
(2016) 04 BOM CK 0008

In the Bombay High Court

Case No : Second Appeal No. 700 and 793 of 2008

Prabhakar Sambhu Chaudhary

APPELLANT

Vs

Laxman Baban Mali and others

RESPONDENT

Date of Decision : 01-04-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Maharashtra Public Trusts Act, 1950 — Section 72(2), 72(4)

Citation : (2016) 3 AIRBomR 600 : (2016) AIRCC 1806 : (2016) 3 ALLMR 294 :
(2016) 3 BCR 714 : (2016) 3 KLT 67 : (2016) 3 MhLJ 202 : (2016) 5 RCRCivil
941

Hon'ble Judges : R.M. Borde;Sunil P. Deshmukh;Ravindra V. Ghuge, JJ.

Bench : Full Bench

Advocate : P.M. Shah, Senior Counsel i/by N.B. Suryawanshi, Advocate, for the Appellant; R.N. Dhorde, Senior Counsel i/by P.S. Dighe, Advocate, A.B. Girase, Government Pleader, for the Respondent

Final Decision : Disposed Off

Judgement

R.M. Borde, J. - Heard Shri R.N. Dhorde, Senior Counsel i/by Shri V.R. Dhorde, advocate for the Appellant in Second Appeal No.700 of 2008 and for Respondent No.1 in Second Appeal No.793 of 2008 with and i/by Shri P.S. Dighe, advocate; Shri P.M. Shah, Senior Counsel i/by Shri S.P. Brahme, advocate for Respondents No. 1 to 3 in Second Appeal No.700 of 2008 and for the Appellant in Second Appeal No.793 of 2008 with and i/by Shri N.B. Suryawanshi, advocate; and Shri A.B. Girase, Government Pleader for Respondent No.5 in both the appeals.

2. These Second Appeals have been presented objecting to the judgment and order dated 29.04.2008, passed by Ad hoc District Judge2, Shahada in Trust Applications No.1 of 2007 and 2 of 2007.

3. Although there is a chequered history of the litigation, it would suffice to note that after elections to the Managing Committee were held, Change Report No.207 of 2003 was presented by Choudhary group i.e. appellant in Second

Appeal No.700 of 2008, whereas, Change Report No.208 of 2003 was presented by Mali group i.e. Respondents in Second Appeal No.700 of 2008 and appellant in Second Appeal No.793 of 2008, respectively claiming themselves to be duly elected office bearers of the Managing Committee. Change Report No.207 of 2003 came to be accepted by the Assistant Charity Commissioner and Change Report No.208 of 2003 came to be rejected by an order dated 12.04.2006. Appeal No.73 of 2006 was filed by Mali group, challenging acceptance of Change Report No.207 of 2003 and rejection of Change Report No.208 of 2003. The said appeal came to be allowed vide order dated 06.01.2007 and order passed in respect of acceptance of Change Report No.207 of 2003 is set aside. On the other hand, order in respect of rejection of Change Report No.208 of 2003 came to be confirmed.

4. Trust Application No.1 of 2007 came to be presented by Chaudhary group, challenging order dated 06.01.2007 in Appeal No.73 of 2006. So also, Trust Application No.2 of 2007 came to be presented by Mali group, challenging order dated 06.01.2007, in respect of Change Report No.208 of 2003. Both the Applications have been rejected by Ad hoc District Judge2, Shahada, by order dated 29.04.2008, which gave rise to presentation of Second Appeal No.700 of 2008 (in respect of Change Report No.207 of 2003 by Chaudhary group); and Second Appeal No.793 of 2008 (in respect of Change Report No.208 of 2003, presented by Mali group).

5. Both the appeals were placed before the learned Single Judge for consideration on 30.01.2012. It was urged by learned Counsel appearing for respective parties, that in view of subsection (4) of Section 72 of the Bombay Public Trusts Act, 1950, there is no warrant to frame a substantial question of law and the High Court is bound to entertain all objections to the correctness of the judgment, including those relating to questions of facts.

6. It was contended that appeal provided under subsection (4) of Section 72 of the Act cannot be subjected to any restrictions or limitations as are prescribed under Section 100 of the Code of Civil Procedure; and further, it is not within contemplation to draw an inference that the appeals are tenable only if the Court is satisfied that it involves substantial questions of law.

7. Relying upon the judgment in the matter of James Joseph v. State of Kerala, reported in 2010 (9) SCC 642, it was urged that if the statute does not place any limitations or restrictions in regard to scope and width of the appeal, it shall be construed that the appeal provides a right of rehearing on law as well as facts.

8. A different view is expressed by Division Bench of this Court in the matter of Shivprasad Shankarlal Pardeshi v. Leelabai Badrinarayan Kalwar, reported in 1998 (1) Mh.L.J. 444. The Division Bench, while considering the scope of an enquiry in the appeal provided to the High Court under subsection (4) of Section 72 of the Bombay Public Trusts Act, 1950 (now Maharashtra Public Trusts Act, 2013) {hereinafter, for convenience, referred to as `BPT Act" or `Act of 1950"}

and Section 100 of the Code of Civil Procedure, has taken a view that:

"An appeal filed under Section 72(4) of the Bombay Public Trusts Act, 1950, is a "Second Appeal" to the High Court and is subject to the restrictions and limitations imposed on a "Second Appeal" as prescribed under Section 100 of the Code of Civil Procedure. There is nothing in the scheme of Section 72 of the Bombay Public Trusts Act or for that matter, any other provisions of the said Act which widens scope of the appeal beyond the limits prescribed by Section 100 of the Civil Procedure Code. In our view, therefore, Such an appeal is maintainable only if the High Court is satisfied that the case involves substantial questions of law within the meaning of Section 100 C.P.C. "

9. Considering the judgment of the Apex Court in the matter of James Joseph (supra), the learned Single Judge has formulated following questions for consideration.

(1) Whether the second appeal filed under the provisions of Section 72(4) of the Bombay Public Trusts Act, 1950, can be heard and considered only if it involves a substantial question of law?

(2) If so, whether the Memorandum of appeal shall have to state the substantial question of law involved in the appeal and whether the High Court is bound to formulate the substantial question/s of law while admitting the appeal or before posting the appeal for hearing.

10. It would be appropriate to refer to certain provisions of the Maharashtra Public Trusts Act. Section 2(4) of the Act defines " Court ". Court means in the Greater Bombay, the City Civil Court and elsewhere the District Court.

11. There are various inquiries and proceedings under Maharashtra Public Trusts Act, 1950, which give rise to an appeal to the High Court.

(i) Section 41D of the Act of 1950 relates to suspension, removal and dismissal of trustees. Subsection (1) of Section 41D provides:

41D Suspension, removal and dismissal of trustees

(1) The Charity Commissioner may, either on application of a trustee or any person interested in the trust, or on receipt of a report under section 41B or suo motu may suspend, remove or dismiss any trustee of a public trust, if he,

(a) makes persistent default in the submission of accounts report or return;

(b) wilfully disobeys any lawful orders issued by the Charity Commissioner under the provisions of this Act or rules made thereunder by the State Government;

(c) continuously neglects his duty or commits any malfeasance or misfeasance, or breach of trust in respect of the trust;

(d) misappropriates or deals improperly with the properties of the trust of which he is a trustee; or

(e) accepts any position in relation to the trust which is inconsistent with his position as a trustee;

(f) if convicted of an offence involving moral turpitude.

Subsection (6) of Section 41D provides:

(6) An appeal shall lie to the High Court against the decision of the Court under subsection

(5) as if such decision was a decree from which an appeal ordinarily lies.

(ii) Similarly, Section 41E refers to power to act for protection of charities. Subsection (1) of Section 41E reads, thus:

41E Power to act for protection of Charities

(1) Where it is brought to the notice of the Charity Commissioner either by the Deputy or Assistant Charity Commissioner through his report or by an application by at least two persons having interest supported by affidavit :

(a) that any trust property is in danger of being wasted, damaged or improperly alienated by any trustee or any other person, or

(b) that the trustee or such person threatens or intends to remove or dispose of that property,

the Charity Commissioner may by order grant a temporary injunction or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of such property, on such terms as to the duration of injunction, keeping an account, giving security, production of the property or otherwise as he thinks fit.

Subsection (6) of Section 41E provides for:

(6) The order of the Court attaching the property of such person or detaining such person in civil prison shall be a decree appealable to the High Court.

(iii) Section 47 of the Act relates to power of Charity Commissioner to appoint, suspend, remove or discharge trustees and to vest property to new trustees. Subsection (5) of Section 47 provides, that:

(5) The order of the Charity Commissioner under subsection (2) shall be deemed to be the decree of the Court and an appeal shall lie therefrom to the High Court.

(iv) Subsection (1) of Section 72 provides, thus:

72. Application from Charity Commissioner's decision under section 40, 41 [41C and 43(2)(a) and (c)], [50A, 70 or 70A], etc.

(1) Any person aggrieved by the decision on the Charity Commissioner under section 40, 41 [41C and 43(2)(a) and (c)], [50A], [70 or 70A] or on the questions [whether a trust exists and whether such trust is a public trust] or

whether any property is the property of such trust [* * *] may, within sixty days from the date of the decision, apply to the court to set aside the said decision.

Subsection (4) of Section 72 provides:

(4) An appeal shall lie to the High Court, against the decision of the court under subsection

(2) as if such decision was a decree from which an appeal ordinarily lies.

12. Section 73 of the BPT Act provides that the officers holding inquiries shall have powers of Civil Court, which reads, thus:

73. Officers holding inquiries to have powers of civil court

In holding inquiries under this Act, the officer holding the same shall have the same powers as are vested in courts in respect of the following matters under the Code of Civil Procedure, 1908 in trying a suit

(a) proof of facts by affidavits,

(b) summoning and enforcing the attendance of any person and examining him on oath,

[(c) ordering discovery and inspection, and compelling the production of documents.]

(d) issuing of commissions.

13. Section 76 of the Act of 1950 provides that:

76. Civil Procedure Code to apply to proceedings [before Court] under this Act.

Save in so far as they may be inconsistent with anything contained in this Act, the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the court under this Act.

14. It is, thus, clear that Section 76 contemplates applicability of provisions of the Code of Civil Procedure to the proceedings before the Court. Whereas, Section 73 entrusts some of the powers mentioned in the aforesaid Section provided under the Code to the officers holding inquiries under the Act.

15 So far as applicability of limitation is concerned, it is provided under Section 75 of the Act of 1950, which reads, thus:

75 Limitation

In computing the period of appeal under this Chapter, the provisions of sections 4, 5, 12 and 14 of the Indian Limitation Act, 1908, shall apply to the filing of such appeals.

16. The Act of 1950 provides for procedure to be observed while conducting

inquiries as well as while conducting appeals and also provides for limitation for entertaining an application for Change or in respect of appeal. The applicability of provisions of the Limitation Act and Code of Civil Procedure is to the extent specified in the Act. The Act of 1950 is, thus, a self contained Code.

17. There cannot be any controversy for drawing an inference that the proceedings before District Court initiated on tender of an application under Section 72 of the BPT Act are in the nature of an appeal. In the matter of Ramchandra Goverdhan Pandit v. Charity Commissioner of State of Gujarat, reported in 1987 AIR SC 1598, the Hon"ble Supreme Court has, set at rest the controversy and ruled that all the characteristics of an appeal and all the powers of an appellate Court are available to the District Court while deciding an application under Section 72. There can be no hesitation to hold that proceedings before the District Court under Section 72(1) are in the nature of an appeal and the District Court exercises appellate jurisdiction while deciding matters under Section 72(1). The Supreme Court approved the decision of the Division Bench of Gujarat High Court in the matter of Hiragar Dayagar v. Ratanlal, reported in AIR 1973 Guj 15 : Guj. LR 181 as well as decision reported in (1956) 58 Bom LR 894. In the aforesaid decision of Bombay High Court, Hon"ble Mr. Chagla, the Hon"ble the Chief Justice (as he then was), has made following observations:

" Now although Section 72(1) confers a right upon a person aggrieved by the decision of the Charity Commissioner to apply to th City Civil Court, we must look at and consider the real nature of the right that is conferred by this subsection. In substance, if not in form the right is in the nature of an appeal. The application is intended to set aside the decision of the Charity Commissioner and the City Civil Court must consider that decision, and if satisfied that the decision is erroneous must set it aside and give the necessary relief to the party aggrieved by that decision. Therefore, in substance there is very little difference between an application contemplated by Section 72(1) and a right of appeal against the order of the Charity Commissioner....."

18. The Supreme Court, in the matter of Ramchandra (supra), found it difficult to approve of the view taken by the Division Bench of this Court in the matter of Khivaraj Chhaggiram Kavar and another v. Shivshankar Basappa Lingashetty and another, reported in AIR 1974 Bom 40. In paragraphs no.8 and 9 of the judgment in the matter of Ramchandra (supra), the Supreme Court has observed, thus:

8. We have considered the reasoning in the three judgments referred above. With respect, we find it difficult to agree with the reasoning in AIR 1974 Bom 40. We agree with the reasoning in the other two cases. The slender thread on which the appellants arguments rest is the absence of the word "appeal" in Section 72(1). That alone cannot decide the issue. If the well known word "appeal" had been used in this section that would have clinched the issue. It is the absence of this word that has necessitated a closer scrutiny of the nature, extent and content of the power under Section 72(1).

9. The power of the District Court in exercising jurisdiction under Section 72 is a plenary power. It is true that the Commissioner is not subordinate to the District Court but the District Court has powers to correct, modify, review or set aside the order passed by the Commissioner. All the characteristics of an appeal and all the powers of an appellate court are available to the District Court while deciding an application under Section 72. To decide this case we must be guided not only by the nomenclature used by the section for the proceedings but by the essence and content of the proceedings. That being so, we have no hesitation to hold that the proceedings before the District Court under Section 72(1) are in the nature of an appeal and that District Court exercises appellate jurisdiction while disposing of a matter under Section 72(1). Consequently, the single Judge of the High Court while deciding the appeal from the order of the District Court deals with a matter made by the District Judge in the exercise of an appellate jurisdiction by a Court subject to the superintendence of the High Court and hence Clause 15 of the Letters patent is directly attracted.

19. By the analogy, the decision in the matter of Ramchandra (*supra*), that the District Court, dealing with an application under Section 72(4) exercises appellate powers, would lead to an inference that an appeal to the High Court against decision of the District Court under Section 72(4) would/may be in the nature of an appeal against appellate decree.

20. It shall also be noted at this stage that on consideration of various provisions of the BPT Act, it can be seen that the Act of 1950 provides and more particularly subsection (4) of Section 72 attaches characteristics of a decree to the decision of the Court under subsection (2) for the purposes of facilitating remedy of an appeal to the High Court.

21. A decision on an application under subsection (2) of Section 72 is subject to an appeal to the High Court as if such decision was a decree from which an appeal ordinarily lies. It is, thus, clear that for the purposes of maintaining an appeal to the High Court, the decision of the Court under Section 72(2) shall have a character of decree from which an appeal ordinarily lies.

22. Similar is the language employed in subsection (5) of Section 47, which provides that the order of a Charity Commissioner under subsection (2) shall be deemed to be a decree of the Court and an appeal therefrom shall lie to the High Court. Subsection (6) of Section 41D also provides remedy of an appeal to the High Court against the decision of the Court under subsection (5) as if such decision was from a decree from which an appeal ordinarily lies. Section 41D relates to suspension, removal and dismissal of a trustee and against the order passed by the Charity Commissioner, the aggrieved party has been provided with remedy under subsection (5) of Section 41D to maintain an application to the Court. The scheme of Section 41D, so far as it relates to maintaining an application and providing remedy of an appeal to the High Court, is similar to that of Section 72. Section 41E of the Act refers to power to act for protection of Charities and aggrieved person has been provided with a remedy of maintaining

an appeal to the High Court against the order of the Court attaching the property of such person or detaining such person in Civil Prison, treating order of the Court to be a decree appealable to the High Court under Section 41E (6) of the Act. Subsection (5) of Section 41E provides for maintaining an appeal to the District Court against an order of injunction or any other order within 90 days from the date of communication of such order. The order of Charity Commissioner, subject to the order of the Court or in appeal is provided finality in view of subsection (7) of Section 41E. It is, thus, an appeal to the High Court under Section 41E (6) from appellate decree of the " Court".

23. In respect of the powers to act for protection of the Charities, the Charity Commissioner is entrusted with the powers to take action on consideration of report tendered by the Deputy or Assistant Charity Commissioner or on an application presented by at-least two persons having interest in the Trust, supported by affidavits.

24. The following hierarchical structure, as regards appeal, emerges from the provisions of Bombay Public Trusts Act.

(i) The change in the entries recorded in the Register kept under Section 17 is required to be reported within 90 days from the date of occurrence of such change to the Deputy or Assistant Charity Commissioner in charge of the Public Trusts Registration Office where the Register is kept and such report shall be made in the prescribed form {under Section 22(1) of the Act}.

(ii) The decision rendered by the Deputy or Assistant Charity Commissioner is appealable under Section 70 of the Act to the Charity Commissioner.

(iii) An application is provided under Section 72(1) to the Court within sixty days from the date of decision of the Charity Commissioner under Sections 40, 41, 41C, 43(2)(a) and [c], 50A, 70 or 70A, etc.

(iv) An appeal to the High Court is provided under Section 72(4) against the decision of the Court under subsection (2) of Section 72, as if such decision was a decree from which an appeal ordinarily lies.

(a) Similarly, in the matters of suspension, removal or dismissal of a trustee, the Charity Commissioner is empowered to take decision on an application of a Trust or any person interested in the Trust or a report under Section 41B or suo motu and such a Trustee may be suspended, removed or dismissed, as provided under Section 41D (1) of the Act.

(b) Aggrieved trustee is provided with remedy to maintain an application within ninety days from the date of communication of the order of suspension, removal or dismissal to the Court under subsection (5) of Section 41D.

(c) An appeal is provided under subsection (2) to the High Court against decision of the Court under subsection (5) of Section 41D.

(d) The Charity Commissioner may, by an order, grant temporary injunction or

make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of such property, on such terms as to the duration of injunction, keeping an account, giving securing production of the property or otherwise as he thinks fit.

(e) After hearing the trustee or person concerned and holding such inquiry as he thinks fit, the Charity Commissioner may confirm, discharge or vary or set aside the order of injunction or pass any other appropriate order.

(f) Subsection (4) of Section 41E provides that in case of disobedience or breach of any injunction, any of its terms or any order passed under this section, the Charity Commissioner may apply to the Court, which may, after hearing the Charity Commissioner and the party affected, order the property of such person, guilty of such disobedience or breach to be attached and may also order such person to be detained in jail for a term not exceeding six months.

(g) Order of attaching property of a person or detaining such person in civil prison is made appealable considering such order as a decree to the High Court.

25. Neither Section 41D (6) nor 41E (6) nor Section 72(4) make use of the word Second Appeal. However, appeal to the High Court is against an appellate order passed by the Court. The word " appeal " is not defined under the Act or under the Code, including scope, however, it has been interpreted in various judgments.

26. It is, thus, clear that the proceedings under Section 41E (5) of the Act of 1950 are that of an appeal, so far as challenge relates to the order of injunction or any other order is concerned. An appeal is provided under subsection (6) of Section 41E in respect of order of the Court attaching property of such person or detaining such person in Civil Prison.

27. In the matter of Tirupati Balaji Developers (P) Ltd. and another v. State of Bihar and others, reported in (2004) 5 SCC 1, it is observed thus:

9. In a unified hierarchical judicial system which India has accepted under its Constitution, vertically the Supreme Court is placed over the High Courts. The very fact that the Constitution confers an appellate power on the Supreme Court over the High Courts, certain consequences naturally flow and follow. Appeal implies in its natural and ordinary meaning the removal of a cause from any inferior court or tribunal to a superior one for the purpose of testing the soundness of decision and proceedings of the inferior court or tribunal. The superior forum shall have jurisdiction to reverse, confirm, annul or modify the decree or order of the forum appealed against and in the event of a remand the lower forum shall have to rehear the matter and comply with such directions as may accompany the order of remand. The appellate jurisdiction inherently carries with it a power to issue corrective directions binding on the forum below and failure on the part of the latter to carry out such directions or show disrespect to or to question the propriety of such directions would - it is obvious - be destructive of the hierarchical system in administration of justice. The seekers of

justice and the society would lose faith in both.

10. In *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, this Court pointed out that appeal is the right of entering the superior court and invoking its aid and interposition to redress the error of the court below. There are two important postulates of constituting the appellate jurisdiction: (i) the existence of the relation of superior and inferior court; and (ii) the power in the former to review decisions of the latter. Such jurisdiction is capable of being exercised in a variety of forms. An appeal is a process of civil law origin and removes a cause, entirely subjecting the facts as well as the law, to a review and a retrial.

28. In the matter of *Hari Shankar v. Rao Girdhari Lal Chowdhury*, reported in AIR 1963 SC 698, the Supreme Court has observed in paragraph no.7 of the judgment, as below:

"7 The distinction between an appeal and a revision is a real one. A right of appeal carries with it a right of rehearing on law as well as fact, unless the statute conferring the right of appeal limits the rehearing in some way as, we find, has been done in second appeals arising under the code of Civil Procedure. The power to hear a revision is generally given to a superior court so that it may satisfy itself that a particular case has been decided according to law. Under Section 115 of the Code of Civil Procedure, the High Court's powers are limited to see, whether in a case decided, there has been an assumption of jurisdiction where none existed, or a refusal of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other Acts, the power is not so limited, and the High Court is enabled to call for the record of a case to satisfy itself that the decision therein is according to law and to pass such orders in relation to the case, as it thinks fit. "

29. In the matter of *Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat*, reported in 1969 (2) SCC 74, the Hon"ble Supreme Court, referred to the statement in *Story on Constitution (of Union States)*, Vol.2, Article 1761, as follows:

"In the well known work of *Story on Constitution (of United States)*, Vol. 2, Article 1761, it is stated that the essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. The appellate jurisdiction may be exercised in a variety of forms and, indeed, in any form in which the Legislature may choose to prescribe. According to Article 1762 the most usual modes of exercising appellate jurisdiction, at least those which are most known in the United States, are by a writ of error, or by an appeal, or by some process of removal of a suit from an inferior tribunal. An appeal is a process of civil law origin and removes a cause, entirely subjecting the fact as well as the law, to a review and a retrial. A writ of error is a process of common law origin, and it removes nothing for reexamination but the law. The former mode is usually adopted in cases of equity

and admiralty jurisdiction; the latter, in suits at common law tried by a jury. "

30. In the matter of M/s. Sri Raja Lakshmi Dyeing Works and others v. Rangaswamy Chettiar, reported in AIR 1980 SC 1253 (1), the Hon"ble Supreme Court has observed in paragraph no.2 of the judgment, thus:

2 "Appeal" and "revision" are expressions of common usage in Indian statute and the distinction between "appellate jurisdiction" and "revisional jurisdiction" is wellknown though not well defined. Ordinarily, appellate jurisdiction involves a rehearing, as it were, on law as well as fact and is invoked by an aggrieved person. Such jurisdiction may, however, be limited in some way as, for instance has been done in the case of second appeal under the Code of Civil Procedure, and under some Rent Acts in some States. Ordinarily again, revisional jurisdiction is analogous to a power of superintendence and may sometimes be exercised even without its being invoked by a party. The extent of revisional jurisdiction is defined by the statute conferring such jurisdiction. The conferment of revisional jurisdiction is generally for the purpose of keeping tribunals subordinate to the revising tribunal within the bounds of their authority to make them act according to law, according to the procedure established by law and according to well defined principles of justice. Revisional jurisdiction as ordinarily understood with reference to our statutes is always included in appellate jurisdiction but not vice versa. These are general observations. The question of the extent of appellate or revisional jurisdiction has to be considered in each case with reference to the language employed by the statute.

31. The judgments of the Supreme Court, referred to above, by analogy, lead to irresistible conclusion that the superior forum i.e. District Court, while exercising jurisdiction, has powers to reverse, confirm, annul or modify the order of the forum appealed against and in the event of remand, the lower forum shall have to rehear the matter and comply with such directions, as may accompany the order of remand. The superior forum i.e. District Court has power to issue corrective directions binding on lower forum. The District Court, dealing with an application under Section 72(1), does have right of hearing on law as well as facts. It answers the proposition that "an appeal is a process of civil law origin and removes a cause entirely subjecting the facts as well as the law, to a review and retrial". There can, thus, be a little doubt that the District Court, exercising jurisdiction under Section 72, does exercise powers and deal with the matter as an appellate forum. Thus, an appeal to the High Court against an appellate order on an application presented to the District Court, is an appeal, but has not been labelled as Second Appeal.

32. Applying the ratio of the decision delivered by the Supreme Court in the matter of Ramchandra (supra), it shall have to be construed that the Single Judge of the High Court, while deciding the appeal from the order of the District Court, deals with the matter decided by the District Judge in exercise of appellate powers by a Court subject to superintendence of the High Court. Though the appeal filed under Section 72(4) of the Bombay Public Trusts Act, 1950, is an

appeal against a decision on the application, exercising appellate powers, is not subjected to restrictions and limitations imposed on the Second Appeal, as prescribed under Section 100 of the Code of Civil Procedure and such a conclusion needs to be drawn in observance of the law laid down by the Supreme Court in the matter of *James Joseph v. State of Kerala*, reported in (2010) 9 SCC 642.

33. The question, that arose for consideration in the appeal presented by James Joseph before the Supreme Court, relates to scope of an appeal against appellate order under Section 12A of the Kerala Forest Act, 1961. Under the scheme of the Act, the Forest Settlement Officer is entrusted with the adjudicatory functions to determine whether disputed lands form part of the proposed or reserved forest. An appeal against the order of Forest Settlement Officer is provided to the District Judge and order of the District Judge is appealable under Section 12A of the Act to the High Court. The appeal to the High Court under Section 12A of the Kerala Forest Act is termed as Second Appeal in the judgment.

34. In aforesaid matter of James Joseph (*supra*), after travelling one round up to the Supreme Court, the matter reached High Court in terms of the order of remand passed by the Supreme Court to determine as to whether jurisdiction exercisable under Section 12A of the Act is akin to Section 100 of the Code of Civil Procedure. When the matter was pending before the High Court on remand, the appellant (who is thirtythird party respondent in the appeal before the Supreme Court), filed an application praying that the High Court be pleased to formulate substantial questions of law before proceeding with hearing of the appeal. It was contended that the appeal under Section 12A was a Second Appeal and that the Second Appeal was available only if the case involves any substantial question of law and was governed by the provisions of Section 100 of the Code of Civil Procedure. The High Court dismissed the application holding that Section 12A of the Act did not provide for a "Second Appeal", but only provides "an appeal" against appellate order and, therefore, the question of importing requirements of Section 100 of the Code of Civil Procedure into such an appeal did not arise. The High Court proceeded to hold that the intention of the Legislature in enacting Section 12A of the Act, granting right of appeal against the order passed by the District Court under Section 11 of the Act, was not limited to substantial questions of law and, therefore, question of formulating any substantial questions of law, before hearing the appeal, did not arise. The aforesaid order was challenged before the Supreme Court in an appeal by a Special Leave.

35. Section 12A of the Kerala Forest Act, 1961, reads, thus:

12A. Appeal to the High Court

(1) The Government or any person objecting to any order of the District Court in an appeal under Section 11 may, within a period of ninety days from the date of that order, appeal against such order to the High Court: Provided that High Court

may admit an appeal preferred after the expiration of the period of ninety days aforesaid if it is satisfied that the appellant had sufficient cause for not preferring the appeal within the said period.

(2) An appeal under subsection (1) shall be in the prescribed form and shall be verified in the prescribed manner and shall be accompanied by a fee of one hundred rupees.

(3) On receipt of an appeal under subsection (1), the High Court may, after giving the parties a reasonable opportunity of being heard, either in person or by a representative:

(a) confirm or cancel the order of the District Court appealed against; or

(b) set aside such order and remand the case to the District Court for decision after such further enquiry as may be directed; or

(c) pass such other orders as it may think fit.

(4) Every order passed in appeal under this section shall be final.

36. It is observed in paragraph 10 of the judgment in James Joseph (supra), that Section 12A does not use the words "Second Appeal". It provides that an appeal would lie against an appellate order under Section 11 to the High Court. The Supreme Court, in paragraph no.19, formulated principles with reference to an appeal. Those are:

"(i) An appeal is a proceeding where an higher forum reconsiders the decision of a lower forum, on questions of fact and questions of law, with jurisdiction to confirm, reverse, modify the decision or remand the matter to the lower forum for fresh decision in terms of its directions.

(ii) The appellate jurisdiction can be limited or regulated by the legislature and its extent has to be decided with reference to the language employed by the statute conferring the appellate jurisdiction.

(iii) The width of jurisdiction or the limitations on jurisdiction with reference to an appeal, does not depend on whether the appeal is a first appeal or a second appeal, but depends upon the limitations, if any, placed by the statute conferring the right of appeal.

(iv) If the legislature's intention is to limit the jurisdiction in an appeal, it may indicate such limits in the provision providing for appeal. Alternatively, it may expressly or impliedly incorporate the provisions of Section 100 of the Code, into the provision for appeals.

(v) Generally statutory provisions for appeals against original orders or decrees (that is, first appeals) will not have any limitations and therefore rehearing on both law and fact is contemplated; and statutory provisions for appeals against appellate orders (that is, second appeal) will be restricted to questions of law. But such restriction is not on account of any legal principle that all second appeals

should always be with reference to questions of law, but would depend upon the wording of the statute placing the restrictions upon the scope of second appeal.

(vi) Where the statute does not place any limitations or restrictions in regard to the scope and width of the appeal, it shall be construed that the appeal provides a right of rehearing on law as well as facts. If the legislature enacts a self contained provision for second appeals, without any limitation upon the scope of the second appeal and excludes the possibility of reading the provision of Section 100 of the Code, into such provision, then, it will not be permissible to read the limitations of Section 100 of the Code into the special provision. "

37. The Hon"ble Supreme Court, in James Joseph (supra), has referred to earlier judgment in the matter of Chunilal Vithaldas v. Mohanlal Motilal Patel, reported in AIR 1967 SC 226, wherein it has been held that Second Appeal under Section 28 of the Saurashtra Rent Control Act, 1951, can be entertained by the High Court within the limits prescribed by Section 100 of the Code of Civil Procedure and it is not open to the parties to demand reappraisal of the evidence by the High Court. The Apex Court held that the scheme of Saurashtra Act did not confer any special jurisdiction, but it only intends to provide for a Second Appeal in terms of Section 100 of the Code of Civil Procedure. The Apex Court held that the Saurashtra Act merely declared that a Second Appeal will lie to the High Court against decrees or orders passed by the Courts exercising jurisdiction under Section 27, but thereby the essential character of a Second Appeal under the Code was not altered and the procedure in the trial of the suit, applications and proceedings under the Act, was the procedure prescribed by the Code of Civil Procedure and, therefore, it had to be held that the Legislature has intended to confer a right of Second Appeal subject to restrictions imposed by Section 100 of the Code. Section 28 (1) of the Saurashtra Rent Control Act, 1951, provides:

"28 (1) Notwithstanding anything contained in any law, but subject to the provisions of the Provincial Small Cause Court Act, as adapted and applied to the State of Saurashtra, an appeal shall lie from a decree or order made by a Civil Judge or a Munsif exercising jurisdiction under Section 27 to the District Court and a second appeal to the High Court. "

38. It was held by the Supreme Court that the expression "Second Appeal" in Section 28(1) of the Act means an appeal from appellate decree and it is subjected to the limitations imposed by Section 100 of the Code of Civil Procedure.

39. In the instant matter, as has been pointed out, subsection (4) of Section 72 provides for an appeal to the High Court against the decision of the Court under subsection (2), as if, such decision was a decree from which an appeal ordinarily lies. Order, on an application under Section 72, is a decree for limited purpose of maintaining an appeal to the High Court. Decree is defined in subsection (2) of Section 2 of the Code of Civil Procedure:

"2(2) " decree " means the formal expression of an adjudication which, so far as

regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

Explanation: A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final;

40. The expression provided in the Section itself includes rejection of a plaint and determination of any question within Section 144. But it does not include any adjudication from which an appeal lies as an appeal from order or any order of dismissal for default.

41. In the instant matter, determination by the Court i.e. District Court, as provided under the Act of 1950, is on consideration of application under Section 72 of the Act and has been accorded the status of decree for the purposes of maintaining an appeal to the High Court under subsection (4). The application, within contemplation of Section 72, cannot be equated with the suit for the purposes of holding that the order passed on an application under Section 72 in the stricto sensu is a decree within the meaning of expression of subsection (2) of Section 72. Appeal provided to the High Court under subsection (4) of Section 72, though is an appeal against an order in exercise of appellate powers, cannot be equated with the Second Appeal subject to the restrictions imposed by Section 100 of the Code of Civil Procedure. The principles laid down by the Supreme Court, in paragraph no.19 of the judgment in the matter of James Joseph (supra), squarely apply to the class of appeals provided under subsection (4) of Section 72 of the Act.

Section 72 of the Maharashtra Public Trusts Act, provides thus:

Section 100 of the Code of Civil Procedure provides thus :

72. Application from Charity Commissioner's decision under sections 40, 41, 41-C and 43(2)(a) and © , 50-A, 70 or 70-A, etc.-

100. Second appeal:-

(1)

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2).....

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3).....

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) An appeal shall lie to the High Court against the decision of the Court under sub-section (2) as if such decision was a decree from which an appeal ordinarily lies. (emphasis supplied)

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Sub-section (4) of section 72 of the Act of 1950 is intended to be a self-contained Code. Insofar as appeals under the Act to the High Court, deliberate deviation from the provisions of section 100 of the Code.

Where the Act wants to adopt provisions of the Civil Procedure Code, it expressly provides so.

For example, section 76 refers to the applicability of the Code to the proceedings before the Court (i.e. District Court) under the Act of 1950, whereas, so far as proceedings for holding inquiries under the Act of 1950 is concerned, vesting of power under the Code of Civil Procedure in trying the suit relates to (a) proof of facts by affidavit; (b) summoning and enforcing presence of any person and examining him on oath; (c) ordering of discovery and inspection and compelling production of documents; (d) issuing of commissions: (section 73)

Sub-section (1), (2) and (3) of section 100 CPC would specifically provide that a Second Appeal would lie where substantial question of law are involved.

But when it comes to appeal to High Court under sub-section 72(4), the Act deliberately makes a departure and does not provide for any limitations on the powers, as provided under section 100 of the Code.

While sub-section (3) of section 100 would require that the memorandum of appeal shall precisely state the substantial questions of law involved in the appeal.

42. In view of the distinctive features specified above, it is clear that the

Legislature did not intend to limit appellate jurisdiction provided under subsection (4) of Section 72. Had there been any such intention, it would have expressly or impliedly incorporated the provisions of Section 100 of the Code of Civil Procedure into the relevant provision of the Act.

43. Focus on the provisions of Section 72 of the BPT Act would reveal another facet which may have to be looked at. While appeals are provided before the Charity Commissioner against certain orders having regard to Sections 70 and 70A, the decisions in such appeals of Charity Commissioner have been subjected to application and not to further appeal under its wisdom by the Legislature. The Legislature appears to have specifically omitted to provide for appeals to the Court keeping in view treatment to be given to the decision of the Court which has been accorded by Legislature the status of a decree from which appeal ordinarily lies. The Legislature has also empowered the Court to exercise powers of court of appeal. The decisions/orders passed in exercise of such powers are regarded to be decree, from which appeal ordinarily lies. Appeal ordinarily lies on facts and on law, as can be gathered from decisions of Supreme Court referred to hereinbefore.

44. Had the legislative intent, in this respect, been about giving of treatment to the decisions of the court under Section 72 of decrees to be subjected to a remedy with restrictions and limitations. it would not have been necessary to refer to in subsection (4) of Section 72, that the decisions would be decrees, from which appeals would ordinarily lie. Appeals lie on facts and on law generally unless restrictions and limitations are placed by statutory provision.

45. The legislative intent is discernible that decisions under Section 72(2) of the BPT Act were not intended to be decrees subjected to appeals with restrictions and limitations. In its wisdom, the Legislature appears to have thought it appropriate that in the proceedings, pursuant to Section 72, the Court may exercise powers of court of appeal, however, the decisions thereunder were not to be treated as appellate decrees amenable to challenge in appeals with restrictions and limitations. The empowerment of the court with the powers of appellate Court and treatment to the proceedings and the decisions thereon appear to have been segregated in the process and as such, it does not appear to be casus omissus.

46. The principle laid down by the Supreme Court in the matter of James Joseph (supra), where the statute does not place any limitations or restrictions in regard to the scope and width of the appeal, it shall be construed that the appeal provides a right of rehearing on law as well as facts, applies on all fours to the class of appeals provided under subsection (4) of Section 72 of the Act of 1950.

47. The expression "First Appeal" or "Second Appeal" does not make any difference since there are no limitations imposed on the powers exercisable by the High Court by the Legislature. The limitations provided under Section 100 of the Code of Civil Procedure cannot be read and pressed into service while dealing

with an appeal to the High Court provided under Section 72(4) of the Act of 1950.

48. There are certain enactments wherein appeal provision incorporates provisions of Section 100 of the Code of Civil Procedure by reference. Section 18(1) of the Telecom Regulatory Authority of India Act, 1997, is an example:

18 Appeal to Supreme Court:

(1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in Section 100 of that Code.

49. On the other hand, there are certain statutes containing provisions in regard to the appeals to High Court which specify limitations on the extent and scope of the appellate jurisdiction providing therein, that the appeal shall lie only if it involves substantial question of law or questions of law without reference to Section 100 of the Code of Civil Procedure.

50. By way of illustration, we may refer to Section 260A of the Income Tax Act, 1961:

260A Appeal to High Court:

(1) An appeal shall lie to the High Court from every order passed in appeal by the Appellate Tribunal, if the High Court is satisfied that the case involves a substantial question of law.

(2) The Chief Commissioner or the Commissioner or an assessee aggrieved by any order passed by the Appellate Tribunal may file an appeal to the High Court and such appeal under this subsection shall be

(a) filed within one hundred and twenty days from the date on which the order appealed against is received by the assessee or the Chief Commissioner or Commissioner;

(b) omitted

(c) in the form of a memorandum of appeal precisely stating therein the substantial question of law involved.

(3) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(4) The appeal shall be heard only on the question so formulated, and the respondents shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this subsection shall be deemed to take away or abridge the power of the court to hear, for reasons to be recorded, the appeal on any other substantial question of law not formulated by it, if it is satisfied that the

case involves such question.

(5) The High Court shall decide the question of law so formulated and deliver such judgment thereon containing the grounds on which such decision is founded and may award such cost as it deems fit.

(6) The High Court may determine any issue which

(a) has not been determined by the Appellate Tribunal; or

(b) has been wrongly determined by the Appellate Tribunal, by reason of a decision on such question of law as is referred to in subsection (1).

(7) Save as otherwise provided in this Act, the provisions of the Code of Civil Procedure, 1908 (5 of 1908), relating to appeals to the High Court shall, as far as may be, apply in the case of appeals under this section."

51. Similar is the provision viz. Section 15Z of the Securities and Exchange Board of India Act, 1992, which provides thus:

15Z Appeal to Supreme Court: Any person aggrieved by any decision or order of the Securities Appellate Tribunal may file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Securities Appellate Tribunal to him on any question of law arising out of such order.

52. The Employee's Compensation Act, 1923, provides for an appeal to the High Court against the order of the Commissioner, however, the First Appeal is required to be heard only on substantial questions of law involved in the appeal. Section 30 of the Employee's Compensation Act, 1923, provides thus:

30 Appeals (1) An appeal shall lie to the High Court from the following orders of a Commissioner, namely

(a) an order awarding as compensation a lump sum whether by way of redemption of a halfmonthly payment or otherwise or disallowing a claim in full or in part for a lump sum;

[(aa) an order awarding interest or penalty under section 4A;]

(b) an order refusing to allow redemption of a halfmonthly payment;

(c) an order providing for the distribution of compensation among the dependents of a deceased [employee], or disallowing any claim of a person alleging himself to be such dependent;

(d) an order allowing or disallowing any claim for the amount of an indemnity under the provisions of subsection (2) of section 12; or

(e) an order refusing to register a memorandum of agreement or registering the same or providing for the registration of the same subject to conditions:

Provided that no appeal shall lie against any order unless a substantial question of law is involved in the appeal, and in the case of an order other than an order such as is referred to in clause (b), unless the amount in dispute in the appeal is not less than three hundred rupees;

Provided further that no appeal shall lie in any case in which the parties have agreed to abide by the decision of the Commissioner, or in which the order of the Commissioner gives effect to an agreement come to by the parties;

[Provided further that no appeal by an employer under clause (a) shall lie unless the memorandum of appeal is accompanied by a certificate by the Commissioner to the effect that the appellant has deposited with him the amount payable under the order appealed against.]

(2) The period of limitation for an appeal under this section shall be sixty days.

(3) The provisions of section 5 of [the Limitation Act, 1963 (36 of 1963)], shall be applicable to appeals under this section.

53. So far as provision of Section 72(4) of the Bombay Public Trusts Act is concerned, there is no such specification that the appeal from appellate order of the District Court, presented to the High Court, shall be heard only if it involves any substantial question of law. Neither Section 72(4) makes reference to Section 100 of the Code of Civil Procedure, nor specifically puts any restriction or limitation on the powers of the High Court in entertaining the appeal. Since the provision itself does not limit scope of the appeal nor puts any limitations on the Court dealing with the appeal, it cannot be construed that appeal to the High Court, as provided under Section 72(4) is subject to any limitations as prescribed under Section 100 of the Code of Civil Procedure.

54. In view of the reasons recorded above, our answer to the questions formulated for consideration, in this Reference, is:

(1) Appeal provided under subsection 72(4) of the Maharashtra Public Trusts Act, 1950, is not subjected to the restrictions and limitations imposed under the provisions of Section 100 of the Code of Civil Procedure and the scope of appeal extends to reconsideration of decision of the lower forum on questions of fact and questions of law with a jurisdiction to reverse, modify the decision or remand the matter to the lower forum for fresh decision in terms of its directions. Appeal to the High Court under subsection (4) of Section 72 of the Act of 1950 is an appeal against the decree under subsection (2) of Section 72 [The decision of Court under section 72(2) is a decree for limited purposes of maintaining an appeal to the High Court.]

(2) Consequently, there is no obligation for the appellant to state substantial questions of law involved in the memorandum of appeal and High Court is also not bound to formulate substantial questions of law while admitting the appeal or before posting the appeal for hearing.