

M.A. No.4544/2018 1
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

Singh Bench: Hon'ble Ms. Justice Vandana Kasrekar

M.A. No.4544/2018

Mangilal S/o Badrilal Patidar
vs.
Ganpatlal S/o Rameshwar Patidar and others

Shri Sunil Jain, learned senior counsel assisted by Shri Kushgra Jain, learned counsel for the appellant.

Shri V.K. Jain, learned senior counsel assisted by Shri Yashwardhan Raghuwanshi, learned counsel for the respondent Nos.1 to 4.

Ms. Mamta Shandilya, learned Government Advocate for the respondent No.5/State.

Whether approved for reporting: Yes/No

J U D G M E N T

(Delivered on 28/02/2019)

The appellant has filed this appeal against the order dated 22/09/2018 passed by I ADJ, Jaora in civil regular appeal No.30-A/2018 whereby the learned Judge has rejected the application filed by the appellant under Order XXXIX Rule 1 and 2 of CPC against the respondents.

2. Facts in brief are that on 19/03/2012 plaintiff has purchased a land bearing survey No.326 ad-measuring 3.08

M.A. No.4544/2018 2
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

hectare from one Laxmibai D/o Bhawarlal Patidar and Balram S/o Rameshwar Patidar of Village-Hanumantiya. It was further stated that the plaintiff immediately after purchase of the land in question, is in cultivation, possession in respect of the suit land. It has further been averred in the plaint that on 14/07/2012, the respondent Nos.1 to 4 came on the suit land and informed the appellant that the suit land has been leased-out to them and they will cultivate it. They further threatened the appellant of dire consequences, therefore, the appellant has filed the civil suit. Respondent after service of summons of the suit filed their written statement and refuted the plaint allegations. Trial Court vide order dated 07/08/2012 allowed the application of the plaintiff filed under Order XXXIX Rule 1 and 2 of CPC and granted temporary injunction in favour of the appellant. Being aggrieved by the said order dated 07/08/2012, the respondents preferred a Miscellaneous Appeal before the ADJ, Jaora. The learned Judge vide order dated 07/01/2013 dismissed the appeal filed by the respondents. Being aggrieved by the order, respondents filed a writ petition before this Court, which was registered as W.P. No.808/2013. The said writ petition was dismissed vide order dated 04/09/2013, thereafter the suit filed by the appellant was finally decided on 27/06/2018, however, the trial Court found that the appellant is in possession of the suit land but yet the decree for permanent injunction has not been granted by the trial Court. Being aggrieved by the said judgment and decree, appellant has preferred first appeal before appellate Court and also moved an application for temporary injunction under

**Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others**

Order XXXIX Rule 1 and 2 of CPC. The application was supported by affidavits. The respondents have filed their reply to the application and opposed the same by contending that on 28/06/2018, they have taken over the possession in presence of the plaintiff. The learned first appellate Court after hearing both the parties and taking into consideration the material placed before him, rejected the application filed by the appellant on the basis of the statement of Ganeshlal that they have taken over possession of the land in question. The appellate Court has held that the sale-deed dated 16/02/2012 is illegal and the plaintiff has not come with clean hands. It has further been held that there is no *prima facie* case in favour of the plaintiff/appellant and balance of convenience is also not in his favour and if injunction is not granted, he would not suffer irreparable injury. Being aggrieved by the order dated 22/09/2018, the present appeal has been preferred by the appellant.

3. Learned senior counsel appearing on behalf of the respondents raised a preliminary objection that the said appeal is not maintainable in view of the provisions of Section 104 (1) of the CPC.

4. Learned senior counsel for the respondents has placed reliance on the judgment passed by Madras High Court in the case of **C. Kalahasti vs. P.C.M. Chetti, AIR 1975 Mad. 3, Krishan Yashwant Shirodkar vs. Subhash Krishna Patil and Ors. AIR 1989 Bombay 68, Natabar Das vs. Braja Kishore Raha and Anr. AIR 1999 Orissa 33 and the judgment passed by Bombay High Court in**

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

Bholeshankar Awas Gruha Nirman Sahakari Sanstha
Maryadit vs. Omprakash and Ors. in Civil Appeal
No.4346/2008 decided on 07/07/2008.

5. Learned senior counsel for the appellant placed reliance on the judgment passed by Andhra Pradesh High Court in the matter of **Kakaria Gangulappa Naidu and others vs. Kolla Gangi Naidu 1982 (1) (HC) A.P. Law Journal 73** and **also the judgment passed by A.P. High Court in the case of Ramu Reddy and another vs. A.K. Sampath Reddy and another 1982 (1) (HC) A.P. Law Journal 495** and submits that the appeal is maintainable.

6. For consideration on maintainability, provisions of Section 104 and 107 are relevant and which are re-produced as under :-

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 :—

[CIs. (a) to (f) omitted by Act 10 of 1940]

(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;

(b) 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;

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

q(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 (if) 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.**"

107. Powers of appellate court.- (1) Subject to such conditions and limitations as may be prescribed, an appellate Court shall have power—

(a) to determine a case finally,

(b) to remand a case;

(c) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) **Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on courts of original jurisdiction in respect of suits instituted therein.**"

7. The question which arises for consideration are as under :-

A. Whether a Miscellaneous Appeal under Section 104 (1) readwith Order 43 Rule (1) of the Code of Civil Procedure, 1908 (hereinafter referred to as the "Code") is maintainable challenging an interlocutory order of either grant or refusal of temporary injunction passed in an appeal under Section 104 (1) readwith Order 43 Rule 1 of the Code ?

B. Whether an Miscellaneous Appeal under Section 104 (1)

M.A. No.4544/2018 6
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

readwith Order 43 Rule (1) of the Code is maintainable challenging an interlocutory order of either grant or refusal of temporary injunction passed in an appeal under Section 96 readwith Order 43 Rule 1 of the Code ?

Analysis of Statutory Provisions :

A. A purposeful and critical reading of Section 104 (2) of the Code with special emphasis on words **“passed in appeal under this Section”** clearly shows that the legislative intent that no further appeal, in the form of miscellaneous appeal under Section 104 (1) readwith Order 43 Rule (1) of the Code, shall lie from any order passed by an Appellate Court in an appeal under Section 104 (1) readwith Order 43 Rule 1 of the Code. The scheme of Section 104 (2) bars a second miscellaneous appeal against any order of the Appellate Court in a miscellaneous appeal under Section 104 (1) of the Code, however, the situation will be a little different in case of an appeal under Section 96 of the Code.

B. Section 96 of the Code provides that an appeal shall lie from every decree passed by any Court exercising original jurisdiction. Thus, **“an appeal against a decree”** is denotably different from **“an appeal against an order”** throughout the scheme of Part-VII of the Code.

C. Section 107 (2) clearly confers co-ordinate powers and duties upon the Appellate Court in an appeal against a decree as that of an Original Court hearing an original suit. Thus, on a plain and comparative reading of Section 104 and 107 of the Code, it is abundantly clear that miscellaneous appeal under Section 104 (1) readwith Order 43 Rule (1) of the

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

Code shall lie before the High Court against an order passed by such Appellate Court under 39 Rule 1 and 2 of the Code, as envisaged under Order 43 Rule (1), if the Appellate Court is hearing an appeal from a decree. However, the same consequence shall not ensue if the Appellate Court is hearing an appeal from an order as prohibited by Section 104 (2) of the Code. These consequence shall ensue essentially as the proposition that an appeal under Section 96 of the Code is a continuation of the suit has been held by the Constitution Bench of the Hon'ble Apex Court in case of **Garikapati Veeraya vs. N. Subbiah Choudhary AIR 1957 SC 540.**

Para 23 (I) of this judgment is re-produced as under :-

"23. From the decisions cited above the following principles clearly emerge:

(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding"

ANALYSIS OF CASE LAW OCCUPYING THE FIELD :

A. In the case of **C. Kalashasti vs. P.C.M. Chetti AIR 1975 Mad. 3,** the plaintiff filed a suit alongwith an application seeking temporary injunction. The learned XV Assistant Judge, City Civil Court rejected the said application. Against this. C.M.A. 36/1973 was preferred before the II Additional City Civil Judge and temporary injunction was sought. The II Additional City Civil Judge granted temporary injunction and this interim injunction order was challenged by the defendant before the High Court. After considering the law, it was held in ***para 9*** as under :-

M.A. No.4544/2018 8
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

9. Before proceeding to consider the provisions of Section 104 and Order XLIII, Rule 1, Civil P. C., it is apposite to remember that, while under Section 96 of the Code, every decree is appealable save where otherwise expressly provided in the body of the Code or by any other law for the time being in force, every order is not necessarily appealable and, as a matter of fact, no other order except those specified in Section 104(1) or exempted thereunder is appealable. Section 104, which is the relevant provision in the Code which makes provision for appeals from orders, provides inter alia that any order made under rules, from which an appeal is expressly allowed by rules, is appealable. Order XLIII, Rule 1, Civil P. C. which enumerates the orders from which an appeal can be preferred is referable to this provision in Section 104 and consequently, Order XLIII, Rule 1, Civil P. C. cannot confer greater rights than what is conferred by Section 104. As a matter of fact, Order XLIII, Rule 1, Civil P. C. itself reads as follows-- "An appeal shall lie from the following orders under the provisions of Section 104." (underlining mine). In as much as reference is made to Section 104 in Order XLIII, Rule 1, Civil P. C. it necessarily follows that Section 104 has to be considered in its entire conspectus to decide the question whether an order referred to in Order XLIII, Rule 1 is an appealable order when it has been passed by an appellate court. As Section 104(2) clearly lays down that no appeal would lie from any order passed in appeal, it necessarily follows that the right of appeal given against the orders enumerated in Order XLIII, Rule 1 will be subject to the stipulation contained in Section 104(2), Civil P. C. Moreover, Section 105 also makes it clear that unless otherwise expressly provided, no appeal shall lie from an order made by a Court in the exercise of its original or appellate jurisdiction. The use of the words

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

'original or appellate jurisdiction' in Section 105 makes it abundantly clear that the court can only exercise either original or appellate jurisdiction, but cannot exercise both at one and the same time. Therefore, the contention of Mr. Shanmugham that even though the order in C. M. P. 49 of 1973 was passed by an appellate court, the order must nevertheless be construed to be one passed by the said court in the exercise of its original jurisdiction, cannot be countenanced, and it is clearly an untenable contention. It is only by virtue of the powers vested in it as an appellate court that the Additional City Civil Court passed the order in C. M. P. 49 of 1973 and consequently, the order will squarely fall within that class of orders which are contemplated in Section 104(2), Civil P. C. and which are expressly prohibited from being canvassed in further appeal. The fact that the order was passed in an interlocutory application will not make the order any the less an order pass in appeal.

Since the appeal was filed against an order in C.M.A. 36/1973, it was held to be not maintainable in view of the statutory bar created by Section 104(2) of the Code.

B. Ramu Reddy and Ors. v. A.K. Sampat Reddy and Ors.
A.A.O. nos. 288 and 289 of 1977 decided on **25.02.1978**
by the **Madras High Court (Annexure 'A')**

The facts of this case show that a suit was filed by the plaintiff alongwith a prayer for interim injunction. The suit was tried and dismissed by the trial Court. Against the decree, the plaintiff filed an appeal under Section 96 of the Code and again prayed for temporary injunction. The learned appellate Court allowed the application for temporary injunction in the appeal

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

under Section 96 of the Code. This order of grant of temporary injunction was challenged before the High Court by way of a miscellaneous appeal. **Para 4** of this judgment is quoted hereinbelow :-

4. In the instant cases, the orders which are appealed against before this court were not passed in appeals preferred under O.43, R.1, C.P.C. but were once passed in appeals preferred under S.96 of the Code. Therefore, as pointed out by N.S. Ramaswami, J. in *Ramasami v. Chinna Sithamma* MANU/TN/0537/1974 : A.I.R. 1976 Mad. 63 the Civil Miscellaneous Appeals are not barred by sub-S.(2) of S.104 of the Code. Hence, the preliminary objection in each of the two appeals cannot be sustained. The appeals will, therefore, stand posted for further hearing on merits.

Since, the impugned order was passed in an appeal under Section 96 of the Code, the bar of Section 104(2) was held to be inoperative and consequently, concurrence was shown with judgment rendered in case of **Ramasami v. Chinna Sithamma, AIR 1976 Mad. 63.**

C. In the case of **Ramasami v. Chinna Sithamma, AIR 1976 Mad. 63,** it was again held that the bar under Section 104(2) shall not apply if the order under challenge has been passed in appeal against a decree preferred under Section 96 of the Code.

D. In the case of **Krishna Yeshwant Shirodkar vs. Subhash Krishna Patil and Ors., AIR 1989 Bom. 68,** Division Bench of Bombay High Court has held as under :-

14. It is not possible for us accept this

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

interpretation of sub-s. (2) of S. 104 of the Code sought to be put by Mr. Gumaste. The words of the said provision are clear. They are to the effect "any order passed in appeal under this Section". Sub-s, (2) of S. 104 does not say "an order disposing of an appeal passed under this Section". We do not see how we can rewrite sub-s (2). S. 104 of the Code in the manner suggested by Mr. Gumaste. If anything the language of the other Sections in the Code also suggests that when the legislature used the words "any order passed in appeal under this Section", if did not restrict the meaning of the word "order" to "an order finally disposing of an appeal", See. For example, the language of S. 105 of the Code. It deals with order made by a Court in exercise of its original or appellate jurisdiction and mentions that any such order is not the subject-matter of an appeal except as otherwise provided, but the validity of the order can be challenged in any appeal preferred from the decree finally passed. If the legislature wanted to restrict the ban imposed by S. 104(2) of the Code to only an order finally disposing of an appeal, it would have naturally used an appropriate language and not a term which is much wider than what is being suggested by Mr. Gumaste.

15. We are proceeding on the assumption, which assumption if fully justified, that an appellate Court in exercise of its jurisdiction under S. 104 of the Code has jurisdiction to pass orders of the nature contemplated by O.43, R.1 of the Code. The appellate Court thus will be having powers to pass order under O.39 or O.40 of the Code. Nevertheless, such order will be orders passed in exercise of its appellate jurisdiction. The appellate jurisdiction which is exercised in the instant case is the one under S. 104 of the Code. It is necessarily an order passed in an appeal, though on an application for inter in relief. We do

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

not see how it is possible to say that the order passed by Mehta J. in the instant case is not an order in an appeal under s. 104 of the Code. If this is so, then the bar contained in sub-s. (2) s. 104 of the Code will necessarily operate, as has been pointed out by the Supreme Court in Shah Babulal's case MANU/SC/0036/1981MANU/SC/0036/1981 : [1982]1SCR187 . WE are, therefore, satisfied that this Letters Patent appeal is not maintainable, Naturally, no relief can be given to the appellant, who is the petitioner in Civil Application NO. 6571 of 1987.

Since the interlocutory order of appointing a commissioner was passed by Learned Single Judge of High Court in a miscellaneous appeal, it was held to be in exercise of powers under order 40 Rule (1) and consequently not appealable under Section 104(1) read with Order 43 Rule (1) of the Code. Therefore, the bar under Section 104(2) was held to be applicable and the Letters Patent Appeal was found to be not maintainable.

E. In the case of **Natabar Das v. Braja Kishore Raha and Anr. MA no. 638 of 1997 decided on 31.08.1998 by the Orissa High Court** (Annexure B), the plaintiff filed a suit, however, his application for injunction was rejected by the Trial Court. Plaintiff then filed an appeal before the Additional District Judge and interim injunction was granted. A miscellaneous appeal was preferred before the High Court challenging the order in which interim injunction was granted. Such miscellaneous appeal was found to be barred the Section 104(2) of the Code in those circumstances. Relevant observations in Para 3,4,5 and 7 are quoted hereunder :-

M.A. No.4544/2018 13
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

3. Before entering upon the merits of the case, it is appropriate to decide about the maintainability of such an appeal. There is no dispute that an Order under Order 39, Rules 1 and 2, C.P.C., passed by a Court in its original jurisdiction is appealable under Order 43, Rule 1 in view of the specific provisions contained in Section 104(1)(i) read with Order 43, Rule 1 (r), C.P.C.. There is also no dispute that no further appeal lies against the final decision in such appeal in view of the specific provisions contained in Section 104(2) and Section 105(1), C.P.C. The learned counsel for the appellant has, however, contended that the present appeal is not against the final decision in the miscellaneous appeal filed before the lower appellate Court, but against an order passed in a miscellaneous proceeding under Order 39, Rules 1 and 2, C.P.C. and as such, the said order passed on the petition under Order 39, Rules 1 and 2 is appealable under Order 43; Rule 1 (r), C.P.C.

4. Section 104(1), C.P.C., provides that an" appeal shall lie from the orders indicated in the said sub-section and it further provides that save as otherwise expressly provided in the body of the Code, or by any law for the time being in force, no appeal shall lie against any other orders. Section 104(1)(i) provides for filing appeal against any Order made under rules from which an appeal is expressly allowed by rules. Order 43, Rule 1 provides the orders against which appeal is maintainable. Section 104(2) specifically states that no appeal shall lie from any order passed in appeal under this section. The aforesaid aspect is reiterated in Section 105(1) which lays down that 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. A combined reading of the provisions of Sections 104, 05 and

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

Order 43, C.P.C. makes it clear that an appeal against an order is maintainable if the order passed is made expressly appealable under the provisions contained in Section 104(1) or under Order 43, Rule 1 and no further appeal is maintainable against the decision in such appeal.

5. The moot question is whether any interim order passed in course of such appeal is further appealable by applying the provisions of order 43, Rule 1. The learned counsel for the appellant has relied upon the decisions reported in MANU/OR/0043/1983MANU/OR/0043/1983 Madhusudan Dhal v. Gaya Prasad Giri MANU/AP/0137/1982MANU/AP/0137/1982 K Gangulampa Naidu v. K. Gangi Naidu and MANU/WB/0063/1981MANU/WB/0063/1981 Smt. Mayarani Dutta v. Bhupal Banerjee in support of his contention that the appeal is maintainable, as the same is one under Order 43, Rule 1, C.P.C. against an order of the lower appellate Court in a proceeding under Order 39, Rules 1 and 2. On a careful perusal of the decisions of Orissa High Court and Andhra Pradesh High Court, it appears that those decisions do not support the contention of the counsel for the appellant, though the decision reported in MANU/WB/0063/1981MANU/WB/0063/1981 squarely supports his contention.

7. In the decision reported in MANU/AP/0137/1982MANU/AP/0137/1982 during pendency of an appeal against a decree under Section 96, C.P.C., before the first appellate Court, a petition for injunction under Order 39, Rules 1 and 2, C.P.C. was filed and after disposal of such petition under Order 39, Rules 1 and 2, the matter was brought to the High Court and the question was as to whether an appeal under Order 43, Rule 1 (r) was maintainable or not. While holding such appeal

M.A. No.4544/2018 15
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

to be maintainable, it was observed by the learned single Judge at page 288 :--

"In the instant case pending the appeal preferred against the disposal of the suit, an application under Order 39, Rule 1 and 2 is filed and that application is disposed of for the first time by the appellate Court. This is not a case where against the orders under Order 39, Rule 1 and 2 made by the trial Court an appeal is preferred to the District Court and as against the orders of the District Court the matter is carried to this Court. So this does not come under the mischief of Section 104(2), C.P.C., but squarely falls under Order 43, Rule 1(r). Accordingly, an appeal shall lie under Order 43, Rule 1 (r) r/w Section 104(1), C.P.C. The authorities cited, as already noted, are distinguishable since the interlocutory proceedings there started from trial Court, then to the appellate Court and thereafter to the High Court attracting Section 104(2), C.P.C. Those High Courts are right in holding that no such appeal in those circumstances could be maintained. The case on hand is altogether different in nature and does not attract Section 104(2). Therefore an appeal does lie and is maintainable in the instant case."

A close reading of the aforesaid decision makes it clear that the ratio of the decision is not applicable to the facts of the present case. The miscellaneous proceeding in the present case arose out of an appeal under Order 43, Rule 1 C.P.C. and not in an appeal under Section 96 of the Code against a decree, as was the case in the decision of the Andhra Pradesh High Court.

F. So far as Section 107(2) of the Code is concerned, the Hon'ble Apex Court in the Case of **Vasant Ganesh Damle v. Shrikant Trimbak Datar, (2002) 4 SCC 183** has held in **para 9** as under :-

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

9. The appeal is considered to be an extension of the suit because under Section 107 of the Code of Civil Procedure, the appellate court has the same powers as are conferred by the Code on courts of original jurisdiction in respect of suits instituted therein. Such a power can be exercised by the appellate court "as nearly as may be" exercised by the trial court under the Code. If the powers conferred upon the trial court are under a specified statute and not under the Code, it has to be ascertained as to whether such a power was intended to be exercised by the appellate court as well. Such a position can be ascertained by having a reference to the specified law by keeping in mind the legislative intention of conferment of power on the appellate court either expressly or by necessary implication.

Observations of the Hon'ble Apex Court quoted above show that the Appellate Court hearing an appeal against a decree exercises original jurisdiction as available to the Trial Court.

G. The judgment of the Bombay High Court in **Bholesankar Awas Gruha Nirman Sahakari Sanstha Maryadit v. Omprakash and Ors. (Annexure C)** is totally distinguishable on facts as local amendment to the Code dt. 05.09.1983 is exclusively applicable to the state of Maharashtra. Therefore, the said judgment is not helpful in resolving the instant controversy.

H. A Full Bench Calcutta High Court in the case of **Sabyasachi Chatterjee and Ors. vs. Prasad Chatterjee and Ors. AIR 2013 Cal. 231** was dealing with CO no. 1862/11 under Article 227 of the Constitution of India, arising

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

out of interlocutory order passed in course of an appeal against the preliminary decree in a partition suit. Para 3 of the judgment is quoted hereinbelow to show the question which arose for consideration in the said case:

Whether, having regard to the facts and circumstances involved in this revisional application, an appeal is maintainable against the impugned order under Order 43 Rule 1 (r) of the Civil Procedure Code or not ?

The Full Bench of the Calcutta High Court in para 6,7,8,9,10 and 34 which are reproduced hereunder, has held that even in an appeal from a decree, a miscellaneous appeal against the interlocutory order will not lie:

6. The first reference may be answered rather simply by discovering that none of the provisions in the body of the Code, or anything in the rules appended thereto, permits an appeal from an interlocutory order passed in an appeal from a decree. The answer is no more difficult to make because of the absence in Section 96 of the Code (which provides for appeals from original decrees) of a provision similar to Section 104(2) of the Code, particularly since the prohibition under Section 105(1) thereof applies to all orders not specifically covered by Section 104(2) of the Code; and an interlocutory order in an appeal from a decree, by virtue of Section 105(1) of the Code, cannot be carried in appeal unless it is expressly provided for. In the context of the present discussion, the unavoidable implication of Section 105(1) of the Code is that only such orders passed in an appeal from a decree would be amenable to appeal as have been expressly provided for; or, if there is no express provision for an appeal from a certain order, there is no

M.A. No.4544/2018 18
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

right of appeal.

7. The more comprehensive answer to the question lies in the general provisions relating to appeals as recognised in Sections 107 and 108 of the Code. In the absence of Sections 107 and 108 of the Code, an appellate Court would apparently have had no express authority to entertain a substantive application for injunction or the like except to the extent permitted by the rules or in exercise of its inherent jurisdiction. But Section 107(2) of the Code gives every appellate Court the same powers and the obligation to perform the same duties "as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein." However, Section 107(2) is of limited import and does not expressly cover appeals from appellate decrees or appeals from orders made under the Code or appeals under any special or local law of civil nature. It is only Section 108 of the Code that extends the authority and the obligation of the appellate Court in, inter alia, Section 107(2) thereof to appeals from appellate decrees; to appeals from orders made under the Code; and, to appeals under any special or local law in which a different procedure is not provided. The authority of an appellate Court to exercise the same powers as are conferred by the Code, and the obligation of the appellate Court to perform as nearly as may be the same duties as are imposed by the Code, on Courts of original jurisdiction may not be as wide in scope in an appeal from an interlocutory or interim order as in an appeal from a decree. Such authority and obligation, which would cover the entire ambit of the relevant suit in an appeal from a decree, would necessarily be restricted to the scope of the interlocutory petition on which the interim order under appeal was passed in an appeal from an order made under the Code.

8. In an appeal from a decree, as in CO No.

M.A. No.4544/2018 19
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

1862 of 2011, Section 107(2) of the Code confers the same powers and imposes the same duties on the appellate Court as conferred and imposed by the Code on the Court of original jurisdiction in respect of the suit. It is the substantive provision of Section 107(2) of the Code that permits an appellate Court to entertain an interlocutory petition in course of the appeal. Such interlocutory petition may be for an order in the nature of attachment before judgment or an order of injunction or an order for the appointment of a receiver or like orders, whether under any precise provision therefor or under the inherent jurisdiction as saved by Section 151 of the Code as available to the Court of original jurisdiction. It is, therefore, plain to see that an appellate Court does not exercise the professed authority under Order XXXVIII or Order XXXIX or Order XL or like provisions of the Code to pass any interlocutory order but, by virtue of Section 107(2) of the Code, read in the appropriate case with Section 108 thereof, the appellate Court exercises the authority or discharges the obligation akin to the direct authority conferred or obligation imposed by the Code on the Court of original jurisdiction. In each case, however, the scope of the authority conferred or the obligation imposed bears a direct nexus with the scope of the authority available or the duties required to be discharged by the Court of the first instance. The authority and obligation of the appellate Court are also directly relatable to the nature of the proceedings -- including the scope thereof -- which resulted in the decree or the order under appeal.

9. This marked distinction between the exercise of authority by a Court of original jurisdiction under Order XXXVIII or Order XXXIX or Order XL or like provisions of the Code and the authority exercised by an appellate Court by virtue of the permissive provision in Section 107(2) of the Code is the defining factor in

**Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others**

determining whether an interlocutory appellate order made in exercise of the power under Section 107(2) of the Code is amenable to an appeal. Since the bar under Section 104(2) of the Code would not apply to any order passed in course of an appeal from a decree, Section 105(1) of the Code would come into play. The embargo under Section 105(1) of the Code is not as uncompromisingly absolute as in Section 104(2) thereof; it only prohibits appeals from all appellate orders for which there is no express provision of appeal. The appeals recognised under Order XLIII Rule 1 of the Code from orders passed by a Court of original jurisdiction cannot be understood to extend by implication to interlocutory appellate orders. Those appellate orders that are appealable are expressly provided for in Order XLIII Rule 1 itself.

10. As an indispensable corollary, once it is noticed that Section 107(2) of the Code, when read with Section 108 thereof, covers all appeals as recognised in the Code, the authority of the appellate Court to exercise the powers of the Court of original jurisdiction cannot be traced to the miscellaneous provisions as to other civil proceedings recognised in Section 141 of the Code. For a start, appeals are regarded as appeals in the Code and cannot be treated as miscellaneous proceedings. Undoubtedly, appellate proceedings cannot be viewed as proceedings of the first instance. Second, Section 141 of the Code extends the procedure provided in regard to suits, to the extent such procedure can be made applicable, to all proceedings in any Court of civil jurisdiction. The expression "all proceedings" in Section 141 of the Code has necessarily to be seen as all proceedings of civil nature to which the Code does not apply in terms and to which the procedure prescribed for suits by the Code would not have applied but for Section 141 thereof. Since the procedure in the conduct of appeals and the substantive rights

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

conferred on an appellate Court are expressly contained in the Code itself, the specific provisions -- whether substantive or procedural -- in the Code governing appeals which arise under the Code will guide the conduct and the course of appeals under the Code and not the residuary provision in Section 141 thereof that makes the procedure under the Code applicable to other proceedings of civil nature.

34. The two references are disposed of by holding that no appeal is maintainable from the order impugned in CO No. 1862 of 2011, whether under Order XLIII Rule 1(r) of the Code or otherwise; and; that no appeal would lie from the order impugned in CO No. 2310 of 2011. Both petitions under Article 227 of the Constitution are obviously maintainable -- since both orders are passed by Courts over which this High Court exercises superintendence -- but the consideration as to whether the petitions ought to be entertained need not be weighed down by any doubt as to the existence of any efficacious alternative remedy of appeal being available.

H.1. However, Division Bench of Kerala High Court in case of **Vijayan P.G. And Ors. vs. Mohanan and Ors., 2016 AIR CC 1001 (KER) (Annexure D)**, was considering a case where suit was dismissed after trial and in an appeal under Section 96, the Appellate Court passed an interlocutory order refusing injunction which was challenged before the High Court. The Division Bench of Kerala High Court analysed the Full Bench judgment of Calcutta High Court and held that it cannot be considered as an authoritative pronouncement on purport of Section 104(2). Para 17 of the judgment rendered by the Kerala High Court is as under:

17. Section 104(2) CPC specifically states that no appeal shall lie from any order passed in appeal

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

"under the Section". Evidently, the purport and the only interpretation possible is that an appeal will not lie against interlocutory orders passed in an appeal filed under Section 104 or order 43 CPC. Consequently, it will not apply in the case of an appeal filed against the original decree under Section 96 or Order 41 of the CPC. Evidently, both the references involved in Sabyasachi Chatterjee's case above, did not deal with orders passed in appeals filed against interlocutory orders. In that view of the matter, the Full Bench decision cannot be considered as an authoritative pronouncement of legal position covered by Section 104(2) of the Code. The natural corollary is that the law laid down in Ganesan's case in the correct interpretation of Section 104(2) of the Code and we affirm the legal proposition therein.

I. Recently, Division Bench of Bombay High Court in the case of **Shivaji Shankar Jadhav and Ors. vs. Laxman Gajanan Godbole, AIR 2019 Bom. 1** has considered the Full Bench judgment of the Calcutta High Court and Division Bench judgment of Kerala High Court and held in para 18 to 27 as under:

18. We find that the bar to a further appeal under Section 104(2) applies only to an appeal from an order passed in an Appeal from Order under Section 104(1) of the CPC. In this context, it is necessary to note that the judgments relied upon by the learned Senior Counsel appearing for the Respondent viz. in Shobha Dinesh Supare (supra), Robert Punaji Salvi (supra), Krishna Yeshwant Shirodkar (supra) hold that a further Appeal is barred from orders passed in Appeal from Order by virtue of Section 104(2) of the CPC. These judgments do not apply to the orders passed in an Appeal from decree under Section 96 of the CPC and from which an Appeal is preferred. These orders are not passed in an

M.A. No.4544/2018 23
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

Appeal from Order.

19. When in an Appeal under Section 96 of the CPC against an original decree, the Appellate Court grants temporary injunction covered by Rules 1 and 2 of Order XXXIX of the CPC, it exercises a power under the said Rules and not under Section 94 or Section 107(2) of the CPC.

20. We do not accept the submission of the learned Senior Counsel that the interim injunction has been passed by the lower Appellate Court under Order XLI Rule 33, as this provision has been held to be very wide by the Supreme Court in Mahant Dhangir (supra). We also do not accept his submission that Order XXXIX does not apply to appeals. We are of the view that an Appeal is in continuation of a Suit and hence, Order XXXIX would equally apply to an Appeal and to a Suit and that orders thereunder can be passed by the Appellate Court particularly, in light of Section 107(2) of the CPC.

21. We find assistance in our view taken from the cases cited by the learned Amicus Curiae. Various High Courts in the country have consistently held that an injunction order can be passed in an Appeal from decree under Section 96 of the CPC and an appeal from such order will not be barred by Section 104(2) of the CPC.

22. We find that this view has also been taken by the Guwahati High Court in the case of Nemi Chand Gangwal (supra), which has also considered Section 107(2) of the CPC and has read the words "wherein a Suit" should be read as "wherein an Appeal" and that the Appellate Court has all powers of the Trial Court. We find that the learned Senior Counsel appearing for the Respondent has on the other hand, placed reliance upon the judgment of the Calcutta High Court in the case of Sabyasachi Chatterjee

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

(supra). The Calcutta High Court has held that Appeals under Order XLIII Rule 1 do not extend to interlocutory Appellate orders passed under Section 107(2), as the same are not expressly provided for under Order XLIII Rule 1. With due respect to the said Court, we are not inclined to follow that view.

23. We are of the considered view that the Appellate Court exercises powers akin to that of a Court of ordinary civil jurisdiction, particularly since an Appeal against a decree is a continuation of a Suit, and hence orders under Order XXXIX Rules 1 and 2 can be passed by the Appellate Court in an Appeal under Section 96 of the CPC and such orders are clearly appealable under Section 104(1) read with Order XLIII Rule 1(r) of the CPC.

24. Clause (r) of Rule 1 of Order XLIII of the CPC reads thus:-

"1. An Appeal shall lie from the following orders under the provisions of Section 104, namely:-

(a)

(r) an order under rule 1, rule 2, [rule 2-A] rule 4 or rule 10 of Order XXXIX"

25. The provision is not qualified by suggesting that an Appeal would lie against the orders passed under the aforesaid Rules of Order XXXIX passed only by the Court at first instance. Wherever legislature intended that an Appeal should remain confined to an order passed in a Suit, the legislature has specifically provided so in Rule 1 of Order XLIII of the CPC. For example Clauses (k) and (n) of Rule 1 of Order XLIII which read thus:-

"(k) an order under rule 9 of Order XXII refusing to set aside the abatement or dismissal of a suit;" and

M.A. No.4544/2018 25
Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

"(n) an order under rule 2 of Order XXV rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit;"

As in case of clause (r), even clause (q) does not limit itself to orders passed in a Suit.

26. As the powers under Rules 1 and 2 of Order XXXIX or Rules 3, 4 and 6 of Order XXXVIII could be exercised in an Appeal against decree under Section 96 by virtue of Section 107(2), the provisions of the Rules under Order XXII are expressly applicable to Appeals by virtue of Rule 11 of Order XXII.

27. We accordingly accept the view taken by this Court in the cases of Krishna Pandurang Wankhede (supra), Shri. Subhash Sheti Pawar (supra) and in Shri. Shivaji Shankarrao Patil (supra) and answer the issue referred to this Division Bench viz. "Whether the order of interim injunction passed in Regular Civil Appeal filed under Order 41 of the CPC is appealable under Order 43 Rule (1) sub-Rule (r) of the CPC?" in the affirmative. We dispose of the reference on the above terms.

The Division Bench of Bombay High Court has not followed the view of Full Bench of Calcutta High Court; rather, it has adopted the view taken by the Division Bench of Kerala High Court in the matter.

CONCLUSION :

In view of the position of substantive provisions of law and their interpretation, the following conclusions have been uniformly reached by all High Courts except Full Bench of the Calcutta High Court:

Mangilal S/o Badrilal Patidar
vs. Ganpatlal S/o Rameshwar Patidar and others

Miscellaneous appeal under Section 104 (1) readwith Order 43 Rule (1)(r) shall be maintainable before the High Court if interim injunction is granted by Lower Appellate Court in an appeal under Section 96 of the Code. However, miscellaneous appeal before High Court shall not be maintainable if order of interim injunction is passed by the Lower Appellate Court in miscellaneous appeal under Section 104(1) readwith Order 43 Rule (1)(r), in view of the bar under Section 104(2) of the Code.

8. In view of the aforesaid discussions and other facts and circumstances of the case, I deem it appropriate to held the appeal is **maintainable**.

9. So far as **merits** of the case is concerned, there is no *prima facie* case in favour of the appellant, therefore, in view of the detailed discussions and arguments advanced by the parties, it is clear that the possession has already been taken by the respondents after passing of the decree by the learned trial Court, therefore, I do not find any reason to interfere into the order dated 22/09/2018 passed by I ADJ, Jaora in civil regular appeal No.30-A/2018 whereby the learned Judge has rejected the application filed by the appellant under Order XXXIX Rule 1 and 2 of CPC against the respondents.

10. Accordingly, the present appeal has no merits and substance and is hereby **dismissed**.

(Ms. Vandana Kasrekar)
Judge