

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WITH

AND

CIVIL APPLICATION (ST.) NO. 5023 OF 2018

01. Shivaji Shankar Jadhav

02. Vasant Shankar Jadhav

...Appellants
(Ori.Respondents)

Versus

Laxman Gajanan Godbole
Through his Power of Attorney
Nikhil Dinkar Pawar

...Respondent
(Ori.Appellant)

Mr. Amit Borkar, Amicus Curiae.

Mr Manmath Sadashiv Athalye, for the Appellants and Applicants.

Mr A.V. Anturkar, Senior Advocate a/w Mr. Amol Gatne, for the Respondent.

CORAM : ABHAY S. OKA AND
RIYAZ I. CHAGLA, JJ.

Reserved on : 19 April 2018
Pronounced on : 17 September 2018

JUDGMENT : *(Per Riyaz I. Chagla, J.)*

1. This is a reference emanating from an order passed by the learned Single Judge of this Court on 6th February 2018 (for short “*the reference order*”). By administrative order dated 14th February 2018 passed by the Hon'ble the Acting Chief Justice, the issue/question framed by the learned Single Judge in the reference order has been referred to a Division Bench headed by one of us (A.S. Oka, J.).

2. The question framed by the learned Single Judge of this Court reads thus:-

“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?”

3. The learned Single Judge had answered this question in the negative and had held the Appeal from Order to be not maintainable. The learned Single Judge had expressly held in paragraph 20 thus:-

*“With due respect and humility, I am not in agreement with the view taken by earlier three Judges in the cases of **Krishna Pandurang Wankhede** (supra), **Shri Shivaji Shankarrao Patil** (supra) and **Subhash Sheti Pawar** (supra) holding that the order of interim injunction passed in appeal filed under Order 41 of the CPC is appealable under Order 43 Rule (1) sub-rule (r) of the CPC. Certain very relevant provisions of Section 104 and Order 43 of the CPC were not pointed to the earlier benches and, therefore, those provisions were not at all discussed. In my considered view, under given circumstances, it is not a case where different view is taken on a issue, but there was no opportunity to discuss the issue. However, it is better*

to refer this issue to the larger bench for more authoritative pronouncement....”

4. Since the view taken in one of the cases referred to in the above extracted paragraph viz. ***Shri Shivaji Shankarrao Patil*** has been taken by one of us (A.S. Oka, J.), we had before hearing the reference, enquired from the Advocates appearing for the parties as to whether they were agreeable to have the reference decided by us. As the Advocates were unanimously agreeable to have the reference decided by us, we have proceeded with hearing of this reference.

5. The brief background of facts is necessary:

- (i) In 1999, the Respondent herein had filed Regular Civil Suit No. 351 of 1999 before the learned Single Judge, Junior Division, Wai for simplicitor injunction against the Appellants' father and Appellant to whom the Respondent

had claimed were unlawfully obstructing the Respondent's possession of the suit property.

(ii) By a judgment and decree dated 8th October 2010, the Trial Court dismissed the Suit and held that the Respondents had failed to prove possession of the suit property and/or unlawful obstruction at the hands of the Appellant's father as well as the Appellant herein who was one of the Defendants in the said Suit.

(iii) The Respondent preferred an Appeal against the judgment of the Trial Court and as there was delay in preferring the Appeal, the Respondent had taken out an Application for condonation of delay.

(iv) The Application for condonation of delay being Miscellaneous Civil Application No. 223 of 2016

was allowed by the order dated 17th March 2017 passed by the learned District Judge, Satara.

- (v) The Respondent herein made an Application for interim injunction in the Appeal being the Regular Civil Appeal No. 117 of 2013. The learned District Judge allowed the Application and granted an interim injunction in favour of the Respondent herein on the ground that the Respondent had made out a *prima facie* case and proved that the balance of convenience lies in the Respondent's favour. It is held that the Appellant herein had failed to adduce any sort of documentary evidence to prove their physical possession of the suit property.

- (vi) The Appellant preferred an Appeal from Order in this Court wherein the Appellants had

challenged the power of the lower Appellate Court to grant interim injunction. Further grounds of Appeal were raised in the Appeal from Order including whether interim relief amounting to final relief can be granted, which we are not concerned with in this reference.

- (vii) The learned Single Judge by the reference order held that the Appeal from Order was not maintainable. The learned Single Judge departed from the prior view taken by this Court and has thus referred this issue to be answered by a Division Bench/Larger Bench.

6. This Court by order dated 22 March 2018 requested the learned Advocate Shri. Amit Borkar to assist the Court as *Amicus Curiae*, considering the importance of the issue being decided and which will have a bearing on several matters. Shri. Borkar readily agreed to assist this Court as *Amicus Curiae*. We

have heard the learned *Amicus Curiae* as well as the learned Counsel appearing for the Appellants and the learned Senior Counsel appearing for the Respondent and appreciate their assistance in deciding this reference.

7. The learned *Amicus Curiae* placed on record a compilation of judgments passed by various High Courts and which had taken the unanimous view that further Appeal would lie from an interim injunction order passed in an Appeal filed against an original decree under Section 96 of the Code of Civil Procedure, 1908 (for short “CPC”). These judgments hold that the express bar of a further Appeal under Section 104(2) of the CPC will not apply to orders passed in such Appeals and would be restricted to orders passed in Appeal from Order under Section 104 of the CPC. The judgments which have been referred to by the learned *Amicus Curiae* are :-

(1) ***Vijayan P.G. Vs. Mohanan***¹

¹ 2015 SCC Online Kerla HC 28461

- (2) *Kakarla Gangulappa Naidu and Others Vs. Kolla Gangi Naidu*²
- (3) *Ramu Reddy and another Vs. A.K. Sampath Reddy and another*³
- (4) *Ganesan Vs. Sadasivan*⁴

8. He has submitted that Section 107(2) of the CPC provides that the Appellate Court shall have the same powers and performs the same duties as conferred and imposed by the Code on the Courts of original jurisdiction in respect of the suits instituted therein. He has placed reliance on the judgment of the Full Bench of the High Court of Calcutta in the case of *Sabyasachi Chatterjee Vs. Prasad Chatterjee and Others*⁵, which holds that Section 107(2) of the CPC permits the Appellate Court to entertain an interlocutory Petition which may be for an order of injunction or the like in the course of the Appeal. It expressly holds that the Appellate Court exercises the

² 1982(1) APLJ Pg.73:Andhra Pradesh HC

³ 1991 LW 495 Madras HC

⁴ 2003 SCC Online Kerla 575

⁵ 2013(4) CTC 657

authority or discharges an obligation akin to the direct authority conferred or obligation imposed by the Code on the Court of original jurisdiction. However, that Court goes on to hold that the Appeals recognised under Order XLIII Rule 1 of the CPC cannot be understood to extend by implication to interlocutory Appellate orders, as the Appellate orders which are appealable, are expressly provided for in Order XLIII Rule 1 of the CPC, and this does not extend to interlocutory Appellate orders passed under Section 107(2) of the CPC. Shri. Borkar, the learned *Amicus Curiae* placed reliance on the judgment of this Court in the case of ***Vera Aranha Vs. Jacob Harlad Aranha***⁶, in support of his submission that where legislature has created a substantive right of Appeal by one clause of Section, cannot take away such a right by referring to a matter of procedure. A statute should be so constructed as to advance a remedy created by law and not to curtail it. He has relied upon the judgment of the Supreme Court in the case of ***Manohar Lal Chopra Vs. Rai***

⁶ 1987 *Mh.L.J.* 849

Bahadur Rao Raja Seth Hiralal⁷ in support of his submission that a Court can issue interim injunction under circumstances which are not covered by Order XXXIX of the CPC. It has been held therein that there is no expression in Section 94 of the CPC which expressly prohibits issue of temporary injunction in circumstances not covered by Order XXXIX or by any Rules made under the CPC. Shri. Borkar has also relied upon a judgment of the Gauhati High Court in the case of ***Nemi Chand Gangwal Vs. Suresh Kumar Jain***⁸, which holds that the First Appellate Court exercising power under Section 96 of the CPC can exercise power under the provisions of Order XXXIX Rule 1 of the CPC since the Appellate Court has all powers of the Trial Court as enshrined under Section 107(2) of the CPC. He has submitted that the order passed by the lower Appellate Court refusing or granting injunction is an order passed in exercise of powers of Order XXXIX Rule 1 of the CPC, for which the bar imposed under Section 104 of the CPC is not applicable and that

⁷ 1962 SUPP(1) SCR 450

⁸ 2014 SCC Online Gau 180

such order is appealable under Order XLIII Rule 1(r) of the CPC.

9. Shri. Athalye, the learned Counsel appearing for the Appellants has submitted that an injunction order passed in an Appeal from decree under Section 96 of the CPC is an order passed in continuation of a suit. He has submitted that the Appeal Court accordingly has the power to grant such an injunction order under Order XXXIX of the CPC and from which a further Appeal arises under Section 104(1) read with Order XLIII Rule 1(r) of the CPC. He has placed reliance upon judgments of the Supreme Court in:-

(1) *Mohammad Mahibulla & Anr. Vs. Seth Chaman Lal (dead) by L.R.s & Ors.*⁹

(2) *Vasant Ganesh Damle Vs. Shrikant Trimbak Datar & Anr.*¹⁰

(3) *Jagtar Singh Vs. Pargat Singh & Ors.*¹¹

(4) *K. Muthuswami Gounder Vs. N. Palaniappa*

⁹ AIR 1993 SC 1241

¹⁰ (2002)4 SCC 183

¹¹ (1996)11 SCC 586

Gounder¹²

He has submitted that an Appellate Court has the same powers and performs as nearly as may be the same duties as are conferred and imposed by the CPC on Courts of original jurisdiction. He has placed reliance on Section 107(2) of the CPC. He has submitted that the Appellate Court has the power to pass interlocutory injunction order under Order XXXIX of the CPC. He has submitted that the judgments relied upon by him have clearly held that the Appellate Court exercises powers as are exercised by the Trial Court and any bar to exercise such powers must be expressly provided for in the CPC. He has submitted that the powers of the Appellate Court to grant an interim injunction is in no way curtailed by any of the provisions of the CPC. He has submitted that the bar to a further appeal under Section 104(2) of the CPC does not apply to orders in Appeals under Section 96 of the CPC and such bar can only apply to orders passed in Appeals from Order under Section 104(1) of CPC from which no Second Appeal lies save as

¹² (1998)7 SCC 327

expressly provided in the body of the CPC and those expressly mentioned in Section 104(1) of the CPC. He has relied upon the judgment of the learned Single Judge of this Court in the case of **Krishna Pandurang Wankhede Vs. Sitaram Punjaji Wankhede**¹³, which holds that an order passed by the Appellate Court under Order XXXIX Rules 1 and 2 is appealable under Order XLIII Rule 1(r) of the CPC. He has also placed reliance upon a judgment of this Court in **Shri. Shivaji Shankarrao Patil Vs. Dnyanu Manu Patole**¹⁴ decided by one of us (A.S. Oka, J.), which holds that an Appeal against a decree is a continuation of a suit and that the Appellate Court while dealing with an Appeal under Section 96 of the CPC can exercise all powers of the Trial Court. It is held therein that an Appeal is maintainable under clause (r) of Rule 1 Order XLIII of the CPC from an order passed in an Appeal against the original decree under Section 96 of the CPC. He has also placed reliance upon the judgment of this Court in the case of **Shri. Subhash Sheti**

¹³ 1985 SCC Online Bom 267

¹⁴ W.P. 6166 of 2009 decided on 27 July 2009

*Pawar Vs. Sou. Minkashi Ravindra Zadbuke & Ors.*¹⁵, which holds that an Appeal from Order under Order XLIII is clearly maintainable against an order granted temporary injunction passed by the lower Appellate Court under Section 96 of the CPC. The learned Single Judge in that case has also followed the view taken by this Court in case of *Krishna Pandurang Wankhede* (supra).

10. Shri. Anturkar, the learned Senior Counsel appearing for the Respondent has made submissions in support of the view taken by the learned Single Judge in the reference order. He has submitted that the Appeal from Order has been correctly held to be not maintainable. He has submitted that Section 104(1)(i) of the CPC provides that “*any order made under rules from which an appeal is expressly allowed by rules.*” He has submitted that the word “*expressly*” means that it must specifically refer to any Rule in the CPC. Where there is no specific and/or express reference to any Rule, then an appellate

¹⁵ W.P.(St.) 31823 of 2014 decided on 17 March 2015

remedy cannot be spelt out. He has submitted that Section 107(2) which is in the main body of the CPC only creates jurisdiction and it is the Rules that indicate the manner in which the jurisdiction has to be exercised. This analysis of the CPC has been expressly provided for in the judgment of the Supreme Court in *Vareed Jacob Vs. Sosamma Geevarshese & Ors.*¹⁶. He has submitted that an Appeal is a creation of statute and is required to be expressly conferred upon. He has placed reliance upon Order XLIII Rule 1 of the CPC and has submitted that the said order refers to only four orders in Order XLI against which an Appeal would lie viz. Rules 19, 21, 23 and 23A. For this, he has drawn reference to clauses (t) and (u) of Order XLIII Rule 1. He has thus, submitted that except these four orders expressly referred to within the meaning of Section 104(1)(i), no Appeal can be spelt out. He has submitted that a combination of two provisions viz. Order XXXIX Rules 1 and 2 read with Section 107(2) of the CPC is impermissible, as then the word “*expressly*” used in Section 104(1)(i) is ignored. He has submitted that

¹⁶ (2004)6 SCC 378

when an Appellate Court passes an order of injunction, it is not using the provisions of Order XXXIX Rule 1, as the orders specifically refers only to a Suit. He has submitted that the words “*Suit*” used in Order XXXIX cannot be liberally interpreted to include “*Appeal*”. He has submitted that Order XLI Rule 33 is much wider than Order XXXIX Rule 1 of the CPC and hence, it would be incorrect to say that the order of injunction is granted by the Appellate Court under the provisions of Order XXXIX Rule 1. He has submitted that the legislature in its wisdom has not included Order XLI Rule 33 of the CPC in the list under Order XLIII Rule 1 and thus, it will not be correct to read that provision in the list. He has relied upon the following judgments of this Court in support of his submission that the Appeal from Order is not maintainable, in the light of the expressed bar under Section 104(2) and 105 of the CPC:-

- (1) ***Shobha Dinesh Supare and Anr. Vs. Dinesh Namdeorao Supare***¹⁷

¹⁷ 1993 (1) Mh. L.J 910

- (2) *Robert Punaji Salvi Vs. Bombay Diocesan Trust Association Pvt.Ltd. & Ors.*¹⁸
- (3) *Krishna Yeshwant Shiroadkar Vs. Subhash Krishna Patil*¹⁹ (by the Division Bench)

He has placed reliance upon the judgment of the Supreme Court in *Mahant Dhangir & Anr. Vs. Madan Mohan & Ors.*²⁰ to submit that Order XLI Rule 33 is very wide and enable the Appellate Court to pass any order or decree to meet the ends of justice. The Appellate Court would thus be exercising powers under that provision in issuing temporary injunction and not under Order XXXIX of CPC. He has also placed reliance upon the judgment of the Full Bench of the Calcutta High Court in the case of *Sabyasachi Chatterjee* (supra), which has held that the Appeals recognized under Order XLIII Rule 1 of CPC do not extend to interlocutory appellate orders passed under Section 107(2), as the same are not expressly provided in Order XLIII Rule 1. He has submitted

¹⁸ 1995 (2) Mh. L.J 679

¹⁹ 1988 Mh.L.J. 327

²⁰ 1987 (Supp) SCC 528

that an order of interim injunction passed in the Regular Civil Appeal filed under Order XLI of the CPC is not appealable under Order XLIII Rule 1(r) of the CPC.

11. We have considered the submissions. We find that the learned Single Judge in the reference order has taken a divergent view from the view taken by this Court in *Krishna Pandurang Wankhede* (supra), *Shri. Shivaji Shankarrao Patil* (supra) and *Shri. Subhash Sheti Pawar* (supra). The view taken in these cases is that the order of interim injunction passed in Appeal from an original decree under Section 96 of the CPC is appealable, as it falls under Order XLIII Rule 1(r) of the CPC. We find that the learned Single Judge has placed reliance upon Section 104 read with Order XLIII Rule 1 of the CPC.

Section 104 of the CPC reads thus:-

“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) and 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;

(2) No appeal shall lie from any order passed in appeal under this section.”

Order XLIII Rule 1 reads thus:-

- “1. ***Appeal from orders***— *An appeal shall lie from the following orders under the provisions of section 104, namely:—*
- (a) *an order under rule 10 of Order VII returning a plaint to be presented to the proper court [except where the procedure specified in rule 10A of Order VII has been followed];*
 - (b) *[***];*
 - (c) *an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a Suit;*
 - (d) *an order under rule 13 of Order IX rejecting an application (in a case open to appeal) for an Order to set aside a decree passed ex parte;*
 - (e) *[* * *];*
 - (f) *an order under rule 21 of Order XI;*
 - (g) *[* * *];*
 - (h) *[* * *];*
 - (I) *an order under rule 34 of order XXI on an*

objection to the draft of a document or of an endorsement;

(j) an order under rule 72 or rule 92 of Order XXI setting aside or refusing to set aside a sale;

[(ja) an order rejecting an application made under sub-rule (1) of rule 106 of order XXI, provided that an order on the original application, that is to say, the application referred to in sub-rule (1) of rule 105 of that order is appealable];

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

(l) an order under rule 10 of Order XXII giving or refusing to give leave;

(m) [* *];*

(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;

[(na) an order under rule 5 or rule 7 or Order XXXIII rejecting an application for permission to sue as an indigent person];

- (o) [** * **]
- (p) *orders in interpleader-suits under rule 3, rule 4 or rule 6 of Order XXXV;*
- (q) *an order under rule 2, rule 3 or rule 6 of Order XXXVIII;*
- (r) ***an order under rule 1, rule 2, [rule 2-A] rule 4 or rule 10 of Order XXXIX;***
- (s) *an order under rule 1 or rule 4 of Order XL;*
- (t) *an order of refusal under rule 19 of Order XLI to re-admit, or under rule 21 of Order XLI to re-hear, an appeal;*
- (u) *an order under rule 23 [or rule 23-A] or Order XLI remanding a case, where an appeal would lie from the decree of the Appellate Court;*
- (v) [*****];
- (w) *an order under rule 4 of Order XLVII granting an application for review”.*

12. The learned Single Judge has construed the

above provisions and although holding that an Appeal is a continuation of a suit, has held that the order passed in exercise of only four Rules in Order XLI of the CPC are appealable under Order XLIII of the CPC viz. Rules 19, 21, 23, 23A and that orders passed under other Rules are not at all appealable under Order XLIII of the CPC. The learned Single Judge has held that an Order of interim injunction passed in the First Appeal (an Appeal under Section 96 against a decree) is not appealable under Section 104 read with Order XLIII of the CPC as it is not specifically mentioned in the list under Rule 1 of Order XLIII of the CPC.

13. The learned Single Judge of this Court in the case of *Krishna Pandurang Wankhede* (supra) at paragraph 4 held thus:-

*“On behalf of the first defendant, it was contended that no appeal lay from the order passed by the District Court under **section 104(1) of the code of***

civil procedure and only a revision should have been brought. It is difficult to accept this contention because under **section 104(1), civil procedure code** an appeal shall lie from the orders enumerated therein and that includes any order made under rules from which an appeal is expressly allowed by rules. Any order made under **rules 1, 2, 4, 10 and 11 of order 39** would be appealable. According to the learned Counsel for the first defendant, these provisions would apply only in respect of the order passed by the trial Court and not when an application is made to the Court of appeal from the decree and the Appellate Court is seized of whole suit as a Court of appeal. **Section 104(1) of the civil procedure code** however, makes no such distinction. The application made to the District Court was evidently one made under **order 39, civil procedure code** and that was an original proceeding from which an appeal would lie in view of the **provisions of order 43, rule 1(r), civil procedure code**. This was also the view taken in Mayarani Dutta v. Bhupal Banerjee (AIR 1981 Cal. 264), K. Gangulappa Naidu v. Gangi Naidu (AIR 1982 A.P. 284), and **Ramaswamy Reddiar v.**

*Chinna Sithammal (AIR 1976 Madras 63). In the case of K. Gangulappa Naidu (supra), the facts were similar and the learned Judge held that a regular appeal pending before the Appeal Court if an order is passed under Order 39, rules 1 and 2, of as a matter of fact under any of the orders then the appeal is maintainable under **order 43, rule 1, civil procedure code** as all such orders are appealable under **order 43, civil procedure code**. There is, therefore, no substance in the plea that no appeal lay from the order passed by the learned Additional District Judge on 29th March 1986.”*

14. This judgment has been followed by a learned Single Judge of this Court in the case of **Shri. Subhash Sheti Pawar** (supra), wherein it is observed that the view taken in the case of **Krishna Pandurang Wankhede** (supra) has been holding the field since the last 30 years and can be said to be a consistent view taken over a long period of time by the High Courts across the country. The learned Single Judge has thus not accepted the contrary view taken by the Calcutta High Court

in ***Sabyasachi Chatterjee*** (supra). The learned Single Judge has held that it cannot be said that the powers exercised by the Appellate Court whilst considering the application for temporary injunction are exercised *dehors* the (relevant) provisions of Rules 1 and 2 of Order XXXIX of the CPC and/or solely under Section 107(2) of the CPC. The learned Single Judge accordingly, held that an Appeal from Order is maintainable from an order under Order XXXIX of the CPC passed by the lower Appellate Court from an original decree under Section 96 of the CPC and this would expressly fall under Order XLIII Rule 1(r) of the CPC. This view has also been taken by one of us (A.S. Oka, J.) in the case of ***Shri. Shivaji Shankarrao Patil*** (supra). Paragraph 2 reads thus:-

“Both the submissions are misconceived. The bar of sub-section 2 of section 104 will apply provided the order impugned has been passed in an appeal against order under Section 104 of the said Code. In the present case, the appeal is against the original decree which is governed by section 96 of the said

Code. The second submission is also misconceived. The appeal against decree is a continuation of a suit. The appellate court while dealing with an Appeal section 96 of can exercise all the powers of the trial court. Therefore, the application made by the petitioner was specifically under rules 1 and 2 of Order XXXIX of the said Code. In view of the law laid down by this court in the case of Krishna Pandurang Wankhede Vs. Sitaram Punaji Wankhede (1986 Mh.L.J. Page 865), an Appeal is maintainable under Clause (r) of Rule 1 of Order XLIII of the said Code. As a statutory remedy of preferring an appeal is open, this petition under Article 227 of the Constitution of India is not entertained.”

15. It has thus been a consistent view taken by this Court that an Appeal against the original decree which is governed by Section 96 of the CPC and in which an order has been passed under Rules 1 and 2 of Order XXXIX of the CPC, an Appeal from that Order is maintainable under Clause (r) of Rule 1 of Order XLIII of the CPC. It has further been held that the

Statutory remedy of Appeal from Order under Section 104 of the CPC is a more appropriate remedy rather than a Petition filed under Article 227 of the Constitution of India.

16. In considering the powers of an Appellate Court, it is necessary to refer to Section 107(2) of the CPC which reads thus:-

“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.”

17. From a reading of Section 107(2) of the CPC, it is clear that the Appellate Court has the same powers and performs as nearly as may be the same duties as are conferred and imposed by the CPC on Courts of regular jurisdiction in respect of the suits instituted therein. This would necessarily include an Appellate Court passing orders which a Trial Court

hearing a Suit would pass. Hence, injunction orders under Order XXXIX are clearly within the ambit of an Appellate Court. The Court of original jurisdiction or Trial Court has a power to pass an order in exercise of powers under Rules 1 and 2 of Order XXXIX of the CPC. The same power can be exercised by an Appellate Court (District Court) in an Appeal under Section 96 of the CPC. This Court in *Prabhakar Vishnu Naik Vs. Union of India*²¹ has considered Section 107(2) of the CPC and held that subject to any conditions and limitations which may have been prescribed, the Appellate Court has as nearly as may be the same duties and powers as the trial Court.

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*

²¹ AIR 1970 Bom. 285

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 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* (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

“(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.

[RIYAZ I. CHAGLA J.]

[ABHAY S. OKA, J.]