
(1995) 07 BOM CK 0003
In the Bombay High Court
Case No : L.P.A. No. 35 of 1995

Robert Punaji Salvi

APPELLANT

Vs

Bombay Diocesan Trust Association Pvt. Ltd. and others

RESPONDENT

Date of Decision : 12-07-1995

Acts Referred:

Bombay City Civil Court Act, 1948 — Section 15
Civil Procedure Code, 1908 (CPC) — Section 100, 100A, 104, 104(1), 104(2)
Constitution of India, 1950 — Article 141
Government of India Act, 1935 — Section 108

Citation : (1995) MhLj 679

Hon'ble Judges : P.S. Patankar, J;A.V Savant, J

Bench : Division Bench

Advocate : Shekhar Naphade, for the Appellant; V.A. Thorat with Smt. V.V. Thorat, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Savant, J.—Heard both the learned Counsel, Shri Naphade for the appellant (original defendant) and Shri Thorat for the respondents (original plaintiffs).

2. This appeal is against the Order dated 23rd March, 1995 passed by the learned Single Judge in Civil Application No. 349 of 1995 in a pending Appeal from Order No. 93 of 1995. Appeal from Order No. 93 of 1995 was admitted on the 7th February 1995 and in Civil Application No. 349 of 1995 interim relief in terms of prayers (a) and (b) was granted on the same day and the same was made absolute by disposing of the Civil Application on 23rd March 1995. Thus, the Appeal is against the order granting interim relief in a pending appeal from Order, which appeal is admittedly u/s 104 read with Order XLIII, Rule 1(r) of the Code of Civil Procedure. A few facts necessary for the disposal of this appeal may be stated as under :-

3. Respondent No. 1 Bombay Diocesan Trust Association Pvt. Ltd. is a Company incorporated under the Companies Act, 1956 and is also a Trust registered under

the Bombay Public Trusts Act, 1950. There are 15 elected directors/trustees on the Board. The appellant Robert Punaji Salvi was the former Secretary of the first respondent plaintiff Company till 28th September, 1994. The 65th Annual General Meeting of the first respondent Company was scheduled to be held at about 12.00 noon on 28th September, 1994. By that time, 8 directors were present. The quorum required for the meeting is 10. Two directors, respondents Nos. 2 and 3, informed the other directors that two more directors were on their way to the meeting and were delayed due to the hold-ups in traffic. However, the request of the majority of directors for delaying the commencement of the meeting was turned down and the appellant arbitrarily typed out a Circular adjourning the meeting and walked out of the room, along with the another director Shri S. T. Amolik.

4. The other two directors who were delayed viz. Mr. Bhalerao and Ms. Inayat reached the venue of the meeting by 10 past 12 noon. The directors, who were present addressed a letter calling upon the appellant to attend the meeting at 2 P.M. on the same day. The letter was received by the appellant by 1 P.M., but he refused to attend the meeting. The rest of the directors held the meeting at 2 P.M. on September 28, 1994 and the second respondent, Reverend P. B. Amolik was elected as the Secretary in place of the appellant and the 3rd respondent Charles Kemkar was retained as the Honorary Treasurer. All the 15 directors continued to be the directors as before, including the appellant.

5. On 26th October 1994 the appellant purported to hold a separate meeting without any authority and with only three directors present at the said meeting, 5 directors were purported to be removed and 2 were sought to be appointed afresh without complying with the provisions contained in the Companies Act. The appellant issued a notice on the 1st November 1994 purporting to convene a meeting of the Board of Directors at 12 noon on the 16th November 1994. This led to the filling of the suit, being S. C. Suit No. 6865 of 1994 by the respondents-plaintiffs in the City Civil Court, Bombay, on the 14th November 1994. The reliefs prayed for in the said suit are to the effect that the 65th Annual General Meeting held on the 28th September 1994 was legal and valid; the meeting purported to have been held on the 26th October 1994 by the appellant was illegal and improper, and that the removal of 5 directors viz. Reverend P. B. Amolik, Mr. Woodman, Mr. Balid, Ms. Inayat and Mr. Chacko was illegal, bad in law, null and void and not binding upon the plaintiffs. Further relief that is prayed for is that the appointment of the two new directors/trustees Mr. Asari and Mr. Rubadi was illegal, null and void. The plaintiffs therefore prayed for an injunction restraining the defendant (present appellant) from in any manner, interfering with the right of the plaintiffs Nos. 2 and 3 to function as the office-bearers of the first plaintiff Company. Pending the hearing and disposal of the suit, an injunction was prayed for restraining the defendant, his servants, agents from conducting any business of the first plaintiff Company, including calling of any meeting etc.

6. On the 16th November 1994, Notice of Motion No. 5545 of 1994 for interim relief in the said suit was adjourned to 28th November 1994. Since 28th November happened to be Maharashtra Bandh, the Motion was adjourned to 19th January 1995. In view of the urgency made out by the plaintiffs, the hearing was preponed to 12th December 1994. Appeal from Order No. 1461 of 1994 was filed by the plaintiffs since they apprehended some mischief by the defendant. But this Court, on 5th December 1994, declined to interfere in the matter pending the Motion and directed that the Motion should be heard peremptorily and should be disposed of early.

7. Notice of Motion No. 5545 of 1994 was heard on the 19th December 1994 and interim relief was refused. The plaintiffs have filed Appeal from Order No. 93 of 1995, which, as stated earlier, has been admitted on the 7th February 1995. The said A. O. is pending. C. A. No. 349 of 1995 was taken out for reliefs in terms of prayers (a) and (b). Prayers (a) and (b) read as under:

"a) That pending the hearing and final disposal of the above appeal, the Respondent through his sons and agents, servants and representatives be restrained by an order and injunction from interfering in any manner with the Applicants Nos. 2 and 3 functioning as office bearers of the First Applicant Company.

b) That pending the hearing and final disposal of the Appeal, the Respondent through his sons, agents, servants and representatives, be restrained by an order and injunction from conducting any business whatsoever of the first Applicant Company as an office bearer including convening any meeting."

These reliefs were granted on 7th February 1995 in C.A. No. 349 of 1995. The Appellant-original defendant filed L.P.A. No. 15 of 1995 against the Order dated 7th February 1995 granting interim relief in C.A. No. 349 of 1995. The appeal Court refused to entertain the appeal, but granted liberty to the appellant to move the learned Single Judge for clarification as to whether the Order dt. 7th February 1995 in the Civil Application was an interim or an ad interim order.

8. Accordingly, C.A. No. 349 of 1995 was heard by the learned Single Judge on 23rd March 1995 and after hearing Counsel for the parties, the learned Single Judge clarified that the Order dt. 7th February 1995 was an interim order and that the Civil Application stood disposed of in terms of the reliefs being granted as per prayers (a) and (b) of the C.A. Thus, the Civil Application stood disposed of on the 23rd March 1995 and relief has been granted in favour of the respondents in their pending Appeal from Order No. 93 of 1995.

9. The respondents then contended that despite the injunction granted against the present appellant in C. A. No. 349 of 1995, he had committed flagrant violation of the Order dated 7th February 1995 which was confirmed on 23rd March 1995. Hence, Contempt Petition No. 113 of 1995 was moved by the respondents against the appellant which has been admitted in this Court on 30th March 1995. A fresh injunction has been granted against the appellant in the said

Contempt Petition.

10. On 27th April 1995, the present appellant-original defendant Robert Salvi filed the present L.P.A. No. 35 of 1995 against the Order dated 23rd March 1995 in C. A. No. 349 of 1995 in pending A.O. No. 93 of 1995. Thus, this Letters Patent Appeal is only against the order granting interim relief pending the said Appeal from Order.

11. At the hearing of this L.P.A., Counsel for the respondents took a preliminary objection regarding the maintainability of the Appeal. A reference was made to certain decisions of the Hon"ble Supreme Court and of this Court. However, after considering the said objection, the learned Judges took the view that the appeal was maintainable, though they felt it proper to leave the question of maintainability of the appeal open to be agitated as a preliminary objection at the hearing of the appeal. Saying so, the appeal was admitted on 27th April 1995 and in C.A. No. 1640 of 1995, though similar objection was raised by the respondents, the Court granted interim relief in terms of prayer (a) of the C.A. Prayer (a) of the Civil Application is for stay of the operation of the interim order that was obtained by the respondents in their C.A. No. 349 of 1995 in the pending Appeal from Order No. 93 of 1995.

12. Against the Order dt. 27th April 1995 admitting the L.P.A. and granting interim relief as above, the respondents moved the Supreme Court in SLP (Civil) No. 11092 of 1993. On the 10th May 1995 the Supreme Court took the view that the question of maintainability of the appeal was kept open as a preliminary objection and hence, it was not necessary to entertain the Special Leave Petition, which was accordingly dismissed.

13. Thereafter, on the 22nd May 1995 the respondents filed Civil Application No. 2602 of 1995 in this Court for a fresh injunction against the appellant since he had called a meeting on the 25th May 1995. The learned Vacation Judge of this Court granted interim relief in terms of prayer (a) of this C.A. No. 2602 of 1995 on 22nd May 1995. When we heard the Civil Application on 9th June 1995, we continued the operation of the injunction till the disposal of the appeal. By consent, the appeal itself was taken up for final hearing since it was thought necessary to decide the preliminary objection regarding maintainability, rather than hearing the question of interim relief in both the Civil Applications viz. C.A. No. 1640 of 1995 filed by the appellant-original defendant and C.A. No. 2602 of 1995 filed by the respondents-original plaintiffs. Accordingly, the L.P.A. has been heard yesterday and today.

14. Shri Thorat, the learned Counsel for the respondents-plain tiffs has raised a preliminary objection regarding the maintainability of the appeal. His objection is that in view of the provisions of section 104(2) of the Code of Civil Procedure, no appeal can lie from any order passed in an appeal u/s 104 read with Order XLIII, Rule 1(r) of the Code of Civil Procedure. Counsel contended that the Order dt. 7th February 1995 that was passed in C.A. No. 349 of 1995 and which was

confirmed on 23rd March 1995 is undoubtedly an order in the pending A.O. No. 93 of 1995, which appeal is u/s 104 read with Order XLIII, Rule 1(r), Civil Procedure Code. Since the plaintiffs failed to get any interim order in their Motion in the pending suit, they have filed A.O. No. 93 of 1995 in this Court. The said appeal is clearly under the provisions of section 104 read with Order XLIII, Rule 1(r), Civil Procedure Code. Section 104 of the CPC reads as under:-

"104. Orders from which appeal lies. - (1) An appeal shall lie from the following orders, and save and otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:

(ff) an order u/s 35A;

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

(g) an order u/s 95;

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

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

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

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

Order XLIII, Rule 1(r) reads as under :-

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

(a).....

(b).....

(r) an order under rule 1, rule 2 (rule 2A), rule 4 or rule 10 of Order XXXIX;"

15. Thus, the preliminary objection is to the effect that against the Order dt. 19th December 1994 passed by the City Civil Court dismissing Notice of Motion No. 5545 of 1994, the plaintiffs filed A. O. No. 93 of 1995 in this Court u/s 104 read with Order XLIII, Rule 1(r), Civil Procedure Code. That appeal having been admitted, the learned Single Judge had granted interim relief in C.A. No. 349 of 1995 on 7th February 1995 and upon hearing Counsel for the parties, interim relief has been confirmed in terms of prayers (a) and (b) of the said C.A. on the 23rd March 1995. Such an order passed in the C.A. pending the Appeal from Order is not capable of being appealed against in view of the specific bar

contained in section 104(2), which reads as above. In support of his contention, Shri Thorat has invited our attention to the decision of the Supreme Court in the case of Shah Babulal Khimji Vs. Jayaben D. Kania and Another, . Our attention has been invited to the specific observations in paras 39 to 43, which read as under :-

"39. With due deference to the Hon'ble Judges we are of the opinion that the decision of the Allahabad High Court on this point is based on a serious misconception of the legal position. It is true that section 104 was introduced by the Code of 1908 and the aforesaid section, as we have already indicated, clearly saved the Letters Patent jurisdiction of the High Court. From this, however, it does not necessarily follow that the restriction that there is no further appeal from the order of a Trial Judge to a larger Bench would be maintainable or permissible. In the first place, once section 104 applies and there is nothing in the Letters Patent to restrict the application of section 104 to the effect that even if one appeal lies to the Single Judge, no further appeal will lie to the Division Bench. Secondly, a perusal of clause 15 of the Letters Patent of the Presidency High Courts and identical clauses in other High Courts, discloses that there is nothing to show that the Letters Patent ever contemplated that even after one appeal lay from the subordinate court to the single judge, a second appeal would again lie to a Division Bench of the Court. All that the Letters Patent provides for is that where the trial Judge passes an order an appeal against the judgment of the said Trial Judge would lie to a Division Bench. Furthermore, there is an express provision in the Letters Patent where only in one case a further or a second appeal could lie to a Division Bench from an appellate order of the Trial Judge and that is in cases of appeals decided by a single Judge u/s 100 of the Code of Civil Procedure. Such a further appeal would lie to a Division Bench only with the leave of the court and not otherwise. The relevant portion of clause 15 of the Letters Patent may be extracted thus :

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, Bombay, Fort William in Bengal from the judgment... of one judge of the said High Court or one Judge of any Division Court, pursuant to section 108 of the Government of India Act, and that notwithstanding anything hereinbefore, provided, an appeal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, made (on or after the first day of February 1929) in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court where the Judge who passed the judgment declares that the case is a fit one for appeal."

"40. A perusal of the Letters Patent would clearly reveal two essential incidents - (1) that an appeal shall lie against any order passed by the trial Judge to a larger Bench of the same High Court, and (2) that where the trial Judge decides an appeal against a judgment or decree passed by the district courts in the

mofussil, a further appeal shall lie only where the judge concerned declares it to be a fit one for appeal to a Division Bench. Thus, the special law, viz. the Letters Patent, contemplates only these two kinds of appeals and no other. There is, therefore, no warrant for accepting the argument of the respondent that if Order 43, Rule 1 applies, then a further appeal would also lie against the appellate order of the trial Judge to a Division Bench. As this is neither contemplated nor borne out by the provisions of the Letters Patent extracted above, the contention of the respondent on this score must be overruled.

41. A further second appeal lying to a Division Bench from an appellate order of the trial Judge passed under Order 43, Rule 1 is wholly foreign to the scope and spirit of the Letters Patent. Unfortunately, however, the Allahabad High Court in *L. Ram Sarup Vs. Mt. Kaniz Ummehani*, refused to follow a Division Bench decision in *Piari Lal vs. Madan Lal*, ILR 39 All 191 = AIR 1917 All. 325(2) and also tried to explain away the Full Bench decision in *Ram Samp's case (Piari Lal's case)* (supra) where it was clearly pointed out that in such cases no further appeal would lie to a Division Bench under the Letters Patent. The distinction drawn by the Allahabad High Court regarding the application of section 104 is a distinction without any difference. Sir John Edge, C.J., in *Muhammad Naim-Ullah Khan's case*, (1892) ILR 14 All 226 (FB) (supra), dealing with this aspect of the matter observed thus -

"It appears to me that the CPC (Act No. XXIV of 1882), as did Act No. X of 1877, contemplates a High Court in two aspects. It contemplates a High Court doing the ordinary work of a Court of original and appellate jurisdiction, having the necessary powers of review and revision in certain cases, and certain other powers such as are generally found vested in the Courts of the importance of High Courts.... Whatever those powers may be, it is quite clear to my mind that the powers conferred on a High Court under Chapter XLV of the CPC are special powers and entirely distinct from the ordinary powers required by the High Court in the carrying on of its ordinary judicial business."

and Mahmood, J. observed thus :

"To hold then that where this statute of ours, namely, our present Code of Civil Procedure, declares a decree or order non-appealable, such decree or order can be made the subject of consideration by the whole of this Court under the Letters Patent, is to hold that wherever no appeal lies to this Court the ceremony of presenting it to this Court to single Judge of this Court who would undoubtedly reject the appeal, makes it the subject of consideration by a Bench of the Court."

42. The other Judges agreed with the view taken by the Chief Justice and Mahmood, J. in *Piari Lal's case*, AIR 1917 All. 325(2) (supra), which was decided after section 104 was introduced in the Code of 1908, the following observations were made :-

"A preliminary objection has been taken to the hearing of the appeal based on the Full Bench decision in the case of *Muhammad Naimullah Khan vs. Ihsanullah*

Khan, 1892 ILR 14 All. 226. Section 104 of the CPC provides for the cases in which an appeal shall lie against an "order". Clause (ii) provides that "No appeal shall lie from any order passed in appeal under this section". The contention of the respondent in the preliminary objection is that no second appeal lies and reliance is placed upon the authority quoted to show that even a Letters Patent Appeal is not permissible. We are of course bound by the Full Bench ruling of this Court. It is contended, however, that the words in section 588 of the Code of Civil Procedure, which was in force when the decision in the Full Bench case was given, differed from the words of the present Code. The only difference is that in the old Code the words were "The order passed in appeals under this section shall be final", whereas in the present Code the words are "No appeal shall lie". We cannot see how the change in the words can in any way help the appellant. Possibly the reason for the change is that under the words in old Code it might have been argued that even a "revision" or a "review of judgment" would not lie against an order passed by an appellate court. We think the preliminary objection must prevail and we accordingly dismiss the appeal with costs".

43. Thus, in these two cases it was clearly held that where a Trial Judge had passed an order in an appeal against an order passed by the district judge under Order 43, Rule 1, a further appeal under the Letters Patent was not maintainable. This view is fully supported by the express language in which clause 15 of the Letters Patent has been couched, as referred to above. Thus the later decision of the Allahabad High Court in L. Ram Sarup Vs. Mt. Kaniz Ummehani, was clearly wrong in holding that an appeal under the Letters Patent would lie even against an appellate order of the Trial Judge passed under Order 43, Rule 1, even though it was prohibited by section 104(2) of the Code."

16. It would be clear from the above quoted observations that where the learned Single Judge has passed an Order in an appeal against the Order, under Order XLIII, rule 1 of the Code of Civil Procedure, further appeal even under clause 15 of the Letters Patent is not maintainable. On a review of the entire Case Law on the subject, the Supreme Court has clearly laid down the said proposition in Para 43 above.

17. In addition to the Supreme Court decision in Shah Babulal Khimji's case, Shri Thorat also invited our attention to the four decisions of this Court which are directly on the point. They are as under :-

(i) Obedur Rehman and another vs. Ahmedali Bharucha and others, reported in 1982 Mh.L.J 283;

Paras 7 and 8 of the said decision read as under:-

"7. As far as Clause 15 of the Letters Patent is concerned, in our opinion, the provisions of section 104 are attracted and it is applicable to the Letters Patent Appeals also. Because the Letters Patent Appeals cannot be said to be an exception and cannot override the provisions of the Code of Civil Procedure.

8. Under clause 37 of the Letters Patent it is provided that the Letters Patent will be guided by Code of Civil Procedure, while making the rules by the High Court and can be altered by the competent Legislature. In this connection, it may be noted that right of appeal is not inherent right of the aggrieved party. It is the creature of Statute and if it can be taken away by Statute no party can claim that this remedy must be available to the party. Right of appeal is not attached to the litigation unless it is provided by law. There must be a clear authority for filing appeal and if the authority is against filing the appeal that legal provision is also to be respected and obeyed. Section 104(2) of the CPC clearly bars an appeal. The plain reading of section 104(2) of the Code that no appeal shall lie from any order passed in appeal under this section is significant. Section is prohibitive and the provisions of prohibitive section under the general principles of Interpretation of Statute must be construed strictly. In this view of the matter, in our opinion, the appeal filed u/s 104 of the Code before the Single Judge of the High Court being an appeal against the order and the order passed by the Single Judge in that appeal being an order passed in appeal governed by section 104 of the CPC is certainly prohibited under the provisions of section 104(2) of the Code".

(ii) *Charity Commissioner, Maharashtra State, Bombay vs. Rajendrasingh Anandrao Jadhav and another*, reported in 1984 Mh.L.J. 806. It was held in this case that under the Letters Patent, appeal lies in certain cases against the decision of the Single Judge. Section 100-A of the CPC prohibits the filing of L.P.A. which would be a third appeal and the same purpose is sought to be achieved under sub-section (2) of section 104 which provides that in no case an appeal shall lie from any order passed in appeal u/s 104 of the Civil Procedure Code. It was, therefore, held, relying upon the decision of the Supreme Court in *Shah Babulal Khimji's* case that no further appeal would lie against an order passed u/s 104, Civil Procedure Code.

(iii) *Krishna Yeshwant Shirodkar vs. Subhash Krishna Paid and others*, reported in 1988 Mh.L.J. 327. It has been held that section 104(2) of the CPC restricts the scope of number of appeals permissible u/s 15 of the Letters Patent. Where an interim order is passed by a Single Judge in an appeal preferred u/s 104 of the Civil Procedure Code, the bar contained in sub-section (2) of section 104 will immediately come into operation. The appellate jurisdiction which is exercised in such cases by the learned Single Judge is the one u/s 104 of the Code. It is, thus, an order passed in appeal, though the application is for interim relief. The order passed being the one in appeal u/s 104, Civil Procedure Code, the bar contained in sub-section (2) of section 104 will necessarily operate. Consequently, the Letters Patent Appeal against such an interim order will not be maintainable.

(iv) *Pandey Mishra and Company vs. Anil Upendra Pitale and others*, reported in 1988 Mh.L.J. 923, where relying upon the Supreme Court decision in *Shah Babulal Khimji's* case and the other decisions referred to above, the same view was reiterated that an appeal under clause 15 of the Letters Patent against the

Judgment of a Single Judge in an appeal u/s 104(1) read with Order XLIII, Rule 1 of the CPC was clearly barred in view of the provisions of section 104(2) of the Civil Procedure Code.

18. In reply to the preliminary objection raised by Shri Thorat, Shri Naphade, learned Counsel for the appellant, contended that despite the Judgment of the Supreme Court in Shah Babulal Khimji's case and the four decisions of this Court referred to above in Para 17, the Letters Patent Appeal was maintainable in view of the wording of clause 15 of the Letters Patent. In the first place, Counsel sought to place reliance on section 4 of the CPC which reads as under:-

"4. Savings. - (1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

(2) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or landlord may have under any law for the time being in force for the recovery of rent of agricultural land from the produce of such land."

Relying upon the above provision, it was contended that though there is a specific provision contained in section 100-A of the CPC Specifically overriding the Letters Patent, there was no such specific provision contained in sub-section (2) of section 104, Civil Procedure Code. It was, therefore, contended that clause 15 of the Letters Patent of the High Court of Judicature at Bombay being a special law, would not be affected by anything contained in the Code of Civil Procedure.

19. Having perused the entire Judgment of the Supreme Court in Shah Babulal Khimji's case, as also the four decisions of this Court referred to above, it is not possible for us to accept the above contention of Shri Naphade. Indeed, Counsel went to the extent of saying that a further appeal was not at all barred in view of the provisions of section 104(2), as slated in para 43 of the Supreme Court decision in Shah Babulal Khimji's case (supra). He contended that the decision in Shah Babulal Khimji's case neither lays down any ratio nor even an obiter. Counsel contended that there are merely some stray observations in the said decision which must be ignored by this Court. Reliance was sought to be placed on a decision of this Court in the case of Mohandas Issardas and Others Vs. A.N. Sattanathan and Others, as to what is meant by a ratio, an obiter and what is a mere observation which was neither a ratio nor an obiter. We are not at all impressed by this submission. Having carefully perused the decision in Shah Babulal Khimji's case, we have no doubt in our mind that the question was specifically decided as a result of the conflicting views expressed by different High Courts and the question was clearly answered in the manner which we have

indicated above by reproducing the relevant discussion in paras 39 to 43 of the Supreme Court judgment. We need not reproduce the said discussion over again and burden this Judgment.

20. Shri Naphade then contended that the decision in Shah Babulal Khimji's case does not consider the earlier decision of the Supreme Court in Shri Radhey Shyam Vs. Shyam Behari Singh, , which takes a contrary view. The submission is clearly misconceived. It is clear from the discussion in para 56 and para 105 in Shah Babulal Khimji's case that the larger Bench of three learned Judges in Shah Babulal Khimji's case considered the earlier decision of two learned Judges in Radhye Shyam's case. This is clear from the discussion in para 56 at pages 1801 and 1802 and the discussion in para 105 at page 1813 in Shah Babulal Khimji's case.

21. Shri Naphade then contended that the Supreme Court did not consider the effect of the provisions of section 15 of the City Civil Court Act while laying down the proposition in Shah Babulal Khimji's case and, therefore, the decision in Shah Babulal Khimji's case is no authority for the proposition that further appeal was barred in view of the provisions of section 104(2) of the Civil Procedure Code. It requires courage to advance such an argument. In the first place, the binding effect of a decision of the Supreme Court does not depend upon whether a particular argument was considered therein or not, provided that the point with reference to which the argument was subsequently advanced was actually decided. This is clear from the observations of the Supreme Court in para 22 of the decision in Smt. Somavanti and Others Vs. The State of Punjab and Others, , at pages 160 and 161. Similar is the view of the Supreme Court that under Article 141 of the Constitution, the Supreme Court decision is binding on the High Court and it cannot be ignored on the ground that some provisions were not brought to the notice of the Supreme Court. This is clear from the observations in para 4 at page 1003 in Ballabhadas Mathurdas Lakhani and Others Vs. Municipal Committee, Malkapur, . The Counsel may, but we cannot be oblivious to the provision of Article 141 of the Constitution, which reads as under :-

"141. Law declared by Supreme Court to be binding on all courts. - The law declared by the Supreme Court shall be binding on all courts within the territory of India."

22. That apart, there is nothing in section 15 of the Bombay City Civil Court Act, 1948, which can mitigate the rigour of sub-section (2) of section 104 of the CPC as interpreted by the Supreme Court and by this Court. Section 15 of the Bombay City Civil Court Act, 1948 reads as under :-

"15. (1) An appeal shall lie to the High Court from -

(a) every decree passed by the Judge of the City Court, and;

(b) such orders passed by the said Judge as are specified in and to the extent provided for by section 104 of the Code of Civil Procedure, 1908.

(2) The period of limitation for an appeal from a decree or order of the City Court shall be thirty days from the day of such decree or order :

(Provided that the High Court may entertain the appeal after the expiry of the said period of thirty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period)."

In fact, clause (b) of sub-section (1) of section 15 quoted above itself provides that an appeal shall lie to the High Court from such orders passed by the said Judge as are specified in and to the extent provided for by section 104, Civil Procedure Code. This would automatically bring in sub-section (2) of section 104 into play. Once sub-section (2) of section 104 comes into play, there is no doubt in our mind that a further appeal against an order made u/s 104 read with Order XLIII, Rule 1(r) cannot lie. There is, thus, no merit in the contention of Shri Naphade that we must ignore the Supreme Court decision in Shah Babulal Khimji's case, as also the four decisions of this Court, referred to in para 17 above, on the assumption that section 15 of the Bombay City Civil Court Act, 1948 was overlooked.

23. Lastly, it was contended by Shri Naphade that the decision in Shah Babulal Khimji's case suffers from another infirmity inasmuch as sections 106 and 108 of the CPC and Order XLII, Rule 3 were ignored by the Supreme Court while arriving at the conclusions slated above. We are amazed by this submission. Section 106 specifically says that where an appeal from any order is allowed, it shall lie to the Court to which an appeal would lie from a decree in a suit from which an order is made or where such order is made by Court (not being a High Court) in exercise of appellate jurisdiction, then to the High Court. Thus, we are of the view that the wording of section 106 rather than supporting Shri Naphade's argument goes against his contention that a further appeal would lie to the High Court even against an order made by the High Court in the exercise of its appellate jurisdiction. We find nothing in the provisions of either sections 106, 108 or Order XLIII or Order XLII, Rule 3 to support such an interpretation.

24. Having considered all the submissions above we are of the view that the preliminary objection raised by Shri Thorat to the maintainability of the Letters Patent Appeal must be upheld. As indicated earlier, the order passed by the learned Single Judge is an order on the Civil Application in the pending A. O. No. 93 of 1995. Such an order was clearly u/s 104, Civil Procedure Code. The appeal from Order is squarely u/s 104 read with Order XLIII, Rule 1(r) of the Civil Procedure Code. In view of the clear pronouncement of the Supreme Court in Shah Babulal Khimji's case and the four decisions of this Court referred to above, we are of the view that a further appeal even under clause 15 of the Letters Patent is clearly barred, having regard to the mandate of sub-section (2) of section 104, Civil Procedure Code. We accordingly hold that the L.P.A. is not maintainable. Appeal is, therefore, dismissed. However, in the circumstances of the case, there will be no order as to costs.

25. At this stage, Shri Naphade prays for stay of the operation of the Order dt. 7th February 1995 passed by the learned Single Judge in C.A. No. 349 of 1995, as confirmed on 23rd March 1995. In view of our conclusions that this appeal itself was misconceived and not maintainable, prayer rejected.

26. Certified Copy expedited.