

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
Writ Petition NO. 518 OF 2017

M/s. Gera Development Pvt. Ltd.	...Petitioner
<i>Versus</i>	
Gera Emerald City Baner Condominium And Ors.	...Respondents

....

Mr.A.V. Anturkar, Senior Advocate i/b. Sandeep Phatak, Advocate
for the Petitioner.

Mr. S.M. Gorwadkar, Senior Advocate a/w. Niranjan Mogre, for
Respondent No.2.

Mr. Nikhil Sakhardande, Advocate for Intervenor.

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With
Writ Petition NO. 751 OF 2017

Mr. Surendra Kumar Sahoo And Anr.	...Petitioners
<i>Versus</i>	
M/s. Gera Development Pvt. Ltd. And Ors.	...Respondents

....

Mr. Nikhil Sakhardande, Advocate i/b. Ms. Manjiri S. Parasnis,
Advocate for the petitioners.

Mr.A.V. Anturkar, Senior Advocate i/b. Sandeep Phatak, Advocate
for Respondent No.1.

Mr. S.M. Gorwadkar, Senior Advocate a/w. Niranjan Mogre, for
Respondent No.2(A) and 2(B).

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CORAM : R. G. KETKAR, J.

DATE : 31st JANUARY, 2017

P.C.

1. Heard Mr.A.V. Anturkar, learned Senior Counsel for the petitioner in W.P. No.518/2017 and for the respondents No.1 and 2 in W.P. No.751/2017, Mr. Gorwadkar, learned Senior Counsel for respondents No.1 and 2 in W.P. No.518/2017 and for respondents No.2(A) and 2(B) in W.P. No.751/2017 and Mr.Sakhardande, learned Counsel for interveners in W.P. No.518/17 and for the petitioners in W.P. No.751/2017, at length.
2. Writ Petition No.518/2017 takes exception to the judgment and order dated 21.9.2016 passed by the learned 13th Jt. Civil Judge, Senior Division, Pune below Exhibit-5 in Special Civil Suit No.1461/2015 as also the judgment and order dated 19.12.2016 passed by the learned District Judge-18, Pune in Misc. Civil Appeal No.362/2016. By these orders, the Courts below allowed the application Exhibit-5 made by (1) Gera Emerald City Baner Condominium, through its Chairman and Secretary, hereinafter referred to as the 'plaintiffs', and issued injunction restraining M/s. Gera Development Private Ltd. through its Directors (1) Mr. Kumar Pritamdas Gera and (2) Mr. Rohit Kumar Gera, hereinafter collectively referred as 'defendant No.1' from

carrying out construction and creating third party interest in the proposed third building 'Affinia' in layout of Survey No.66/1 to 5, Baner, Pune (for short, 'suit property) till disposal of the suit.

3. It is the case of the plaintiffs that the suit property together with two buildings standing thereon are submitted to the provisions of the Maharashtra Apartment Ownership Act, 1970 (for short, 'MAOA') by Deed of Declaration dated 24.12.2008 totally admeasuring 15936 square meters which was amended by Deed of Declaration dated 5.10.2009 to the extent of 14788 square meters. As per the sanctioned plan dated 26.3.2007, the buildings have total building area 20042.21 sq.mtrs out of which the construction admeasuring 15903.6 sq.mtrs is in the form of residential buildings No.1 and 2 consisting of units and area admeasuring 4138.0 sq. mtrs constituting General Common Area, Play Areas, Community Lounge, Guest Room, open space and podium. Commencement Certificates were issued on 19.10.2005, 21.11.2005, 4.2.2006, 14.6.2006 and 26.3.2007 comprising of buildings No.1 and 2, open space no.1 and 2 excluding the amenity space handed over to Pune Municipal Corporation.

4. Defendant No.1 has executed deeds thereby conveying

the structure and share in the land with common areas and amenities to the plaintiffs. Total FSI @ 100% as permissible under Development Control Rules was 11957.18 sq. mtrs and the FSI proposed for buildings No.1 and 2 was 11614.98 sq. mtrs having 120 tenements. The area under amenity space handed over to Pune Municipal Corporation was to be developed according to D.C.R.. In substance, it is the case of the plaintiffs that total area admeasuring 15936 sq. mtrs. was meant and proposed for project comprising two buildings and as per the sanctioned lay-out plan, general common areas of buildings No.1 and 2 and open space in the lay-out was for recreation of the Association. In the month of December, 2014, the plaintiffs noticed certain building activities in open space and amenities space and upon enquiries, the plaintiffs came to know that defendant No.1 has proposed a building in the open space and amenities space in the same lay-out without the consent of the plaintiffs or its members. Upon making further enquiries with the Corporation, the plaintiffs came to know that in 2011, defendant No.1 has revised the plan and in 2013, it is learnt that defendant No.1 has proposed third building called 'Affinia". Correspondence was exchanged between the parties. The plaintiff has, therefore, instituted the present suit *inter alia* for perpetual

injunction restraining defendant No.1 from carrying out construction of third building “Affinia” in the suit property; restraining defendant No.1 from creating any third party interest in any units in building No.3 “Affinia”; for mandatory order directing defendant No.1 to restore the original position of the lay-out, open spaces, internal roads according to sanctioned plans as it existed at the time of final conveyance of lay-out to the members of the plaintiff by way of Declaration and Apartment Deeds, amongst other prayers.

5. During pendency of the suit, the plaintiffs took out application Exhibit-5 for temporary injunction restraining defendant No.1 from carrying out construction of third building “Affinia” in the suit property as also from creating third party interest in any units in building No.3 “Affinia” in the suit property.

6. Defendant No.1 filed written statement opposing the claim made by the plaintiffs. By order dated 21.9.2016 the trial Court allowed the application Exhibit-5. Aggrieved by that decision, defendant No.1 preferred Misc. Civil Appeal before the District Court. During pendency of the appeal, the petitioners in Writ Petition NO.751/2017 filed applications Exhibit-27 and 28

under Order I Rule 10(2) of C.P.C. for their impleadment in the appeal.

7. The learned District Judge dismissed the appeal as also the applications. Aggrieved by the orders passed by the Courts below, defendant No.1 has instituted Writ Petition No.518/2017. Third party, applicants in Exhibits-27 and 28, have instituted Writ Petition No.751/2017.

8. In support of W.P. No.518/2017, Mr. Anturkar appearing for defendant No.1 has raised following contentions :

1. Whether the area of 14788 sq. mtrs. is the subject matter of Deed of Declaration dated 24.12.2008 as amended on 5.10.2009 or it is 9150 sq. mtrs.

2. Assuming that an area of 14788 sq. mtrs is the subject matter of Deed of Declaration dated 24.12.2008 as amended on 5.10.2009, whether it amounts to conveyance of 14788 sq. mtrs. in favour of the plaintiffs.

3. Whether the Deed of Apartment dated 19.4.2010 created interest in favour of the plaintiffs in respect of an area admeasuring 14788 sq. mtrs.

9. Elaborating his submissions, Mr. Anturkar submitted that in paragraph-24, the learned District Judge observed that the schedules appearing in Deed of Declaration as well as Deed of Apartments show that undivided right in the entire land described in Schedule-1A to 1E (admeasuring 14788 sq. mtrs.) has been transferred to the Association of the plaintiffs.

10. In paragraph-25, the learned District Judge has observed that defendant No.1 submitted plan of the year 2015 for sanction without express consent of all the unit purchasers. He submitted that the Association of the plaintiffs had given consent and, therefore, consent of all the unit purchasers is not necessary. The learned District Judge also failed to notice the distinction between registration of a Co-operative Society and Declaration by which property is submitted to the provisions of MAOA. Administration of the property is governed by bye-laws which are annexed to the Declaration made under the provisions of MAOA.

11. Mr. Anturkar submitted that as per recital FIRST, G, at page-174 of the Deed of Declaration dated 24.12.2008 of W.P. No.518/2017, defendant No.1 is entitled to develop the property described in Schedule 1A to 1E admeasuring 14788 sq. mtrs. He

invited my attention to clauses-3 and 4 of bye-laws (pages 359-360) annexed to the Deed of Declaration dated 24.12.2008. Bye-law 3 thereof deals with Apartment Ownership and lays down that the buildings situated on the land which admeasures approx. 9150 sq. mtrs. out of land bearing S. No.66, Hissa No.1 to 5, Baner, Pune and the said Buildings known as Gera's Emerald City, Baner are submitted to the provisions of MAOA. He submitted that the land admeasuring approximately 9150 sq. mtrs. is submitted to the provisions of MAOA. The plaintiffs have not challenged said bye-law. Bye-law No.4 deals with the objects of the Association and lays down that the objects of the association shall, among others, be (a) to be and to act as the Association of Apartment Owners of the buildings called Gera's Emerald City, Baner Condominium situate on the land admeasuring approximate 9150 sq. mtrs out of land bearing Survey No.66, Hissa No.1 to 5, Baner, Pune 411 045.

12. Mr. Anturkar invited my attention to Deed of Declaration dated 24.12.2008 and in particular:

Recital FIRST, A (pg. 173)

Recital FIRST, G (Pg. 174)

Schedule 1A to 1E (pgs. 225 and 226)

13. Mr. Anturkar submitted that as per Section 11 of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short 'MOFA'), defendant No.1 has not executed the conveyance in favour of the plaintiffs. Deed of Declaration dated 24.12.2008 does not amount to conveyance in favour of the plaintiffs in respect of an area admeasuring 14788 sq. mtrs. He relied upon Sections 3(b), (d),(f),(j),(r) of MAOA which define expressions - "apartment owner", "Association of Apartment Owners", "common areas and facilities", "Declaration" and "property" respectively. Expression "apartment owner" is defined in Section 3(b) to mean the person or persons owning an apartment and an undivided interest in the common areas and facilities in the percentage specified and established in the Declaration. Expression "Association of Apartment Owners" is defined in Section 3(d) to mean all of the apartment owners acting as a group in accordance with the bye-laws and Declaration. Expression "common areas and facilities" is defined in Section 3(f) to mean areas and facilities covered by clauses (1) to (8). Expression "Declaration" is defined in Section

3(j) to mean the instrument by which the property is submitted to the provisions of this Act, [as provided by section 2], and such Declaration as from time to time may be lawfully amended. Expression “property” is defined in Section 3(r) to mean the land, the building, all improvements and structures thereon, and all easements, rights and appurtenances belonging thereto, and all articles of personal property intended for use in connection therewith, which have been, or are intended to be. submitted to the provisions of this Act.

14. Mr. Anturkar submitted that Section 11 deals with contents of declaration. Section 12 deals with contents of Deeds of Apartments. Section 16 deals with bye-laws and their contents. He also relied upon Rules 3, 5 and 7 of the Maharashtra Apartment Ownership Rules, 1972 (for short 'Rules). Rule 3 thereof lays down that the Declaration to be executed and registered under Section 2 of the MAOA shall be in form “A”. Rule 5 lays down that all transfers of apartment by the sole owner or all the owners of the property (being an owner or owners who has or have executed and registered a Declaration in Form 'A”) to an apartment owner and subsequent transfers from an apartment owner to his transferee shall be by a Deed of Apartment. Rule 7 deals with

'Contents of Deeds of Apartment". He invited my attention to recital NINTH at page-222 which lays down that the Administration of Gera's Emerald City – Baner Condominium and the land described in Schedule "I" written thereunder and the Apartments as described in the Fifth para of the Deed shall be in accordance with the provisions of this Deed and with the provisions of the bye-laws which are made part of the Deed and are attached as Annexure "D" at pg. 359. In particular, he heavily relied upon bye-laws 3 and 4.

15. He also invited my attention to recital FIFTH, at pg. 175 of the Deed of Declaration which lays down that as per the P.M.C. Drawings the total building area of 20042.21 sq. mtrs (approx) out of which 15903.6 sq. mtrs. (approx.) will constitute Units and 4138 sq. mtrs. (approx) constitutes General Common Areas, Play Areas, Community Lounge, Guest Room & Podium & marked on Annexure "C" at page-358.

16. Mr. Anturkar relied upon clause (O) of the Deed of Apartment dated 19.4.2010 which lays down that the the purchaser agrees to abide by the Deed of Declaration dated 24.12.2008 and Deed of Amendment dated 5.10.2009 and the bye-

laws which are in terms of MAOA and by the terms and conditions of the agreement dated 27.3.2006 and all the terms and conditions of the said agreement and possession letters shall be applicable and continued to be applicable as and when required.

17. He invited my attention to the following portions of the Deed of Apartment dated 19.4.2010 :

“That, in consideration of payment of total amount payable to the Confirming Party by the Purchaser of Rs.3317000/- (Rupees Rs. Thirty Three Lacs Seventeen Thousand Only only) towards the cost of the construction of the Apartment (Unit) and towards the proportionate cost in the land described in Schedule “1A to 1E” written hereunder, the receipt of which sum the Confirming Party hereby own admit and acknowledge and of and from the same and every part thereof doth forever acquit release and discharge the Purchaser and the Confirming Party doth hereby forever grant convey transfer and assure unto the Purchaser all that the undivided share in the land described in the Schedule “1A to 1E” written hereunder

AND WHEREAS it is agreed between the Confirming Party/Vendors and Purchaser that the Purchaser shall enter into the following covenants with the Confirming Party/Vendors. NOW THIS INDENTURE FURTHER WITNESSETH that in pursuance of the said agreement and in consideration of the premises the Purchaser for himself/herself his/her heirs executors administrators and assigns and for all the present and future owners of the said

undivided share or portion in the said land, hereditaments and premises doth hereby covenant with the Confirming Part/Vendors and/or other co-owners who may have acquired heretofore or may hereafter acquire any interest in the soil of the land tenement or tenements in any of the buildings that the Purchaser will not ask for a partition by metes and bounds of the said piece or parcel of land more particularly described in the first Schedule hereunder written and common areas situated in the said building and land appurtenant. And Whereas this Deed of Apartment shall be always subject to the provisions of Maharashtra Apartment Ownership Act and Deed of Declaration dated 24/12/2008 registered at Serial No.10548/2008 with the office of Sub Registrar Haveli No.1 & 1st Deed of Amendment (to the Deed of Declaration dated 24.12.2008) dated 05/10/2009 registered at Serial No.8650/2009 on 05/10/2009 with the Sub Registrar, Haveli No. 11 Pune.”

18. He submitted that if these two clauses are capable of two interpretations, namely, whether defendant No.1 has conveyed, transferred and assessed area of 14788 sq. mtrs or area admeasuring 9150 sq. mtrs., in the light of the Deed of Declaration and Deed of Apartment as also provisions of MOFA and MAOA, the interpretation suggested by defendant No.1 is preferable and the Court should accept said interpretation.

19. On the other hand, Mr. Gorwadkar supported the impugned order. He relied upon Section 6(2), (3) and (13) of MAOA

as also the Deed of Apartment. He submitted that the plaintiffs are not party to the Deed of Declaration dated 24.12.2008 and as amended on 5.10.2009. He further submitted that annexure B1 at page-356 and annexure 'C' at page-358 of the Deed of Declaration dated 24.12.2008 do not form part of the sanctioned plan.

20. He submitted that as per Section 6(2) of MAOA, the percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the Declaration shall have a permanent character, and shall not be altered without the consent of all of the apartment owners expressed in an amended Declaration duly executed and registered as provided in this Act. The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains, and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the conveyance or other instrument. He submitted that Section 13(2) lays down that simultaneously with the registration of the Declaration there shall be filed alongwith it a set of the floor plans of the building showing the layout, location, apartment numbers and dimensions of the apartments

etc. He submitted that in the sanctioned lay-out of 2005 on the Deed of Declaration dated 24.12.2008, which was amended on 5.10.2009, only two buildings are shown. In other words, the third building 'Affinia' is not shown in the lay-out and the Declaration.

21. In support of W.P.No.751/2017, Mr. Sakhardande strenuously contended that the petitioners are vitally affected by the orders passed by the Courts below. The petitioners have purchased the respective flats after taking loan from the financial institutions. If any adverse order is passed, it will vitally affect them. He further submitted that the plaintiffs have moved the Court belatedly, when almost entire building is constructed. In short, he submitted that this is not a fit case in upholding the impugned orders as the balance of convenience does not lie in favour of the plaintiffs.

22. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. The short controversy raised in the present petition is whether defendant No.1 has conveyed, transferred land admeasuring 14788 sq. mtrs described in Schedule 1A to 1E as contended by the plaintiffs or land admeasuring 9150 sq. mtrs. as

contended by defendant No.1. Before dealing with this controversy it is necessary to refer to the Deed of Declaration dated 24.12.2008 as amended on 5.10.2009 as also Deed of Apartment dated 19.4.2010 as also provisions of MOFA and MAOA and Rules framed thereunder.

23. Perusal of recital FIRST on internal page-173 of the Deed of Declaration dated 24.12.2008 shows that Shri Raghu Rama Kalamakar and eighteen others referred as Grantor No.1 and defendant No.1 as Grantor No.2 executed declaration. Recital FIRST (A) records that the lands described in Schedule 1A to 1E are owned by Grantor No.1 and are subjected to Deed of Declaration under MOFA. Clause (G) of the FIRST recital records that Grantor No.2 (defendant No.1 herein) is well sufficiently entitled to develop the property described in Schedule 1A to 1E. Recital FIFTH records that as per the P.M.C. drawings the total building area of 20042.21 sq. mtrs (approx) out of which 15903.6 sq. mtrs. (approx.) will constitute Units and 4138 sq. mtrs. (approx) constitutes General Common Areas, Play Areas, Community Lounge, Guest Room & Podium & marked on Annexure "C" at page-358 of the compilation. Recital NINTH on internal page-43 lays down that the Administration of Gera's

Emerald City – Baner Condominium and the land described in Schedule “I” and the Apartments as described in the FIFTH para of the Deed shall be in accordance with the provisions of the Deed and with the provisions of the bye-laws which are made of the Deed and are attached at Annexure “D”. Recital TWELVE on internal page-43 of the Deed provides that neither the Grantor No.1 No.1 nor the Grantor No.2 own or hold any unit in the development except Unit No.E/10/2 on the Tenth Floor in Building No.2 & portion of land marked as remaining undeveloped Plot on the plan annexed as Annexure B-1 which portion of the land shall be developed by the Grantor No.2 in any manner as per their choice in terms of the Development Control Rules and other laws applicable either by Grantor No.2 or its assignee or nominee. Recital FOURTEENTH on internal page-54 records that Grantor No.2 have clearly reserved their right to use the remaining undeveloped portion of said land for future development / construction, sale or other purposes by themselves or by their successor in title, assignees as the case may be also the Grantor No.2 shall be entitled to make any variations, alterations or amendments of any and every kind in the said plans, layouts etc..

24. The bye-laws of Gera's Emerald City, Baner Condominium and particularly bye-law Nos. 3 & 4(a) read thus:

“3. Apartment Ownership : The buildings situated on the land which admeasures approx. 9150 sq. mtrs. out of land bearing S. No.66, Hissa No.1 to 5, Baner, Pune and the said Buildings known as Gera's Emerald City, Baner are submitted to the provisions of the Act.

4. Objects of the Association : (1) The objects of the Association shall :

(a) To be and to act as the Association of Apartments Owners for the buildings called Gera's Emerald City, Baner Condominium situated on the land admeasuring about 9150 sq. mtrs and being part of land bearing S. No.66 Hissa No.1 to 5, Baner, Pune 411 045 (herein referred to as “the said buildings”) for those who have filed their respective Apartment Deeds submitting their apartments to the provisions of the Act.”

25. Mr. Anturkar relied upon the provisions of MOFA and in particular Section 11 thereof as also Section 3(a), (b), (d), (f), (j), (r) which define expressions under MAOA.

26. Mr. Anturkar heavily relied upon bye-law 4(a), extracted hereinabove, as also Section 16 of MAOA. Mr. Anturkar submitted that the administration of the property is governed by the bye-laws which are annexed to the Declaration. No modification of or

amendment to the bye-laws is valid unless set forth in an amendment to the Declaration, and such amendment is duly recorded, and a copy thereof is duly filed with the competent authority.

27. Mr. Anturkar also relied upon subsequent part of Deed of Apartment dated 10.4.2010 to substantiate that the portion in the said land means 9150 sq. mtrs and not 14788 sq. mtrs. He submitted that the learned District Judge committed error in paragraph-24 in observing that the land admeasuring 14788 sq. mtr is transferred to the plaintiffs on the basis of Deed of Declaration executed under MOFA and Deed of Apartment executed under MAOA. It is not possible to accept the submissions advanced by Mr. Anturkar. Perusal of Deed of Apartments dated 19.4.2010 clearly shows that **defendant No.1 has recovered amount from the purchasers towards the cost of construction of the apartments (units) and towards the proportionate costs in land described in Schedule 1A to 1E written thereunder.** It is not in dispute that Schedule 1A to 1E is forming part of the Deed of Apartments dated 19.4.2010. It is also not in dispute that the area covered under Schedule A to

Schedule E admeasures 14788 sq. mtrs. and not 9150 sq. mtrs. Thus defendant No.1 having recovered amount from the purchasers towards the cost of construction of apartments (units) and also towards the proportionate costs in land described in Schedule 1A to 1E which admittedly admeasures 14788 sq. mtrs., it is not open to defendant No.1 to contend that interest is not created in respect of area admeasuring 14788 sq. mtrs. in favour of the plaintiff. (Emphasis supplied)

28. Mr. Anturkar submitted that the subsequent portion of the recital, namely, portion in the said land is capable of two interpretations. One interpretation is as suggested by the plaintiffs viz 14788 sq. mtrs and the other as suggested by defendant No.1 is 9150 sq. mtrs. is subject of Deed of Apartment dated 19.4.2010. In the light of the provisions of Deed of Declaration as also provisions of MOFA and MAOA, the interpretation suggested by defendant No.1, namely, Deed of Apartment is in respect of 9150 sq. mtrs. is preferable. It is also not in possible to accept this submission.

29. Section 6(2) of the MAOA read thus :

“6 - Common areas and facilities :

(1)

(2) The percentage of the undivided interest of each apartment owner in the common areas and facilities as expressed in the Declaration shall have a permanent character, and shall not be altered without the consent of all of the apartment owners expressed in an amended Declaration duly executed and registered as provided in this Act. **The percentage of the undivided interest in the common areas and facilities shall not be separated from the apartment to which it appertains, and shall be deemed to be conveyed or encumbered with the apartment even though such interest is not expressly mentioned in the conveyance or other instrument.** (emphasis supplied)

30. Section 13(2) of MAOA lays down that Simultaneously with the registration of the Declaration there shall be filed alongwith it a set of the floor plans of the building showing the layout, location, apartment numbers and dimensions of the apartments etc. Mr. Gorwadkar submitted that in the sanctioned lay-out of 2005 and Deed of Declaration dated 24.12.2008 which was amended on 5.10.2009 only two buildings are shown. That apart, it is not disputed that Pune Municipal Corporation has issued stop work notice to defendant No.1 and as of date it is not withdrawn. In view thereof, I do not find that the Courts below committed any error in allowing the application for

injunction.

31. In the case of **Wander Limited and another Vs. Antox India Private Limited, 1990 (Supp.) SCC 727**, the Apex Court in paragraph 14 has observed as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Limited Vs. Pothan Joseph*, (1960) 3 SCR 713, (SCR 721)

32. In the case of **Surya Dev Rai vs. Ram Chander Rai and others, (2003) 6 SCC 675** the Apex Court has dealt with

powers of High Court under Articles 226 and 227 of the Constitution of India. Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When the subordinate Court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the Court in a manner not permitted by law and failure of justice or grave injustice has occasioned. The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion.

33. Applying the tests laid down by the Apex Court in the aforesaid decisions, it cannot be said that the Courts below committed serious error in passing the impugned orders. It cannot be said that the Courts below exercised the discretion arbitrarily, capriciously or perversely. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. W.P. No.518/2017 fails and the same is dismissed.

34. As the petitioners in W.P. No.751/2017 are claiming through defendant No.1, they cannot claim higher rights than defendant No.1. I have already held that the defendant No.1 cannot proceed with the construction as also cannot create third party interest. That apart, as of date the Corporation has not withdrawn the stop work notice issued to defendant No.1. The applicants have not filed an application before the trial Court for their impleadment. In view thereof, W.P. No.751/2017 fails and the same is dismissed.

35. Liberty is reserved to defendant No.1 to apply for expeditious hearing of the suit. If such an application is taken out, the learned trial Judge will pass appropriate orders. Needless to observe that the observations made herein are tentative and *prima facie* only for the purpose of finding out the correctness of the impugned orders. The learned trial Judge will decide the suit on the basis of evidence on record in accordance with law and on its own merits uninfluenced by the observations made herein. Order accordingly.

(R. G. KETKAR, J.)