

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION STAMP NO.31823 OF 2014**

Shri Subhash Sheti Pawar : **Petitioner.**

versus

Sou. Minkashi Ravindra Zadbukeye & ors. : **Respondents.**

Mr. Ajay A Joshi for the Petitioner.

Mr. Amit B Borkar i/by Mr. Amit M Shete for the Respondent Nos.1 to 4.

CORAM : R. M. SAVANT, J.

Reserved on : 11th February 2015

Pronounced on : 17th March, 2015

ORAL ORDER

1 The writ jurisdiction of this Court under Article 227 of the Constitution of India is invoked against the order dated 13/11/2014 passed by the learned District Judge-1, Pandharpur by which order the Application numbered as Exhibit 5 filed by the Appellants for temporary injunction came to be allowed and resultantly the Respondent No.3 to the Appeal i.e.one Shri Subhash Sheti Pawar was restrained from interfering or causing any acts of obstruction in the possession and enjoyment of the Appellants over the agricultural land bearing Block No.316/1/B, situated at Mouje Magarwadi, Tal. Pandharpur, Dist. Solapur pending the decision of the Regular Civil Appeal No. 119 of 2013.

2 The Respondent Nos.1 to 4 herein are the original Plaintiffs who have filed the suit in question being Special Civil Suit No.421 of 2002 for partition, declaration and injunction against the Petitioner and other Respondents to the above Petition. The agricultural land bearing Block No.316/1/B situated at Mouje Magarwadi, Tal. Pandharpur, Dist. Solapur is the suit property. The Plaintiffs and the Defendant No.1 are the members of a joint family. The Defendant No.1 sold the said land to the Defendant No.2 prior to filing of the suit in question. The Petitioner herein is the purchaser from the Defendant No.2. In the said suit the Plaintiffs had filed Applications (Exhibits 5 and 7) seeking temporary injunction against the Defendants for restraining them from disturbing their possession and not to create third party interest in respect of the said property. However, the said Applications were not pursued by the Plaintiffs on the ground that the Plaintiffs have obstructed the possession of the Petitioner who is the Defendant No.3 in the suit. The Defendant No.3 had filed an Application (Exhibit 68) seeking injunction against the Plaintiffs. The Trial Court rejected the said Application (Exhibit 68). The Defendant No.3 thereafter carried the matter by way of an Appeal being Misc. Civil Appeal No.1 of 2012 before the Lower Appellate Court. The Lower Appellate Court allowed the said Appeal and prohibited the Plaintiffs from disturbing the possession of the Defendant No.3 over the said land.

3 The suit thereafter proceeded to trial. The issues were framed and

the parties led evidence in respect of their respective assertions. The Trial Court on the basis of the material on record was pleased to dismiss the suit by the judgment and order dated 25/4/2013. The Plaintiffs carried the matter in Appeal by filing Regular Civil Appeal No.119 of 2013. In the said Appeal, the Plaintiffs filed an Application for temporary injunction which was numbered as Exhibit 5. The said Application was directed against the Defendant No.3 in respect of the land in question for restraining him from disturbing the possession of the Plaintiffs. The Lower Appellate Court has by the impugned order dated 13/11/2014 allowed the said Application and thereby granted injunction to the extent mentioned in the earlier part of this Order. As indicated above, it is the said order dated 13/11/2014 which is taken exception to by way of the above Writ Petition.

4 The learned counsel appearing on behalf of the Respondent Nos.1 to 4 i.e. the original Plaintiffs Shri Amit Borkar has questioned the maintainability of the above Writ Petition on the ground that having regard to the nature of the order passed being one under Order XXXIX Rule 2 of the Code of Civil Procedure, the above Writ Petition is not maintainable, and the Petitioner would have to file an Appeal from Order for challenging the impugned order dated 13/11/2014. The learned counsel for the Respondent Nos.1 to 4 would contend that though the instant Appeal being Regular Civil Appeal No.119 of 2013 has been filed under Section 96 of the Code of Civil

Procedure challenging the decree of dismissal passed in the suit, the Application (Exhibit 5) having been filed under Order XXXIX of the Code of Civil Procedure, an Appeal would have to be filed under Order XLIII of the Code of Civil Procedure read with Section 104 of the Code of Civil Procedure. The learned counsel for the Respondent Nos.1 to 4 would contend that though Section 107 of the Code of Civil Procedure postulates that the powers of the Appellate Court are co-extensive with the powers of the Trial Court, the instant Application being filed under Order XXXIX Rule 1 of the Code of Civil Procedure, it is an Appeal from Order that would have to be filed by the Petitioner i.e. the Defendant No.3 and therefore the above Writ Petition is not maintainable. The learned counsel for the Respondent Nos. 1 to 4 sought to place reliance on the judgment of a learned Single Judge of this Court reported in the matter of Krishna Pandurang Wankhede v/s Sitaram Punjaji Wankhede¹ and the judgment of a learned Single Judge of the Andhra Pradesh High Court reported in the matter of K. Gangulappa Naidu and others v/s. K. Gangi Naidu². The learned counsel also sought to rely upon the judgment of a learned Single Judge of the Madras High Court reported in the matter of Ramaswamy Reddiar and others v/s. Chinna Sithammal and others³, which has been referred to in the judgment of the learned Single Judge of Andhra Pradesh High Court. As also the judgment of a Learned Single Judge of the

¹ 1986 Mh.L.J. 865

² AIR 1982 Andhra Pradesh 284

³ AIR 1976 Madras 63(1)

Gauhati High Court in the matter of **Nemi Chand Gangwal Vs. Suresh Kumar Jain**⁴ The learned counsel would contend that the position in law that even in an Appeal filed under Section 96 of the Code of Civil Procedure, if an Application is filed under Order XXXIX of the Code of Civil Procedure for temporary injunction, then remedy is by way of an Appeal under Order XLIII read with Section 104 of the Code of Civil Procedure seems to be a consistent view taken by the different High Courts and therefore on the application of the principles of Stare Decisis, the said proportion of law would have to be applied. The learned counsel in support of the application of the principle of Stare Decisis sought to place reliance on the judgment of the Apex Court in the matter of **Rashmi Metallics Ltd. Vs. Kolkatta Metropolitan Developers Authority**⁵. The Learned Counsel would contend that the Full Bench judgment of the Calcutta High Court has only possessive value and this Court is not bound to follow the said judgments. The Learned Counsel would contend that in the view taken by the Learned Single Judge of this Court in **Krishna Wankhede's** case (supra) is required to be followed in support of the said contention. The Learned Counsel placed reliance on the judgment on the Apex Court in the matter of **Pradip J Mehta v/s Commissioner of Income Tax, Ahmedabad**⁶.

5 Per contra, in so far as the maintainability of the above Writ

4 2014 SCC online Gau 180

5 2013) 10 SCC 95

6 (2008) 14 SCC 283

Petition is concerned, the learned counsel appearing on behalf of the Petitioner/original Defendant No.3 Shri Ajay Joshi would contend that the above Writ Petition is maintainable . The learned counsel for the Petitioner would contend that the language used in Order XXXIX Rule 1 refers to a suit, the remedy by way of Appeal would not be available if the Appellate Court has granted temporary injunction. The learned counsel for the Petitioner would contend that in the instant case the power is exercised under Section 94 of the Code of Civil Procedure and since Section 94 of the Code of Civil Procedure does not find mention in Order XLIII of the Code of Civil Procedure, the remedy by way of an Appeal from Order is not available. The learned counsel for the Petitioner would contend that the Appeal being a creature of statute, since Order XLIII of the Code of Civil Procedure does not provide for any Appeal against an order passed whilst exercising the appellate jurisdiction, the remedy by way of an Appeal from Order is not available. The learned counsel for the Petitioner in support of his said contention, sought to place reliance on the Full Bench Judgment of the Calcutta High Court in the matter of *Sabyasachi Chatterjee v/s Prasad Chatterjee and others*⁷. The learned counsel also sought to place reliance on the judgment of the Apex Court in the matter of *Vareed Jakob v/s. Sosamma Geevarghese and others*⁸.

6 In view of the objection that is raised on behalf of the Respondent

7 2013 Calcutta 231

8 (2004) 6 SC 378

Nos. 1 to 4 herein i.e. the original Plaintiffs, the question that is posed in the instant matter is, whether against the order passed on a application for temporary injunction in an Appeal filed under Section 96 of the Code of Civil Procedure against the final decree, an Appeal would lie under Order XLIII of the Code of Civil Procedure or, the above Writ Petition is maintainable.

To answer the said question, relevant provisions of the Code of Civil Procedure would have to be referred to. The said provisions are Section 96, Section 104, Section 105, Section 107 and Order 43 Rule 1(r) which for the ready reference are reproduced herein under :-

96. Appeal from original decree.

(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of such Court.

(2) An appeal may lie from an original decree passed ex parte.

(3) No appeal shall lie from a decree passed by the Court with the consent of parties.

⁷⁹[(4) No appeal shall lie, except on a question of law, from a decree in any suit of the nature cognizable by Courts of Small Cause, when the amount or value of the subject-matter of the original suit does not exceed ⁸⁰[ten thousand rupees].]

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:-

⁸⁹[***]

⁹⁰[(ff) an order under section 35-A;]

⁹¹[(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;

⁹⁰[Provided that not 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 ⁹²[*****] from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

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.

ORDER XLIII APPEALS FROM ORDERS

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

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g)
- (h)
- (i)
- (j)
- (ja)
- (k)
- (l)
- (m).....

- (n)
- (na)
- (o)
- (p)
- (q)
- (r) an order under Rule 1, Rule 2, Rule 2A Rule 4 or Rule 10 of Order XXXIX;
- (s)
- (t)
- (u)
- (v)
- (w)

1A. Right to challenge non-appealable orders in appeal against decrees.-

(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in art appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.

(2) In an appeal against a decree passed in a suit after recording a compromise or refusing to record a compromise, it shall be open to the appellant to contest the decree on the ground that the compromise should, or should not, have been recorded.

2 Procedure --- The rules of Order XLI shall apply, so far as may be, to appeals from orders.”

A reading of Section 104 of the Code of Civil Procedure makes it clear that an appeal lies from the orders expressly provided in the body of the Code or by any law for the time being in force but from no other orders. Clause (i) of the said provision provides that an appeal lies against any order

made under rules from which an appeal is expressly allowed by rules. A reading of Section 105 provides 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. In so far as Section 107 is concerned, it postulates the powers of Appellate Court and sub-section (2) thereof provides that 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 the CPC on Courts of original jurisdiction in respect of suits instituted therein.

Now coming to Order XLIII of the Code of Civil Procedure, the said provision postulates that an appeal would lie under section 104 against the orders passed which are mentioned in clauses 1(a) to (w) of the said provision. The conjoint reading of Section 104 with Order XLIII of the Code of Civil Procedure would therefore lead to a conclusion that an appeal would lie under Section 104 of the Code of Civil Procedure against the orders passed under various provisions which are mentioned in clauses 1(a) to (w) of Order XLIII of the Code of Civil Procedure. Hence what Order XLIII provides for is an appeal against several orders made under several Orders of the Code of Civil Procedure. It is required to be noted that the procedure contemplated by Order XLI of the Code of Civil Procedure applies to the appeals filed under Order XLIII. A reading of Order XLIII of the Code of Civil Procedure therefore indicates that in the said order no distinction is made as to whether the order is

passed by the Trial Court whilst exercising original jurisdiction or the Appellate Court whilst exercising the jurisdiction under Section 96 of the Code of Civil Procedure. In so far as Order XLIII of the Code of Civil Procedure is concerned, the Legislature has not imposed any bar to the effect that when such a power of exercised by the Appellate Court exercising powers under Section 96 of the Code of Civil Procedure, an order passed under any of the clauses of Order XLIII of the Code of Civil Procedure, the same would not be appellable under Order XLIII of the Code of Civil Procedure.

7 In so far as Section 104 of the Code of Civil Procedure is concerned, by virtue of sub-section (2) thereof further appeal against the order passed in an appeal filed under Order XLIII of the Code of Civil Procedure is prohibited. Hence what is prohibited is filing of a further appeal against an order passed in an appeal under Order XLIII. The bar under Section 104(2) applies to order passed in an Appeal under Section 104 (1) therefore cannot apply to the appeal filed under Section 96 wherein an application for temporary injunction as in the instant case has been filed under Order XXXIX rules 1 and 2 of the Code of Civil Procedure.

8 Since the learned counsel appearing on behalf of the Petitioner Shri Ajay Joshi in support of his case that the above Writ Petition is maintainable and that the Petitioner is not required to file an appeal under

Order XLIII of the Code of Civil Procedure has placed reliance on the judgment of the Full Bench of Calcutta High Court in *Sabyasachi Chatterjee's* case (supra). The said judgment would have to be considered. The Reference made to the Full Bench of Calcutta High Court was in the following terms :-

“Whether, having regard to the facts and circumstances involved in this revisional application, an appeal is maintainable against the impugned order under O.43 R. 1(r) of the Civil procedure Code or not.?”

“The question as to whether a revisional application would be maintainable against an order of injunction passed in a misc. case is unsettled in view of conflicting opinions expressed by two sets of Division Bench decisions of this Court”

The said reference was made in view of the divergence of views between two sets of Division Benches of the Calcutta High Court. The facts before the Full Bench of the Calcutta High Court were identical to the facts in the instant case inasmuch as the Petition under Article 227 of the Constitution of India was filed arising out an interlocutory order passed in course of an appeal from a preliminary decree in a partition suit. On the issue as to whether an appeal would lie under Order XLIII of the Code of Civil Procedure or a revision under Article 227 of the Constitution of India is maintainable, there was a divergence of use between two sets of Division Benches of the Calcutta High Court, one set of Division Benches had held that in similar situations no appeal would be available from an interlocutory order of injunction passed by an Appellate Court, whereas other set of Division Benches

had taken a contrary view. Hence the matter was referred to the Full Bench whereas the reference which has been adverted to in the earlier part of this order was made. The Full Bench of the Calcutta High Court on considering the relevant statutory provisions held that the Appellate Court whilst considering the application for temporary injunction exercises powers under Section 107(2) of the Code of Civil Procedure and does not exercise the powers under Order XXXIX of the Code of Civil Procedure or like the provisions of the Code to pass an interlocutory order. The Full Bench held that the Appellate Courts exercise the powers under Section 107 read with Section 108 and since the appeal is not provided against an order passed in exercise of powers under Section 107(2), an appeal would not lie. The Full Bench relied on Section 105(1) to hold 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 right of appeal. The conclusion of the Full Bench can be found in Paragraph 27 of its judgment wherein the Full Bench has concluded that since there is no express provision for an appeal from an interlocutory appellate order upon the Appellate Court exercising the power under Section 107(2) of the Code, whether or not read with Section 108 thereof, the order which was passed and which was impugned in the appeal in question filed under Article 227 of the Constitution of India was not an appealable order. Hence what flows from the judgment of the Full Bench of the Calcutta High Court is that the Appellate Court whilst

considering an application for temporary injunction is exercising powers under Section 107 (2) of the Code and since by Section 105(1) of the Code no appeal lies against any order save and otherwise expressly provided and since no appeal is provided for against an order passed under Section 107(2) of the Code, an appeal would not lie, and therefore a Writ Petition filed under Article 227 of the Constitution of India is maintainable. The maintainability of the above Writ Petition is sought to be justified on the basis of the said Full Bench Judgment.

9 In so far as the efficacy of the judgment of the other courts is concerned, it is trite that the said judgments have persuasive value which should be taken note of and if dissented, the same has to be done by recording reasons therefor. A useful reference could be made to the judgment of the Apex Court in *Pradip J Mehta's* case (supra). Paragraph 23 of the said report is material and is reproduced herein under :-

23. Although the judgments referred to above, were cited at the bar in the High Court, which were taken note of by the learned Judges of the Bench of the High Court, but without either recording its agreement or dissent it answered the two questions referred to it in favour of the Revenue. Judicial decorum, propriety and discipline required that the High Court should, especially in the event of its contra view or dissent, have discussed the aforesaid judgments of the different High Courts and recorded its own reasons for its contra view. We quite see the fact that the judgments given by a High Court are not binding on the other High

Court(s), but all the same, they have persuasive value. Another High Court would be within its right to differ with the view taken by the other High Courts but, in all fairness, the High Court should record its dissent with reasons therefor. The judgment of the other High Court, though not binding, have persuasive value which should be taken note of and dissented from by recording its own reasons.”

In the said case before the Apex Court, though the judgments of various High Courts and one decision of the Authority for Advance Rulings were cited the Division Bench of the Gauhati High Court did not record its agreement or dissent from the view taken therein. It is in the said context, the Apex Court observed that though the judgments of other High Courts are not binding, they have persuasive value which should be taken note of and, if dissented from the dissenting court has to record its own reasons.

In **Rashmi Metallics Ltd.** (supra) the need to follow decisions which have stood the test of time was enunciated by the Apex Court. The Apex Court held that the same is a characteristic of the doctrine of Stare Decisis.

In so far as the judgment of the Full Bench of the Calcutta High Court is concerned, with utmost respect to the Full Bench, I am unable to persuade myself to take the view that is taken by the Full Bench of the Calcutta High Court. The view of the Full Bench of the Calcutta High Court that an interlocutory order of injunction passed in an appeal from the original decree is not referable to Order XXXIX of the Code but is passed in exercise of the powers under Section 107(2) of the Code is a view which I am respectfully not

in agreement with. A reading of Section 107(2) of the Code discloses that the said provision is in the nature of a declaratory provision which spells out the powers of the Appellate Court. By sub-section (2) of the said provision, it is provided that the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are concerned and imposed by the Code on the Courts of original jurisdiction. Hence the powers of the Appellate Courts are akin to the powers exercised by the Trial Courts when they are exercising the original jurisdiction in the matter of considering applications made under various provisions or Orders of the Code of Civil Procedure. Hence when the Appellate Court considers an application for temporary injunction or an application for appointment of Court Receiver, it is the power conferred by Section 107(2) which enables the Appellate Court to consider such applications, but the applications are referable to the specific provisions of the Code of Civil Procedure, in so far as temporary injunctions are concerned, it is Order XXXIX Rules 1 and 2 of the Code, in so far as the appointment of the Court Receiver is concerned it is Order XL of the Code. It therefore cannot be said that the powers exercised by the Appellate Courts whilst considering the application for temporary injunction or the application for appointment of Court Receiver/Commissioner are exercised de hors the relevant provisions of the Code of Civil Procedure and solely under Section 107(2) of the Code. If the said interpretation as propounded by the Full Bench of the Calcutta High Court viz the powers are exercised under Section 107(2)

of the Code, the same would lead to a conclusion that the powers under Order XXXIX or Order XL of the Code can only be exercised by the Trial Courts exercising the original jurisdiction. Moreover a perusal of Order XLIII discloses that it doesn't make any distinction between orders passed in the original jurisdiction or orders passed in the appellate jurisdiction.

10 Since the powers are exercised by the Appellate Court under Order XXXIX of the Code, the provisions of Section 105(1) of the Code have no application as against the order passed in an application under Order XXXIX of the Code an appeal is provided for under Order XLIII of the Code. In fact Section 106 provides that if any appeal against any order is allowed, the said Appeal would lie to the Court to which an appeal would lie from the decree in the Suit or where such an order is made by a Court exercising Appellate Jurisdiction then to the High Court. In so far as Section 104(1) is concerned, it also does not distinguish between an order passed by the Trial Court and an order passed by the Appellate Court. Hence a conjoint reading of Section 104(1) with Section 106 leads to a conclusion that when the Appellate Court considers any application under any of the Orders in the CPC an Appeal would lie to the High Court. Hence for the reasons aforesaid, I am unable to persuade myself to take the view that is taken by the Full Bench of the Calcutta High Court and therefore do not deem it appropriate to apply the judgment of the Full Bench of the Calcutta High Court on the said issue.

11 As indicated above, the learned Single Judges of various High Courts i.e. a learned Single Judge of Andhra Pradesh High Court in ***K. Gangulappa Naidu's*** case (supra), a learned Single Judge of this Court in ***Krishna Wankhede's*** case (supra) as also a learned Single of the Gauhati High Court in ***Nemi Chand Gangwal's*** case (supra) have all held that whilst deciding the interlocutory applications in an appeal filed under Section 96 of the Code, the Court is exercising powers under Order XXXIX of the Code and therefore the appeal would lie under Order XLIII of the Code and the bar contemplated by Section 104(2) would not apply. In so far as **Ramaswamy Reddiar's** case is concerned, the appeals filed under Section 96 were dismissed for non payment of court fees. The said dismissal was therefore under Order XLI Rule 19 of the Civil Procedure Code against which order an Appeal lies under Order XLIII. However in the context of the present issue it is required to be noted that the Learned Single Judge in the said case observed that the bar of Sub Section (2) of Section 104 has no application to an order made in an Appeal coming under Section 96.

12 Before the Learned Single Judge of the Gauhati High Court it seems that the judgment of the Full Bench of the Calcutta High Court was not cited. However, the Learned Single Judge of the Calcutta High Court can be said to have adjudicated the said issue from a slightly different perspective. The Learned Single Judge held that Section 104(2) only applies to an Appeal

filed under Section 104(1) and the said bar under Section 104(2) cannot apply to an Appeal filed under Section 96 or under any other provision, reading such a bar would amount to legislation by the Court which is contrary to the doctrine of *causis omnisus*. The Learned Single Judge of the Gauhati High Court has further held that since the Appellate Court has all the powers of the Trial Court as enshrined under Section 107(2) of the Civil Procedure Code the words “wherein a Suit” would be read as “wherein an Appeal” when power under order XXXIX Rule 1 is exercised by an Appellate Court sitting in an Appeal under Section 96 of the Civil Procedure Code, and therefore an Appeal would lie under Order XLIII of the Civil Procedure Code.

13 Now turning to the judgment of the Learned Single Judge of this Court in **Krishna Wankhede's** case (*supra*), the facts in the said case were identical to the facts in the instant case. The Suit in question therein was filed for perpetual injunction restraining the Defendants from interfering with his possession and enjoyment of the suit land. After a full trial, the Suit came to be dismissed by the Trial Court. The matter was carried in Appeal by the Plaintiff. In the said Appeal an application for temporary injunction by the Plaintiff who was the original Appellant was filed. The lower Appellate Court passed an order granting injunction and thereby protected the Plaintiff's joint possession along with the first Defendant. The Plaintiff/Appellant filed an Appeal From Order against the said order aggrieved by the limited injunction granted as it

was his case that he was entitled to an injunction restraining the Defendants from interfering with his possession. On the other hand the Defendant No.1 filed a Civil Revision Application challenging the said order on the ground that the lower Appellate Court ought not to have granted the limited injunction.

The Defendants questioned the filing of the Appeal on the ground that no Appeal lay from the order passed by the lower Appellate Court under Section 104(1) of the Civil Procedure Code and only a Revision would lie. The said contention urged on behalf of the Defendants was rejected by the Learned Single Judge of this Court. The Learned Single Judge held that under Section 104(1) of the Civil Procedure Code an Appeal shall lie from the orders mentioned therein and that includes any order made under Rules from which an Appeal is expressly provided by Rules. The Learned Single Judge held that any order passed under Rules 1, 2, 4, 10 and 11 of Order XXXIX would be Appealable. The contention urged by the Defendant No.1 that the said provisions apply only in respect of the order passed by the Trial Court and not when an order is passed by the Appellate Court was rejected by the Learned Single Judge on the ground that no such distinction is made by Section 104(1). The Learned Single Judge held that the application made to the Appellate Court was evidently made under Order XXXIX and since that was an original proceeding, an Appeal would lie under order XLIII Rule 1(r) of the Civil Procedure Code.

The Learned Single Judge relied upon the judgment of the Learned Single Judge of the Andhra Pradesh High Court reported in AIR 1982 AP 284 in the matter of K. Gangulappa Naidu Vs. Gangi Naidu, the Learned Single Judge of the Madras High Court reported in AIR 1976 Madras 63 and the Learned Single Judge of the Calcutta High Court reported in AIR 1981 Cal 264 in the matter of Mayarani Dutta Vs. Bhupal Banerjee.

I am in respectful agreement with the view taken by the Learned Single Judge of this Court in **Krishna Wankhede's** case (supra). The said view is holding the field since the last about 30 years. The said view can also be said to be a consistent view which has been taken over a long period of time by the High Courts across the country. Hence applying the doctrine of Stare Decisis, in my view, the view taken by the Learned Single Judge of this Court on the said issue commends acceptance and is therefore required to be followed.

14 Though the Learned Counsel for the Petitioner sought to place reliance on Section 94 of the Civil Procedure Code, the said provision has no application as the Appellate Court has not exercised power under the said provision. The Judgment of the Apex Court in **Vareed Jacob's** case (supra) in the facts of the present case has also no application.

15 Hence to conclude, it would have to be held that the above

Petition is not maintainable and the Petitioner is required to file an Appeal from Order under Order XLIII against the order granting temporary injunction passed by the Lower Appellate Court in Regular Civil Appeal No.119 of 2013 i.e. against the impugned order.

[R.M.SAVANT, J]

Date : 17th March, 2015

After pronouncement of the order, the Learned Counsel for the Petitioner Shri. A. A. Joshi seeks withdrawal of the above Petition with liberty to file Appeal from Order under Order XLIII of the Civil Procedure Code. The above Writ Petition is accordingly allowed to be withdrawn with liberty to file Appeal from Order. To facilitate the same the ad-interim relief which is operating in the above Petition to continue for a period of two weeks from date.

[R.M.SAVANT, J]