

(2009) 07 BOM CK 0090

In the Bombay High Court

Case No : Letters Patent Appeal No. 114 of 2008 in Writ Petition No. 276 of 2008

Mrs. Mangala Mutha and Others

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 22-07-2009

Acts Referred:

Bombay High Court (Appellate Side) Rules, 1960 — Rule 18
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 21 Rule 103, Order 21 Rule 16, Order 21 Rule 35, Order 21 Rule 97
Constitution of India, 1950 — Article 14, 141, 21, 226, 227
Maharashtra Land Revenue Code, 1966 — Section 247

Citation : (2009) 111 BOMLR 3186

Hon'ble Judges : R.K. Deshpande, J; P.V. Hardas, J

Bench : Division Bench

Advocate : R.R. Mantri, for the Appellant; K.G. Patil, A.G.P. for respondent Nos. 1 and 2, R. N. Dhorde, h/f., R.L. Kute, for Respondent No. 3, A. S. Bajaj, for the Respondent No. 4 and V.D. Hon, for Respondent Nos. 5(A) to 5(H), for the Respondent

Final Decision : Dismissed

Judgement

FACTS

1. The appellants herein claimed themselves to be the successors intitle as well as in possession of the properties survey Nos. 53/1B, 52/1, 52/2, 133 and 46/2 situated at Chahurna (Bk), Taluka and District Ahmadnagar, from the original defendant Nos. 7 & 8 in Special Civil Suit No. 13/1956 decreed on 13.04.1956 by the learned Civil Judge Senior Division Ahmednagar. The appellants are the objectors in Special Darkhast No. 57/1977, to the executability of the decree passed in Special Civil Suit No. 13/1956. The objections raised by the appellants to the executability of the decree are rejected by the Collector, Ahmednagar vide his order dated 24.12.2007 and also by the learned Civil Judge Senior Division, Ahmednagar by his order dated 07.01.2008. The appellants preferred writ petition No. 276/2008 under Article 226 and 227 of the Constitution of India

before learned Single Judge challenging the aforesaid orders. The said writ petition is dismissed by the learned Single Judge, in motion hearing by his order dated 12.06.2008, against which, the instant Letters Patent Appeal has been filed. Basically two questions are required to be decided in this appeal:

(1) Regarding the maintainability of Letters Patent Appeal.

(2) The merits of the matter challenging the orders passed by the Collector on 24.12.2007 and by the Civil Court on 07.01.2008.

2. The facts in detail giving rise to the instant appeal are as under:

One Maheboob Zarekari was the owner of survey Nos. 46/2, 47/6, 48/6, 53/1B, 133/3, 52/1, 52/2, 131, 50/4 situated at Chahurna (Bk), Taluka and District Ahmednagar and the house property bearing No. 5106 City Survey No. 4097 Ward No. 12, Ahmednagar. Said Maheboob Zarekari died on 19.05.1948 leaving behind him his widow Mamulabee and a daughter Chotibee. The property was then mutated on 13.07.1948 in the name of widow Mamulabee. On 27.07.1949 Mamulabee executed gift deed in respect of survey Nos. 47/6, 48/6 and 50/4 in favour of one Babu Sagulal Itare @ Zarekari. On 13.04.1953, Mamulabee executed registered sale deed in favour of one Sakharam Mahadev Misal in respect of survey No. 52/2. On 12.11.1953, Mamulabee sold property survey No. 53/1B by registered sale deed to one Ramchandra Gopinath Misal. Again on 23.09.1953, Mamulabee executed another sale deed in favour of Sakharam Misal in respect of survey No. 52/1.

3. On 13.04.1957 Chotibee filed Special Civil Suit No. 13/1956 for partition and separate possession in respect of the properties owned by her father Maheboob Zarekari. In the said civil suit Mamulabee was joined as defendant No. 1 and the other persons to whom Mamulabee transferred survey Nos. 46/2, 131, 47/6, 48/6, 52/1, 53/1B and 133/3 were also joined as defendant Nos. 2 to 9. Babu Sagulal Itare @ Zarekari was joined as defendant No. 2 as survey No. 47/6, 48/6 and 50/4 were transferred to him by way of gift by Mamulabee. The defendant No. 3 Khandu Ramu Phulsaunder and defendant No. 4 Laxman Ramu Phulsaunder purchased survey No. 131 and some portion of survey No. 46/2 and hence were joined as defendant Nos. 3 and 4 respectively. One Raghunath Pandit purchased survey No. 46/6 from defendant No. 2 and was joined as defendant No. 5 in the suit. Rev. Dr. Bhaskar Diwale purchased survey No. 48/6 from defendant No. 2 and hence was joined as defendant No. 6. Sakharam Misal purchased survey No. 52/1 and 52/2 from defendant No. 1 and, was therefore, joined as defendant No. 7. Ramchandra Misal purchased survey No. 53/1B and Laxman Bhosale purchased survey No. 133/3 and, hence, were joined as defendant Nos. 8 and 9 respectively.

4. During the pendency of the said Special Civil Suit plaintiff/Chotibee executed registered sale deed dated 25.05.1957 by which she sold her 3/4th share in the land survey Nos. 47/6, 48/6, 53/1B, 133/3, 52/1 and 52/2 to one Mahadu Narayan Pawar, who subsequently joined in the said special civil suit as plaintiff

No. 2. Thus the Chotibee and Mahadu were the plaintiff Nos. 1 and 2, whereas, Mamulabee was defendant No. 1 and the other purchasers were defendant Nos. 2 to 9.

5. On 13.09.1957 the Trial Court i. e. the learned Civil Judge Senior Division, Ahmednagar passed decree in favour of plaintiff No. 1 Chotibee to the extent of her 7/8th share in the suit house and the suit land survey No. 50/4. A decree was passed in favour of plaintiff No. 2 Mahadu to the extent of 7/8th share in the suit lands survey Nos. 47/6, 48/6, 53/1B, 133/3, 52/1 and 52/2. A decree was also passed in favour of defendant No. 1 Mamulabee to the extent of 1/8th share in the house and suit lands survey Nos. 46/2, 47/6, 131 and 50/4. The suit was further decreed in favour of defendant No. 6 to the extent of 7/8th share in the suit land survey No. 48/6, in favour of defendant No. 7 Sakaram to the extent of 1/8th share in the suit land survey No. 52/1 and 52/2, in favour of defendant No. 8 Ramchandra to the extent of 1/8th share in the suit land survey No. 53/1B and in favour of defendant No. 9 to the extent of 1/8th share in the suit land survey No. 133/3. Further inquiry into the mesne profit was also ordered under Order XII Rule 18 of CPC and it was directed that the plaintiff Nos. 1 and 2 and the defendant Nos. 1, 6 to 9 be put in to separate possession of their respective shares as declared by the judgment and order. The names of defendant Nos. 3 and 4 were ordered to be deleted from the suit.

6. Being aggrieved by the aforesaid judgment and decree passed by the Trial Court, the original defendant Nos. 7 and 8 preferred separate appeals before this Court. The appeal filed by the defendant No. 7 Sakharam Mahadeo Misal was registered as First Appeal No. 78/1958, whereas, the appeal filed by the Ramchandra Gopinath Misal was registered as First Appeal No. 79/1958. This Court delivered the common judgment and order in both the appeals, on 24th September, 1963. The decree passed by the Trial Court was confirmed, however, there was some modification made in the decree, which according to original defendant Nos. 7 and 8, protected their possession on the basis of equitable partition. However, the plaintiffs/decreed holders disputed this claim made by the original defendant Nos. 7 and 8. This Court in its judgment above, also framed two issues regarding status of tenant, claimed by the defendant Nos. 7 and 8 and directed the lower Court to refer the same to the Mamlatdar, for determination. The reference to this dispute shall be made in the later part of this judgment, while dealing with the contentions of the parties. Thereafter, on the application for speaking to minutes filed in aforesaid First Appeals, this Court passed an order dated 09.02.1963, clarifying certain position and issuing directions.

7. On 23rd December, 1963, the decree passed by the Trial Court in Special Civil Suit No. 13 of 1956 was amended in the light of judgment and order dated 24.09.1963 passed by this Court in the aforesaid two appeals and on the application for speaking to minutes, passed on 09.10.1963. The plaintiffs filed Special Darkhast No. 06/1965 for execution of the modified decree, however,

there is dispute about the papers of Special Darkhast No. 06/1965 being lost. The plaintiff No. 1 Chotibee died on 02.10.1966. Thereafter, on 13.04.1977 Special Darkhast No. 57/1977 was filed by the legal representatives of plaintiff No. 1 along with the plaintiff No. 2 Mahadu Narayan Pawar.

8. During the pendency of the Special Darkhast No. 57/1977, the plaintiff No. 2 Mahadu Narayan Pawar assigned his rights under the decree in favour of one Hussan Babu Zarekari in respect of his share in lands survey No. 47/6, 48/6, 53/1B, 133/3, 52/1 and 52/2 by executing a deed of assignment dated 01.10.1981. On 22.10.1981, the defendant No. 3 and 4, who were deleted from the suit by an order of the Trial Court, filed an application Exh. 14 praying for deletion of survey No. 131 and 46/2 of Chahurna (Bk) from Special Darkhast No. 57/1977. On 23rd October, 1981, the defendant Nos. 7 and 8 filed application Exh. 17 in Special Darkhast No. 57/1977 for deletion of lands survey No. 52/1 and 52/2 alleging that as per the modification of the decree done by this Court in First Appeals No. 78/1958 and 79/1958, the whole survey Nos. 52/1 and 52/2 were to be assigned to the share of defendant No. 1 by way of equitable partition. Similarly a pursis (Exh. 21) was also filed by Hassan Babu Zarekari on 16.11.1981, for substituting his name, in place of plaintiff No. 2/deGREE holder No. 2 Mahadu Narayan Pawar, on the basis of deed of assignment dated 01.10.1981. Similarly, on the same day i. e. on 16.11.1981, the plaintiff No. 2/deGREE holder No. 2 Mahadu Narayan Pawar also filed application (Exh. 22) for deleting his name in Special Darkhast No. 57/1977.

9. Although, the executing Court passed an order on 21.12.1981 below Exh. 14 deleting survey Nos. 46/2 and 131 from Special Darkhast No. 57/1977 and also passed another order on 21.12.1981 below Exh. 17 directing the Collector to allot survey No. 52/1 and 52/2 to the share of defendant No. 1 in the proposed partition, did not pass any orders on the applications Exh. 21 and 22 filed for substituting the name of Hassan Babu Zarekari in place of decree holder No. 2 Mahadu Narayan Pawar or deleting the name of decree holder No. 2 from Special Darkhast No. 57/1977. The matter remained pending before the executing Court. On 22.11.1983 one Shaikh Ahmad claiming to be the legal representative of the plaintiff No. 1/deGREE holder No. 1 filed an application Exh. 26 for joining certain persons as parties to the Special Darkhast No. 57/1977. Notices were thereon issued to the concerned parties proposed to be joined as defendants/non applicants in Special Darkhast No. 57/1977. Amongst those proposed parties some are the appellants now in this appeal.

10. The decree holder No. 2 Hassan Babu Zarekari filed writ petition 1788/1988 before this Court challenging order dated 27th April, 1987, passed on Miscellaneous Application No. 97/1984 by the Second Joint Civil Judge Senior Division, Ahmednagar, rejecting the application for making reference to the Mamlatdar for deciding whether defendant No. 7 and 8 are the tenants in the suit land survey No. 52/1, 52/2 and 53/1B. It was prayed that if upon the decision being rendered that the defendant Nos. 7 and 8 are not the tenants, then the

applicant be put in actual possession of 7/8th share in the aforesaid lands, and accordingly, the Collector be directed. It was further prayed that necessary amendments be made in the Special Darkhast No. 6/1965 and Special Darkhast No. 57/1977. In this petition the decree holder No. 2 Hassan Babu Zarekari joined some of the appellants as respondents, apart from the original defendants were also joined as respondents in the said writ petition. The said writ petition was ultimately dismissed as infructuous and was disposed of as such on 12.04.1990.

11. The Special Darkhast No. 57/1977 was pending for execution, on 09.03.1998 the executing Court passed an order below Exh. 21 which was a pursis filed under the signature of Hassan Babu Zarekari an assignee of decree from plaintiff No. 2/decreed holder No. 2 Mahadu Narayan Pawar, for deletion of the name of Mahadu Narayan Pawar and for substituting his name. However, according to the decree holders no order was passed on Exh. 22 an application which was filed by Mahadu Narayan Pawar for deletion of his name. On 10.04.2002 the decree holder No. 2 Hassan Babu Zarekari moved an application u/s 47, 54 of Civil Procedure Code, read with Section Order XXI Rule 35 of CPC and Section 151 of CPC Exh. 99 praying therein that the decree holder may be put in possession of the lands under decree namely survey Nos. 52/1, 52/2, 133/3, 47/6, 48/6 and 53/1B, etc. immediately. It was alleged that all these properties except land survey No. 53/1 have been converted to non agricultural lands and, therefore, it is not now necessary to send the decree to the Collector for effecting partition. It was alleged that the defendant No. 7 and 8 have absolutely no existing interest in any of the suit properties, as the same have been illegally disposed of by them. It was further alleged that layouts have been prepared of lands in question and on some part of it, buildings have also been constructed. It was alleged that there is no question of making reference to the tenancy Court and accordingly prayer was made. There was no order passed on this application and it remained pending.

12. The plaintiff No. 2/decreed holder No. 2 Mahadu Narayan Pawar filed writ petition No. 1597/2002 before this Court on 15.02.2002, claiming direction to the respondent No. 2, the Collector Ahmednagar, to effect partition and actually separation of shares as provided u/s 54 of CPC in the matter of Special Darkhast No. 57/1977 referred by the learned Civil Judge Senior Division, Ahmednagar and to report accordingly to the executing Court within specified time. It was further prayed that Civil Judge Senior Division, Ahmednagar be directed to dispose of Special Darkhast No. 57/1977, expeditiously. In this writ petition appellant Sharad Premraj Mutha and Anandram Chandmal Munot were joined as intervenors as per order dated 12.07.2004 passed on Civil Application No. 5077/2004 in the said writ petition. However, there was no order passed on the application for intervention filed by the appellant No. 1 Mrs. Mangla Sharad Mutha. This Court by its judgment and order dated 12.07.2004 directed the Civil Judge Senior Division, Ahmednagar to transmit the Special Darkhast immediately to the Collector, Ahmednagar for execution in accordance with law. The Collector

was personally directed to execute the decree, instead of transmitting it to subordinate officers and to complete the proceeding within a period of one year and to report the compliance to this Court. In para 7 of the said judgment, this Court observed as under:

Since we are not keeping the petition pending here, all other contentions which the parties are eligible to raise, may raise them in the execution proceedings before the Collector. We make it clear that the Collector may adjust the equities to the extent of they are possible to be adjusted.

13. That on 12.08.2004 the learned Civil Judge Senior Division, Ahmednagar transmitted Special Darkhast No. 57/1977 to the Collector Ahmednagar for execution. On 13.11.2004, the Collector called report from the Tahsildar in respect of the issues of tenancy framed by this Court in First Appeal Nos. 78/1958 and 79/1958. On 13.04.2005 the Tahsildar submitted his report, in substance holding that the defendant Nos. 7 and 8 have surrendered their tenancy rights in the year 1952 in respect of survey Nos. 52/1, 52/2 and 53/1B and since then their tenancy has come to an end. This order of the Tahsildar was challenged in appeal u/s 247 of Maharashtra Land Revenue Code before the Sub Divisional Officer, Ahmednagar by one Vishawas Dattatraya Athare, the Court Receiver, by filling Tenancy appeal No. 01/2005 to which all the original defendants and their successors/legal representatives were joined as respondents/non applicants. The said appeal was dismissed by an order dated 24.07.2006, by the learned Sub Divisional Officer, Ahmednagar holding that in view of the order passed by this Court to effect partition it is not possible to issue notices to several parties and decide the appeal.

14. It seems that on 13.09.2005 the appellant No. 1 filed application for recall of the order passed in writ petition No. 1597/2002 by this Court on 12.07.2004 which was dismissed by this Court. Against this order also SLP was preferred before the Apex Court and the same was also dismissed. The appellants/objectors, thereafter, moved an application dated 07.12.2005 before the Collector raising several objections to the executability of the decree and sending the matter back to the Civil Court for correction of decree. According to the objectors, who are the appellants before this Court, it was not the correct precept, which was forwarded by the Civil Court to the Collector for execution. According to the appellants/objectors, the Special Darkhast No. 57/1977 contained various properties, which were required to be deleted as per the decree modified by this Court, in aforesaid two first appeals. It was also alleged that the decree was not amended in the light of orders passed below Exh. 14, Exh. 17 dated 21.12.1981 and Exh. 21 on 09.03.1998, by the executing Court. Keeping in view all the objections which were raised, the Collector Ahmednagar forwarded the entire record to the Civil Court under his covering letter dated 21.06.2006, with a request to carry out necessary amendments and corrections in the original decree, as it had become impossible to execute the decree due to various complications. On 22.06.2006 the learned Civil Judge Senior Division,

Ahmednagar to whom the said letter was sent passed an order holding that the Court has become functus officio and as per the order passed in writ petition No. 1597/2002, the Collector was required to take all suitable steps for executing the decree u/s 54 of Civil Procedure Code. The learned Civil Judge again transmitted the entire record and proceedings to the Collector by observing that it is not possible for him to accept the proceedings unexecuted.

15. Upon receipt of such proceedings from the Civil Court, the Collector passed an order on 25.08.2006, effecting partition of the suit properties and delivering possession to the concerned parties in accordance with law. The statements were prepared by Taluka Superintendent of Land Records, Ahmednagar. By this partition 7/8th share in all the nine properties and house property was assigned to plaintiff No. 1 and 2, whereas, 1/8th share in all such properties was assigned to defendant No. 1 and other defendants, as per the decree passed by the Trial Court.

16. Being aggrieved by the aforesaid order of the Collector, several appeals were preferred before the Commissioner, by the persons who claimed themselves to be owner and in possession of the portion of the properties, which were the subject matter of the partition. The learned Additional Commissioner, Nashik Division, Nashik by his common order dated 31.05.2007, remanded the matter back to the Collector for inquiry afresh and decision therein within a period of three months after giving an opportunity to all the parties. It was noted by the Additional Commissioner in his order that the objections raised to the executability of the decree, were required to be decided in the light of various provisions of Civil Procedure Code, more particularly Order XXI Rule 16. The same were not decided and, therefore, the matters were remanded back to the Collector.

17. The legal heirs of plaintiff No. 2/deed holder No. 2 Mahadu Narayan Pawar filed writ petition No. 3636/2007 before this Court in which several appellants/objectors were arrayed as party respondents. This petition was heard and finally decided on 05th September, 2007 by the learned Single Judge of this Court. The said writ petition was dismissed and the order of remand passed by the Additional Commissioner on 31.05.2007, was maintained. It was observed in para 17 of the judgment, that the appeals filed before the Additional Commissioner were maintainable and the objectors were entitled to raise the contentions before the Collector, and the collector was bound to consider the same. The contention that, it was not open for the respondents to raise objections before Collector, was rejected. It was alleged that the decree passed in Special Civil Suit No. 13/1956, as was amended by the judgment and order passed in first appeal Nos. 78/1958 and 79/1958 was required to be executed. It was further held that the orders passed below Exh. 14 and 17, in Special Darkhast No. 57/1977 were also required to be taken into consideration along with the fact that certain lands were declared as slum areas. It was further observed that in view of mandate of Order XXI Rule 16 of Civil Procedure Code,

the assignee of the decree was entitled to same conditions, as the decree holder. It was also held that the executing Court on a erroneous premise held that he became functuous officio and refused to issue order or clarify and refer the proceeding to the Collector. It was further observed that the Civil Court can see, if the Collector had acted in accordance with the decree holders mandate. It was further observed that the Collector was required to execute decree by adjusting equities, to the extent of they are possible to be adjusted and, therefore, the queries/clarifications sought by the Collector cannot be said to be baseless.

18. The order dated 22.06.2006, passed by the Civil Court holding that it has become functuous officio, was the subject matter of the writ petition No. 5669/2007 filed by one Sharad Mutha. It was however, dismissed on 28.09.2007, in view of the observations made in para 17 of the judgment in writ petition No. 3636/2007.

19. After remand of the matter back by the learned Single Judge of this Court in writ petition No. 3636/2007, the Collector Ahmednagar passed an order dated 24.12.2007 rejecting the objections raised by the appellants and refusing to refer the matter to the Civil Court for corrections or amendment in the special darkhast on the ground that such was not the direction issued by this Court. It was further observed that, since the equitable partition was possible, there was no need to send the matter to Civil Court and if the parties wanted to make such correction, to be made, then they can directly approach the Civil Court for the said purpose.

20. The objectors moved the civil Court for correction of decree, however, as the learned Civil Judge Senior Division, Ahmednagar by his order dated 07.01.2008 held that it is not at all necessary to take into consideration the contentions raised by the appellants, as it would definitely cause hurdle in execution proceeding going before the Collector.

21. Being aggrieved by the aforesaid two orders; one passed by the Collector on 24.12.2007, rejecting the objections raised by appellants and the other passed by the Civil Court on 07.01.2008 rejecting the objections raised before it by the objectors to the executability of the decree in Special Darkhast No. 57/1977, the appellants filed writ petition No. 276/2008 before this Court. The said writ petition has been dismissed by the learned Single Judge by its order dated 12th January, 2008, holding that no interference is warranted in the impugned order in exercising extraordinary jurisdiction under Article 227 of the Constitution of India.

22. Being aggrieved by the said order, the instant appeal is being preferred by the appellants.

MAINTAINABILITY OF LETTERS PATENT APPEAL

23. We now turn to the preliminary objection raised on behalf of respondents as to the maintainability of the Letters Patent Appeal on the ground that the learned

Single Judge after considering the averments made in the petition and the reliefs claimed therein was of the view that the writ petition could justifiably be filed only under Article 227 of the Constitution of India and has accordingly in concluding para of the order observed that no interference is warranted in exercise of extraordinary writ jurisdiction under Article 227 of the Constitution of India. According to the respondents it is not now open for this Court to sit in appeal over the judgment and order passed by the learned Single Judge in exercise of his extraordinary writ jurisdiction under Article 227 of the Constitution of India, to find out whether learned Single Judge was right in treating the writ petition, only as one under Article 227 of the Constitution of India, though, the petition was styled as one under Article 226 and 227 of the Constitution. Hence, according to the respondents the Letters Patent Appeal is not maintainable.

24. The respondents, in support of their preliminary objection relied upon the following judgments of the Supreme Court as well as of this Court:

I. Mansaram Sampat Patil since deceased through his LRs. Smt. Banubai Mansaram Patil and Others Vs. Sambhu Harchand Chaudhary since deceased through his L.Rs. Smt. Sumanbai Chaudhary and Others, .

II. Suresh Khatri Vs. Balkisan Chandak and Others,

III. National Textile Corporation (SM) Ltd. Vs. Devraj Chandrabali Pai, .

IV. Shri Kondiba Dhondiba Dalvi Since Deceased by His Lrs. and Others Vs. Shri Narayan Namdeo Nanware, .

V. 1965 Mh.L.J. 426. Jagannath v. Gulabrao.

25. On the contrary, the appellants submit that it is the test of the title of writ petition, which is a decisive factor for maintainability of Letters Patent Appeal. If the petition is styled as one under Article 226 or under Article 226 and 227 both, then the Letters Patent Appeal would be maintainable, irrespective of the fact that the learned Single Judge treated the petition, to be one under Article 227 of the Constitution of India. It is the contention of the appellants that when learned Single Judge decides to treat the petition as one under Article 227 of the Constitution, although the jurisdiction invoked is under Article 226 and 227, then he commits an error in exercise of his jurisdiction under Article 226 and 227 of the Constitution of India, and in appeal the Division Bench of this Court can certainly go behind the order passed by the learned Single Judge, to find out, whether the facts pleaded and the reliefs claimed in the petition justify the filing of writ petition under Article 226 and 227 of the Constitution.

26. In support of this contention, the appellants have relied upon the following judgments:

I. 1981 Mh. L. J. 93, State v. Kusum.

II. Umaji Keshao Meshram and Others Vs. Radhikabai and Another, .

III. Jagdish Balwantrao Abhyankar and Others Vs. State of Maharashtra and Others, .

IV. M/s. Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad, .

V. LPA 42/2006 Anil Housing Society v. Kashinath Tukaram.

VI. 2008 (1) Mh.L.J. 225, Sanjay Kumar v. Uttamlal.

VII. AIR 2003 SC 3872, Suryadevi v. Ramchander.

VIII. Javed Patel Vs. State of Maharashtra and Others, .

IX. AIR 2008 SCW 7409, Shahu Shikshan Prasarak Mandal v. Lata P. Kore, etc.

X. AIR 2009 SCW 767 MMTC Ltd. v. Commissioner of Commercial Tax and Ors.

PRINCIPLES AS TO THE RATIO UNDER Article 141

27. The principles as to the ratio of the judgment and how it is to be deduced are laid down in various judgments of the Apex Court as well as of this Court. The ratio is the abstract proposition of law laid down in the judgment, which alone has a force of law. The ratio has to be found out by reading the judgment in its entirety and not the line from here and there. The decision takes its colour from the question of law involved in the case in which, the decision is rendered, as has been laid down by the Apex Court in *The Divisional Controller, KSRTC Vs. Mahadeva Shetty and Another*, . It has been further laid down in this judgment that mere causal expressions carry no weight at all, nor every passing observation of a judge, howsoever eminent, can be treated as *excathedra* having weight of an authority. In the case of *Zee Telefilms Ltd. and Another Vs. Union of India (UOI) and Others*, , it has been laid down that a decision is not an authority for the proposition which did not fall for its consideration. The decisions rendered *per incuriam* or *subsilentio* have no force of law under Article 141 of the Constitution of India.

28. This Court in its full Bench decision rendered in the case of *Emkay Exports and Mrs. Kanchan S. Chaudhary, partner of Emkay Exports Vs. Madhusudan Shrikrishna*, , has said that finding of a ratio decidendi is not a mechanical process, but an art which one gradually acquires through the practice and it is the abstract ratio decidendi which alone has the force of law. In the case of *Union of India (UOI) and Others Vs. Dhanwanti Devi and Others*, , the Apex Court has held that every decision contains three basic ingredients : (1) Finding of material facts, (2) Statements of principles of law and (3) The judgment based upon the combine effect of items 1 and 2 above. The item No. 2 is the vital element of the decision which constitutes the ratio. The finding of material facts does not constitute the ratio. Similarly final or ultimate order passed by the Apex Court which may or may not be based upon the combine effect of items 1 and 2, also cannot constitute the ratio.

29. In view of the aforesaid law laid down by the Apex Court as to how and in

what manner the ratio of the judgment is to be culled out or deduced, we are of the opinion that basically three things are required to be seen, (1) What is the ratio of the judgment ?, (2) What is not the ratio of the judgment ? (3) The ratio of the judgment of the High Court which the Apex Court has in terms overruled. While considering the judgment of the Apex Court, the finding of material facts, the casual expressions, the decision on the proposition which did not fall for consideration, and the observations which are rendered per incuriam and subsilentio and the ultimate conclusion drawn, are the factors which are required to be ignored. What would then remain, would be the ratio of the judgment, which is a decision on the question of law to be understood in the light of the facts of the case. While considering the judgment of Apex Court, what is further required to be seen is that the ratio of the judgment of High Court, which has been overruled by the Apex Court, is not repeated or followed.

Consideration of various judgments on maintainability of Letters Patent Appeal.

30. In *Umaji Keshao Meshram and Others Vs. Radhikabai and Another*, , the Apex Court was considering writ petition which was preferred only under Article 227 of the Constitution of India. It was held that Letters Patent Appeal against the judgment or order passed in such a petition is not maintainable. However, the Apex Court, also considered following two questions:

1. Where a petition filed only under Article 226 of the Constitution of India, is decided by the Single Judge, whether an appeal under Clause 15 of the Letters Patent before the Division Bench is maintainable ?
2. When a petition filed under Article 226 and 227 is decided by the learned Single Judge, whether an appeal under Clause 15 of Letters Patent would be maintainable?.

So far as the first question regarding petition under Article 226 is concerned, it was held that the Letters Patent Appeal would be maintainable. So far as the question No. 2 is concerned, it was held that, where facts justify filing of an application under Articles 226 or 227, and the party chooses to file an application under Article 226 and in the final order, the Court gives ancillary directions which pertain to Article 227, this ought not to deprive the party a right of appeal under Clause 15 of the Letters Patent, where substantial part under Article 226 of the Constitution of India.

31. The question when the averments made in the petition and the reliefs claimed makes out a case only under Article 227 and not under Article 226, but the title shows that the petition is under Article 226 or under Article 226 and 227 both, whether the Letters Patent Appeal is maintainable has not been decided in *Umaji's* case cited supra. However, this question is considered by the full Bench of this Court in the case reported in 1991 (1) Mh. L. J. 958 *Jagdish v. State*, wherein it has been held that it is not permissible to make such an inquiry to treat the petition as one under Article 227 as it was contrary to law laid down in *Umaji's* case by the Supreme Court. It was held that if the petition is titled as

one under Article 226 or under Article 226 and 227 both, the Letters Patent Appeal would be maintainable.

32. The question when a party had a choice to file petition under Article 226 or under Article 226 and 227 both, but chose to file a petition only under Article 227, whether, the Court can go behind the title and examine the pleadings and the nature of order passed by the Single Judge to decide the maintainability of Letters Patent Appeal, has also not been considered in Umajis case cited supra. However, this question has been considered by this Court in its Division Bench judgment reported in 2004 (4) Mh.L.J. 1102, Manasram Sampat Patil v. Sambhu Chaudhari and it has been held that no such inquiry is permissible and the Letters Patent Appeal is not maintainable, as the petitioner has chosen to invoke the jurisdiction only under Article 227 of the Constitution of India thereby intending to attach finality to the said proceedings. It was on the principle of doctrine of election that it was held that, the appeal under Clause 15 of letters patent would not be maintainable.

33. In Umaji's case cited supra, the Apex Court considered the view taken by the full Bench of this Court. The full Bench had taken a view that both the Articles 226 and 227 of the Constitution of India, in substance, provided for the same relief namely scrutiny of records and control of subordinate Courts and Tribunals and, therefore, the exercise of jurisdiction under this Articles would fall within the expression "revisional jurisdiction" or "power of superintendence" and hence even under Clause 15 the Letters Patent Appeal is barred. In para 98 of the judgment in Umaji's case cited supra, the Apex Court has held that, when a Single Judge of the Chartered High Court decides a petition under Article 226 or 227 his judgment is one given pursuant to Article 225 of the Constitution and is appealable under Clause 15 of the Letters Patent, unless it falls within one of the excluded category. In para 99 of the judgment in Umaji's case cited supra, the Apex Court has held that the power to issue writs is different from power of superintendence, which is in addition to the power under Article 226 and the fact that same result can be achieved, does not mean that two processes are the same. Thus the Apex Court overruled the view of the full Bench of this Court that while dealing with the orders passed by subordinate Courts or Tribunals, the High Court exercises only the power of superintendence under Article 226 and 227.

34. In Sushilabai Laxminarayan Mudliyar and others Vs. Nihalchand Waghajibhai Shah and others, , the Apex Court on the second occasion reversed view of the full Bench of this Court, which is reported in 1989 Mh.L.J 595, Sushilabai v. Nihalchand. It was a petition under Article 226 and 227 of the Constitution of India. The matter was referred to the full Bench of this Court to resolve the conflicting views about the maintainability of Letters Patent Appeal. The full Bench has specifically taken a view that in a petition under Article 226 and 227 of the Constitution of India, it is for the Single Judge to decide whether to treat this application as one under Article 226. It was further held that if the Single Judge has in fact, invoked only supervisory powers under Article 227, the appeal

would not lie. It was further held that if the learned Single Judge mentions particular article under which he was passing the judgment, it may not be necessary to examine the question of maintainability. It was held by the Division Bench on facts that the order of the Single Judge was in truth and substance under Article 227 of the Constitution of India, and hence, the letters patent appeal was held to be not maintainable. The Supreme Court reversed the decision of the full Bench by following the view taken in Umaji's case cited supra, and has held that where the facts justify filing of application either under Article 226 or 227 and the party chose to file his application under both these Articles, the Court ought to treat the application under Article 226 and not to deprive the right of appeal. The Supreme Court also perused the writ petition and held that the grounds taken therein unmistakably go to show that it was a petition under Article 226 and the order passed was also under Article 226.

35. In *Ratnagiri District Central Cooperative Bank Ltd. v. Dinkar* reported in 1993 Supp (1) SCC 09, the Supreme Court was considering a petition filed under Article 226 and 227 of the Constitution of India, on the basis of the relief granted by the learned Single Judge. The Apex Court held that it was an exercise under Article 226 of the Constitution of India and not of one under Article 227. In *Mangalbai v. Radheysham* reported in 1993 Mh.L.J. 567 (SC), the Supreme Court was considering the view taken by the Division Bench of this Court, that the Letters Patent Appeal against an order passed by the learned Single Judge in a petition under Article 226 and 227 of the Constitution of India was not maintainable, as the order passed was, in truth and substance, one under Article 227 of the Constitution of India. The Supreme Court reversed the said judgment and it was held that the petition was clearly under Article 226 of the Constitution of India and hence Letters Patent Appeal was held to be maintainable. While holding this, the Supreme Court examined the contents of writ petition as well as the order passed by the learned Single Judge.

36. In *M/s. Lokmat Newspapers Pvt. Ltd. Vs. Shankarprasad*, , the Supreme Court was considering the question of maintainability of Letters Patent Appeal challenging the order passed by the learned Single Judge dismissing the writ petition filed under Article 226 and 227 of the Constitution of India, challenging the order passed by the Labour Court dismissing the complaint and by the Industrial Court dismissing the revision application. It was held that the petition was invoking jurisdiction under Article 226 and 227 both and the petitioner tried to make out a case for interference under Article 226. While dealing with the argument that the dismissal of writ petition under Article 226 and 227, meant that the Single Judge refused to exercise his jurisdiction under Article 227 and hence the Letters Patent Appeal at the instance of petitioner was not maintainable, the Supreme Court held that it cannot be said that there was refusal to interfere under Article 227. It was held that once the jurisdiction under Article 226 and 227 was invoked, it cannot be said that learned Judge exercised his jurisdiction only under Article 226 (Sic). While considering the factual aspect whether it was a petition under Article 226 and 227 or only under Article 227,

the Apex Court considered the averments in the petition that the Courts below lost right of object and purpose of provision and put an interpretation alien to industrial jurisprudence and thus committed an error of law apparent on the face of record resulting in miscarriage of justice. It was also the averment in the petition that impugned order resulted in infringement of his fundamental rights under Article 14 and 21 and other articles of Constitution. It was held that petitioner tried to make out case under Article 226 and invoked jurisdiction under both Articles 226 and 227. It was also observed that learned Single Judge nowhere stated that he was considering petition under Article 226.

37. In *Surya Dev Rai Vs. Ram Chander Rai and Others*, , the Supreme Court was considering the question of impact of amendment in Section 115 of CPC brought in to force by Act No. 47 of 1999 with effect from 01.07.2002, on the powers of the High Court to entertain writ of certiorari under Article 226 or invoking power of superintendence under Article 227 against the orders which were subject matter of challenge u/s 115 of Civil Procedure Code, prior to amendment. It was a petition filed under Article 226 of the Constitution of India challenging the order passed on the application under Order XXXIX Rule 1 and 2 of CPC refusing to grant injunction which was also confirmed in appeal by the appellate Court. The High Court held that writ petition under Article 226 was not maintainable. The Supreme Court reversed the judgment of the High Court and it was held that the petition under Article 226 was maintainable, while dealing with the question involved, the Supreme Court although pointed out the difference between jurisdiction of the High Court under Article 226 and 227 of the Constitution of India, it was observed that, in practice both the jurisdictions are the same and the distinction between them is almost obliterated. The most material distinction that has been pointed out by the Supreme Court is that in exercise of the jurisdiction under Article 227 of the Constitution of India, the High Court can not only quash the order passed by the subordinate Court, but it can also substitute its own decision in place of the decision of the subordinate Court. However, the Supreme Court observed that this power is not possessed by the High Court, while exercising the jurisdiction under Article 226 of the Constitution of India.

38. The latest judgments of the Supreme Court reported in 2008 AIR SCW 7409, *Shahu Shikshan Prasarak Mandal v. Lata P. Kore*, etc. and another judgment reported in 2009 AIR SCW 767, *MMTC Ltd. v. Commissioner of Commercial Tax and Ors.* now need to be considered. In the first judgment in *Shahu Shikshan Prasarak Mandal*'s case, it was a petition under Article 226 of the Constitution of India, challenging the order of the Tribunal on the ground that it was arbitrary, unreasonable, unjust and perverse. The Supreme Court held that it was a petition under Article 226 and 227 of the Constitution of India and, therefore, Letters Patent Appeal was held to be maintainable. The judgment of the Division Bench of the High Court holding that the Letters Patent Appeal is not maintainable was set aside. In the second judgment *M/s. MMTC Ltd.*'s case, it was a petition filed under Article 227 of the Constitution of India, the Division Bench of the High Court considering the order passed by the learned Single

Judge held that the Letters Patent Appeal was not maintainable, as the order was passed in exercise of power of superintendence under Article 227 of the Constitution of India. The Supreme Court held that the High Court was not justified in holding that the Letter Patent Appeal was not maintainable.

39. In *Ramesh Chandra Sankla Etc. Vs. Vikram Cement Etc.*, , the Apex Court again considered the question of maintainability of intra Court appeal. It was a petition under Article 226 and 227 of the Constitution of India, the Division Bench of the High Court dismissed Letters Patent Appeal as not maintainable. It was held by the Division Bench of the High Court that the writ petitions were filed under Article 227 of the Constitution and the learned Single Judge was exercising supervisory jurisdiction and, therefore, Letters Patent Appeal was not maintainable. The Supreme Court on facts found that the learned Single Judge was exercising supervisory jurisdiction under Article 227 of the Constitution over the subordinate Court or Tribunal and, therefore, the Division Bench was right in holding that the Letters Patent Appeal was not maintainable. However, in para 32 of the said judgment the Supreme Court observed as under:

32. In our judgment, the learned Counsel for the appellant is right in submitting that nomenclature of the proceeding or reference to a particular Article of the Constitution is not final or conclusive. He is also right in submitting that an observation by a Single Judge as to how he had dealt with the matter is also not decisive. If it were so, a petition strictly falling under Article 226 simpliciter can be disposed of by a Single Judge observing that he is exercising power of superintendence under Article 227 of the Constitution. Can such statement by a Single Judge take away from the party aggrieved a right of appeal against the judgment if otherwise the petition is under Article 226 of the Constitution and subject to an intra court/Letters Patent Appeal? The reply unquestionably is in the negative see *Pepsi Foods Ltd. and Another Vs. Special Judicial Magistrate and Others*, .

40. We now, turn to the judgments cited by the learned Counsel for respondents *Shri V.D. Hon*, who urged that the instant appeal under Clause 15 of the Letter Patent Appeal is not maintainable as the learned Single Judge has exercised his jurisdiction under Article 227 of the Constitution of India.

41. The first judgment cited is one delivered by the Division Bench of this Court in *Mansaram Sampat Patil since deceased through his LRs. Smt. Banubai Mansaram Patil and Others Vs. Sambhu Harchand Chaudhary since deceased through his L.Rs. Smt. Sumanbai Chaudhary and Others*, . The question of law decided in this case is reproduced in para 1A of the said judgment which is also reproduced below:

Whether Letters Patent Appeal filed under Clause 15 of the Letters Patent of the Bombay High Court is maintainable against the judgment rendered by the Single Judge of the High Court in a writ petition invoking jurisdiction under Article 227 of the Constitution of India before the Division Bench ?

42. It was undoubtedly a petition exclusively filed under Article 227 of the Constitution of India and the petitioner did not invoke the jurisdiction of this Court under Article 226 or 226 and 227 both. Hence, in our view, this judgment shall have no application in the present case, as the appellants have invoked the jurisdiction of this Court under Article 226 and 227 both. In this judgment, apart from the fact that there is express bar under Clause 15 of the Letters Patent to entertain an appeal against the judgment of the learned Single Judge rendered in a petition under Article 227 of the Constitution of India, this Court has held that there was no occasion for the Court to examine as to whether the said writ petition is in substance under Article 226 of the Constitution of India. It was held that it is for the party to choose remedy and once a party chooses the remedy, availability of appellate remedy would depend upon such a choice. The original petitioner who chose to file a petition exclusively under Article 227, was prevented from preferring an appeal under Clause 15 of the Letters Patent by invoking doctrine of election. Such is not the case in the instant appeal.

43. After holding that the appeal is not maintainable, this Court in the aforesaid Mansaram's case has recorded a finding of fact that in none of the appeals it has been contended and/or demonstrated that the petition, though, filed under Article 227 of the Constitution of India, is in fact or in substance a petition invoking jurisdiction under Article 226 of the Constitution of India. It was further held that in none of the writ petitions filed before learned Single Judge from which the appeals decided by the aforesaid judgment arose, any grievance about violation of fundamental right was made, nor writ was sought and as such, the Court was of the view that the writ petitions filed before the learned Single Judge was in fact and in substance one only under Article 227 of the Constitution of India. The learned Counsel Shri V. D. Hon heavily relied upon this observation made in para 15 of the said judgment. As pointed out earlier, the finding of material facts cannot constitute a ratio. Apart from this, the said decision is not an authority for the proposition that though, the petitioner invoked the jurisdiction of the learned Single Judge under Article 226 and 227 of the Constitution of India, the Letters Patent Appeal under Clause 15 was not maintainable. The question of law framed and decided, if judged in the background of the facts involved in the case, it would be apparent the said judgment has no application in the present case.

44. The respondents relied upon the another judgment of this Court delivered in, Suresh Khatri Vs. Balkisan Chandak and Others, . It was a petition under Article 226 and 227 of the Constitution of India, which was dismissed by the learned Single Judge. The Division Bench dismissed the Letters Patent Appeal on both the counts i. e. being not maintainable and on merits also. It was held that the petition was in fact and in substance one under Article 227 of the Constitution of India, as the learned Single Judge treated it to be under Article 227. In our view, the decision of the Apex Court in Sushilabai's case cited supra, was not brought to the notice of this Court in the said judgment. In fact, the view which has been taken by the Division Bench in this reported judgment, was the view taken by

the full Bench of this Court reported in 1989 Mh.L.J. 595, *Sushilabai v. Nihalchand*, which has been specifically overruled by Apex Court in *Sushilabai's* case reported in AIR 1993 S.C. 185 and in the *Ratnagiri District Central Cooperative Bank Ltd.'s* case cited supra. Apart from this, the ratio is contrary to the latest judgment of the Apex Court in *Ramchandra Sankla's* case cited supra, in which it has been held that an observation by a Single Judge as to how, he had dealt with the matter is not decisive. It was further held that if a statement made in the judgment by the learned Single Judge in a petition under Article 226 and 227 of the Constitution of India to the effect that he is exercising his power of superintendence under Article 227 of the Constitution of India, that also cannot take away the right of appeal under Clause 15. The said judgment in *Suresh's* case is therefore, in our view, not applicable in the instant case, as on facts, it was held to be petition under Article 227 of the Constitution of India.

45. The third judgment relied upon by Shri V.D. Hon, learned Counsel for the respondent is one reported in *National Textile Corporation (SM) Ltd. Vs. Devraj Chandrabali Pai*, . It was a petition under Article 226 and 227 of the Constitution of India, challenging the basic order passed by the Labour Court and the Revisional order passed by the Industrial Court. The Division Bench held that an appeal under Clause 15 of the Letters Patent was not maintainable and though the petition was styled as one under Article 226 and 227 of the Constitution of India, it was in pith and substance, the exercise of supervisory jurisdiction by this Court under Article 227 of the Constitution of India. This Court proceeds on the assumption that under Article 227 of the Constitution of India, the learned Single Judge exercises his power of superintendence over only such judicial, quasi judicial authorities and Tribunals which are subordinate to the High Court and Article 226 is available to this Court for correcting jurisdictional errors or errors resulting from miscarriage of justice by the authorities, which are not subordinate to this Court via Article 227 and the jurisdiction under Article 226 can be exercised for that purpose.

46. In our view, the view taken by this Court in *NTC's* case, that there was no need to resort to writ of certiorari under Article 226 of the Constitution of India, is contrary to the law laid down by the Apex Court in the *Umaji's* case. In *Umaji's* case cited supra, the Apex Court reversed the view of the full Bench of this Court, which is recorded in para 85 of the judgment, wherein, it was held by the full Bench that Clause 15 of the Letters Patent provides for an intra Court appeal only in cases heard in exercise of original civil jurisdiction by a Single Judge of the High Court and, it does not, therefore, comprehend within its scope a judgment passed by a Single Judge in exercise of jurisdiction under Article 226 or 227 of the Constitution of India. This view taken by the full Bench has been specifically overruled in para 91 of *Umaji's* case by the Apex Court, wherein, it has been held that under Clause 15 of the Letters Patent all the chartered High Court, from the judgment of a Single Judge of the High Court, an appeal lies to a Division Bench, of that High Court and there is no restriction or limitation as to nature of jurisdiction exercised by the Single Judge, while passing his judgment.

It was held that unless an appeal is barred by statute or that the conditions laid down by Clause 15 are fulfilled, the Letters Patent Appeal would be maintainable. Obviously, the judgment rendered by the Single Judge in a petition under Article 226 of the Constitution of India, does not fall under any of the excepted categories of Clause 15 of the Letters Patent. This view taken by the Apex Court in Umaji's case has not even been referred by the Division Bench in its judgment.

47. In the NTC's case, this Court has made a distinction between Article 226 and 227 of the Constitution of India to the effect that learned Single Judge exercises his power of superintendence under Article 227 of the Constitution of India over only such judicial, quasi judicial authorities and Tribunals which are subordinate to the High Court and the power of superintendence under Article 226 of the Constitution of India is available for correcting jurisdictional error or the errors resulting in miscarriage of justice by the authorities which are not subordinate to the High Court under Article 227 of the Constitution of India. We may at this stage consider the judgment of the Constitution Bench of Seven judges, delivered by the Apex Court in L. Chandra Kumar Vs. Union of India and others, , wherein, it has been held that, the power vested in the High Court to exercise judicial superintendence over the decisions of all Court and Tribunals, within their respective jurisdictions is also part of the basic structure of the Constitution and, hence, the Administrative Tribunals constituted under Article 323A were held to be subordinate to the High Court under Article 226 and 227 of the Constitution of India. It has been held that in all the decisions of the Tribunals rendered in cases that they are specifically empowered to adjudicated upon by virtue of their parents statutes, will also be subject to scrutiny before the Division Bench of their respective High Courts. The writ petitions under Article 226 and 227 of the Constitution of India, challenging judgment and order of Administrative Tribunals are entertained and decided by the Division Bench only.

48. In our view, the Division Bench of the High Court exercises jurisdiction under Article 226 and 227 of the Constitution of India over the decisions of all the Courts and Tribunals, whether subordinate to it or not, similar is the width and depth of the power/jurisdiction of the learned Single Judge under Article 226 and 227 of the Constitution of India over the Courts, Tribunals or Authorities passing orders under any enactments specified under Rule 18 of Chapter 17 of the Bombay High Court Appellate Side Rules, irrespective of the fact whether those Courts or Tribunals/Authorities are subordinate to the High Court or not. The Rule is that all writ petitions filed under Article 226 or 227 or both under Article 226 and 227 are required to be decided by the Division Bench. It is only by way of an exception that the writ petitions under Article 226 or 227 or both under Article 226 and 227, arising out of orders passed by subordinate Court or any quasi judicial authority or Tribunal, in exercise of statutory power conferred by enactments specified under Rule 18 of Chapter 17 of Bombay High Court Appellate Side Rules, the learned Single Judge is competent to entertain and decide. The exception is not in relation to subordination of Courts, quasi judicial authorities or Tribunals, but it is in relation to orders passed in exercise of

statutory powers to adjudicate conferred by the enactment specified under Rule 18 of Chapter 17 of the aforesaid Rules.

48A. Apart from this, bare reading of Article 227 of the Constitution of India nowhere indicate that the learned Single Judge exercises his power of superintendence over only such judicial, quasi judicial authorities and Tribunals which are subordinate to the High Court and not over the judicial, quasi judicial authorities and Tribunals which are not subordinate to the High Court. The word "subordinate", does not at all appear under Article 227 of the Constitution of India and hence the power of the High Court under Article 227 of the Constitution of India cannot be curtailed, restricted or limited to the supervisory jurisdiction over the Courts and Tribunals or authorities which are subordinate to the High Court.

49. In our view, the extraordinary jurisdiction conferred upon High Court under Article 226 and 227 of the Constitution of India is wide enough to include not only to issue the prerogative writs, such as the writ in the nature of Habeas Corpus, Mandamus, Prohibition, Quowarranto and Certiorari, not only for violation of fundamental rights, but also for "any other purpose" as is clear from the language under Article 226 of the Constitution of India. In *Suryadevrai's* case cited supra, decided by the Apex Court, it was a petition under Article 226 of the Constitution of India, challenging the orders passed by the two courts below recording concurrent finding in respect of rejection of an application under Order XXXIX Rule 1 and 2 read with Section 151 of Civil Procedure Code. The learned Single Judge dismissed the petition filed under Article 226 of the Constitution of India, on the ground that the same is not maintainable. The Apex Court has, however, overruled the said judgment and has held that such a power to interfere in the orders passed by the Civil Court on an application under Order XXXIX Rule 1 and 2 read with Section 151 of CPC is also available to the learned Single Judge in exercise of his powers under Article 226 of the Constitution of India. In *Suryadev Rai's* case, the Apex Court has after taking review of all the judgments delivered by it pointed out the distinction between Article 226 and 227 of the Constitution of India. The judgment in *Suryadev Rai's* case clearly shows that jurisdiction under Article 226 of the Constitution of India can also be exercised by the learned Single Judge in respect of orders passed by the Courts subordinate to the High Court.

50. There are several judgments of the Apex Court, wherein, Letters Patent Appeal against the order passed by the learned Single Judge in a petition invoking jurisdiction of the learned Single Judge under Article 226 and 227 of the Constitution of India was invoked in respect of the orders passed by the Labour and Industrial Courts as well as by other authorities subordinate to the High Court. For instance, in *Lokmat News Paper's* case cited supra, judgment and order passed by the Labour Court as well as by the Industrial Court were the subject matter of challenge in a petition under Article 226 and 227 of the Constitution of India. It was dismissed by the learned Single Judge. The Letters

Patent Appeal was held to be maintainable by the Apex Court. Similarly in another decision of the Apex Court delivered in *Kishori Lal Vs. Sales Officer, District Land Development Bank and Others*, , an appeal against grant of recovery certificate was dismissed against which second appeal preferred before the Board of Revenue was allowed. The bank preferred writ petition which was allowed by the learned Single Judge, setting aside the orders passed in second appeal by the Board of Revenue. The Letters Patent Appeal was dismissed by the Division Bench holding that it was petition under Article 227 of the Constitution of India. The Apex Court set aside the judgment of the Division Bench holding that the same was rendered without noticing the judgment in *Sushilabai's* case cited *supra*. There is no point in multiplying citation on such authorities now.

51. Shri Hon, learned Counsel for respondents, then relied upon Division Bench judgment of this Court reported in *Shri Kondiba Dhondiba Dalvi Since Deceased by His Lrs. and Others Vs. Shri Narayan Namdeo Nanware*, . In respect of this judgment, we may say that in fact the judgment does not support the case of the respondents. It clearly lays down that, where a petition is filed under Article 226 or under Article 227 or under both is to be found on the basis of the facts, pleadings, points raised and the prayers made in the petition. It has further been held that from all these factors, it is to be seen, whether learned Single Judge exercised the jurisdiction under Article 226 or 227 of the Constitution of India. It was a petition under Article 226 and 227 both. However, on the basis of facts, pleadings, points raised, prayer made and the jurisdiction exercised by the learned Single Judge, the Division Bench has held that Letters Patent Appeal was not maintainable, as it was a petition in pith and substance under Article 227 of the Constitution of India. Thus, it was a finding of material facts, which cannot constitute the ratio and, has therefore, no binding force.

52. The last judgment relied upon by learned Counsel for respondents is reported in 1965 Mh. L. J. 426, *Jagannath v. Gulabrao*, which was a petition filed exclusively under Article 227 of the Constitution of India. It was held that the said appeal was barred under Clause 15 of the Letters Patent. In view of this, the said judgment has no application in the present case.

Decision on Maintainability of Letters Patent Appeal

53. In view of the law laid down by the Supreme Court as aforesaid in all cases, it is clear that the nomenclature of the proceeding or reference to a particular Article of the Constitution is not final and conclusive. The observations by a Single Judge as to how he had dealt with the matter is also not decisive. A statement of a Single Judge in a petition strictly falling under Article 226 simpliciter, that he is exercising power of Superintendence under Article 227 of the Constitution, cannot take away right of appeal conferred upon a party. The argument that while dealing with the orders passed by the subordinate Court or Tribunal, the High Court in writ petition, exercises only the power of superintendence under Articles 226 and 227 of the Constitution, also does not impress us for the reason that such was the view taken by the full Bench of this

Court which has been in terms overruled by the Apex Court in Umaji's case as pointed out earlier. Similarly, argument that in a petition under Article 226 and 227 of the Constitution, it is for the learned Single Judge to decide whether to treat the application as one under Article 226 or 227 and that when Single Judge mentions a particular Article under which he is passing an order, it may not be necessary to examine the question of maintainability, also does not impress us for the reason that such view was taken by the full Bench of this Court, constituted on second occasion in the case of Sushilabai v. Nihalchand reported in AIR 1989 Mh.L.J. 595, which has been specifically overruled by the Apex Court in its judgment reported in Sushilabai Laxminarayan Mudliyar and others Vs. Nihalchand Waghajibhai Shah and others, .

54. Now, in our view, what is required to be seen in a petition either under Article 226 or 227 or under both Articles 226 and 227, is the totality of the facts and circumstances of the case, the pleadings of the party, the nature of reliefs claimed and the ultimate order passed by the learned Single Judge, to decide the maintainability of Letters Patent Appeal. Broadly speaking, where the High Court Suo Motu exercises jurisdiction without there being any prayer made by or on behalf of party aggrieved, it would be an exclusive exercise of jurisdiction under Article 227. Similarly, where the learned Single Judge of the High Court substitutes his own decision for the decision of the subordinate Court or Tribunal or passes an order which the subordinate Court or Tribunal can pass in its original jurisdiction, it is the power under Article 227 which the High Court exercises. But where, the proceedings of the subordinate Court or Tribunal are quashed and the High Court gives ancillary directions pertaining to Article 227 of the Constitution of India, this shall, however, not to deprive a party right of appeal under Clause 15 of Letters Patent, as the substantial part of the order is under Article 226 i. e. issuance of writ of certiorari. This is what has been emphasized by the Apex Court in Umaji's case.

55. Keeping in view the aforesaid principles in mind, we have examined the writ petition filed by the appellants before learned Single Judge and have also gone through the order passed by the learned Single Judge, dismissing the writ petitions. After examining facts and circumstances of the case, pleadings of the parties, nature of reliefs claimed and the ultimate order passed by the learned Single Judge, we record our observations as under:

(a) Writ petition is styled as one under Article 226 and 227 of the Constitution of India, thereby suggesting that the appellants intended to invoke the jurisdiction of the learned Single Judge under both these Articles.

(b) Bare perusal of the reliefs claimed in the petition shows that the appellants have prayed for calling for the record and proceedings of Special Darkhast No. 57/1977, from the learned Civil Judge Senior Division, Ahmednagar and also from the Collector, Ahmednagar.

(c) The relief is claimed to quash and set aside order dated 07.01.2008 passed

by the learned Civil Judge Senior Division, Ahmednagar as well as the order dated 24.12.2007 passed by the Collector, in Special Darkhast No. 57/1977

(d) Further relief is claimed to direct the learned Civil Judge Senior Division, Ahmednagar to correct the precept by incorporating modifications made by this Court in First Appeals No. 78/1958 and 79/1958 and also in the orders passed below Exh. 14, 17, 21 and 22 by the executing Court in Special Darkhast No. 57/1977.

(e) The grounds of challenges including the ground of failure of learned Civil Judge Senior Division, Ahmednagar to perform his duties while forwarding Special Darkhast u/s 54 of CPC to the Collector, Ahmednagar.

(f) The complaint is made that there is total ignorance of the provisions of Section 54 as well as those of order XXI Rule 16 of Civil Procedure Code.

(g) The ground of non application of mind, arbitrariness in passing orders has also been raised.

(h) Learned Single Judge has dismissed the writ petition by holding that the appellants, who are objectors before the executing Court have no right to raise objections and the proceedings cannot be reopened. It has further been observed that the executing Court and the Commissioner has to proceed in accordance with law, in executing the decree as modified by this Court.

56. In our view, it was writ petition seeking writ of certiorari calling for the record and for quashing the orders passed by the learned Civil Judge Senior Division as well as by the Collector. This exercise could only be carried out in a petition under Article 226 of the Constitution of India. Similarly, the ancillary directions are also sought to the authorities below to correct the decree, in the light of the orders passed by this Court as well as by the executing Court, on earlier occasions. In short, the relief claimed, is to bring the decree in conformity with the orders passed by this Court as well as by the executing Court and to forward the Correct precept with appropriate directions to the Collector, u/s 54 of the Civil Procedure Code. The question of issuance of ancillary direction pertains to the realm of jurisdiction of the learned Single Judge under Article 227 of the Constitution. Thus, the petition was rightly styled as one under Article 226 and 227 of the Constitution of India and, therefore, the Letters Patent Appeal was maintainable. The passing observation made by the learned Single Judge, in his order dismissing petition, to the effect that the facts of the case and the material placed on record, no interference is warranted in the impugned order in exercise of extraordinary writ jurisdiction under Article 227 of the Constitution of India, in our view, is not sufficient to deprive the appellants right of appeal under Clause 15 of the Letter Patent. In view of this, we reject the preliminary objection taken by the respondents regarding maintainability of the Letters Patent Appeal and hold that the instant Letters Patent Appeal under Clause 15 is maintainable.

Propriety of deciding issue of maintainability.

57. We are conscious of the fact that the judicial propriety and discipline demand that in case of two divergent views expressed by two coordinate Benches of the same High Court, the matter is required to be referred to a larger Bench to resolve the conflict. In Mansaram's case, the Division Bench of this Court has held that, the view taken by the another Bench of this Court reported in Mohammad Hasan Khan Vs. Mohammad Majidulla and Others, , is no longer a good law, for the reason that three binding decisions were not brought to the notice of the Division Bench and those were (1) in Umaji's case cited supra, (2) The decision of the Special Bench of this Court in State of Maharashtra v. Kusum reported in 1981 Mh. L. J. 93 and (3) The full Bench decision in the case of Jagdish v. State of Maharashtra.

58. In the instant case, we are required to decide the preliminary issue as to the maintainability of the appeal, in view of the order passed by the Apex Court on 16.01.2009 in Special Leave to Appeal preferred by the some of the parties to the instant Letters Patent Appeal, which is reproduced as below:

O R D E R

Heard learned Counsel for the petitioners.

Delay condoned.

By the impugned order, High Court admitted Letters Patent Appeal and directed that interim order shall continue. While doing so, the High Court observed that preliminary objections raised on behalf of the respondents are kept open.

In our view, the High Court, before admitting the appeal, should have gone into the question whether preliminary objection raised on behalf of the respondents to the maintainability of the Letters Patent Appeal on the ground that the order impugned thereunder was passed by the learned Single Judge of that Court in exercise of powers under Article 226 of the Constitution of India had any substance or not instead of postponing the said question to be decided after more than a decade which is the usual time taken in disposal of the Letter Patent Appeals pending before the High Court. The facts of the case show that the suit was of the year 1956 and decree was passed in the year 1957 and as on the date of admission of the appeals, over fifty years had elapsed. In view of these facts, the High Court is requested to consider the preliminary objection raised before it and decide the same after giving opportunity of hearing to the parties. In the fitness of things, High Court is requested to decide this question within a period of six months from the date of receipt/production of copy of this order.

The SLP is, accordingly, disposed of.

59. In view of the aforesaid order, we are required to consider the preliminary objection and to decide the same after giving opportunity of hearing to all the parties that too within a period of six months from the date of receipt of the order passed by the Apex Court. From the tone and tenor of the order passed by the Apex Court, we do not think that the decision on the preliminary issue need

to be prolonged any more by referring the matter to the larger Bench. We are required to decide the said issue and not to postpone the same. The parties before us agree that even entire matter can be decided on merits. Hence, with the consent of all parties, the matter is heard on maintainability as well as on merits at length.

ON MERITS

60. At the very outset, we must point out her that the petitioners in para No. 01 of their writ petition, have claimed that they are holding part of the disputed property in this petition and are parties to the litigation, also before the Collector, namely Survey Nos. 51 to 54, 133 and 46/2, etc. During the course of oral arguments, Shri Mantri learned Counsel for the appellants urged that the appellants are the occupants of survey Nos. 53/1B, 133, 52/1, 52/2 and 46/2. However, since the objections in respect of Survey Nos. 131, 46/2, 52/1, 52/2 and 53/1B pertain to the interpretation of modified decree and the orders passed below Exh. 14 and 17 by the executing Court, interpreting the judgment and orders passed by this Court, we wish to conclude the objections in respect of it, instead of leaving it to be decided now at this late stage by the executing Court, as we see that decision in respect of these survey numbers is resulting in prolonging of execution of decree in question. In respect of other objections, we propose to remand the matter back to the lower authorities to decide the same in accordance with law.

61. We now, proceed to deal with the findings recorded by the learned Single Judge in his order dated 12.06.2008 dismissing the writ petition on the grounds that the appellants have prima facie no right to raise objections before the executing Court, in the manner in which it is taken and the proceedings at their instance cannot now be reopened. Hence, let us see the nature and the manner of objections raised by the appellants. It is not in dispute that the appellants are claiming to be successors in title and possession of survey Nos. 52/1, 52/2 and 53/1B which were in occupation and possession of the original defendant Nos. 7 and 8 Sakharam and Ramchandra, respectively. According to the appellants, they have stepped in the shoes of original defendant Nos. 7 and 8 and hence they can legitimately raise all such objections to the executability of the decree, which could legitimately be raised by the original defendant Nos. 7 and 8 the judgment debtors. The appellants are not disputing, either the correctness of the judgment and decree passed by the Trial Court or one which is confirmed /modified by this Court in aforesaid two first appeals. The appellants are claiming, their right through the judgment debtors, on the basis of the so called modification of decree by this Court, as has been interpreted by the executing Court by passing orders below Exh. 14 and 17. The appellants are interested to see that the decree is executed strictly in accordance with the orders passed by this Court as well as by the executing Court, and this is what we also find the claim and the prayer made in the writ petition.

62. The learned Single Judge has observed in his order that the executing Court

and the Commissioner, the Collector has to proceed in accordance with law in executing the decree as modified by the High Court. Thus, the learned Single Judge was also of the opinion that the decree has to be executed in accordance with law and as modified by this Court. In our view, the appellants are entitled to raise all such objections as could validly be raised by their predecessor in title who were the judgment debtors and the Trial Court as well as the Collector is not only competent, but also duty bound to decide these objections and this is, what has been reiterated by this Court in its subsequent judgment and order passed in writ petition No. 1597/2002 and writ petition No. 3636/2007, filed by the plaintiff No. 2/the decree holder. It could not, therefore, be said that the appellants have no right to raise objections before the executing Court, in the manner in which they are raised. There is no question of reopening the decree passed by the Trial Court or going behind the modification done by this Court, or going behind the orders passed on Exh. 14 and 17, by the executing Court. The nature of objection does not require, the concluded proceedings to be reopened.

63. It is no doubt true that the appellants are not the parties in Special Darkhast No. 57/1977 or even to the Special Civil Suit No. 13/1956. The decision relied upon by the learned Counsel for the appellant reported in Shreenath and Another Vs. Rajesh and Others, . clearly supports the contention of the appellants, that even third party in possession can claim independent right as tenant, can object and get his claim adjudicated when sought to be dispossessed by the decree holder and he need not wait until he is dispossessed. The appellants claim to be in possession of the property in question. Under Order XXI Rule 97, the expression used "any person" shows width of the scope and power of executing Court to adjudicate the claim made in any such application and by persons resisting the delivery of possession, claiming right in the property, even those not bound by the decree including the tenants or other persons claiming right of their own, including a stranger, is entitled to raise an objection. Whether, the objection goes in his favour or not, is immaterial for the locus of the appellants. The authorities cited, clearly support the proposition advanced by the learned Counsel for the appellants. In another decision of this Court reported in 1997 Mh. L. J. 252, Mannubai v. Shivprasad, it has been held by invoking the provisions of Order 1 Rule 10(2) of Civil Procedure Code, that the proceedings taken after the preliminary decree are the proceedings in the suit itself and hence such a stage is a stage in the proceedings, in the suit as contemplated by Sub-rule (2) of Rule 10 of Order 1 of CPC and there is no reason why the parties should not be allowed to be added simply because a preliminary decree is passed, when the Rule permits adding of party "at any stage of the proceedings". It has further been observed that it is one thing to say that a party added after preliminary decree, would not be allowed to go behind it and it is another, to say that he should not be added, because preliminary decree is final with regard to the matters adjudicated by it. Applying the principles laid down in both these cases, we are of the view that the appellants have right to raise an objection to the executability of the decree, in the manner in which they have raised and the

decision on such objections raised by the appellants, does not amount to reopening of the proceedings or going behind the decree passed by the Court. Hence, the objection taken by the respondents that the appellants have no locus standi to participate in the proceeding or raise an objection, in the manner in which they are raised, is therefore, rejected.

64. As a matter of fact, on 22.11.1983 one Shaikh Ahmad claiming to be the legal representative of the plaintiff No. 1/decree holder No. 1 filed an application Exh. 26 for joining certain persons as parties to Special Darkhast No. 57/1977. The notices were issued to the concerned parties proposed to be joined as defendants/non applicants in the said Darkhast. Amongst those proposed parties appellant No. 2 Sharad Mansukhlal Muth was the proposed non applicant No. 15. In the writ petition No. 1597/2002 filed by the plaintiff No. 2/decree holder No. 2 Mahadev Narayan Pawar, the appellant No. 2 and one Anandram Chandmal Munot were joined as intervenors, as per the order passed on 12.07.2004 on Civil Application No. 5077/2004. In the appeal filed u/s 247 of the Maharashtra Land Revenue Code challenging the order dated 13.04.2005 passed by the Tahsildar, Ahmednagar, the appellants were joined as some of the respondents. Similarly, in writ petition No. 3636/2007 filed by Mahadev Narayan Pawar, the plaintiff No. 2/decree holder, several appellants were joined as respondents. The objections raised by the appellants before the Collector as well as before the learned Civil Judge S. D., Ahmednagar have been rejected. In view of this, it cannot be said that the appellants had nothing to do with the property or that they were not the persons aggrieved or that they have not locus to file the writ petition as well as this appeal. The decree holders have thus joined some of the appellants as parties to the various proceedings as pointed out above. Hence on this count also the objection raised by the respondents/decree holders regarding the locus of the appellants need to be rejected.

65. In respect of survey Nos. 131 and 46/2, it is not in dispute that the Mamulabee i. e. the original defendant No. 1 sold survey No. 131 and some portion of survey No. 46/2 to the original defendant No. 3 Khandu Ramu Pulsaunder and defendant No. 4 Laxman Ramu Pulsaunder vide registered sale deed dated 08.07.1955, and hence they were joined as defendants in the suit by the plaintiff Chotibee. During the pendency of Special Civil Suit No. 13/1956 Chotibee also sold her share in survey Nos. 131 and 46/2 to the defendant Nos. 3 and 4. She, therefore, filed pursis Exh. 62 for deleting their names from array of defendants. Although, the Trial Court framed the issues in respect of these survey numbers, and finding is recorded that it is not necessary to decide the said issues, in view of pursis Exh. 62. Hence the adjudication is that the plaintiffs have waived their rights to claim partition in respect of survey Nos. 131 and some portion of survey No. 46/2. In view of this, the contention raised by the respondents that at the most the share of the plaintiff No. 1 Chotibee shall be reduced from the said survey number to the extent of her 1/8th share in the properties does not survive. These two survey numbers cannot, therefore, be included in the preliminary decree passed for partition and consequently, the

same cannot be the subject matter of Special Darkhast No. 57/1977. There is no adjudication in Special Civil Suit No. 13/1956 in respect of survey No. 131 or any part of survey No. 46/2. If these two survey numbers are not the subject matter of Special Civil Suit No. 13/1956, how could the same be the subject matter of a decree, obviously it cannot be. The said survey numbers, therefore, need to be excluded from the preliminary decree and consequently, from the Special Darkhast No. 57/1977.

66. The substantial controversy involved in this case, revolves around the interpretation of the judgment and order dated 24.09.1963 passed by this Court in first appeal No. 78/1958 and 79/1958 as well as of the order dated 09.10.1963 passed on an application for speaking to minutes filed in the aforesaid two first appeals. The parties agree that all the eventualities have been taken care of, in the aforesaid two judgments and orders passed by this Court. The respondents/decreed holders submit that the plaintiff No. 1 is held entitled to have 7/8th share in all the lands involved in the appeal and the house property, and hence, the plaintiffs are entitled to get possession to the extent of their 7/8th share in all the properties. Not only this, but this Court further directed inquiry into the mesne profit from the defendant Nos. 7 and 8, till delivery of possession, which clearly indicate not only determination of share but delivery of possession also.

67. As against this, the contention of the appellants is that mere entitlement to the 7/8th share in the properties of the plaintiffs was not enough to get possession of the said share from the original defendant Nos. 7 and 8, as this Court has put certain riders on the rights of the plaintiff to get possession of the properties. According to the appellants, although, an inquiry has been ordered through Mamlatdar in respect of tenancy rights possessed by the original defendant Nos. 7 and 8 in respect of survey No. 53/1B, 52/1 and 52/2, the same will not have any practical importance, in view of equitable distribution as ordered by this Hon'ble Court, is effected of the said properties. It is submitted by the learned Counsel for the appellants that irrespective of the fact, whether, the original defendant No. 7 and 8 are to be held as tenants or not, this Court has directed by way of modification, that the properties be equitably partitioned, so that as far as possible the defendant No. 1 is assigned the whole of the survey numbers which have been purchased by the defendant Nos. 7 and 8. It has further been modified that in the event of such partition not been possible, the Court will assign as much land out of these two survey numbers to the defendant No. 1 as is possible in consideration of her share in the house and other lands and as to the rest of the share, the plaintiff will be entitled for reasonable compensation from the defendant No. 7 and 8.

68. The appellants, alternatively submit that their possession is protected till the issue of tenancy is finally determined. As against this, the contention of the respondents/decreed holders is that if it is held by the Mamlatdar that the defendants No. 7 and 8 are not the tenants of the land, the plaintiff will get

possession of such land as falls to her share of partition as directed by us and will also get mesne profit from the defendant No. 7 and 8 as claimed, until delivery of possession. Thus, two different possible interpretations are placed on the judgment and order passed by this Court in the aforesaid first appeals.

69. In our view, it is not necessary for us to adjudicate upon the issue, as to which of the two interpretations of the judgments and orders dated 24.09.1963 and 09.10.1963 passed by this Court in the first appeals No. 78/1958 and 79/1958, is to be accepted. The matter has traveled beyond that. The orders passed by the executing Court, subsequent to the decision of the aforesaid first appeals, conclude the controversy to a greater extent. This Court, in its judgment and order dated 24th September, 1963 passed in aforesaid first appeals, after framing two issues and ordering inquiring into the same to be proceeded simultaneously, has held that the decision of these issues will not have any practical importance, if equitable partition can be effected by the lower Court. The questions as to how the judgments and orders passed by this Court in First Appeals are to be interpreted/followed, whether there should be an equitable partition or not, and whether such equitable partition is possible and in what manner, etc. are the questions to be decided by the Executing Court. The Executing Court has passed orders below Exh. 14, and Exh. 17 which have attained finality. The order passed below Exh. 14 on 22.12.1981 in Special Darkhast No. 57/1977 directed that survey Nos. 46/2 and survey No. 131 be deleted and partition pertaining to the remaining lands be effected as per the order of this Court. Similarly, an order below Exh. 17 has been passed in Special Darkhast No. 57/1977 on 21.12.1981. The material portion of it, which is relevant is reproduced below.

Now in view of the of the specific directions by the Hon'ble High Court that the Survey Nos. 52/1 and 52/2 be allotted to the share of the defendant No. 1 as far as possible with the further direction and in the event of such a partition not being possible the court will assign as much land put to these two survey numbers to defendant No. 1 as is possible in consideration of her share in the house and other lands. As to the rest of the share the plaintiff will be entitled to reasonable compensation from the defendants Nos. 7 and 9. The issue is practically settled for all purposes. The interpretations of the judgment and decree is clear that Survey Nos. 52/1 and 52/2 have to be allotted to the share of the defendant No. 1 in this partition to be effected by the Collector. If in case, the property is less for distribution to the plaintiffs share, then she should be compensated by payment of reasonable compensation. So now what is remained to be done, is that the decree be sent to the Collector for effecting the partition the agricultural lands with the specific direction that sur. Nos. 52/1 and 52/2 be allotted to the share of defendant No. 1. The question of compensation if any paid to the plaintiff, can be considered after the Collector effects the partition as per this determination, and if it is found that the properties available for the plaintiff's 7/8th share is less, then the amount of compensation to be paid to the plaintiff, will be determined. Thus the Collector should allot these two survey

numbers to the share of the defendant No. 1 in this proposed partition and effect the partition of remaining lands. Intimation be sent to the Collector, Ahmednagar for effecting the partition, accordingly.

70. Thus, to the extent of properties survey Nos. 46/2, 131, 52/1 and 52/2, the issue is practically concluded, as there is no appeal preferred against these orders. It was the Civil Court which was directed by the judgment of this Court in the aforesaid two first appeals to decide the issue of equitable partition and thereafter, to remit the said decree for execution, to the Collector. In view of these orders passed on 21.12.1981 below Exh. 14 and 17, the survey Nos. 46/2 and 131 are required to be deleted from Special Darkhast No. 57/1977, whereas in respect of survey No. 52/1 and 52/2, there is specific direction to the Collector to allot the said survey Nos. to the share of defendant No. 1 in the proposed partition and to effect the partition of the remaining lands.

71. The learned Counsel appearing for the respondents contended that survey No. 53/1B is not covered by the orders passed below Exh. 14 or Exh. 17 on 22.12.1981 in Special Darkhast No. 57/1977 and hence, the said survey number cannot be excluded from the share of plaintiffs in partition and separate possession. It is urged that, there is no order passed by the Executing Court like one which was passed below Exh. 17 on 21.12.1981 directing the Collector to allot survey No. 53/1B in favour of the defendant No. 1 and hence the decree holders are entitled to execute the decree for partition and separate possession of their 7/8th share in survey No. 53/1B. It is fact that the survey No. 53/1B is not covered either by an order passed below Exh. 14 or Exh. 17 by the executing Court in Special Darkhast No. 57/1977. However, once, the Executing Court accepts the particular interpretation of the judgment and order passed by this Court in the aforesaid two first appeals in respect of survey No. 52/1 and 52/2, there cannot be a different interpretation of the judgment in respect of survey No. 53/1B. The reason, in our view, is that the property survey No. 53/1B stands on the same footing as the property survey No. 52/1 and 52/2. The modification of the decree done by this Court in respect of all these three survey numbers is one and the same. The only difference being the original defendant No. 8 Ramchandra Misal had purchased survey No. 53/1B from the defendant No. 1 and claimed himself to be the tenant in respect of the same. This distinction, therefore, in our opinion will not alter the interpretation done vide order dated 21.12.1981 passed below Exh. 17 of the judgment and order passed in two first appeals decided by this Court. This Court by its judgment and order passed in Writ Petition No. 1597/2002 and also in Writ Petition No. 3636/2007 directed the Civil Court as well as, Collector to consider all these objections raised by the appellants claiming equitable partition and allotment of survey No. 53/1B to the share of defendant No. 1 Mamulabee. In view of this, we are of the opinion that, there cannot be any distinction in between allotment of survey No. 52/1, 52/2 and 53/1B. If survey No. 53/1B is not allotted to the share of defendant No. 1, then it would result in miscarriage of justice. Hence, in our view, survey No. 53/1B is required to be allotted in partition to the share of defendant No. 1.

Mamulabee, and the same therefore, stands allotted accordingly.

72. The contention of the learned Counsel for the respondents that all these objections were raised by the appellants in SLP preferred on both the occasion before the Apex Court is of no avail for the reason that the question of interpretation of the judgment and order passed by this Court in the aforesaid two first appeals did not really fall for consideration, on any occasion, earlier than the execution of a decree. The appellants have taken recourse to ill advised litigation, but that will not create an estoppel against them to raise the question regarding interpretation of the judgment and order passed by this Court. The learned Counsels Shri V. D. Hon and Shri R. N. Dhorde very vehemently argued that the issue of tenancy has been decided against the appellants or their predecessors in title namely, the original defendant Nos. 7 and 8 by the tenancy Court and the appellants are bound by the same. According to learned Counsels, as per the judgment and order passed by this Court in first appeals No. 78/1958 and 79/1958, the plaintiffs/decreed holders were entitled to get the possession of the properties to the extent of their 7/8th share in all the properties. In our view, once the matter is concluded and has attained the finality by way of orders passed below Exh. 14 and 17 on 21.12.1981, the decision on the issue of tenancy shall not have any practical impact on the rights of the defendant Nos. 7 and 8, to own and possess the properties, consequently also of the appellants.

73. Even if we assume that the issue of tenancy in respect of original defendant Nos. 7 and 8 in relation to survey Nos. 53/1/B, 52/1 and 52/2 framed by this Court in first appeals was required to be decided by the Mamlatdar/Tahsildar and partition and separate possession of these three properties depend upon outcome of the said issues, we find that the said issue was decided on 13.04.2005 holding that the defendant No. 7 and 8 has surrendered their tenancy rights in respect of those survey numbers on 02.05.1952. In fact, the sale deeds in respect of these three survey numbers are dated 13.04.1952 in respect of survey No. 52/2, dated 12.11.1952 in respect of survey No. 53/1B and dated 23.09.1953 in respect of survey No. 52/1. The Special Civil Suit No. 13/1956 was filed on 13/04/1957, which is much after the said surrender of tenancy rights. Several questions in this regard would arise including the constructive rejudicata, the manner of surrender of tenancy rights, etc. which were required to be taken in to consideration and adjudicated upon by the Executing Court in Special Darkhast No. 57/1977, if the order of the Tahsildar is that there was surrender of tenancy rights by the original defendant No. 7 and 8. The same has not been done in the instant case. Apart from this, it was stated at the bar that many of the defendants, more particularly the defendant No. 7 and 8 had expired even before the decision of the Mamlatdar/Tahsildar, on the question of tenancy referred on 13.04.2005. The appeals preferred against this order u/s 247 of the Maharashtra Land Revenue Code were dismissed by holding that, it is not possible to interfere in the order of Mamladar passed in Tenancy Case No. 05/2004, as the several persons have expired and it will not be possible to adjudicate upon the issue, as it would result in interfering in the process of

partition which is to be completed within a stipulated time. In our view, the impact of the decisions of the Mamlatdar as well as his appellate authority, the Sub Divisional Officer rendered on 13.04.2005 and 24.07.2006 respectively will have to be considered by the Civil Court, particularly when it is alleged that the orders are passed against dead persons.

74. The appellants have raised an objection that during the pendency of Special Darkhast No. 57/1977, not only the original defendant Nos. 7 and 8 have expired, but also the plaintiffs No. 2 as well as his assignee Hassan Babu Zarekari. According to appellants that the provisions of Order XXI Rule 16 of CPC lays down the manner in which the assignees of the decree holder or the legal representatives of the decree holder could be brought on record. According to the learned Counsel for the appellants, this could only be done by the Civil Court. The learned Counsel has relied upon the decisions of this Court reported in AIR 1940 Bom. C.R. 5 Brijmohandas v. Sadashiv; Dhansukhbhai Fakirbhai Patel Vs. Fakirbhai Dayabhai Patel and Others, in support of his contentions. He has also relied upon the full bench judgment of the Andhra Pradesh High Court reported in Arvapalli Ramrao Vs. Kanumarlapudi Ranganayakulu and Others, . However, we do not intend to deal with all such objections and leave it to be decided by the competent Court of first instance, as it will be an adjudication over the question of facts and law.

75. Now we turn to the order passed by the Collector, Ahmednagar, rejecting the objections filed by the appellants, which was impugned in Writ Petition No. 276/2008. The appellants had raised several objections in writing, however, without recording any specific finding on each of such objections, the Collector passed an order that it is possible to have equitable partition of the property and, therefore, it is not necessary to forward the special darkhast to the Civil Court for corrections. However, a liberty was granted to the objectors to directly approach the Civil Court and obtain orders. The appellants approached the learned Civil Judge Senior Division, Ahmednagar and filed their objections dated 31.12.2007. The learned Civil Judge Senior Division, Ahmednagar passed an order on 07.01.2008 rejecting the objections raised by the appellants on the ground that this Court had specifically directed the Collector, Ahmednagar to execute the decree and the Collector can effectively settle the equities, if found necessary according to the provisions of Section 54 of Civil Procedure Code. It is further been observed that judgment debtors have lost the battle at the first appellate stage as well as before the Apex Court and hence, there is no necessity to modify the decree. It has further been held that, it is not necessary to take into account the objections, as it would cause hurdle in the execution of the proceedings, which are to be concluded anyhow by 15.02.2008.

76. In a suit for partition and separate possession involving the agricultural lands, the decree is required to be passed in two stages. (1) A preliminary decree, (2) The final decree. The Court passing a preliminary decree does not seize to have any control over the proceedings leading to the passing of the final

decree. It cannot, therefore, be said that the Civil Court becomes functus officio and this was the view taken rightly by this Court in para 17 the judgment of learned Single Judge delivered on 05th September, 2007 in Writ Petition No. 3636/2007. The Trial Court, therefore, cannot abdicate its function of adjudicating the objections to the executability of the decree. Such objections can be dealt with u/s 47 read with Order XXI Rule 97 of Civil Procedure Code. The appellants have also raised the objections pertaining to Order XXI Rule 16 of Civil Procedure Code. The Collector is also empowered to deal with the objections and adjudicate upon it u/s 54 of Civil Procedure Code. It is now well settled that the directions of the Court are required to be understood in the light of the provisions of law and, therefore, direction to conclude the execution proceedings within a stipulated period cannot construed to mean to pass orders in ignorance of mandatory provisions of law and without application of mind to the objections raised. The questions whether a person is bound by a decree or order, whether the objectors are the legal representatives of judgment debtor or of the judgment holder, whether objector is claiming protection of his possession on the basis of his own, right, title and interest in the property etc. are all the objections which are required to be decided in the execution proceedings itself and not by a separate suit. Any decision on the objections under Order XXI Rule 98 of CPC has a force of decree under Order XXI Rule 103 of CPC and, therefore, the Civil Court as well as the Collector were duty bound to decide the objections and the same cannot be lightly brushed aside.

77. So far as, the judgments and orders passed by this Court in writ petition No. 1597/2002 is concerned, it was a petition filed by the plaintiff No. 2 Mahadu Narayan Pawar, seeking direction to the respondent No. 2 Collector effecting partition and actual separation of the shares as provided u/s 54 of the Civil Procedure Code. It was further the direction sought to the executing Court to dispose of the Special Darkhas 57/1977. The said judgment does not deal with the rights of the parties. But direction is issued in paragraph 6 and 7 of the judgment as under:

6. We further find in the present matter that as the suit was of 1956 and in view of the fact that earlier papers have been lost by the Collector's office and as the execution is pending for pretty long period the partition has been dragged. The Collector will personally execute this decree, instead of transmitting it to the subordinate officers and shall see that within a period of one year from today, execution in the instant matter is completed and a report of compliance of execution shall be send to this Court.

7. Since we are not keeping the petition pending here, all other contentions which the parties are eligible to raise, may raise them in the execution proceeding before the Collector. We make it clear that the Collector may adjust the equities to the extent they are possible to be adjusted.

78. Be as it may, this Court not only directed to decide all such objections in Writ Petition No. 1597/2005 decided on 12.07.2004, but also by an order dated 30th

September, 2005 passed in Civil Application No. 7701/2005 filed in Writ Petition No. 1597/2002. We may reproduce below the relevant portion of order dated 30th September, 2005 passed in Civil Application No. 7701/2005 as below:

We need not adjudicate any of the questions raised, for the obvious reason that while disposing of the writ petition, we had permitted all objections in regard to the execution being raised before Collector and the Collector is also directed to consider the said objections. Our judgment and order also make it clear that so far as possible, the Collector may adjust the equities. We have no iota of doubt that Collector will execute the modified (Amended) decree after taking in to consideration and after adjudicating the objections raised by the objectors. The apprehension voiced by the learned Counsel for the applicants that the Collector will not execute the modified decree is ill founded .

This was the order passed on the application filed by the some of the present appellants.

79. Bare perusal of the aforesaid direction will reveal that all the contentions which the parties are eligible to raise are permitted to be raised in the execution proceedings before the Collector and the Collector was directed to adjust the equities to the extent they are possible to be adjusted. Thus, the Collector was required to adjust the equities in accordance with the decree to be forwarded by the Civil Court. This was to be done after hearing of the concerned parties entitled to raise the objections.

80. Perusal of both the orders which were impugned in the writ petition, it is clear that neither the Collector, nor the Civil Court has dealt with any of the objections raised by present appellants/objectors. They have acted in complete ignorance of the directions given by this Court on three occasions, which are reproduced earlier. The appellants are being put to run from pillar to post. The impugned orders being in ignorance of provisions of law as well as without application of mind to the objections raised by the appellants are liable to be quashed and set aside.

81. The reference was made by the parties to judgment delivered in another writ petition No. 3636/2007, which was preferred by the Mahadu Narayan Pawar challenging order dated 31.05.2007 passed by the Additional Commissioner Nashik remanding the matter back to the Collector for deciding the objections raised by the present appellants/objectors. The said writ petition was dismissed and the order of the remand was confirmed. As a result of the confirmation of the order of the remand, the Collector was required to taken in to consideration all the objections raised by the appellants. In the light of the observations made by this Court in para 17 of the said judgment, it was held that the Civil Court was wrong in holding that he had become functus officio and refused to issue the order or clarify and refer the proceeding to the Collector. It was observed that it was duty of the Civil Court to see that the Collector had acted in accordance with the decree holders mandate. The relevant portion of para 18 of the said

judgment is reproduced below:

18. Perusal of the impugned order passed by the Additional Commissioner makes it clear that the Additional Commissioner has remanded the matter back on the grounds mentioned in the said order. The said grounds, in my view, are grounds which were germane whilst carrying out the exercise of the execution of decree in question. It, therefore, cannot be said that the Additional Commissioner had traveled beyond or behind the decree. The order of the Collector does not disclose that the said grounds have been taken into consideration. May be, the Collector was handicapped on account of the fact that the executing Court had refused to clarify or issue orders in respect of the decree which is to be executed. In that view of the matter, no fault could be found with the order of remand passed by the Additional Commissioner and consequently, no case for interference by this Court in its jurisdiction under Article 226 and 227 of the Constitution of India is made out and the petition is, therefore, dismissed and Rule discharged with no order as to costs.

82. In our view, the aforesaid judgment which has become final require the Civil Court to correct the decree by taking into consideration all the objections of the appellants/objectors and to pass an order and transmit correct precept for execution to the Collector with suitable specific directions. However, this course was not followed and the objections remained to be decided by the Civil Court regarding correction in the decree which is the subject matter of execution for Special Darkhast No. 57/1977.

83. In the light of above adjudication by us, we sumup our conclusions and pass an order as under:

1) The preliminary objection as to the maintainability of the Letters Patent Appeal raised by the respondents is rejected and it is held that the Letters Patent Appeal under Clause 15 of the Letters Patent of the Bombay High Court is maintainable.

2) The instant appeal is partly allowed.

3) The judgment and order dated 12.06.2008 passed by the learned Single Judge in Writ Petition No. 276/2008 is quashed and set aside.

4) The order dated 07.01.2008 passed by the learned Civil Judge Senior Division, Ahmednagar and by the learned Collector, Ahmednagar dated 24.12.2007 in Special Darkhast No. 57/1977 are quashed and set aside.

5) It is held that the properties survey Nos. 131 and 46/2 of village Chahurna (Bk), Tq. & Dist. Ahmednagar stands deleted from preliminary decree forwarded to the Collector by the learned Civil Judge Senior Division, Ahmednagar and the same stands deleted consequently from Special Darkhast No. 57/1977.

6) The survey Nos. 52/1, 52/2 and 53/1B stands allotted to the share of original defendant No. 1 Mamulabee in the proposed partition and the Collector,

Ahmednagar is directed to effect the partition of the remaining lands.

7) The executing Court and the Collector, shall however, consider the question of allotment of share of defendant No. 1 Mamulabee in house property and in lands other than Survey Nos. 131, 46/2, 52/1, 52/2 and 53/1B to the share of plaintiffs or the payment of monetary compensation, in consideration of lands Survey Nos. 52/1, 52/2 and 53/1B, by the defendant Nos. 7 and 8 to the plaintiffs.

8) The entire record and proceedings of Special Darkhast No. 57/1977 shall immediately be remitted back to the learned Civil Judge Senior Division, Ahmednagar for deciding all the objections which are raised, but not decided in this judgment within a period of 6 months with effect from 31st August, 2009, by affording all the parties an opportunity of being heard in the matter.

9) The parties to appear before the learned Civil Judge Senior Division, Ahmednagar on 31st August, 2009, and on that day, the learned Civil Judge Senior Division, Ahmednagar shall fix the programme of hearing and passing orders and no separate notices will be necessary, to the parties to the proceedings.

10) The learned Civil Judge Senior Division, Ahmednagar dealing with the Special Darkhast No. 57/1977 shall forward the corrected precept to the Collector, Ahmednagar, within a period of one week from the date of his decision on the objections with specific direction which the circumstances may required to be issued.

11) The Collector shall complete the execution proceedings within a period of four weeks from the date of receipt of the precept from the Court of Civil Judge Senior Division, Ahmednagar.

12) We make it clear that although, parties have raised various contentions, we have dealt with and adjudicated the same only to the extent of survey Nos. 131, 46/2, 52/1, 52/2 and 53/1B, leaving all other objections to the executability of decree open to be decided by the Civil Court and the Collector.

13) The parties shall bear their own costs.