

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL APPEAL (L) NO. 434 OF 2018
WITH
NOTICE OF MOTION (L) NO. 1002 OF 2018

Trident Steel and Engineering Co.	}	
a sole proprietorship concern	}	
through its sole proprietor	}	
Mr.Hitesh N. Kanungo, having its	}	
address at Office No. 1, 101, 1 st floor,	}	
Prime View Building, 8 th Khetwadi,	}	
Mumbai-400 004	}	Appellant
versus		
1. Vallourec (A company existing	}	
under the Laws of France 27,	}	
Avenue du General Leclerc 92100,	}	
Boulogne-Billancourt, France,	}	
represented by its President-	}	
Mr.Philippe Crouzet	}	
	}	
2. Mr.Dharampal Singh	}	
Building No. 5, Shiv Sankalp	}	
Plot No. 706, Mazekar Lane,	}	
Gandhinagar, Worli, Mumbai-	}	
400 018	}	Respondents

WITH
COMMERCIAL APPEAL (L) NO. 428 of 2018
WITH
NOTICE OF MOTION (L) NO. 996 OF 2018

Reliant Pipes and Tubes Pvt. Ltd.	}	
501, 5 th floor, 67 Ankush	}	
Apartments, 10, Khetwadi Road,	}	
Mumbai-400 004	}	Appellant
versus		
1. Vallourec (A company existing	}	
under the Laws of France 27,	}	
Avenue du General Leclerc 92100,	}	
Boulogne-Billancourt, France,	}	
represented by its President-	}	
Mr.Philippe Crouzet and through	}	

Zubin Koshi, age 38 years,	}	
Occ. Service, R/at 603, Rustomji	}	
Alliance Inorbit Mall Off Road,	}	
Malad (East), Mumbai-400 064	}	
	}	
2. Osho Tubes and Pipes,	}	
Mumbai No.46, Kapadia Chambers,	}	
D. N. Road, Masjid Bunder,	}	
Mumbai-400 003	}	
	}	
3. Toshiba JSW Power Systems	}	
Pvt. Ltd., 4 th floor, Building No. 10,	}	
Tower B, Phase II, DLF Cyber City,	}	
Gurgaon-122002	}	Respondents

Mr. Mayur Khandeparkar with Mr. Kunal Kanungo and Mr. Smith Shah I/b. Mr. S. Venkateshwar and Mr. Kunal Kanungo for the appellant in COMAPL/434/2018.

Mr. Ravi Kadam-senior advocate with Mr. Mehul Shah and Ms. Snehal Dukhale for respondent no. 1 in COMAPL/434/2018.

Mr. Rizwan Merchant with Mr. Ramiz Shaikh I/b. Mr. Pandey Gaurav Vijay for the appellant in COMAPL/428/2018.

Mr. Venkatesh Dhond-Senior Advocate with Ms. Snehal Dukhale I/b. Mr. Mehul Shah for respondent no. 1 in COMAPL/428/2018.

Mr. Chinmay Gaonkar with Mr. Sajid Shaikh I/b. M/s. Gaonkar and Company for respondent no. 2 in COMAPL/428/2018.

Mr. Hiren Kamod with Mr. Adheesh Nargolkar I/b. M/s. Khaitan and Co. for respondent no. 3 in COMAPL/428/2018.

**CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.**

DATE :- OCTOBER 16/17, 2018

ORAL JUDGMENT :- (Per S. C. Dharmadhikari, J.)

1. These two appeals were heard together and are disposed of by this common order. It is agreed by both sides that in these appeals, the orders passed by the learned Single Judge of this court, during the course of hearing of the Notices of Motion for interim reliefs, are impugned on several grounds.

2. When these matters were called out, the contesting respondents therein represented by Mr.Ravi Kadam-learned senior counsel and Mr.Venkatesh Dhond-learned senior counsel raised preliminary objections to the maintainability of these appeals. Our attention was invited to section 13 of the Commercial Courts Act, 2015 as amended by the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018. This amendment has been brought into force from 21st August, 2018, but effective from 3rd May, 2018.

3. It is urged by the learned senior counsel that the orders impugned in these appeals are not appealable within the meaning of sub-section (1A) of section 13 of the Commercial Courts Act,

2015 as amended. They would submit that these appeals be dismissed on the ground of maintainability alone.

4. For considering the issue of maintainability of the appeals, it would be worthwhile reproducing certain relevant dates and events.

5. We would, for the sake of convenience, refer to the facts and circumstances in Appeal (L) No. 434 of 2018. That appeal has been brought by Trident Steel and Engineering Co. It is claiming to be a sole proprietorship of one Hitesh Kanungo. The sole proprietorship is original defendant no. 1 in Commercial IP Suit No. 1158 of 2018 on the file of this court. Respondent no. 1 to this appeal is the original plaintiff, whereas, respondent no. 2 is one Dharampal Singh.

6. Notice of Motion (L) No. 231 of 2018 was moved in this Commercial IP Suit and a copy of that notice of motion has been annexed to the appeal paper book. That is at page 50 of the paper book. However, the plaint as originally instituted has only one defendant-appellant before us. The reliefs claimed against the appellant-defendant are an injunction restraining the appellant from infringing or attempting to infringe the registered trademark VALLOUREC and which is depicted in the prayers with

a registration number and the further restraint is against manufacturing, causing to manufacture, selling, offering for sale, marketing, import or export either directly or indirectly or in any manner dealing with the said trademarks or any other similar or identical marks likely to cause confusion in the minds of the customers. Prayer clause (b) is pertaining to the logo marks and prayer clause (c) seeks to restrain the goods being passed off as that of respondent no. 1-plaintiff. By prayer clause (d), appointment of receiver is sought and with all powers under Order XL Rule 1 of the Code of Civil Procedure, 1908, including a prayer to inspect the premises of the appellant before us, take stock of all infringed materials containing the marks of respondent no.1-plaintiff and thereafter, taking the same in custody. There are further incidental and ancillary prayers.

7. The prayers in the notice of motion are sought to be supported by the affidavit, duly affirmed on 11th January, 2018.

8. This notice of motion is pending in this court. The prayers in the same are founded on the pleadings, particularly that the first respondent-plaintiff is a company existing under the laws of France and the first defendant is within the territorial jurisdiction of this court and carrying on business at the address mentioned in the cause title.

9. The background of the plaintiff is claimed to be world leader in premium tubular solutions primarily serving the energy markets (oil, gas and power generation). It claims to be an expert in manufacturing facilities, advanced research and development and a presence in more than 20 countries. It offers to its customers innovative global solutions to meet the energy challenges of the 21st century. In the course of such activities, it manufactures tubes. These are manufactured at its plant world wide. They are claimed to be high quality products produced to withstand harsh environments. They are designed to resist corrosion, extreme temperature variations and very high pressure. Their main uses are in the oil and gas sector. It is during the course of its business activities that the plaintiff asserts its presence in the Indian market. It says that it has supplied its products to the National Thermal Power Corporation, Khargone Power Project built by M/s. Larsen and Toubro. Its solutions enable power companies to meet the challenges of energy efficiency and reduce carbon emissions in power plants. These wide range of tubes for installations in refineries, mechanical engineering applications and industrial sectors have been extensively sold and after setting out the trademark registration, it is claimed that the plaintiff has a huge turnover. The presence in Indian market is also established by relying upon

certain documents. After the presence in international and Indian market, it is stated that its reputed clients based in India includes Bharat Heavy Electricals Limited and Larsen and Toubro etc. Relying upon an invoice of products of the plaintiff supplied in India, it is claimed that the pipes, which are manufactured and sold through the group company are given a mill test certificate. It is claimed to be conclusive evidence that the products are genuine and originated from the plaintiff and its group company only. The mill test certificate is a *prima facie* evidence of the genuineness of the product.

10. In para 12 of the plaint and thereafter, the ill effects of counterfeit pipe and proactive measures taken by the plaintiff have been extensively set out and then, the sequence of events is mentioned leading to the institution of the suit. It is claimed that the company styled as M/s. International Pipeline Structural Solutions Limited (IPSS) sold certain pipes and which were purchased by another entity based in Dubai. It is the Dubai entity which informed the plaintiff that there were fake pipes with the mark of the plaintiff with a fake mill test certificate. It is claimed that it was procured from M/s.IPSS. In turn, IPSS confirmed that the same was acquired and procured from a company in India, namely, defendant no. 1-appellant before us. That is how on

getting further information, the plaintiff-respondent no. 1 made inquiries in the market and contacted several entities. During its enquiries, it came to the plaintiff's knowledge that it is the appellant-defendant no. 1, who has been responsible for the alleged illegal and wrongful acts resulting in an infringement of their registered mark. It is in these circumstances that the cause of action in the plaint is set out and it is claimed that it arose when the plaintiff was approached by the Dubai based entity to reconfirm the veracity of the mill test certificate, which was supplied by the defendant in order to provide the counterfeit pipes. That is issued by defendant on 16th February, 2017. The cause of action further arose when on 20th February, 2017 when IPSS approached the plaintiff to verify the mill test certificate. Thus, the cause of action continues to arise because such acts have not been discontinued despite the defendant being specifically informed and in writing by the plaintiff. Thus, this cause of action is a continuing one.

11. On these pleadings, the suit was instituted in this court in the month of January, 2018 and it had several documents annexed and styled as exhibits. It is in such a suit that the notice of motion for interim reliefs was moved.

12. In somewhat identical facts and circumstances the suit in the companion appeal was also moved before this court by the plaintiff therein. In that, the plaintiff is the same (respondent no.1 before us). The plaint in IP Suit (L) No. 1098 of 2018 has, other than the appellant-original defendant no. 2, two more entities M/s. Osho Tubes and Pipes, Mumbai and M/s. Toshiba JSW Power Systems Pvt. Ltd. As defendant nos. 1 and 3. The appeal is filed by defendant no. 2 M/s. Reliant Pipes and Tubes Pvt. Ltd. It is stated in the plaint in this suit and after reiterating the plaintiff's presence in the market in India that there are ill effects of counterfeit pipes. They are being supplied and because of that there was an incident in November, 2017 which is highlighted. The plaintiff's attention was invited to the counterfeit supply with forged mill test certificate. After launching inquiries and investigations, it was brought to the notice of the plaintiff that Toshiba International (Europe) Ltd. an Equipment Procuring Contractor (EPC) in the United Kingdom, on behalf of its subsidiary (original defendant no. 3) placed an order for supply of seamless pipes for building the steam turbine and generator package for a thermal power plant at Meja, Allahabad in the State of Uttar Pradesh. That is how the plaintiff became aware that when these pipes were supplied in the year 2013-14, there occurred an explosion in that power plant on 16th January,

2017, resulting in the death of a local contractor, an employee of a sub-contractor of defendant no.3. This internal investigation revealed that there was a joint venture between National Thermal Power Corporation and a Uttar Pradesh based company. That joint venture entered into an agreement with defendant no. 3, which is a subsidiary of Toshiba International (Europe) Ltd. to build the steam turbine and generator package for the Meja Project. The project was to assure thermal power availability for the Indian State of Uttar Pradesh. M/s. Toshiba International (Europe) Ltd. approached the plaintiff specifically requesting the plaintiff's branded carbon seamless steel pipes of the specifications detailed in Annexure 'R' to the plaint. The order was booked directly on the plaintiff and then, the mill test certificate of 17th January, 2017 procured by defendant no. 3 was brought to the notice of the plaintiff. After checking that certificate, the plaintiff discovered that it had never supplied any pipes to defendant no. 1 after 2001. The pipes of the dimension mentioned in this certificate were never supplied in India. That is how the further inquiries in relation to issuance of the mill test certificate were launched, whereafter, the plaintiff became aware of the entire network. That is how it sets out in detail that the procuring of the pipes resulted in the infringement and passing off. On the said pleadings and setting out the cause of action, the

plaintiff has claimed the final and interim reliefs. In the suit, which has been filed in this court on 12th July, 2018, Notice of Motion (L) No. 1943 of 2018, seeking similar interim reliefs as in the first suit, was filed.

13. When copies of the complaints and notices of motion with affidavits in support were duly served, the plaintiffs made an application for urgent ad-interim reliefs.

14. It would be necessary then to set out the events post such application for urgent ad-interim reliefs.

15. From the record of Commercial Appeal (L) No. 434 of 2018, it is clear that when the suit was filed and the application as above was made, the learned Single Judge was of the view that the sole proprietor of M/s. Trident Steel and Engineering Company ought to have remained present in the court in view of the serious allegations pertaining to fabrication of documents. The court was informed that the representative of the said Trident Steel and Engineering Company was celebrating his cousin's marriage in Rajasthan. Thereupon, the court recorded a statement of the defendant, made on instructions. The order passed on 7th February, 2018 reads as under:-

“1. The Defendant ought to have remained present in Court in view of the very serious allegations made against them

including the allegation pertaining to fabrication of documents. Instead the Court is informed that the representative/owner of the Defendant Company is celebrating his cousin's marriage at Rajasthan.

2. The learned Advocate for the Defendant on instructions, states that the Defendant has not received any orders for supply of pipe under the mark VALLOUREC' and shall not sell, supply or export pipes under the said mark VALLOUREC. The statement is accepted.

3. Stand over to 13-02-2018 when the owner/representative of the Defendant shall remain present.”

16. Then, the matter was placed before this court on 13th February, 2018, on which date, after hearing both sides, this court passed the following order:-

“1. The Plaintiff is allowed to join Mr.Dharampalpad of Accurate Multi Trade having office at R/C-5, Shiv Sandesh Co-operative Housing Society Ltd., Dainik Shivneri Marg, Gandhi Nagar, Worli, Mumbai as well as Mr.Upadhya as party Defendants to the above Suit. Amendments to be carried out on or before 14th February, 2018. Reverification is dispensed with.

2. Mr. Dharampalpad of Accurate Multi Trade is directed to remain present before this Court on 14th February, 2018 at 3.00 p.m., failing which this Court shall be constrained to pass appropriate orders to ensure his presence before the Court.

3. Since I am satisfied that Mr.Hitesh Kanunga has cheated several purchasers and dealers in Steel and has provided certificates purportedly issued by the Plaintiff knowing that the same is fabricated. He is directed not to leave the jurisdiction of this Court until further orders.

(Underlining ours.)

4. Stand over to 14th February, 2018 at 3.00 p.m.”

17. A perusal of this order would indicate that in the first suit, apart from the sole defendant Trident Steel and Engineering Company, one more entity represented by Mr. Dharampalpad

Singh was joined as a party defendant. In fact, Mr.Dharampalpad was impleaded in his personal capacity. It was stated that he carried on business in the trading name and style M/s.Accurate Multi Trade. The order passed on 13th February, 2018 reveals that the court was of the view that Mr.Dharampalpad Singh is also involved in the acts attributed to the appellant before us. Thereafter, apart from the appellant sole defendant, Mr.Dharampalpad was also directed to be impleaded as a party defendant. This court expressed a view that the appellant's owner/representative Hitesh Kanungo has cheated several purchasers and dealers in steel and has provided certificates purportedly issued by the plaintiff knowing that the same are fabricated. Hence, he was directed not to leave the jurisdiction of the court until further orders. Then, the matter was posted on 14th February, 2018.

18. The matter was then posted on 16th February, 2018. On that date, this court was apprised of the fact that the entity Accurate Multi Trade is a sole proprietorship concern of one Dharampalpad Singh. It had a bank account with Yes Bank Limited, Lamington Road Branch. This sole proprietor also had a Mobile phone connection and that mobile phone was provided by a service provider-Bharti Airtel Limited. However, that number was not

found to be active. Then, it is stated by the proprietor of defendant no. 1 that he has to pay an amount of Rs.23 lakhs to Dharampalpad Singh and the profit that defendant no. 1 has earned in regard to the two transactions is Rs.11 lakhs. Therefore, on or before 20th February, 2018, he was directed to deposit a demand draft of Rs.30 lakhs. The matter was then posted on 20th February, 2018. The learned Single Judge made some corrections in his earlier order and after hearing parties, made the following order:-

“1. Pursuant to the Order passed by this Court dated 16th February, 2018, the Proprietor of the Defendant, who is present in Court, has tendered two demand drafts, aggregating to Rs.30,50,000/- drawn in favour of the Prothonotary and Senior Master, High Court, Bombay. The Prothonotary and Senior Master shall get the demand drafts encashed and invest the same in fixed deposit of a nationalized bank initially for a period of 90 days.

2. I have perused the letter dated 10th February, 2018 produced by the Branch Business Leader, Yes Bank Limited, Lamington Road Branch, Mumbai written by the Senior Police Inspector, V. P. Road, Mumai calling upon Yes Bank Limited, Lamington Road Branch, Mumbai to provide certain particulars with respect to account No. 01983800002391 of M/s.Accurate Multi Trade, whose Proprietor is Mr.Dharampalpad Singh.

3. Since the above Suit is filed before this Court against M/s.Accurate Multi Trade making several allegations of fraud and Mr.Dharampalpad Singh is not available at his address at R/C-5, Ground Floor, Parel Shiv Sandesh CHSL., Gandhi Nagar, Dainik Shivneri Marg, Worli, Mumbai - 400 018 for service, the Senior Police Inspector, V.P.Road Police Station, Mumbai is directed to remain present before this Court on 21st February, 2018 at 03.00 p.m. along with all the documents, that are in his possession with regard to M/s.Accurate Multi Trade, whose Proprietor is Mr.Dharampalpad Singh.

4. A copy of this Order shall be forthwith served on the Senior Inspector of Police, V. P. Road Police Station, Mumbai.
(Underlining by us.)

5. The Proprietor of the Defendant shall remain present before this Court as and when require.

6. Stand over to 21st February, 2018 at 03.00 p.m.”

19. Pertinently, in this order, the learned Single Judge directs that a copy of the same shall be forthwith served on the Senior Inspector of Police, V. P. Road Police Station, Mumbai. The matter was stood over to 21st February, 2018, on which date, the learned Single Judge passed the following order:-

“1. Pursuant to the order passed by this Court dated 20th February, 2018, Mr.S. Z. Avhad, PN 30947 attached to V. P. Road Police Station is present before this Court. He has produced a copy of the anonymous complaint received by the Senior Inspector of V. P. Road Police Station against Mr.Dharampalpad Singh, on 2nd February, 2018. Mr. Avhad has informed the Court that they are investigating the matter. Since, the representative of YES Bank has provided the mobile number of Shri. Dharampalpad Singh, the same is handed over to Mr.Z. Z. Avhad. (Underlining by us.)

2. The Nodal Officer, Bharti Airtel Limited, 7th Floor, Interface Building No. 7, Interface Link Road, Malad (West), Mumbai - 400 064 shall on 23rd February, 2018 at 3.00 p.m. produce before this Court, all the particulars pertaining to Mobile No.9892997115 including the application form submitted by the subscriber.

3. Stand over to 23rd February, 2018 at 3.00 p.m.”

20. Thereafter, on the adjourned date, namely, 23rd February, 2018, the learned Single Judge was informed that the mobile connection is not of Mr. Dharampalpad Singh, but one Modsingh Padam Singh Rajput. Upon being so appraised, the learned Single Judge made the following order:-

“1. Pursuant to the order passed by this Court dated 21st February, 2018, Mr. Manoj Patil, Nodal Officer of Airtel is present in Court. He has informed the Court that the Mobile number mentioned in the order is registered in the name of Modsingh Padam Singh Rajput. The same is activated on 15-06-2009 and his address is Kothari Cloth Store, Shri Ram Mills Galli, B. D. D. Chawl No. 102, Samrutwar Marg, Shree Ram Mills, Mumbai - 400 013. A photocopy of the Application form filed by Mr. Modsingh Padam Singh Rajput seeking a mobile connection is also submitted by Mr. Patil, which is taken on record.

2. Mr. Modsingh Padam Singh Rajput is directed to remain present before this Court on 27th February, 2018 at 3.00 p.m. A copy of this order shall be served on Mr. Modsingh Padam Singh Rajput by hand delivery by the Advocate for the Plaintiff. Stand over to 27th February, 2018 at 3.00 p.m.”

21. It appears that the matter was then heard in the month of April, 2018, in Chambers. On 12th June, 2018, the matter was again posted before the same learned Single Judge and he passed the following order:-

“1. The Plaintiff has filed a complaint with V. P. Road Police Station on 21-03-2018, pursuant to which V. P. Road Police Station is now proceeding to register an FIR and investigate the matter. The statements of the representative of the Plaintiff and Mr. Hitesh Kanungo were recorded on 24-04-2018.

2. Perused the order dated 13-02-2018, more particularly paragraph 3 of the said order. Since I am informed that after passing of the said order Mr. Hitesh Kanungo has extended all co-operation in the matter and has also deposited an amount of Rs.30,50,000/- in this Court, which comprises of his profit and the payment to be made by him to Mr. Dharampal Singh, the investigating officer shall not take action on the basis of the contents of the said paragraph and shall proceed with the investigation on its own merits. The IO shall submit his report to this Court on 15th June, 2018. Mr. Hitesh Kanungo shall extend all co-operation to the IO with regard to the investigation being carried out.

(Underlining by us.)

3. Despite several attempts, Mr. Dharampal Singh is not appearing before the Court and the Plaintiff has been unable to serve the proceedings on Mr.Dharampal Singh. In view thereof, issue bailable warrant in the sum of Rs.15,000/- against Mr.Dharampal Singh, Accurate Multi Trade, R/C-5, Ground Floor, Parel Shiv Sandesh Co-op. Hsg. Soc. Ltd., Gandhi Nagar, Dainik Shivneri Marg, Worli, Mumbai, 400 018, returnable on 15th June, 2018. The Prothonotary and Senior Master shall forward the said bailable warrant to the Commissioner of Police, Mumbai by hand delivery with a direction to the said authority to execute the said bailable warrant and return the said executed bailable warrant to this Court before the returnable date. Stand over to 15th June, 2018.”

22. On 15th June, 2018, namely, on the adjourned date, the learned Single Judge was informed by the Assistant Police Inspector attached to V. P. Road Police Station, Mumbai and the Police Sub Inspector attached to Worli Police Station, both of whom were present in court, that they were not successful in tracing Dharampal Singh. The learned Single Judge observed that Mr.Dharampal Singh is absconding. In view thereof, he directed the Registry of this Court to issue non-bailable warrant against Mr.Dharampal Singh at his last known address. The Prothonotary and Senior Master of this court was also directed to forward the non-bailable warrant to the Commissioner of Police, Mumbai by hand delivery with a direction to the said authority to execute this warrant and to return this court on 29th June, 2018. Since the address of Mr.Dharampal Singh was provided to this court and it was informed that he resides within the limits of Worli Police Station, the record indicates that the Assistant

Commissioner of Police, Worli Division and Police Inspector attached to Worli Police Station were present in court on 29th June, 2018. This court then passed the following order:-

“1. Mr.Sandbhor, ACP, Worli Division with Mr.Jitendra Pawar, PI, Worli Police Station are present in Court. They have informed the Court that though this Court has by an order dated 15th June, 2018 issued a non-bailable warrant of arrest against Mr.Dharampal Singh, they are unable to trace him.

2. Mr.Dharampal Singh is involved in a very serious fraud. He has cheated several purchasers and dealers in the steel business by selling pipes to them on a misrepresentation that the same are manufactured by well known international companies like the Plaintiff and has provided them certificates, purportedly issued by such international companies, which are infact, forged and fabricated. In view thereof, the Commissioner of Police, Greater Mumbai shall form a special team of senior and experienced police officers to execute the non-bailable warrant of arrest issued against Mr.Dharampal Singh and produce him before this court on the extended returnable date i.e. 18th July, 2018. A copy of this order shall be forthwith served on the Commissioner of Police, Greater Mumbai.

(Underlining by us.)”

23. The matter was again heard on 4th July, 2018. On 4th July, 2018, the court was apprised of registration of FIR No. 166 of 2018 and arrest of the accused. Thus, the process of registration of FIR commenced post institution of the suit. It is evident, prima facie, that the FIR was registered in view of the observations of this court in the above reproduced orders. Pertinently, this court directed, to post the motion on 11th July, 2018, as also the Investigating Officer to file his report. The matter was stood over to 11th July, 2018. Accused Dharampal Singh was produced

before the court and therefore, the non-bailable warrant stood cancelled. On 11th July, 2018, one of the impugned orders came to be passed. That reads as under:-

“1. Advocate for the Plaintiff has tendered draft amendment. He seeks to amend the Plaint in terms of draft amendment. The draft amendment is taken on record and marked 'X' for identification. The Plaintiff is allowed to carry out the amendments within a period of one week from today in terms of draft amendment marked 'X'.

2. Perused the report submitted by V. P. Road Police Station, Girgaon, Mumbai. From the said report, it appears that investigation is being carried out, and certain individuals are absconding. Advocate Ashish Mehta states that his client – proposed Defendant No. 2 is a victim of mistaken identity. Learned Advocate for the Plaintiff states that it appears that Defendant No. 1 is involved in selling pipes of international brands alongwith fabricated certificates purportedly issued by well known manufacturers of pipes like the plaintiff. In view thereof, the Commissioner of Police may form a special team to investigate this matter headed by an officer not lower the rank of the Deputy Commissioner of Police.

3. Stand over to 23rd July, 2018 for submission of further investigation report.

4. The Prothonotary and Senior Master shall forward a copy of this order alongwith the orders dated 29.06.2018 and 04.07.2018 to the Commissioner of Police, Greater Mumbai.
(Underlining by us.)”

24. After this order was passed, the matter was again posted on 23rd July, 2018. That was for submission of further investigation report. On that report being submitted and the prior report of 20th July, 2018 being already on record, the second order impugned in this appeal came to be passed. That order reads as under:-

“1. Pursuant to the order passed by this Court dated 11th July, 2018, the Commissioner of Police has formed a special team headed by the Deputy Commissioner of Police to investigate the scam pertaining to supply of spurious pipes alongwith certificates purportedly issued by international pipe manufacturers, which are forged and fabricated. Today, DCP, Zone II, Mumbai has submitted his report wherein he has stated that they are in search of the accused Mr.Hitesh Kanungo. He has also stated that an application seeking anticipatory bail has been filed by Mr. Kanungo and the same is kept on 27th August, 2018. He has also stated that no protective order is passed in his favour and therefore, Police is trying to locate his whereabouts. Advocate for Kanungo states that Mr.Kanungo is not served with any notice. I. O. who is present in Court states that no notice is required to be served and he had visited the residence of Mr.Kanungo and left a message with his mother and brother stating that he should attend the Police Station. In view thereof, stand over to 28th August, 2018.”

25. In the appeal filed by M/s. Reliant Pipes and Tubes Pvt. Ltd., the appellant impugns the orders in the Commercial Suit (L) No. 1098 of 2018. The orders impugned in that appeal are dated 27th August, 2018 and 29th August, 2018. The two orders impugned in this appeal read as under:-

Order dated 27th August, 2018:-

“1. Pursuant to the Order dated 11th July, 2018 passed by this Court in Notice of Motion (L) No. 231 of 2018 in COMIP (L) No. 148 of 2018, the Commissioner of Police, Greater Mumbai has formed a Special Team headed by the Deputy Commissioner of Police to investigate the scam pertaining to supply of spurious pipes along with certificates purportedly issued by international pipe manufacturers, which are forged and fabricated. The DCP, Zone-II has submitted his report to this Court and Notice of Motion (L) No. 231 of 2018 is placed on 28th August, 2018.

2. This is one more matter, which is filed by the Plaintiff pointing how the various third parties continue to supply spurious pipes along with certificates purportedly issued by the international pipe manufacturers, which are forged and fabricated. In view thereof, the papers and proceedings shall be forthwith handed over by the Advocate for the Plaintiff to

Mr.Dnyaneshwar Chavan, DCP, Zone-II, Mumbai who is investigating the matter.

(Underlining by us.)

3. The Director of Defendant No. 2 – Reliance Pipes and Tubes Private Limited, is directed to remain present before this Court on 29th August, 2018 at 03.00 p.m. failing which the Court shall proceed to pass necessary orders against him to ensure his presence before the Court including issuing a warrant of arrest.

4. Defendant No. 3 – Toshiba JSW Power Systems Private Limited shall file their Affidavit of Disclosure including the pipes supplied to MTC in terms of prayer Clause (g) of the above Notice of Motion, which is reproduced hereunder :

“(g) That pending the hearing and final disposal of the Notice of Motion, this Court be pleased to direct Defendant Nos. 2 and 3 to provide the details of the source of manufacturer of the counterfeit products and the list of customers in India and internationally to whom the said products have been supplied over the last 10 years.”

5. Stand over to 29th August, 2018 at 03.00 p.m.”

Order dated 29th August, 2018

“1. The learned Advocates for Defendant Nos.2 and 3 undertake to file Vakalatnama within one week from today.

2. In paragraph No.3 of the order dated 27th August, 2018, “Reliance” be read as “Reliant”. In paragraph No.4 of the said order, “MTC” be read as “NTPC”.

3. Mr. Manoj Singhvi, Proprietor of Defendant No.2, having his office address at 5th Floor, Office No.5, 10, Khetwadi Lane, Mumbai – 400 004 and residential address at Earth Sampat Tower, 13th Floor, Plot No.1501, 10, Khetwadi Road, Mumbai – 400 004 (Mobile No.9821037386) is present in Court along with his Advocate. The Advocate for Defendant No.2 states that he needs time to take instructions from Defendant No.2 since Defendant No.2 has supplied pipes to several customers and will have to go through his records.

4. The learned Advocate for Defendant No.3 seeks time to comply with the order dated 27th August, 2018.

5. Pursuant to the order dated 27th August, 2018, papers and proceedings are forwarded by the Advocate for the

Plaintiff to Mr. Dnyaneshwar Chavan, DCP, Zone II, who is investigating a similar complaint being subject matter of Comm. IP Suit (L) No.148 of 2018. The Dy. Commissioner of Police shall submit his report to this Court on 5th September, 2018 at 3.00 p.m.

(Underlining by us.)

6. In the meantime, if Defendant No.2 sells any vallourec pipes or Defendant No.3 is desirous of using any pipes, they shall forward the Mill Test Certificate (MTC) to the Advocate for the Plaintiff at mehul.shah@intellectlegal.com for confirming the genuineness of the test certificate.

7. The proprietor of Defendant No.1 who is present in Court has tendered his written submission interalia stating that he had commenced his business in the name of Osho Tubes and Pipes as a proprietary concern in the year 1991 and had shut the business in the year 2004-05; the alleged infringement has taken place on 10-01-2017; he is therefore, not concerned with the same and the Suit be dismissed against him. Defendant No.1 is therefore, directed to remain present in Court along with his Advocate on the adjourned date.

Stand over to 5th September, 2018 at 3.00 p.m.”

26. In countering the submission of Mr. Kadam and Mr. Dhond on the point of maintainability, Mr. Khandeparkar appearing for the appellant in Appeal No. Commercial Appeal (L) No. 434 of 2018 submits that in this case the learned single Judge passes several orders, which could not have been passed in the exercise of its powers by a civil court. The civil court, seized of a civil dispute in the form of a IP(L) Suit, could have passed protective or prohibitory orders. It could have also granted injunctive reliefs. This court, after recording a statement of Mr. Hitesh Kanungo and accepting it, posted the matter for hearing on ad-interim reliefs. It was posted from time to time. However, instead

of granting a ad-interim relief of injunction or otherwise, in furtherance of the prayers in the Notice of Motion or hearing the Notice of Motion finally, the learned Single Judge issued directions and passed orders which could not have been passed by a civil court at all. This is, according to Mr. Khandeparkar, a clear case of usurpation of powers vesting in a criminal court by the civil court. That is clearly impermissible in law, according to Mr.Khandeparkar. He submits that in all the orders and the directions, the learned Single Judge directed the police authorities to investigate the matter and during the course of such investigation, not only the appellant's owner/representative was being interrogated, but later on the name of one Dharampalpad Singh was also directed to be included in the investigations by the police. During the course of investigations and before they concluded in registration of an FIR, the learned Single Judge had also recorded a statement of the said Hitesh Kanungo and that statement continues to operate as an ad-interim order in the suit. In addition, defendant-Trident had been directed to deposit a specific sum, with the Prothonotary and Senior Master of this court, to the credit of the suit. Ordinarily, the defendant, therefore, should have been granted an opportunity to defend the suit and also the interim relief application. The version of the defendant on merits was yet to be

placed on record. The defendant could have been granted this reasonable and fair opportunity by the learned single Judge. He should not have directed his attention to any extraneous and irrelevant matters. However, according to Mr. Khandeparkar, once the learned single Judge's attention was invited and orally by the plaintiff to certain alleged illegal acts and allegedly perpetrated by other entities, the learned Single Judge, in the course of noting them in his orders, directed his attention towards Mr. Dharampal Singh. When it was brought to his notice that Dharampal Singh and the entity represented by him are not the persons involved in the alleged forging and fabricating of mill test certificates, the learned single Judge then focused his attention on some third entity. All this is done after the learned Single Judge recorded a *prima facie* finding on the fabrication of the test certificates. In his *prima facie* view these certificates were forged. That is how the learned single Judge associated and involved the police machinery in a purely civil dispute. The learned Single Judge thereafter, not only involved the police machinery in the instant case, but directed the said police machinery to investigate the matter and file a report of the investigation before the civil court. Such directions were issued prior to and post registration of a FIR. The reports of investigation are directed to be filed before the civil court and the

learned Single Judge trying a civil suit virtually ensured that criminal law is set in motion. He went much beyond this in directing constitution of a Special Investigation Team (SIT), who should be interrogated and questioned and from the point of view expressed by him. That is already expressed.

27. The learned Single Judge expressed a clear opinion, that in his view, a SIT needs to be set up to investigate the crime. That was promptly accepted and the Commissioner of Police set up a SIT. Thus, this is not a mere opinion or a *prima facie* view of the learned single Judge, but it was taken as a direction to the police machinery to set up a SIT to investigate the crime. Mr. Khandeparkar invited our attention to the provisions of the Criminal Procedure Code, 1973, particularly dealing with inquiry and investigation, to submit that if these provisions are carefully perused, it would be evident that no police officer can be denuded of his powers to investigate a crime if that crime takes place within the territorial jurisdiction of the police station which he is manning. Our attention has been invited to the definition of the words “cognizable offence”, “complaint”, “enquiry”, “investigation”, “local jurisdiction” “Officer-in-charge”, “police report” and “police station” appearing in that order in section 2 of the Code of Criminal Procedure, 1973 to urge that the scheme of

this Code indicates that an enquiry means a process other than the trial conducted under the Criminal Procedure Code, 1973 by a Magistrate or court. The word “investigation” includes all proceedings under the Criminal Procedure Code, 1973, for collection of evidence, conducted by a police officer or by any person who is authorized by a Magistrate on his behalf. The word “local jurisdiction” as defined in section 2(j), according to Mr.Khandeparkar would denote that in relation to court or Magistrate means the local area within which the court or Magistrate may exercise all or any of its or his powers under this Code and such local area may comprise the whole of the State or any part of the State as the State Government may, by notification, specify. Our attention has also been invited to the definition of the term “non-cognizable offence” appearing in section 2(1) to mean an offence for which or a case in which a police official has no authority to arrest without a warrant. The word “offence” is also defined and thereafter our attention is invited to the term “officer-in-charge” of a police station. According to Mr. Khandeparkar, these words are defined with a specific object and purpose. It is the police station within whose jurisdiction the offence is committed, which is authorised through its officers in-charge to carry out the investigation. However, that investigation is carried out in order to collect evidence. After

that, the report of such investigation has to be submitted before a competent Magistrate. It is thereafter the Magistrate's prerogative to direct further investigation. Our attention is, therefore, invited to the provision in relation to investigation and prior thereto, regarding arrest to urge that no court other than the competent criminal court, has a power to direct that a report of the investigation, be placed before it. It is that court which can issue directions as envisaged by the Criminal Procedure Code, 1973. A civil court cannot take over these powers. If no cognizance is taken by the police, although the complainant is of the opinion that cognizable offence has been committed, then, his remedy is to approach a Magistrate by filing a private complaint and within the meaning of section 190 of the Criminal Procedure Code. Thereupon, the steps as envisaged by the Code can be taken by the police. Sections 156 and 157 are the further provisions to which our attention has been invited. Equally, our attention is invited to section 159 of the Code.

28. Mr. Khandeparkar would submit that none of these powers could have been taken over by a civil court and in the manner done. He would submit that it is no answer to his argument that there is no adverse impact thereafter and pursuant to such takeover. Mr. Khandeparkar would submit that implicit in the

preliminary objection is the fact that the power and jurisdiction of the police and Magistrate have indeed been taken over by the learned Single Judge. In ordering and directing filing of reports, setting up a SIT, the learned Single Judge has usurped the powers of a criminal court. He has acted beyond the powers conferred in a civil court. That is how the orders impugned in these appeals are without jurisdiction. Mr.Khandeparkar submits that they have a potential of interfering with the life and liberty of the appellant. It is clear in law that no civil court, even if presided over by a High Court Judge, could have issued such sweeping directions. Now, the conclusion is foregone. The appellant's representative has been arraigned as an accused. He has also been threatened with arrest. His application seeking anticipatory bail was rejected by the learned Sessions Judge and our attention is invited to a copy of the order passed by the learned Sessions Judge in that regard. Mr.Khandeparkar submits that now an application seeking anticipatory bail is pending in this court. In the event this court does not protect the appellant's representative in exercise of its powers under section 438 of the Criminal Procedure Code, 1973, his arrest is imminent. After and in the light of the impugned orders, such consequences can be suffered. The appellant's representative has fully cooperated with the civil court. He has attended the proceedings from time to

time, made a statement which has been accepted as an undertaking given to this court and showed his *bona fides* by depositing a substantial sum in this court. Now, Mr.Dharampalpad Singh is let off and it is stated that it is a case of mistaken identity. It is now the appellant and it's representative who is targeted. Therefore, the orders of the learned Single Judge have resulted in adverse consequences and there can be no objection then to the maintainability of the appeal nor is it enough to plead that this appeal is not maintainable because the appellant-defendant has ample opportunity to defend itself before a criminal court. The appellant is already appearing before a civil court. He would be virtually forced into settling a civil dispute to which he has a *bona fide* defence. For all these reasons, it is submitted that the appeal is maintainable.

29. Mr. Rizwan Merchant, while adopting the arguments of Mr.Khandeparkar, would submit that the appellant Raliant Pipes and Tubes Pvt. Ltd. in the other appeal has also been visited with similar consequences. He submits that the learned Single Judge lost sight of the fact that the direction can only be issued by a competent criminal court exercising powers under section 156(3) of the Criminal Procedure Code, 1973 or section 482 thereof. The appellant could not have been directed to be investigated in the

manner done by a civil court. The learned Single Judge directed formation of SIT and further directed that Team to submit its report to him. In all this, the learned single Judge lost sight of the fact that merely a civil suit was instituted and there was no element of criminal law involved. A mere doubt or suspicion was raised, but the learned Single Judge having expressed a firm opinion resulted in the registration of a FIR. Now, FIR No. 214 of 2018 has been registered. After its registration, the Director of the appellant Mr. Manoj Singhvi was forced to appear before the police. He was taken into custody on the very day on which he appeared before the police, i.e. on 4th September, 2018. In these circumstances, it is clear that the learned Single Judge has taken over the powers of the criminal court and which was wholly impermissible in law. For these reasons he would submit that the objection to the maintainability of the appeal be rejected and the appeal be entertained.

30. Since both sides have relied upon the Commercial Courts Act, 2015, we make a brief reference to some of its provisions. The Act, prior to its amendment and later on has been enacted with a specific purpose. It is enacted to provide for constitution of Commercial Courts, Commercial Appellate Courts, Commercial Appellate Courts, Commercial Division and Commercial Appellate

Division in the High Courts for adjudicating commercial disputes of specified value and matters connected therewith or incidental thereto. There are definitions in section 2 of this Act appearing in Chapter I titled as “Preliminary” and relevant for our purpose are the definitions of the words, “Commercial Appellate Courts”, “Commercial Appellate Division”, “Commercial Court” and “Commercial dispute”. These definitions are reproduced hereinbelow for ready reference:-

“2(a) Commercial Appellate Courts” means the Commercial Appellate Courts designated under section 3A;

2(aa) “Commercial Appellate Division” means the Commercial Appellate Division in a High Court constituted under sub-section (1) of section 5;

2(b) “Commercial Court” means the Commercial Court constituted under sub-section (1) of section 3;

2(c) “Commercial dispute” means a dispute arising out of-

- (i) ordinary transactions of merchants, bankers, financiers and traders such as those relating to mercantile documents, including enforcement and interpretation of such documents;
- (ii) export or import of merchandise or services;
- (iii) issues relating to admiralty and maritime law;
- (iv) transactions relating to aircraft, aircraft engines, aircraft equipment and helicopters, including sales, leasing and financing of the same;
- (v) carriage of goods;
- (vi) construction and infrastructure contracts, including tenders;
- (vii) agreements relating to immovable property used exclusively in trade or commerce;
- (viii) franchising agreements;

- (ix) distribution and licensing agreements;
- (x) management and consultancy agreements;
- (xi) joint venture agreements;
- (xii) shareholders agreements;
- (xiii) subscription and investment agreements pertaining to the services industry including outsourcing services and financial services;
- (xiv) mercantile agency and mercantile usage;
- (xv) partnership agreements;
- (xvi) technology development agreements;
- (xvii) intellectual property rights relating to registered and unregistered trademarks, copyright, patent, design, domain names, geographical indications and semi-conductor integrated circuits;
- (xviii) agreements for sale of goods or provision of services;
- (xix) exploitation of oil and gas reserves or other natural resources including electro-magnetic spectrum;
- (xx) insurance and re-insurance;
- (xxi) contracts of agency relating to any of the above; and
- (xxii) such other commercial disputes as may be notified by the Central Government.

Explanation: A commercial dispute shall not cease to be a commercial dispute merely because-

- (a) it also involves action for recovery of immovable property or for realisation of monies out of immovable property given as security or involves any other relief pertaining to immovable property;
- (b) one of the contracting parties is the State or any of its agencies or instrumentalities, or a private body carrying out public functions."

31. The Commercial Division is set up in High Courts under sub-section (1) of section 4 of the Commercial Courts Act, 2015. Pertinently sub-section (2) provides that the words and expressions used and not defined in the Act, but defined in the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872 shall have the same meaning respectively assigned to them in that Code and the Act. Chapter II is titled as “Commercial Courts, Commercial Appellate Courts, Commercial Divisions and Commercial Appellate Divisions”. Therein appears sections 8 and which reads as under:-

“8. Bar against revision application or petition against an interlocutory order

Notwithstanding anything contained in any other law for the time being in force, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge, subject to the provisions of section 13, shall be raised only in an appeal against the decree of the Commercial Court.”

32. A perusal of section 8 would reveal that notwithstanding anything contained in any other law for the time being in force, no civil revision application or petition shall be entertained against any interlocutory order of a Commercial Court, including an order on the issue of jurisdiction, and any such challenge, subject to the provisions of section 13, shall be raised only in an appeal against the decree of the Commercial Court.

33. Section 13 appears in Chapter IV titled as “Appeals” and reads thus:-

“13. Appeals from decrees of Commercial Courts and Commercial Divisions

(1) Any person aggrieved by the judgment or order of a Commercial Court below the level of a District Judge may appeal to the Commercial Appellate Court within a period of sixty days from the date of judgment or order.

(1A) Any person aggrieved by the judgment or order of a Commercial Court at the level of District Judge exercising original civil jurisdiction or, as the case may be, Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of the judgment or order.

PROVIDED that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the Code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).

(2) Notwithstanding anything contained in any other law for the time being in force or Letters patent of a High Court, no appeal shall lie from any order or decree of a Commercial Division or Commercial Court otherwise than in accordance with the provisions of this Act.”

34. Prior to its amendment with effect from 3rd May, 2018, sub-section (1) reads as under:-

“13. (1) Any person aggrieved by the decision of the Commercial Court or Commercial Division of a High Court may appeal to the Commercial Appellate Division of that High Court within a period of sixty days from the date of judgment or order, as the case may be.

PROVIDED that an appeal shall lie from such orders passed by a Commercial Division or a Commercial Court that are specifically enumerated under Order XLIII of the code of Civil Procedure, 1908 (5 of 1908) as amended by this Act and section 37 of the Arbitration and Conciliation Act, 1996 (26 of 1996).”

35. Several Division Benches of this court had an occasion to examine the ambit and scope of the appellate power conferred in the Commercial Appellate Court and the Commercial Division of the High Court. Equally, we had an occasion to examine this aspect of the matter and our judgment has been referred by both sides. That was rendered in the case of *Shailendra Bhadauria and Ors. vs. Matrix partners India Investment Holdings LLC*¹ and connected matters decided on 25th September, 2018. The three paragraphs, which have been heavily relied upon from this judgment are paras 34, 35 and 40. A perusal thereof would reveal that this court took a view that an appeal would lie only within the four corners of section 13 and no other provision can be relied upon to bring an appeal, particularly when Letters Patent of this court has been overridden. The parliament stepped in with a definite intent so as to override the Letters Patent of this Court. However, while noting that aspect, this court, in para 34 of this judgment clarified the position that when the learned Single Judge makes an order by taking recourse to the substantive powers conferred by the Code of Civil Procedure, 1908, but usurps the jurisdiction or purports to pass orders beyond his powers as a civil court, then, such orders and directions can be challenged and impugned, provided that such an order and direction had

¹ Commercial Appeal No. 327 of 2018

been passed during the course of exercise of a power vesting in the civil court and if an appeal lies against such orders within the scheme of Order XLIII Rule 1 of the Code of Civil Procedure, 1908 or section 37 of the Arbitration Act. Thus, attention of this court was invited to section 104 of the Code of Civil Procedure, 1908 and order XLIII Rule 1 and it would be evident that prior to section 104 appear sections 94 and 96. By section 94 appearing in Part VI under caption "Supplemental proceedings", it is clarified that in order to prevent the ends of justice from being defeated the court may, if it is so prescribed, issue a warrant to arrest the defendant and bring him before the court to show cause why he should not give security for his appearance and if he fails to comply with any order for security, commit him to the civil prison, direct the defendant to furnish security to produce any property belonging to him and to place the same at the disposal of the court or order the attachment of any property, grant a temporary injunction and in case of disobedience, commit the person guilty thereof to the civil prison and order that his property be attached and sold, appoint a receiver of any property and enforce the performance of his duties by attaching and selling his property, make such other interlocutory orders as may appear to the court to be just and convenient. Section 104 appears in Part VII titled as "Appeals from orders". That reads 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:-

* * * * *

(ff) an order under section 35-A;

(ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92 as the case may be;

(g) an order under section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

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

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

36. Thus, an appeal lies from the orders mentioned in sub-section (1) of section 104 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. That provision *inter alia* includes any order made under rules from which an appeal is expressly allowed by the rules. Order XLIII Rule 1 of the Code of Civil Procedure, 1908 must be read together with section 104 and that enumerates the appealable orders.

37. Mr. Kadam and Mr. Dhond, in raising the issue of maintainability, have submitted that the impugned orders are not the orders of injunction or appointing a receiver. It is not an appealable order within the meaning of Order XLIII Rule 1 clause (r) of the Code of Civil Procedure, 1908. It is an order passed during the course of hearing of a notice of motion for interim reliefs. Such an order is not an appealable order. That is not specifically enumerated in the provision which we have referred above. Thus, this is not a decree or an appealable order. Merely because some observations have been made by the learned Single Judge or a *prima facie* opinion has been rendered that by itself and without anything more would not result in an order within the meaning of a appealable order under Order XLIII Rule 1 of the Code of Civil Procedure, 1908.

38. Mr. Dhond has gone as far as contending that the order that has been made by the learned Single Judge does not in any way travel beyond the power conferred in a civil court, much less usurping the jurisdiction of the criminal court. It is an order which must be sustained by applying the principles of judicial flexibility or legal engineering. Mr. Dhond would submit that none of the rights guaranteed by the Constitution of India (Article 21) or by the Criminal Procedure Code, 1973 to an accused, have

been jeopardised in any manner. No appeal can be entertained merely because a party like the appellant submits that he is suspecting that he would be arraigned as accused, arrested or brought before a criminal court to face a charge. Merely because an investigation has been directed, no accused can object to it nor in the scheme of the Criminal Procedure Code, 1973 he has any right to seek interference with it or interject the same. The accused cannot complain against constitution of a SIT. He cannot dictate to any court as to who should investigate him. It is the sole prerogative of the court or the police machinery investigating the crime. Further, Mr. Dhond would submit that the orders passed by the learned Single Judge have not resulted in any adverse consequences, much less taken away the rights guaranteed by the Constitution of India. The learned Single Judge has not directed setting up of a SIT. He has merely expressed an opinion or a hope that such a team would be set up. He has not directed that the investigation reports should be brought before him with a view to monitor the investigation. In these circumstances, both, Mr.Kadam and Mr.Dhond would submit that these appeals are incompetent for the appellants have no locus. The learned Single Judge's orders and directions have not gained finality and that the appellants have not been arraigned as accused merely because the learned Single Judge

has expressed some opinion. They have been arraigned as accused because there is a *prima facie* case of their involvement in cognizable offences. The matters are at a delicate stage and these appeals should not be entertained on mere apprehensions as orally expressed by the appellants.

39. None of these submissions impress us and for more than one reason. If the orders and directions were as innocuous as the learned senior counsel appearing for the respondents-plaintiffs would point out and submit, then, it was not necessary for them to rely on an order passed by the learned Single Judge and which is equally passed during the course of what they would submit as a hearing of a notice of motion. They rely on the order dated 30th July, 2018. The learned Single Judge was moved by the appellant-defendant in the suit filed against Trident Steel and Engineering Company. The matter was moved before the learned Single Judge on a praecipe and the learned Single Judge clarified on 30th July, 2018 as under:-

“Not on board. Upon mentioning, take on board.

It is clarified that the Special Team formed by the commissioner of Police shall investigate the matter on its own merits and shall not be influenced by any observations made by this Court in any orders.”

40. A bare perusal of this clarification would indicate that the learned Single Judge was aware of the serious consequences or

wide repercussions of his sweeping orders and binding directions. They could have been construed by the Commissioner of Police and the police machinery to the effect that the appellant is *prima facie* guilty of serious cognizable offences. That is why he clarifies that the SIT formed by the Commissioner shall investigate the matter on its own merits and shall not be influenced by the observations made by him in any order. If the matter had rested there, possibly, by relying on this order, we would not have entertained this appeal. However, it is evident that the matter did not rest there. The learned Single Judge directed and followed up the investigations from their inception and though it was only a civil suit brought before him, during the course of hearing of an interim relief application, the learned Single Judge, as rightly pointed out by Mr. Khandeparkar and Mr. Merchant, directed his attention towards certain acts attributable to individuals by terming them as serious violations of law. If he was of the opinion that the alleged acts and attributed to these parties have resulted in infringement of a registered trademark and passing off of the goods by the defendants as that of the plaintiffs, he could have appointed an ad-interim receiver if it was just and convenient and there was enough material before him. He could have very well granted an injunction and in addition to the statement of defendant-Hitesh

Kanungo, recorded and accepted by him. Instead, with great respect to the learned Single Judge, from the date of the institution of the suits and the applications for interim reliefs, he charted a strange course. He was of the view that such persons, as are brought before him, cannot be let off by only passing any order in exercise of the powers conferred on him by the Code of Civil Procedure, 1908. The acts attributed to them are so serious that the criminal law has to be set in motion. He could have very well expressed such an opinion and ended the whole issue there. However, he went further and directed that the matters be brought to the notice of the police, they must carry out investigation and file a report of the said investigation in his court and before him. It is this step which amounts to taking over the jurisdiction of a competent criminal court. It is only the competent criminal court to which the police machinery investigating any crime pursuant to registration of a FIR is answerable and accountable. It is that court which can monitor and supervise the progress of the investigation and make comments on the fairness and impartiality thereof. If any provision in the Criminal Procedure Code, 1973 has to be referred, a reference to the provisions that we have made in the foregoing paragraphs, would be enough. In addition, we would only invite the attention of all concerned to the provisions

contained in the Code, which empower only a competent criminal court to look into such aspects. It is the competent criminal court which has been vested with powers, but even such powers have to be exercised subject to the conditions prescribed in the Criminal Procedure Code, 1973. It is evident from the definitions that there is a distinction drawn between a summons case and a warrant case. There is a distinction drawn and clearly spelt out between a cognizable offence and non-cognizable offence. It is evident that the Criminal Procedure Code makes a distinction between inquiry which is other than a trial conducted under this Code by a Magistrate or court. The term "court" also has a connotation. That is a legal one. The investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person authorised by a Magistrate in this behalf. The police report means a report forwarded by a police officer to Magistrate under sub-section (2) of section 173. Then, there is a clear distinction between bailable offence and non-bailable offence. The word "complaint" is defined to mean any allegation made orally or in writing to a Magistrate with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report. As to what can be done after registration of FIR is clearly spelt out by section 154 onwards. By

section 154, which deals with information in cognizable cases, it is clear that such information has to be given orally to the in-charge police official, which phrase is also defined, and he shall reduce the same into writing and under his direction, the investigations have then to proceed. A person aggrieved by refusal on the part of in-charge official of the police station to record information referred to in sub-section (1) may send the substance of such information, in writing and by post, to the Superintendent of Police concerned who, if satisfied that such information discloses the commission of a cognizable offence, shall either investigate the case himself or direct an investigation to be made by any police officer subordinate to him, in the manner provided by this Code and such officer shall have all the powers of an officer in charge of the police station in relation to that offence. Section 156 enumerates the police officer's powers to investigate cognizable case and he may, without the order of a Magistrate, investigate any cognizable case which a court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII and the procedure for investigation is set out in section 157. Thereupon, the further steps have to be taken and it is clear that a power to hold investigation and preliminary inquiry is enumerated by section 159 which follows sections 156, 157 and

158. The Magistrate, on receiving a report, may direct an investigation or, if he thinks fit, at once proceed or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into or otherwise to dispose of the case in the manner provided in this Code. Thus, the power to hold investigation or preliminary inquiry is also vesting in the competent criminal court. The report of the investigation and within the meaning of section 156 has to be brought before the competent criminal court and that is evident from section 173. Section 173, with its sub-sections, reads as under:-

“173. Report of police officer on completion of investigation – (1) Every investigation under this Chapter shall be completed without unnecessary delay.

(1A) The investigation in relation to rape of a child may be completed within three months from the date on which the information was recorded by the officer in charge of the police station.

(2) (i) As soon as it is completed, the officer in charge of the police station shall forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the State Government, stating—

- (a) the names of the parties;
- (b) the nature of the information;
- (c) the names of the persons who appear to be acquainted with the circumstances of the case;
- (d) whether any offence appears to have been committed and, if so, by whom;
- (e) whether the accused has been arrested;

- (f) whether he has been released on his bond and, if so, whether with or without sureties;
- (g) whether he has been forwarded in custody under section 170.
- (h) whether the report of medical examination of the woman has been attached where investigation relates to an offence under section 376, 376A, 376B, 376C, 376D or section 376E of the Indian Penal Code (45 of 1860)

(ii) The officer shall also communicate, in such manner as may be prescribed by the State Government, the action taken by him, to the person, if any, by whom the information relating to the commission of the offence was first given.

(3) Where a superior officer of police has been appointed under section 158, the report shall, in any case in which the State Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police station to make further investigation.

(4) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(5) When such report is in respect of a case to which section 170 applies, the police officer shall forward to the Magistrate along with the report—

(a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during investigation;

(b) the statements recorded under section 161 of all the persons whom the prosecution proposes to examine as its witnesses.

(6) If the police officer is of opinion that any part of any such statement is not relevant to the subject-matter of the proceedings or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interest, he shall indicate that part of the statement and append a note requesting the Magistrate to exclude that

part from the copies to be granted to the accused and stating his reasons for making such request.

(7) Where the police officer investigating the case finds it convenient so to do, he may furnish to the accused copies of all or any of the documents referred to in sub-section (5).

(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

41. Therefore, the report has to be forwarded to the Magistrate empowered to take cognizance of the offence. Sub-section (8) of section 173 says that nothing in section 173 shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, whereupon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2).

42. Thus, the Criminal Procedure Code, 1973 is exhaustive of not only an inquiry, investigation and trial, but all steps in relation thereto or in furtherance thereof. It is only in exceptional cases that the civil court would retain some powers, but it is conceded before us that such powers, as are sought to be exercised by the learned Single Judge in the present case, could not have been in the scheme of the Criminal Procedure Code, 1973 exercised by him. This is not a dispute of the nature mentioned in the Criminal Procedure Code, 1973 and saving the power in that behalf of the civil court or reserving it otherwise than in the scheme of the Criminal Procedure Code, 1973. We are not impressed by the fact that the learned Single Judge has not used any word “shall”, but has observed that the Commissioner “may”. This attempt by the learned senior counsel appearing for the contesting respondents-plaintiffs fails to impress us. It is not the counsel's or his client's understanding which is relevant. It is how the police machinery understood the order and direction of this court. Though the word “may” was employed, still the police machinery took it as a mandate not only to remain present before the learned Single Judge, but comply with his order. It proceeded to investigate the matter, register a FIR and submit reports of their investigation to the learned Single Judge. The police machinery, acting through the Commissioner of Police, ensured

setting up of a SIT. Thus, the police machinery did not understand the order and direction of the learned Single Judge as is now projected before us. They could not have afforded to brush it aside.

43. Further, if that is not the position, then, it was unnecessary for the respondent-plaintiff to rely upon section 36 of the Criminal Procedure Code. Section 36 of the Code, falling under Chapter IV confers powers on superior officers of police and they may exercise the same powers throughout the local area to which they are appointed as may be exercised by such officer within the limits of his station. Thus, an officer in charge of a police station is vested with powers to investigate into the offences committed within the limits of his police station, but such powers can also be exercised by a police officer superior in rank to him. They can step in and by their stepping in, the legality attached to the investigation is not diluted or interfered with. However, this provision cannot be read in isolation. This provision cannot lend support to the argument that in this case a civil court has in no way taken over the powers vesting in a competent criminal court far from usurping them. With respect, it is evident that the orders and directions of the learned Single Judge have an enormous impact on the criminal prosecution. These orders and

directions have serious consequences. That some parties have not been actually visited with them is no answer to uphold these orders and directions. No civil court seized of a civil suit is legally empowered to direct a police officer to submit a report of the investigation carried out by the police in relation to a crime. It may feel while dealing with a civil suit that a party before it has defrauded and cheated not only the plaintiff but several others. The learned Single Judge can express an opinion that a criminal law element is present and forward the records in the civil suit to the police machinery for necessary action at its end or may just invite its attention to the views expressed by him. The learned Single Judge must leave the matter here for the Criminal Procedure Code, 1973 has all the provisions to enable setting of criminal law in motion. In the event the police machinery does not take note of the views expressed by the learned Single Judge, it is not as if the aggrieved parties or citizens are remedyless. The Criminal Procedure Code, 1973 postulates instituting a private complaint in the court of competent jurisdiction highlighting the inaction of the police machinery. The competent criminal court has all the powers to ensure that a cognizable offence does not go without punishment of the guilty. A civil court should not allow anybody before it to bypass the above scheme of the Criminal Procedure Code, 1973 nor should it do anything to

override it. There will be utter chaos, confusion and conflict resulting in a benefit to the wrong doer/accused if this discipline, demarcation and distinction in law is not borne in mind. In this context, we may usefully reproduce the pertinent observations of a Division Bench of this court, at Aurangabad, in the case of *Harischandra s/o Vishwanath Chavan and Anr. vs. The State of Maharashtra*² decided on 24th March, 2017:-

“13] When the defendants appeared and did not file the written statement in consonance with the provisions prescribed under the CPC, it was incumbent on the part of concerned Civil Judge to proceed further for adjudication of matter in issue without written statement and pass a decree in the suit, as envisaged under Order VIII, Rule 5 of CPC. But, instead of taking recourse of the provisions of Civil Procedure Code, the concerned Civil Judge appreciated the allegations nurtured on behalf of defendants against the plaintiff and exceeded his jurisdiction by exercising powers of a Magistrate. He ventured to pass the impugned order directing the police to investigate under Section 156(3) of the Cr.P.C. The action of the concerned civil Judge (J.D.) diverting civil proceeding to criminal complaint, for initiating penal action against the plaintiffs at the behest of defendant, appears somewhat strange and not amenable within the ambit of procedural law. The concerned presiding officer of the Civil Court could not avail the liberty to exercise the powers of Magistrate in the civil proceeding, as per his whims and caprices. There are guidelines laid down under the procedural law in regard to jurisdiction of civil and criminal court and judicial powers to be exercised while presiding over such courts.

14] It is worth to mention that the impugned order directing investigation under Section 156(3) of Cr.P.C. was passed by the concerned presiding officer of the civil court, when he was dealing with a civil matter by exercising jurisdiction of civil court assigned to him. The tenor and mode of application-cum-complaint filed on behalf of defendants, indicates that the application was filed to traverse the claim of the plaintiffs in the suit. It was not a petition under Section

156(3) of Cr.P.C. or complaint against the plaintiff but the defendant was intending to deny the pleadings propounded on behalf of plaintiffs, who sought the relief of injunction in the suit. However, the learned Civil Judge, on receipt of the application, suo-motu took the decision unilaterally and passed the impugned order under Section 156(3) of Cr.P.C. The learned presiding officer of the civil court overlooked or glossed over the procedural law while exercising the powers of Magistrate when he was dealing with the civil proceedings and not criminal complaint. The protest application filed by the defendant to traverse the claim of plaintiffs/other side in the suit would not be considered as a "complaint" as defined under section 2(d) of the Cr.P.C. It would not be a complaint to the Magistrate with a view to take action under the Cr.P.C. Therefore, it would be fallacious to appreciate the bare protest application filed before Civil Judge, while dealing with civil proceedings, as a petition under section 156(3) of Cr.P.C. It is true that there is no specific format of complaint. But, it must contain particular kind of information and is more or less formally made with the definite object that the person to whom the complaint is made will take action under the Cr.P.C. In the instant case, the circumstances would show that the defendant appeared in the civil proceedings and filed the protest application to resist the claim of the plaintiffs. There was no object of defendant for penal action against the plaintiffs, nor he made any request or prayer to take action under Cr.P.C. The protest application was not in the nature of complaint under section 2(d) of Cr.P.C. But, it was filed to raise objection to the relief claimed on behalf of plaintiffs/applicants-herein.

15] There was no compliance of mandatory provisions of section 154 of Cr.P.C. prior to remedy under section 156(3) of Cr.P.C. nor there are any complaints to superior officer of the Police as contemplated U/Sec.154(3) of the Cr.P.C. It is true that learned Civil Judge bade for separate registration of application/complaint as a Miscellaneous Criminal Application for exercise of powers of Magistrate. Albeit, it emerges from the impugned order that the learned Civil Judge, instead of awaiting for separate registration of proceeding as Miscellaneous Criminal Application, contemporaneously proceeded to pass the impugned order under section 156 of Cr.P.C. in most hasty manner and appended his signature as a Presiding Officer of civil court. The manner in which the learned Civil Judge dealt with the civil proceeding and passed the impugned order of criminal in nature is indefensible and incomprehensible one within the purview of procedural law.

16] Now, dealing with the another spectrum of the matter, it appears that while passing impugned order, the learned Judge did not apply his mind. The impugned order is cryptic and slender in nature. At this juncture, it is gainful to refer to the observations of the Apex Court in the case of ***Pepsi Foods Ltd. and another vs. Special Judicial Magistrate and others reported in (1998)5 SCC 749*** wherein the Apex Court, in unequivocal terms, delineated that summoning of an accused in a criminal case is a serious matter. The criminal law can not be set into motion as a matter of course. It is essential for the Magistrate to apply his mind to find out the truthfulness of the allegations. Atleast he is to verify from the averments of the complaint as to whether the ingredients to constitute the offence complained of have been made out or not. The Observations of the Apex Court are as under:-

“Summoning of an accused in a criminal case is a serious matter. Criminal law cannot be set into motion as a matter of course. It is not that the complainant has to bring only two witnesses to support his allegations in the complaint to have the criminal law set into motion. The order of the Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. He has to examine the nature of allegations made in the complaint and the evidence both oral and documentary in support thereof and would that be sufficient for the complainant to succeed in bringing charge home to the accused. It is not that the Magistrate is a silent spectator at the time of recording of preliminary evidence before summoning of the accused. The Magistrate has to carefully scrutinize the evidence brought on record and may even himself put the questions to the complainant and his witnesses to elicit answers to find out the truthfulness of the allegations or otherwise and then examine if any offence is prima facie committed by all or any of the accused.”

17] The Apex Court in the case of ***Maqsood Syed Vs. State of Gujarat (2008)5 SCC 668***, in paragraph No. 13 has held that where a jurisdiction is exercised on a complaint petition filed in terms of section 156(3) or section 200 of the Code of Criminal Procedure, the Magistrate is required to apply the mind. It is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting criminal liability.

18] It is a settled principles of law that if the petition or complaint does not disclose commission of a cognizable offence, the learned Magistrate cannot pass the order under Section 156(3) of the Cr.P.C. It has also been held that the disclosure of commission of offence is a Sine Qua Non for issuing the order under Section 156(3) of Cr.P.C.

20] It is also significant to mention that, the impugned order directing the investigation under section 156(3) of Cr.P.C. came to be passed by the learned Civil Judge against the original plaintiff on bare protest application tendered by defendant (respondent No. 2-herein) on his appearance in the civil proceeding. The very purpose of filing the application by the defendants was to deny or traverse the pleadings of the plaintiffs made in the suit and not to set the criminal law in motion. In general, in each and every civil proceeding there are allegations against each other by the parties to the proceeding. But, it does not mean that in every proceeding the concerned civil court has to exercise the powers of Magistrate as contemplated under the Cr.P.C. for initiating criminal proceeding against the original plaintiffs. In case, after filing civil proceeding for any relief of civil nature against the defendants, the plaintiffs are forced to face criminal proceedings, on the allegations nurtured on behalf of the defendants, it would, create a very unhealthy atmosphere and would open the flood-gates of such type of unscrupulous and unprincipled litigation/complaints to harass the plaintiffs in such civil proceedings, and nobody would dare to come forward to seek reliefs from the civil courts of law. It may also result in cynical disregard of law which would have impact on the society and people may lose faith from the judicial system.

21] The impugned order under Section 156(3) of Cr.P.C. passed on bare protest application of respondent No.2 filed in the civil proceedings is not amenable within the purview of legal provisions. The action on the part of the concerned civil court, appears deprecative and unsustainable one. The plaintiff should not be victimized or exploited at any point of time and cost, on his approaching to the civil court for seeking justice. In case, defendant would have any grievance of penal nature he may take recourse of remedy available under Criminal Procedure Code and file separate complaint for penal action against the miscreants. We find force in the submission canvassed on behalf of applicants that the impugned order is erroneous, imperfect, perverse and liable to be quashed and set aside.”

We respectfully concur with the above views.

44. The reports of investigation of a crime have to be presented or forwarded to the competent criminal court alone. In the instant case, when such reports were brought before the learned Single Judge, he issued further directions on perusal of the same. These further directions are to be found in the orders which may not have been impugned before us. However, we have carefully perused all the orders having a bearing on this issue and read them together. We have not picked up one sentence or one paragraph in any order, but read it and all of them in entirety. We have taken all these orders together to reach a conclusion that the same do not in any manner fall within the jurisdiction of a civil court competent to decide only commercial disputes. These are not orders or directions which we can support with the aid of section 151 of the Code of Civil Procedure. That provision saves the inherent power of a court. By the saving provision, such of the powers which enable a civil court to render justice are saved, but that does not mean that with the aid of these powers, the court can travel beyond or defeat other provisions in the Code of Civil Procedure, 1908 enabling grant of interlocutory and interim reliefs. These are conferred by the Code itself. Section 151 cannot, therefore, be of any assistance much less when recourse to it defeats the substantive provisions of the Code. It is well settled that the Code of Civil Procedure, 1908 contains partly

procedural and partly substantive provisions. The substantive powers conferred in the civil court enable it to render complete justice. Section 151, therefore, cannot override the same and by taking aid of section 151, the civil court cannot pass an order which it is not empowered to pass under the substantive provisions of the Code. Section 151 is but an aid to exercise of these powers. That is why we have upheld several orders, which have been passed under section 151 so as to render assistance to a civil court or assist the executing court or its enforcement machinery to execute decrees and orders passed by a civil court. Such aid can be in the form of police assistance also. However, beyond that, a clear takeover of the powers of a criminal court can never be upheld and has not been upheld by us.

45. Pertinently, when in this case it has been brought to our notice that the subject civil suits were filed earlier and the registration of the FIR is a subsequent act. We are not for a moment suggesting that depending upon the conduct of the civil proceedings, at the instance of the aggrieved party like the plaintiff, criminal law could not have been set in motion. It could very well have been set in motion and we say nothing about that part. However, what we have found is that throughout the learned single Judge, and with great respect, was following up

both civil and criminal proceedings. The learned Single Judge unmindful of the broad distinction noted above also lost sight of the fact that the assignment of judicial work by the Hon'ble Acting Chief Justice to him and in terms of the current Roaster does not enable him to simultaneously function as a Criminal Appellate Court nor does it vest him with any powers under section 482 of the Criminal Procedure Code, 1973 read with or otherwise independent of the Criminal Procedure Code but in terms of Article 226 of the Constitution of India. The learned Single Judge, with utmost respect to him, was not aware of the scheme of the Criminal Procedure Code, 1973 and that once a crime is registered, it should be investigated by a competent police functionary. The learned single Judge has not observed anything in the order and particularly the orders passed from time to time which would enable us to hold that there are reasons and sound enough in law for a competent court to direct formation of a SIT or investigation to be carried out by such SIT headed by other higher level police official. If indeed some recommendations and observations had been made by a competent criminal court, then, there was no quarrel or dispute. However, here the impugned orders were not construed as mere recommendations or opinions of the learned Single Judge, but taking them as binding directions, a SIT was formed and thereafter, the learned single

Judge's orders mandated that the report of all investigations be filed on record of the civil suit. It is that part which has raised the above serious issues of law before us.

46. We are aware of the principles and salutary as they are that those who are being investigated and proceeded against for having allegedly committed cognizable offences have no say in such matters nor they have locus to complain about constitution of SIT or its composition. Yet, it is a different matter when such issues are raised before a competent criminal court or a court exercising its supervisory jurisdiction. It is during the course of considering an application for interim relief in a civil suit that such a SIT was constituted and under the orders of the learned single Judge. Further, the learned single Judge required such team to forward and place report of the investigations on the file of the civil suit. Subsequently, at the instance of the plaintiff, the FIR was registered and the criminal law was set in motion.

47. We have found that a statement of the plaintiff's representative has been recorded while registering the FIR. The persons who have been named as accused in the said FIR include the representative/owner of Trident Steel and Engineering Company. It is clear from the observations of the learned single Judge and in one of the orders that this person who has been

named as an accused (Hitesh Kanungo) has been found to be co-operating with the investigation and that is how the learned single Judge has remarked in one of his orders. Later on it transpires that despite such observation and remark, this Mr.Hitesh Kanungo has been arraigned as an accused.

48. All concerned ought to be aware that the journey in criminal law is not simple by any means. There is a presumption of innocence and not of guilt. In the instant case, the prosecution has been launched by the State/police. The degree of proof in a criminal trial is stringent and strict, namely, proof beyond reasonable doubt. In civil cases, the rigour is slightly diluted and it is the preponderance of probabilities. Hence, it may be that the FIR proceeds on the footing that this Hitesh Kanungo is an accused. However, the investigations are still going on and they are at very delicate and sensitive stage. In criminal law a suspect may be named as accused and for an accused to be convicted, a full fledged trial has to be held. The reports of investigations are filed in the competent criminal court, based on which, the prosecution requests the court to frame a charge. At that stage, those arraigned as accused can request the court that there is no prima facie material to term them as accused and therefore, they should be discharged from the criminal case. At that stage, on the

basis of the materials collected by the prosecution, it is possible for such persons to argue that the criminal law could not have been set in motion at all or if it could have been set in motion, they could not have been impleaded as an accused at all. All such stages during the course of criminal proceedings are vital and crucial insofar as the rights of the person proceeded against are concerned. At every stage, such a court has to be vigilant and has to bear in mind that the presumption of innocence is a human right. That cannot be displaced casually and lightly. By the impugned orders, there is every likelihood of this presumption getting displaced and it is possible that people in-charge of prosecution may argue that given the observations and remarks of the learned Single Judge of the High Court, such persons should not be discharged from the criminal case. It is not necessary that those who are named as accused should be visited with adverse legal consequences based on the observations and remarks in such orders. They need not actually suffer and undergo these consequences. That there is a possibility of their rights being jeopardised is enough and that is why one frequently notices the High Courts and the Hon'ble Supreme Court clarifying even in interlocutory orders that the observations and remarks therein should not be taken as conclusive findings or a binding opinion and the courts below or those in-charge of conducting the

prosecution should not be influenced by them. It is amply clarified that the court has not expressed any opinion on the rival pleas and which would be taken as binding on the trial courts or the police machinery.

49. In the instant case, we find that after the FIR was registered and the said Hitesh Kanungo was booked as an accused, he sought anticipatory bail from the Sessions Court. The anticipatory bail application has been rejected. During the course of rejecting the same, the learned Judge has made observations and by referring to the pending civil suit. It may be that the same has not entirely or totally influenced his mind or his ultimate conclusion, but surely, that aspect was highlighted before him. Now, we are informed that the said accused has sought anticipatory bail from this court and his application is pending.

50. It is in these circumstances that we are of the view that there is merit in the contentions of Mr. Khandeparkar and Mr. Merchant that the learned Single Judge has, in issuing certain directions, particularly in the nature of filing of investigation reports on the file of the civil suit, overstepped his limits. It is in that sense that he has taken over the specific powers conferred in a criminal court. It is, therefore, apparent that the learned Single Judge, in his anxiety to curb certain alleged illegal, immoral and

unethical practices prevailing particularly in the trade of supply of pipes by relying on test certificates, which are questionable and doubtful, issued directions to the police machinery as well.

51. Mr. Kadam and Mr. Dhond would submit that the learned Single Judge had before him enough materials to which he had made a reference and these materials are a part of the pleadings in the civil suits. Therefore, the learned Single Judge was justified in making certain prima facie observations.

52. We have perused all the orders, including those impugned before us in these appeals. The learned Single Judge has not assigned any reasons in arriving at the conclusion that the pipes are spurious. Beyond the version of the plaintiff that the certificates are forged and fabricated, nothing has been referred by the learned Single Judge. When such conclusions are to be rendered even at a prima facie stage, the learned Single Judge, with great respect, ought to have referred to not only the pleadings meaning thereby the plaint and the affidavit in support, but the version of all the parties before him. They deserve an opportunity to rebut the allegations against them. It is only after such rebuttal or denial is found to be vague or there being no denial at all that the learned Single Judge could have termed the act of the concerned parties as illegal. He has not only termed

that as illegal, but gone ahead and termed it as a punishable offence. Once a High Court Judge makes, and in the course of rendering a decision on an interim relief application in civil suit, such observations, they are bound to influence the police officials, if not competent criminal courts necessarily. That is why we say that the learned Single Judge should have been careful enough in holding that the supply of pipes by the appellant is a deal in spurious pipes. Such a finding is recorded by referring to certificates which are allegedly forged and fabricated. He could have avoided the use of the words, particularly “forged” and “fabricated” at this stage. The conclusions reached by him may be based upon the investigations by the police machinery. At the stage of calling upon police machinery, the learned Single Judge employed, with great respect, the word “scam”, which means a dishonest scheme, a fraud. We have seen several presiding officers and judges routinely observing in their orders that there is a huge scam. It may be a word of day to day usage. However, when it finds place in a judicial order, it has serious consequences. A scam by itself is not a punishable offence. The offence is either cheating, criminal breach of trust, criminal misappropriation, forgery, but there is nothing like a scam carved out as a punishable offence in the Indian Penal Code, 1860. However, when such a word is employed in judicial orders, those

implementing such orders frequently get carried away. They think that a serious offence is committed and the persons allegedly involved in commission of the same can safely be termed as accused and can be proceeded against accordingly. Then, they forget the long and arduous journey in criminal law. It is in these circumstances that we are constrained to hold, with great respect, that the learned Single Judge should not have ventured into this territory, but left the needful to be done by a competent criminal court. All the orders that have been passed by him during the course of hearing the notice of motion have thus impacted the powers vesting in a competent criminal court and reserved exclusively for it in the scheme of the Criminal Procedure Code, 1973.

53. The learned senior counsel appearing for the contesting respondents cannot, therefore, rely on any materials and which find no place in the impugned orders to support the learned Single Judge venturing into such territories as are exclusively reserved and carved out for the criminal courts. They have then argued that the appellants have no locus for they are not aggrieved parties at all. For the reasons aforementioned, we are unable to agree with them. We are also not impressed by their argument that the learned Single Judge has amply clarified that his orders

will not in any manner influence the investigations and they shall be carried on their own merits and in accordance with law. According to the learned senior counsel, therefore, there is no prejudice and once there is no prejudice established and proved, then, there is no reason to entertain these appeals. Even these contentions have been dealt with by us in the foregoing paragraphs and we have found enough material to the contrary. We have found that the orders and directions issued from time to time are following a pattern and this clarification in a stray sentence does not dilute the effect of the earlier orders and directions therein. Despite such clarification, the learned Single Judge called upon the police machinery to place on record of these civil proceedings, the investigation reports. He has carefully perused them and retained them in the files. He has also directed the parties before him to handover documents in their possession to certain police officials. He has presumed that because one of the parties named before him-Dharampalpad Singh has given his residential address as that of Worli, Mumbai, that the offence is committed within the local limits of Worli Police Station. That is how he has directed the police inspector attached to that police station to attend the court and submit his report. He has also involved other police officials. It is in these circumstances that we find that the orders under challenge

cannot be sustained by accepting the arguments of the learned senior counsel appearing for the contesting respondents. They made sincere efforts to support the orders and the directions therein by providing reasons which are not to be found in the orders. There may be materials in the form of pleadings and with regard to issuance of the certificates, but given the fact that the suits were filed sometime in the month of January/July, 2018 and the certificates are of prior dates, then, all the more we do not find that the learned Single Judge's conclusion that all of them are forged and fabricated to be justified.

54. We are, therefore, of the opinion that the above directions to the police machinery cannot be sustained. We are of the opinion that the appellant Trident Steel and Engineering Company is justified in bringing this appeal and challenging the orders of the learned Single Judge to the above effect and its complaint that despite agreeing to a without prejudice ad-interim arrangement, the learned Single Judge has gone ahead and issued the impugned directions without disposing of the notice of motion or the application of the plaintiff for ad-interim reliefs with a reasoned order, is justified. It is apparent that as far as the statement recorded by the learned Single Judge in one of his orders, no appeal has been brought to challenge it or the order based

thereon. The appellant would have no grievance if the statement was continued till the hearing of the notice of motion. The appellant would be satisfied if it had been granted an opportunity to resist the application for further ad-interim reliefs by filing detailed affidavits. Thus, it was willing to contest the notice of motion filed in the civil suit on merits. Therefore, to our mind, beyond recording the without prejudice statement and then listing the motion for ad-interim relief or for hearing and final disposal, the learned Single Judge was not required to issue any further directions and in the nature issued in the impugned orders. These orders and directions have been issued by a court not competent to issue them. The competence is lacking in law and therefore, these orders cannot be termed as mere irregularities.

55. Once we reach the above conclusion, it is not possible to agree with Mr. Dhond that the directions in the impugned orders are innocuous in nature. Mr. Dhond has brought to our notice several decisions of the Hon'ble Supreme Court and we shall deal with them seriatim. He firstly relied upon the judgment of the Hon'ble Supreme Court in the case of *Talab Haji Hussain vs. Madhukar Purshottam Mondkar and Ors.*³ In this case, the Hon'ble Supreme Court was considering the legality and validity

3 AIR 1958 SC 376

of an order passed by a Division bench of this court. There, the appellant before the Hon'ble Supreme Court, along with others, was charged with an offence punishable under section 120-B of the Indian Penal Code and section 167(81) of the Sea Customs Act, 1878. These were bailable offences. The accused-appellant before the Hon'ble Supreme Court was released on bail of Rs.75,000/- with one surety in the like amount on 9th December, 1957 by the learned Chief Presidency Magistrate at Bombay. On 4th January, 1958, an application was made by the complainant before the Magistrate for cancellation of bail, but that application was dismissed on the ground that the Magistrate lacks jurisdiction to cancel the bail. Against this order, the complainant preferred a revision application before this court and he invoked not only the revisional jurisdiction, but this court's inherent power under section 561-A of the Criminal Procedure Code, 1898. This provision is akin to section 482 of the Criminal Procedure Code, 1973. The Division Bench of this court heard these applications and held that under its inherent power, this court can cancel the bail granted to a person accused of a bailable offence and that in a proper case, such power can and must be exercised in the interest of justice. That is how the bail was cancelled and the accused was directed to be arrested and committed to custody forthwith. It is against this order that the

accused approached the Hon'ble Supreme Court. Thus, this is a case turning upon the powers vesting in a criminal court to cancel the bail granted to an accused, who is accused of committing a bailable offence. That whether such a power vests in the High Court in terms of section 561-A and even under section 482 of the Criminal Procedure Code, 1973 is the issue or aspect dealt with in this judgment. This judgment has, therefore, no bearing on the controversy before us. The controversy before us is entirely different. In the case in hand, the learned Single Judge was not exercising powers vesting in him under section 482 of the Criminal Procedure Code, 1973. He was exercising powers as a civil court and while deciding an application for interim reliefs in that civil suit, the impugned orders and directions have been passed and issued. Hence, this judgment is of no assistance to the original plaintiff-respondent no. 1.

56. The next judgment which is relied upon is rendered by the Hon'ble Supreme Court in the case of *Ratilal Bhanji Mithani vs. Asstt. Collector of Customs, Bombay*⁴. There, the appellant, along with others, was tried for an offence punishable under section 120-B read with section 167(81) of the Sea Customs Act, 1878 and section 5 of the Import and Export Control Act, 1947. The offence is bailable. The appellant was released on bail. The trial

4 AIR 1967 SC 1639

commenced and though large number of witnesses were examined, the trial was not concluded. By an order passed in exercise of its inherent jurisdiction, this court cancelled the bail and directed the appellant to surrender. In these circumstances, the Hon'ble Supreme Court relied upon its judgment in the case of *Talab Haji Husain* (supra) and concluded that there is no merit in the appeal.

57. To the similar effect is the judgment of the Hon'ble Supreme Court in the case of *Rasiklal vs. Kishore s/o. Khanchand Wadhwaní*⁵. For the reasons assigned above, even this judgment is of no assistance to the plaintiffs.

58. In the judgment of the Hon'ble Supreme Court rendered in the case of *Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal*⁶, the ambit and scope of the powers conferred by section 151 of the Code of Civil Procedure, 1908 was in issue. The Hon'ble Supreme Court, outlining the ambit and scope of these powers, pertinently held that in the exercise of these powers, the civil courts cannot pass such orders as are totally beyond their jurisdiction. While Mr. Dhond relies upon para 18 of this judgment, it must be stated that the Hon'ble Supreme Court did not accept the extreme arguments, but cautioned that the powers

⁵ (2009) 4 SCC 446

⁶ AIR 1962 SC 527

under section 151 of the Code of Civil Procedure, 1908 are not to be exercised when their exercise is in conflict with what has been expressly provided in the Code of Civil Procedure, 1908. This restriction, for practical purposes, on the exercise of these powers is not because these powers are controlled by the provisions of the Code, but because it should be presumed that the procedure specifically provided by the legislature for orders in certain circumstances is dictated by the interests of justice (see paras 20 and 21). This judgment, therefore, cannot be read in the manner suggested by Mr. Dhond, but must be read together with this note of caution. Once it is so read, that is also of no assistance.

59. Then, Mr. Dhond relied upon a judgment of the Hon'ble Supreme Court in the case of *Banarsi and ors. vs. Ram Phal*⁷. In this judgment, the Hon'ble Supreme Court has specifically held that an appeal can be filed by a person aggrieved by the decree. Unless a person is prejudicially affected by a decree, he is not entitled to file an appeal. No appeal lies against a mere finding. We are aware of these legal principles, but dependent upon the facts and circumstances of each case, it will have to be determined as to how a person is prejudicially affected by a decree and that would depend upon the circumstances in each case and peculiar to it. We have found from the facts and circumstances in the cases

⁷ (2003) 9 SCC 606

before us that the appellants are indeed prejudiced by the impugned orders. Hence, we have not deviated from the principles enshrined in this judgment.

60. Then, we have the reliance placed by Mr. Dhond on two decisions of the Hon'ble Supreme Court. *Narmada Bai vs. State of Gujarat and Ors*⁸ was a decision of the Hon'ble Supreme Court on the petition of Narmada Bai. She says that she is mother of Tulsiram Prajapati, the deceased, who, according to her, was killed in a fake encounter by respondent nos. 6 to 19, who are the officials of the Gujarat and Rajasthan Police, somewhere on the road going from Ambalimal to Sarhad Chhapri. She filed the writ petition under Article 32 of the Constitution of India praying for issuance of a writ of mandamus or in the nature thereof or any other writ, order or direction directing the Central Bureau of Investigation to register a FIR and investigate into the fake encounter killing of her son and submit its report to the Hon'ble Supreme Court. She also prayed for compensation. Her case and the pleadings on her behalf have been referred to extensively as also the stand of respondent no. 2, a private party. The Hon'ble Supreme Court concluded that a writ petition under Article 32 lies at the instance of an aggrieved party like Narmada Bai and who desired that the concerned police officials should be brought

8 (2011) 5 SCC 79

to book by proceeding against them under the criminal law. There was definitely an element of criminality and in the acts committed by these police officials, according to her. Being officials of the police machinery of the two States, she apprehended that no investigation will be carried out at all. No FIR would be registered even though the persons have committed serious offences and punishable with severe punishment. The accused tried to resist this transfer of investigations to the CBI. In rejecting their stand, the observations relied upon by Mr. Dhond and to be found in para 64 of this judgment have been made. They are of no assistance to the plaintiff-respondent before us. The context in which they have been made should not be lost sight of while relying on them. The principles culled out by the Hon'ble Supreme Court from its own judgment are that when allegations are levelled against high level police officials, despite investigation made by police authorities of the State, a CBI investigation can still be ordered. Therefore, the investigation was transferred from the State police to the CBI. When such transfer is directed, the accused have no right and they cannot say that they should be investigated by a particular investigating agency.

61. Surely, the learned Single Judge, while passing the impugned orders, was not considering any prayer and on par with

Narmada Bai. This was not a case where a complainant came before this court and complained that a crime has been committed by the appellants before us and the local police is not investigating them at all. Their complaint was not that the local investigations are unfair. They were praying for interim reliefs in a civil suit. Therefore, since the learned Single Judge was not seized of a request as made by Narmada Bai, then, we do not see how any assistance can be derived from this judgment of the Hon'ble Supreme Court.

62. The judgment in the case of *Central Bureau of Investigation and Anr. vs. Rajesh Gandhi and Anr.*⁹ was also rendered by the Hon'ble Supreme Court in a case where the directors of a company were raided by the Income Tax Department and the raid was carried out on their office, residence and factory of a company where they are directors with others. Certain documents were seized. The documents so seized were stored by the then Assistant Director (Investigation), Department of Income Tax in one steel almirah kept in his chamber. On one night, the seized documents were burnt after breaking open the office's steel almirah. The local police registered a FIR. Investigation was carried out by the local police. Thereafter, at the request and with the consent of the State of Bihar, the Central

⁹ (1996) 11 SCC 253

Government issued a notification under section 6 of the Delhi Special Police Establishment Act, 1946 authorising the CBI to investigate the offence. Hence, the investigations were transferred to the CBI. A fresh case was registered. The accused filed a writ petition challenging these notifications and that challenge was accepted by the High Court. Aggrieved, the CBI approached the Hon'ble Supreme Court. In this backdrop, the observations in para 8 of the judgment and heavily relied by Mr. Dhond have been made. The context in which they have been made cannot be overlooked. Once we have a case of the investigations being transferred to another agency, but the accused asserted that they ought to be investigated by the local police, that the issue of their right to object to such transfer arose and was considered.

63. While we are careful in observing and holding that the learned Single Judge acted beyond his powers as a presiding officer of a civil court in issuing the impugned directions, we would do nothing by which any benefit or advantage can be derived by those, who are being proceeded against as accused in the subject FIRs. Our ultimate directions will bear out this aspect.

64. Before we do so, we must dispose of Mr. Dhond's contention based on the judgment of a Division Bench of this court in the case

of *Dinesh Jajodia vs. Citi Bank and Ors*¹⁰ decided on 28th June, 2016. In that order, the Division Bench was considering a challenge to the direction of the learned Company Judge. The Judge, while deciding the company petition filed by the HDFC Bank Limited, directed the SEBI as well as the Enforcement Directorate (ED) to forthwith take action against the directors of the respondent company as well as the said Dinesh Jajodia. That was to be taken under the appropriate provisions of law and the learned Judge directed further that the attachment be levied on their properties. The Company Registrar was directed to forward a copy of the affidavit filed in that proceedings to the SEBI as well as the ED along with a copy of his order. The Economic Offences Wing (EOW) of the Bombay Police was directed to render all assistance to SEBI and ED for effecting compliance of his order.

65. Against such an order, the appeal was filed and firstly, an objection was raised to its maintainability. The Division Bench held that given the directions of the learned Single Judge and because he has rendered only a prima facie opinion with regard to commission of cognizable offence by the appellant that the consequential directions have been issued. The appeal would not be tenable because the order passed by the learned Single Judge had not gained finality. However, the Division Bench did not

¹⁰ Appeal No. 396 of 2016

dispose of the appeal only on this ground. It perused the order and decided the appeal on merits. The learned Judge's orders were carefully perused by the Bench. After noting the background facts, the Division Bench came to the conclusion that all that the learned Single Judge has done was to set the criminal law in motion. He has not acted beyond the powers conferred in him. By directing that the criminal law be set in motion, he did not takeover the powers of a criminal court. Such is not the position before us. Once we have found that the instant case is of takeover of the powers of a competent criminal court and as enumerated above, then, reliance on this order of the Division Bench is misplaced. This judgment is also distinguishable on facts.

66. We have found enough support in the view that we have taken in this judgment from the principles that have been laid down from time to time. The Hon'ble Supreme Court has, in the case of *K. G. Premshankar vs. Inspector of Police and Anr.*¹¹ has held that the findings of fact recorded by the civil court do not have any bearing so far as the criminal case is concerned and vice versa. The standard of proof is different in civil and criminal cases. In civil cases, it is preponderance of probability and in criminal cases, it is proof beyond reasonable doubt. There is

11 (2002) 8 SCC 87

neither any statutory nor any legal principle that findings recorded by the court either in civil or criminal proceedings shall be binding between the same parties while dealing with the same subject matter and both the cases have to be decided on the basis of evidence. That is how in several orders passed post *Premshankar* (supra), the Hon'ble Supreme Court has held that these proceedings are independent in nature given the degree of proof and the fundamental distinction therein. However, sections 41 to 43 of the Evidence Act cannot be brushed aside while recording such finding.

67. The other principle and which is equally salutary and must be applied to the cases brought before us is to be found in the judgment reported in the case of *Hurrish Chunder Chowdry vs. Kali Sundari Debia*¹². The Privy Council judgment would definitely guide us in such cases. The following pertinent observations in this judgment require reproduction:-

“From this order or judgment of Mr. Justice *Pontifex* an appeal was preferred to the High Court. All three of the learned Judges of the High Court, the Chief Justice and the two puisne Judges, were of opinion that Mr. Justice *Pontifex* had exercised a wrong discretion, and that he ought to have sent the case for execution; but the Chief Justice was of opinion that no appeal would lie from the proceeding before him, and that his error could not be set right. The two puisne Judges were of opinion that an appeal would lie under sect. 15 of the Royal Charter of 1865, which is in these terms:- “We further ordain that an appeal shall lie to the said High Court of Judicature, at Fort William in Bengal, from the judgment

12 (1882) L. R. Vol. X Indian Appeals 4

(not being a sentence or order passed or made in any criminal trial) of one Judge of the said High Court, or of one Judge of any Division Court, pursuant to sect. 13 of the said recited Act” - the said recited Act, with regard to this matter, having enabled the Court to confer upon a Judge, or a division of the Court, the power of the Court itself. These learned Judges held (and their Lordships think rightly) that whether the transmission of an order under sect. 610 would or would not be a merely ministerial proceeding, Mr. Justice *Pontifex* has in fact exercised a judicial discretion and had come to a decision of great importance, which, if it remained, would entirely conclude any rights of Kali Soondari to an execution in this suit. They held, therefore, that it was a judgment within the meaning of sect. 15.

The Chief Justice was of opinion that it was not a judgment: and he seems to have based his opinion in a great measure upon the ground that, in his view, Mr. Justice *Pontifex* had no jurisdiction to inquire at all whether or not Kali Soondari had a right to execution; that his function was merely ministerial; that all he could do, or ought to have done, was to transmit the decree of Her Majesty in Council to the Lower Court for execution; that he usurped a jurisdiction which did not belong to him; and that under those circumstances no appeal would lie. Their Lordships do not think that Mr. Justice *Pontifex* can be properly treated as having usurped jurisdiction; but, if he had, this would have been a valid ground of appeal, and they are unable to agree with the Chief Justice, that if a Judge of the High Court makes an order under a misapprehension of the extent of his jurisdiction, the High Court have no power by appeal, or otherwise, in setting right such a miscarriage of justice.

(Underlining and emphasis is ours)”

68. A bare perusal of these conclusions leave us in no manner of doubt that if a Judge of the High Court makes any order beyond his jurisdiction, the higher court is not helpless. It is not the conclusion emerging from this judgment that when the jurisdiction is usurped and which did not belong to the learned Judge, under no circumstances, an appeal would lie. On the other hand, the Privy Council concludes that in these circumstances, an

appeal would lie. The said principle has been applied and followed in subsequent judgments in India.

69. In the case of *Meenakshi Naidoo vs. Subramaniya Sastri*¹³ the Hon'ble Privy Council concluded that when a Judge has no inherent jurisdiction over the subject-matter of a suit, the parties cannot by their mutual consent convert it into a proper judicial process, although they may constitute the Judge their arbitrator, and be bound by his decision on the merits when these are submitted to him. But there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties without objection join issue, and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the ground that there were irregularities in the initial procedure which, if objected to at the time, would have led to the dismissal of the suit.

70. This aspect has been pointed out in a decision rendered by the Division Bench of Madras High Court in the case of *Oor Nayakkan Alias Krishnaswami Naidu and Ors. vs. Ps. Ar. Ar. Arunachala Chettiar*¹⁴. The Division Bench of that court in that decision held as under:-

¹³ (1887) L. R. Vol. XIV Indian Appeals 160

¹⁴ AIR 1948 MADRAS 245

“There is a considerable line of authority in this Court to the effect that where a Court wrongly acts under an appealable provision of law and passes an order a party is not deprived of the right of appeal, though on the facts the order should not have been passed under that provision: *Muthiah Chettiar v. Govindas Krishnadas* (1921) 41 M.L.J. 316 : I.L.R. 44 Mad.19 (F.B.). *Somasundaramma v. Seshagiri Rao* (1947) 1 M.L.J. 292.”

71. The later judgment of Kerala High Court in the case of *Parvathi Pillai and Ors. vs. Kuttan Pillai*¹⁵ is equally eloquent and elaborates this principle in the following words:-

“7. The question still arises as to whether an application under Order IX Rule 9 can be tried by the original Court after an appeal from the decree has been disposed of by the appellate Court. No case decided on a set of facts parallel to the present one has been cited before me by either of the parties. The disposal of the suit having been professed to be on merits it cannot be said that an appeal was incompetent. The right of appeal depends not on what the Court ought to have done, but on what the Court did. Even if the Court has purported to act wrongly under an appealable section, the decision therein will be appealable. (See *Bilas Singh v. Emperor*, AIR 1925 All 737, *Karam Nawaz v. Runka*, AIR 1929 Lab 376, *Somasundaramma v. Seshagiri Rao*, AIR 1947 Mad 378 and *Philopose v. Venkitta Subba Iyer*, AIR 1954 Trav-Co 118). In this case the appeal against the decree dismissing the suit has been disposed of; but the application moved under O. IX Rule 9 remains yet to be disposed of by the primary Court.”

72. This principle was followed by a Division Bench of the Patna High Court in the case of *Union of India (Military Department) vs. Ramdas Oil Mills, Jamshedpur*¹⁶. In paras 8 and 9 of this decision, the legal principles have been summarised. After following the Privy Council judgment, the Patna High Court held that the right of appeal was not taken away by the fact that the court rejecting

¹⁵ AIR 1962 KERALA 17

¹⁶ AIR 1968 PATNA 352 (V 55 C 101)

the application wrongly assumed the existence of a decree to be executed. The Patna High Court held that no contrary principle than the one outlined in the Privy Council decision has been brought to its notice. Thus, when the jurisdiction is usurped by a court in passing an order during the course of deciding an injunction application that such order is appealable if it would have been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction. Paras 8 and 9 of this judgment read as under:-

“8. In view of the foregoing discussion, it must be held that the provisions of the Arbitration Act, 1940 do not apply to the instant case and the award of Mr. M. P. Verma could not be challenged under Section 16, 17 or any other Section of that Act and that an appeal lies against the award directly to the High Court, in view of the provisions of Section 19 of the Defence of India Act. The jurisdiction of the High Court, on appeal, in this case is, therefore, not limited to the matters contained in rules 16, 17 and 30 to 32 of the 1940 Act. The view is fortified by an observation of the Supreme Court in *Ebrahim Aboobakar v. Custodian General of Evacuee Property, New Delhi*, AIR 1952 SC 319. Their Lordships observed:-

“Like all courts of appeal exercising general jurisdiction in civil cases, the respondent has been constituted an appellate court in words of the widest amplitude and the legislature has not limited his jurisdiction by providing that such exercise will depend on the existence of any particular state of facts. Ordinarily, a court of appeal has not only jurisdiction to determine the soundness of the decision of the inferior court as a court of error, but by the very nature of things it has also jurisdiction to determine any points raised before it in the nature of preliminary issues by the parties. Such jurisdiction is inherent in its very constitution as a

court of appeal. Whether an appeal is competent, whether a party has 'locus standi' to prefer it, whether the appeal in substance is from one or another order and whether it has been preferred in proper form and within the time prescribed, are all matters for the decision of the appellate court so constituted."

In the instant case, too, there is no limitation on the powers of the High Court as an appellate authority under Section 19 of the 1939 Act and the rules made thereunder; and this court can examine all the matters relevant to the decision of the appeal and the cross objection filed by the parties. Mr. Chatterji's preliminary objection, therefore, fails.

9. Mr. Lalnarain Sinha argued, in the alternative, that even assuming that the provisions of the Arbitration Act applied to the arbitration in question, this appeal lies because the arbitrator has usurped the jurisdiction of the court contemplated by the 1940 Act; and he relied on some decisions in support of this argument. In *Hurrish Chander Chowdhary v. Kali Sundari Debia*, (1882-83) 10 Ind App 4 (PC) it was held that if in such exercise of judicial discretion a Judge usurps jurisdiction, which he does not possess, that alone would be a valid ground of appeal. A bench of the Calcutta High Court said in *Gangadhar v. Shekharbasini*, AIR 1917 Cal 320 that, where jurisdiction is usurped by a court in passing an order against which an appeal would lie if it had been passed with jurisdiction, an appeal against the order cannot be defeated on the ground that the order was made without jurisdiction; and for this proposition of law reliance was placed on several decisions, including the decision of the Judicial Committee in *Minakshi Naidu v. Subramanya Sastri*, (1886-87) 14 Ind App 160 (PC).

A bench of the Madras High Court in *Abdul Rahiman Sahib v. Ganapatti Bhatta*, (1900) 10 Mad LJ 305 held that an appeal lay against an order by which the District Judge purported to issue an attachment and appoint a receiver under section 492 and 503 of the old Civil Procedure Code, in a proceeding under the Guardians and Wards Act, 1890, under which the court has no power to issue such attachment or appoint a receiver. Their Lordships took this view as they treated the impugned order as having been really passed under the aforesaid sections of the Civil Procedure Code. In coming to this decision, their Lordships relied on the decision of the Privy Council in the aforesaid case of *Hurrish Chunder Chowdhary* (1882-83) 10 Ind App 4 (PC). In *Sarish Chandra Roy v. Roy Banomali Rai*, (1904) 14 Mad LJ 185, a compromise decree had been passed for partition, and one of the parties applied

for the appointment of Commissioner. This application was rejected on ground that it was barred by limitation. Their Lordships of the Madras High Court took the view that this order was appealable under section 244 of the old Civil Procedure Code, and such appeal was not taken away by the fact that the Court rejecting the application wrongly assumed the existence of a decree to be executed. Here too, their Lordships relied on the Privy Council decision in the case of Hurrish Chunder Choudhary, (1882-83) 10 Ind App 4 (PC). No decision to the contrary had been pointed out by Mr. Chatterji and, therefore, the contention of Mr. Sinha must prevail.”

73. These judgments are a complete answer to the arguments of Mr. Kadam, who would rely upon section 13 of the Commercial Courts Act, 2015 and the language of section 104 and Order XLIII Rule 1(r) of the Code of Civil Procedure, 1908. Mr. Kadam would argue that the order passed by the learned Single Judge is not appealable because it is not specifically enumerated in Order XLIII Rule 1 of the Code of Civil Procedure, 1908. It cannot be held to be appealable by relying on clause (15) of the Letters Patent, which is expressly overridden by sub-section (2) of section 13 was his submission. We are unable to accept it and for more than one reason. The learned Single Judge in this case was seized of an application for interim relief/injunction made in a IP(L) Commercial Suit. He was, therefore, seized of a commercial dispute. He was aware that in a commercial dispute as was brought before him, there was a request made to grant interim reliefs or interlocutory injunction or the prayer for appointment of court receiver. He was, therefore, obliged to consider that

request within the four corners of the law. The four corners of the law included the Code of Civil Procedure and Order XXXIX and XL Rules 1 and 2 thereof. The other applicable provision was section 94 of the Code of Civil Procedure, 1908. Therefore, the request to grant reliefs as claimed by the plaintiff could have been considered on the touchstone of these provisions and the legal principles interpreting the powers in relation thereto. The learned Single Judge assumed that during the course of exercise of such powers as are enumerated in Order XXXIX and XL, he can also summon the police officials, direct them to carry out an investigation and submit report of that to him, particularly on the aspect as to whether the parties brought before him are *prima facie* guilty of any offence punishable under the Trade Marks Act, 1999 and the Indian Penal Code, 1860. The learned Single Judge then went ahead and found that given the nature of the allegations, it is necessary to recommend constitution of a SIT and he observed accordingly. Relying upon his observations and the remarks during the course of consideration of the application for interim reliefs, the police machinery stepped in, it constituted such SIT and submitted its report from time to time to the learned Single Judge who considered these reports and made further observations which had a definite bearing on the rights of those brought before him. These rights pertain to their life and liberty.

The learned Single Judge, unmindful of the consequences of such recommendations/ opinions/ observations has gone ahead and termed their acts as punishable offences. In view of these sweeping directions and observations, there is enough material to conclude that the learned Single Judge took over the powers of a competent criminal court in making such orders. That is how we have proceeded by applying the aforementioned legal principles and to the effect that if the ad-interim or interim orders passed in exercise of the powers conferred vide Order XXXIX and XL of the Code of Civil procedure, 1908 are appealable orders, then, issuing directions beyond the same would definitely permit us to interfere with the impugned orders and to prevent serious miscarriage of justice. That is how we have entertained these appeals.

74. We have not set down any wide or broad legal proposition and which can be applied to every case. We clarify that it is only in the above facts and circumstances that these legal principles would apply. They cannot be applied to all cases irrespective of the peculiar facts and circumstances therein. Ultimately the application of the above legal principles and also those enumerated in para 34 of our order in the case of *Shailendra Bhadauria* (supra) would arise in the facts and circumstances of each case. No general rule has been laid down by us.

75. While we interfere with the Impugned orders and to the extent that the learned Judge could not have called upon the police officials to remain present before him nor could he summon all the parties to the suit personally as if they were accused before a criminal court, we do not intend to confer any benefit to those who are involved in criminal acts. If there is an element of criminality in their acts, then, that has to be taken care of by recourse to criminal law. No amount of interference by us in the impugned orders and directions would enable those proceeded against to contend and urge that the investigations have been carried out by a police official not at all competent to carry them out. They may raise issue and pleas about the legality and validity of the investigation, but we express no opinion on such contentions. All that we direct is that the report of all these investigations be placed before the competent criminal court. It is for the competent criminal court to express any opinion on the legality and validity of such investigations and the merits thereof when they are placed before it. Since all the reports of the investigations carried out till date are on the file of the civil suits in this court, we direct that they shall be forthwith transferred to the file of the competent criminal court. It is for the competent criminal court to then decide as to whether a *prima facie* case has been made out against the persons named therein and can a

charge be framed against them. Once these reports are placed before the competent criminal court, it is its duty and function in accordance with the Criminal Procedure Code, 1973 to take an appropriate decision. That decision will be taken strictly in accordance with law. While taking that decision, the criminal court shall not be influenced by any opinion or expression of any opinion in the orders under challenge. Equally, the competent criminal court shall not be influenced by the fact that we have interfered with the orders under challenge and to the extent indicated above. We clarify that once the investigations have been carried out, it is not for us to unsettle them nor do we intend to scuttle them. If they are in process, let them be carried out and taken to their logical conclusion. The reports of such investigation be placed before the competent criminal court and it is for that court to then take a call and strictly in accordance with law. Presently, we do not give any declaration and as desired by the appellants, particularly to the effect that the investigations have been carried out without jurisdiction.

76. By the above directions, we have balanced the rights and equities. We clarify that we have also not expressed any opinion on the merits of the rival contentions. We direct that the notices of motion shall be decided on their own merits and in accordance

with law. While deciding the same or considering the prayer for interim reliefs, the learned Single Judge shall not be influenced by any observations, orders and directions which have been interfered with by us and to the extent indicated above. The motions shall be decided strictly in accordance with law.

77. Needless to clarify that we have not expressed any opinion on the contention raised by Mr. Merchant that the appellant represented by him is guilty of only bailable offences. We do not intend to express any final opinion on this aspect. We are mindful and aware of the fact that the Trademark Act, 1999 also enlists offences, which can be termed as cognizable offences. It is entirely for the investigating machinery to apply such provisions of the Trademark Act, 1999 and the Indian Penal Code, 1860 as are permissible in both laws.

78. We clarify that the order granting leave to amend the plaint is not an appealable order and indeed it has not been challenged before us. Equally, if there is any application and styled as application seeking disclosure of documents pending in the civil suit, it should be decided in accordance with law. In the event it is decided and any disclosure is directed, we clarify that the said aspect is not under challenge before us. The disclosures be made as directed by the learned Single Judge.

79. Before parting and since heavy reliance is placed by Mr.Dhond on the judgment of the Hon'ble Supreme Court and particularly some observations therein, merely to clear the doubts, we invite the attention of all concerned to the fundamental distinction made by the Hon'ble Supreme Court itself. There is, off-course a freedom to experiment and as held by the Hon'ble Supreme Court, legal engineering is permissible, but at the same time, the note of caution sounded by the Hon'ble Supreme Court in the case of *Newabganj Sugar Mills Co. Ltd. vs. Union of India and Ors.*¹⁷ should not be lost sight of. The Hon'ble Supreme Court held as under:-

“6. Rejecting, therefore, the recommendations for solution of the problem arising here, as put forward by counsel for the appellants, we have to devise other measures. We are aware of our limitations:

“The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in social life.' Wide enough in all conscience is the field of discretion that remains.”

The difficulty we face here cannot force us to abandon the inherent powers of the Court to do. “The inherent power has its roots in necessity and its breadth is co-extensive with the necessity”. Certainly, we cannot go against any statutory prescription. Had India had a developed system of class actions or popular organisation taking up public interest

¹⁷ (1976) 1 SCC 120

litigation, we could have hoped for relief otherwise than by this Court's order. We lag in this regard, although people are poor and claims are individually trivial. Legal aid to the poor has a processual dimension. As things stand, if each victim were remitted to an individual suit the remedy could be illusory, for the individual loss may be too small, a suit too prohibitive in time and money and the wrong would go without redress. If there is to be relief, we must construct it here by simple legal engineering.”

80. In assuming the jurisdiction, which was not vesting in it, the court has usurped it. In law, that means taking possession of a power illegally or by force. That cannot be justified and upheld by applying the principles of legal engineering.

81. With the aforesaid directions, both the appeals stand disposed of. There would be no order as to costs.

82. In the light of the disposal of the appeals, all the pending notices of motion in these appeals do not survive and stand disposed of as such.

(B. P. COLABAWALLA, J.)

(S.C.DHARMADHIKARI, J.)