing the provisional rent and accepted the figures submitted by the landlord in a mechanical manner without considering the

particulars of payment of rent furnished by the tenant. He argued that since the order dated June 11, 2009 determining the provisional rent was patently illegal, the Appellate Authority did not commit any error in upsetting that order in the appeal preferred by the tenant.

21. Dr. Rajeev Dhawan, learned senior counsel for the landlord, on the other hand, in support of the High Court's order, 2 (2003) 11 SCC 397 made the following submissions : (i) the order determining provisional rent is a foundational order and not an interlocutory order; such order could have been challenged in appeal under Section 15(1)(b) of the 1949 Rent Act within 15 days from the date of passing that order and in no other way; (ii) in the appeal challenging the eviction order dated April 7, 2010, the order determining the provisional rent could not have been challenged and such challenge was not maintainable; (iii) the only contention that was raised by the tenant before the Rent Controller was that he had invested huge amount of Rs. 58,98,370/- by raising loan from a bank and the said amount was liable to be adjusted in the arrears of rent; there was no contention raised about the payment of Rs. 37,00,950/- having been made towards rent from April, 2007 to the landlord; and (iv) the whole conduct of the tenant had been to prolong the litigation and it was to achieve this objective that the tenant continued to make applications one after the other before the Rent Controller which could not be legally maintained and were frivolous and without merit.

22. One thing needs to be noticed immediately that besides the specific averment made by the tenant in the written statement that he has paid Rs. 37,00,950/- to the landlord towards rent from April 2007 and no rent was due and payable by him, in his affidavit dated June 6, 2009, the tenant gave the details of the payment of Rs. 37,00,950/- having been made to the landlord from April, 2007. The affidavit contains the cheque numbers, the dates on which such cheques were issued and the amount of cheques. Dr. Rajeev Dhawan, learned senior counsel for the landlord did not dispute the receipt of the copy of the affidavit dated June 6, 2009 by the landlord on June 11, 2009 before the matter was heard and considered by the Rent Controller for determination of the provisional rent.

23. Curiously, the order dated June 11, 2009, whereby the provisional rent was determined by the Rent Controller, does not show any consideration of the affidavit dated June 6, 2009 filed by the tenant.

24. The tenant was not satisfied with the order dated June 11, 2009 since the Rent Controller failed to consider the amount of Rs. 37,00,950/- which he claimed to have paid to the landlord towards rent for the period from April, 2007 and, therefore, he made an application on September 7, 2009 for recalling the order dated June 11, 2009. This application was decided on April 7, 2010 and by the same order, the eviction order was passed against the tenant.

25. Section 15(1)(b) of the 1949 Rent Act provides, to a person aggrieved by an order passed by the Rent Controller, a remedy of appeal. The Section provides for limitation for filing an appeal from that order and also the forum to which such appeal would lie. The provision, for maintaining the appeal, does not make any difference between the final order and interlocutory order passed by the Rent Controller in the proceedings under the 1949 Rent Act. There is no specific provision in the Section that if a party aggrieved by an interlocutory order passed by the Rent Controller does not

challenge that order in appeal immediately, though provided, and waits for the final outcome, whether in the appeal challenging the final order of the Rent Controller, the correctness of the interlocutory order from which an appeal lay could or could not be challenged in the appeal from the final order.

26. The observations made by the Privy Council more than a century and five decades back in Maharajah Moheshur Sing v. The Bengal Government3 deserve to be recapitulated. The Privy Council stated:

> 3 (1859) 7 Moore's Indian Appeals 283 ".....We are not aware of any law or Regulation prevailing in India which renders it imperative upon the suitor to appeal from every interlocutory Order by which he may conceive himself aggrieved, under the penalty, if he does not so do, of forfeiting for ever the benefit of the consideration of the appellate Court. No authority or precedent has been cited in support of such a proposition, and we cannot conceive that anything would be more detrimental to the expeditious administration of Justice than the establishment of a rule which would impose upon the suitor the necessity of so appealing; whereby on the one hand he might be harassed with endless expense and delay, and on the other inflict upon his opponent similar calamities. We believe there have been very many cases before this Tribunal in which their Lordships have deemed it to be their duty to correct erroneous interlocutory Orders, though not brought under their consideration until the whole cause had been decided, and brought hither by appeal for adjudication."

27. It is appropriate that some of the provisions of the Code of Civil Procedure, 1908 (for short `Code') are noticed for consideration of the question raised before us. Sections 97, 104 and 105 of the Code read as under :

> "97. Appeal from final decree where no appeal from preliminary decree. - Where any party aggrieved by a preliminary decree passed after the commencement of this Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.
>
> 104. Orders from which appeal lies. - (1) An appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:-
>
> (ff) an order under section 35A;
>
> (ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;
>
> (g) an order under section 95;

> (h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;
>
> (i) any order made under rules from which an appeal is expressly allowed by rules;

Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made. (2) No appeal shall lie from any order passed in appeal under this section.

105. Other orders. - (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness."

28. The Calcutta High Court in Nanibala Dasi and Another v. Ichhamoyee Dasi and others4 was concerned with a question as to whether the challenge to preliminary decree in a suit for partition 4 AIR 1925 Cal 218 could be made in a case where the final decree in the suit had already been made by the Subordinate Judge and no appeal against the final decree was then or has at any time been filed. The High Court referred to some of its earlier decisions, namely, Baikunta Nath Dey v. Nawab Salimulla Bahadur5 , Mackenzie v. Narsingh Sahai6 , Khirodamoyi Dasi v. Adhar Chandra Ghose7, Sadhu Charan Dutta v. Haranath Dutta8, Kuloda v. Ramanand9 and held that the right of appeal from interlocutory order ceases after disposal of the suit and that rule is equally applicable to suits in which there is first a preliminary decree and ultimately a final decree.

29. On the other hand, in Syed Ishak Syed Farid and another v. Kunjbihari Singh Sirdhujasingh Kshatriya10, the Division Bench of Nagpur High Court held as under :

> "The contention on the other side is that the Legislature has conferred a right of appeal against, an order refusing to extend time, and that an aggrieved party must be afforded an opportunity of exercising the right so conferred, especially as there is danger of it being held hereafter that as the orders in question were appealable, matters decided in them will be final in the absence of an appeal, and that they cannot be re-agitated hereafter in an appeal against the final decree. The learned Counsel urging this contention relied on the analogies of preliminary 5 (1907) 6 C.L.J. 647 6 (1909) 36 Cal 762 7 (1912) 18 C.L.J. 321 8 (1914) 20 C.W.N. 231 9 A.I.R. 1921 Cal. 109 10 A.I.R. 1940 Nagpur 104 decrees and of orders of remand against a decision of a trial Court on a preliminary point. S. 105(1), Civil P.C., is in these terms:

> - A right of appeal is a valuable right, and we do not think that the Legislature after conferring it in such express terms in Section 104 would take it away by implication in a large class of cases in the next Section. An enabling Section which confers additional rights in certain cases cannot, we think, be read as taking away rights which have already been expressly conferred, especially when they are such valuable and cherished rights as those of appeal. We also feel that if a right of appeal is once conferred, then in the absence of anything curtailing it, full opportunity must be afforded to an aggrieved party to exercise it. If he does exercise it and succeed, then any subsequent proceedings which militate against any rights he obtains in the appeal fall to the ground.
>
> - when the law gives a person two remedies he is entitled to avail himself of either of them unless they are inconsistent."

[Emphasis supplied by us] 30 The order passed by the Rent Controller determining the provisional rent in an eviction petition based on the ground of default in a situation where the tenant fails to comply with that order may be a foundational order for an order of eviction that follows but nevertheless such order is an interlocutory order as that order does not determine the principal matter finally; it is only the order on subordinate matter with which it deals.

31. Section 15(1)(b) of 1949 Rent Act provides that a person aggrieved by an order passed by the Rent Controller may prefer appeal to the Appellate Authority within the time prescribed therein; it does not say that if any aggrieved person by an interlocutory order passed by the Rent Controller from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness. There is no provision in Section 15(1)(b), a provision like Section 105 (2) and Section 97 of the Code.

32. We find no impediment for an aggrieved person, on reading Section 15(1)(b) of the 1949 Rent Act, that an interlocutory order which had not been appealed though an appeal lay, could not be challenged in an appeal from the final order. In our opinion, Section 15(1)(b) does not make it imperative upon the person aggrieved to appeal from an interlocutory order and, if he does not do so, his right gets forfeited when he challenges the final order.

33. It is true that an order of eviction follows as a matter of course if there is non-compliance of the order determining the provisional rent but when tenant challenges the order of eviction and therein also challenges the order of fixation of provisional rent - the order of eviction, in its nature, being dependant on the correctness of the order fixing the provisional rent and there being no indication to the contrary in Section 15(1)(b) - it must be open to the Appellate Authority to go into correctness of such provisional order when put in issue.

34. In view of the above legal position, we shall now advert to the facts of the present case. The tenant at the first available opportunity i.e., in his written statement filed on April 24, 2009 averred that he has been paying the rent to the landlord by cheques and from April 1, 2007, he has paid rent of Rs. 37,00,950/- to the landlord. As a matter of fact, the tenant by his counter claim prayed for

refund of the excess payment made to the landlord. Then he filed his affidavit dated June 6, 2009 setting out the details of the payments made towards rent from April, 2007.

35. The landlord relied upon his ledger account to show that the tenant was in arrears of rent. According to the landlord, he received the payment as under:-

Date	Debit	Credit
9.4.2007	173643.75p	-
26.4.2007	-	163250
26.4.2007	-	10000
9.5.2007	173643.75p	-
9.6.2007	173643.75p	-
9.7.2007	173643.75p	-
18.7.2007	-	163250
18.7.2007	-	10000
9.8.2007	182325.94p	-
9.9.2007	182325.94p	-
27.9.2007	-	10000
28.9.2007	-	163250
9.10.2007	182325.94p	-
27.10.2007	-	10000
8.11.2007	-	171900
8.11.2007	-	10000
9.11.2007	182325.94	-
1.12.2007	-	163250
3.12.2007	-	10000

9.12.2007	182325.94	-
10.12.2007	-	10000
11.12.2007	-	171900
9.1.2008	182325.94p	-
9.2.2008	182325.94p	-
9.3.2008	182325.94p	-
9.3.2008	182325.94p	-
1.4.2008	-	Opening Balance 450000 (security amt.)
15.4.2008	-	528400
15.4.2008	450000 (amount given through Cheque)	-
9.5.2008	182325.94p	-
13.5.2008	-	181900
9.6.2008	182325.94p	-
12.6.2008	202900 (amount given through Cheque)	-
12.6.2008	350000 (amount	-

given through

Cheque

12.6.2008	450000 (amount given through Cheque)	-
9.7.2008	182325.94p	-
9.8.2008	150000	-
9.9.2008	150000	-
9.10.2008	150000	
21.8.2008	-	40000
22.8.2008	-	60000
9.11.2008	150000	-
Total	49,35,386-28	24,99,000/-

36. On the other hand, the tenant in his affidavit dated June 6, 2009 gave the details of the payments made to the landlord towards rent from the month of April, 2007 as under :

	Cheque No.	"Dated	for Rs.
i)	011862	30.3.2007	1,63,250.0
ii)	011861	30.3.2007	10,000.
iii)	011863	25.4.2007	1,63,250.0
iv)	011864	25.4.2007	10,000.
v)	011868	16.7.2007	1,63,250.0
vi)	011867	16.7.2007	10,000.
vii)	011885	24.9.2007	10,000.
viii)	011886	24.9.2007	1,63,250.0
ix)	011887	25.10.2007	1,71,900.0
x)	011888	25.10.2007	10,000.

xi)	011889	6.11.2007		1,71,900.0
xii)	011890	6.11.2007		10,000.
xiii)	011892	30.11.2007		1,63,250.0
xiv)	011893	3.11.2007		10,000.
xv)	011894	5.12.2007		10,000.
xvi)	011895	5.12.2007		1,71,900.0

xvii)	4789	11.4.2008		5,28,400.00
xviii)	4790	18.4.2008		5,45,700.00
xix)	4791	10.5.2008		1,81,900.00
xx)	4794	12.6.2008		2,75,000.00
xxi)	4795	12.6.2008		3,25,000.00
xxii)	4796	13.6.2008		4,00,000.00
xxiii)	4797	13.6.2008		1,80,000.00
xxiv)	116150	20.8.2008		60,000.00
xxv)	116151	20.8.2008		40,000.00
xxvi)	116152	20.8.2008		50,000.00
		Total	Rs.	37,00,950.00

37. The Rent Controller, apparently, did not consider the statement given by the tenant at all and relied upon the ledger account submitted by the landlord and in his order dated June 11, 2009 held that an amount of Rs. 27,84,875.04 was due and payable

by the tenant towards the arrears of rent. Since the Rent Controller failed to even consider the statement of payment tendered by the tenant, the tenant made an application for recall of the order dated June 11, 2009. The Rent Controller dismissed the application for recall and two other applications made by the tenant by a common order and also passed an order for eviction of the tenant on April 7, 2010 as the tenant failed to comply with the order dated June 11, 2009 determining the provisional rent.

38. The tenant challenged the order dated April 7, 2010 and also the order dated June 11, 2009 in appeal. The Appellate Authority considered the material that was available before the Rent Controller for determination of rent, particularly, the two statements, one filed by the landlord and the other by the tenant, and on comparison thereof found that the entire payments made by the tenant have not been reflected in the ledger account submitted by the landlord. This is what the Appellate Authority observed :

> "Thus, it is apparent that the entire payments made by the respondent/tenant are not reflected in the account books of the respondent/landlord. The appellant/tenant has also raised a plea that he had made the payment of Rs. 2,75,000/- to the respondent, vide cheque No. 4794 dated 12.6.2008, Rs. 3,25,000/- vide cheque No. 4795 dated 12.6.2008, Rs. 4,00,000/- vide cheque No. 4796 dated 12.6.2008 and Rs. 1,80,000/- vide cheque No. 4797 dated 12.6.2008. The said cheques were the bearer cheques and were allegedly got encashed by the Manager of the respondent. However, this Court need not enter into the controversy as to if the payment of the bearer cheques, was received by the respondent/landlord or not as it would be for the Ld. Rent Controller to consider this question. However, the assessment order dated 11.6.2009 passed by the Ld. Rent Controller is patently illegal and erroneous. From the perusal of the said order, it is made out that Ld. Rent Controller did not apply his mind and accepted the figures mentioned by the respondent/landlord in the rejoinder in the mechanical manner. The Ld. Rent Controller has not mentioned anything that as to how the amount of about Rs. 14,52,900/- paid by the respondent/landlord to the tenant was being treated as arrears of rent. The Ld. counsel for the respondent could be claimed as arrears of rent [sic]. He tried to wriggle out of the situation by submitting that the tenant had agreed to repay the said amount with the rent. However, even on this the said amount could not be treated as arrears of rent. Moreover, the amount of Rs. 5,45,700/- which was received by the respondent/landlord from the tenant even as per the statement of account pertaining to the bank account of the respondent was not adjusted. The Ld. Rent Controller did not consider these aspects of the case at all."

39. The Appellate Authority held that the order dated June 11, 2009 was patently illegal; the tenant was called upon to tender much more amount than was actually due as arrears of rent and, accordingly, by its order dated June 10, 2010 set aside the orders dated April 7, 2010 and June 11, 2009 and remanded the matter to the Rent Controller with a direction to pass fresh order of provisional assessment of arrears of rent, interest and costs of the proceedings as contemplated by Section 13(2)(i) proviso of the 1949 Rent Act.

40. The High Court, however, held that as tenant did not avail of his remedy to challenge the order fixing provisional rent during the period between the date of the order and date fixed for payment, the Appellate Authority could not have gone into the merits of such determination and, accordingly, set aside the order of the Appellate Authority. In our view, the High Court fell into grave error in what it held. The legal position, in our opinion, is this: Where a tenant does not challenge the order of the fixation of provisional rent passed under Section 13(2)(i) proviso in appeal under Section 15(1)(b) and also fails to comply with that order, the order of eviction must follow as per the provisions contained in the 1949 Rent Act but when the tenant challenges the order of eviction in appeal and therein also challenges the order determining the provisional rent, it is not open to the Appellate Authority to refuse to consider the legality and validity of the order determining the provisional rent on the ground that the correctness of such order cannot be examined as no appeal was filed from that order though an appeal lay therefrom.

41. On the facts of the present case, the Appellate Authority did not commit any error in calling upon the Rent Controller to determine the arrears of rent, interest and costs afresh as the tenant's statement of payments towards rent from April, 2007 was not at all referred to and considered by the Rent Controller. If the order of the High Court is allowed to stand, it would occasion in manifest injustice and result in miscarriage of justice inasmuch as the tenant would be thrown out of the leased premises although he may not have been in arrears of rent. In the circumstances, re-determination of arrears of rent, interest and costs by the Rent Controller, as directed by the Appellate Authority, would subserve the ends of justice. If on re-determination, the tenant is found in arrears of rent and does not deposit/pay the amount as determined by the Rent Controller in time, as may be directed, obviously he would suffer the order of eviction.

42. In the result, the appeal is allowed. The order dated September 23, 2010 passed by the High Court is set aside and the order dated June 10, 2010 passed by the Appellate Court, S.A.S Nagar (Mohali) is restored. The parties shall bear their own costs.

.....J. (Aftab Alam) ..... J.

(R.M. Lodha) NEW DELHI.

MAY 13, 2011.