

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 10390 OF 2013

Smt. Anubai Bhiva Turuke
And Ors

...Petitioners

Versus

Bhagwan Shiva Turuke
And Anr

...Respondents

....

Mr.Rahul P. Walvekar, Advocate for the Petitioners.
Mr.V.B. Rajure, Advocate for Respondents.

....

CORAM : R. G. KETKAR, J.
DATE : 02nd MARCH, 2017

P.C.

1. Heard Mr.Rahul Walvekar, learned Counsel for the petitioners and Mr.V.B. Rajure, learned Counsel for the respondents, at length.

2. Rule. Mr. Rajure waives service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, petitioners have challenged the judgment and order dated 17.07.2013 passed by the learned Ad-hoc District Judge-1,

Kolhapur in Miscellaneous Civil Application No.245 of 2013 as also the judgment and order dated 21.08.2013 passed by the learned District Judge-1, Kolhapur below exhibit-1 in Miscellaneous Civil Application No.245 of 2013. By order dated, 17.07.2013, the learned District Judge granted leave to file appeal to the respondents. By order dated 21.08.2013, the learned District Judge condoned the delay of 106 days caused in filing the appeal. The facts and circumstances giving rise to filing of the Writ Petition, briefly stated, are as follows :

4. Regular Civil Suit No.524/1990 was instituted by (1) Shiva Rau Turuke, (2) Parashram Shankar Turuke, and (3) Smt. Parubai Shankar Turuke for partition and separate possession of their shares by metes and bounds against (1) Rangrao Bhiwa Turuke, (2) Raghunath Bhiwa Turuke, and others. Gat No.331, Hissa No.4 admeasuring 1 H 25 R and Gat No.331, Hissa No.13 admeasuring 33 R, among others were suit properties. Pending that suit, defendant No.1 Rangrao Turuke and defendant No.2 Raghunath Turuke executed registered sale deed in favour of respondents on 19.12.1995. Defendant No.15 Sonabai Dhotre and defendant No.16 Savitribai Mane were the consenting parties. Respondents were impleaded as defendants No.18 & 19.

By that sale deed, defendants No.1 & 2 sold following properties :

1. Gat No.331, Hissa No.4/11 admeasuring 0.06 R.
2. Gat No.331, Hissa No.4/12 admeasuring 0.9 R
3. Gat No.331, Hissa No.4/7 admeasuring 0.11 R
4. Gat No.331, Hissa No.4/3 admeasuring 0.06 R
5. Gat No.331, Hissa No.13A undivided 2 Anna share of defendants No.1 and 2.
6. Gat No.331, Hissa No.4/14, 1/3rd share of defendant No.1 Rangrao Turuke to the extent of 0.03.66 R.

5. On 29.9.2003, the learned trial Judge decreed the suit. The learned trial Judge declared that plaintiff No.1 has 1/4th share, plaintiffs No.2 & 3 and defendants No.10 to 14 together have 1/4th share, defendants No.1 to 3 and 15 & 16 together have 1/4th share, defendants No.4 to 6 & 17 together have 1/4th share in the suit properties. Aggrieved by that decision, defendant No.3 Annubai Bhiwa Turuke preferred Regular Civil Appeal No.449/2003. By order dated 23.6.2008, the learned trial Judge allowed the appeal. Clauses (b) and (e) of the operative part of the order dated 23.6.2008 read thus :

“(b) It is hereby declared that the plaintiff No.1 has 1/4th share, the plaintiff No's.2, 3 and defendant No's 9 to 13 have 1/4th share together, the defendant No's 1,2,3,14 and 15 have 1/4th share together and the defendant No's 4, 5, 6 and 16 have 1/4th share together in the suit lands described in plaint paragraph No.1 situated at Uchgaon, Tq. Karvir District Kolhapur and the plaintiffs are entitled to partition and separate possession of their shares as above in the suit lands.

(e) The portions of the lands from the suit Gat No.331 hissa No.4 and Gat No.331 hissa No.13 which are sold by the defendant No's 1 and 2 to the defendant No's 18 and 19 shall as far as possible be allotted to the shares of the defendant No's 1 and 2 at the time of partition of the suit lands.”

6. It is not in dispute that the order passed by the learned District Judge was not challenged and thus attained finality. Defendant No.3 Annubai Bhiwa Turuke instead of challenging the judgment of the Appellate Court, instituted R.C.S. No.110/2013 on 17.1.2013 against defendant No.1 Rangrao Bhiwa Turuke, defendant No.2 Raghunath Bhiwa Turuke, defendant No.3 Sonabai Dhotre and defendant No.4 Savitribai Namdeo Mane for partition and separate possession of Gat No.331/4 admeasuring 32 R and Gat No.331/13 (wrongly typed as 331/3) admeasuring 0.08 R, among other properties.

Respondents were not made party in that suit.

7. On 20.3.2013, the suit was disposed of in terms of the compromise terms. Allotment was made as under :

Sr. No.	Survey No.	Area adm. Hectare . Are	Allottee
1	331/13	0.08	Entire area was allotted to the plaintiff Annubai Bhiwa Turuke.
2	331/4	0.08	Southern portion from boundary of Ujlaiwadi to the plaintiff Annubai Bhiwa Turuke.
3	331/4	0.08	From northern side of plaintiff's land to defendant No.3 Sonabai Raosaheb Dhotre.
4	331/4	0.08	Northern side of defendant No.3's portion to defendant No.4 Savitribai Namdeo Mane.
5	331/4	0.04	Remaining northern portion of defendant No.4 to defendant No.1 Rangrao Bhiwa Turuke
6	331/4	0.08	Remaining northern portion of defendant No.1 to defendant No.2 Raghunath Bhiwa Turuke.
7	347/2	0.05	Eastern portion to Sunita Rangrao Turuke wife of defendant No.1
8	347/2	0.05	Western portion to Sunita @ Kalpana Raghunath Turuke wife of defendant No.2
9	347/3	0.08	Jointly defendant No.1 Rangrao Bhiwa Turuke and defendant No.2 Raghunath Bhiwa Turuke 0.04 each.

8. After acquiring knowledge of this decree, respondents

filed Misc. Civil Application No.245/2013 on 4.7.2013 for leave to file appeal against the compromise decree. In that application, respondents also filed application under Section 5 of the Act for condoning the delay of 120 days in filing the appeal. Respondents also filed application Exhibit-6 for stay of the exparte decree. On behalf of the petitioners reply was filed on 21.8.2013 opposing the application for condonation of delay and stay application. This reply was drafted by none other than Advocate S.K. Chitnis. Reliance was placed upon the decision of this Court in ***Khalil Haji Vs. Parveen, 2013(3) Mh.L.J. 182*** and in particular paragraph-17 thereof. By order dated 17.7.2013, the learned District Judge granted leave to appeal. By order dated 21.8.2013, the learned Judge condoned the delay of 120 days. It is against the order dated 17.7.2013 granting leave to appeal and the order dated 21.8.2013 condoning the delay, the petitioners have instituted present Petition.

9. In support of this Petition, Mr. Walvekar submitted that appeal preferred by respondents, itself, is not maintainable. He submitted that respondents have filed appeal challenging the compromise decree passed in Regular Civil Suit No.110 of 2013. Respondents are not party to the suit. In other words, they are

strangers. He invited my attention Sections 96, 146, Order XXIII, Rule 3, Rule 3-A, Order XLI as also Order XLIII, Rule 1-A of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

10. Mr. Walvekar submitted that the remedy, if any, for them is to institute separate suit challenging the consent decree, if they feel aggrieved by the decree or file application before the Court which passed compromise decree. He also relied upon the following decisions:

- a. *M. Ramnarain Pvt. Ltd. Vs. S.T.C.I. Ltd.*, (1983) 3 SCC 75;
- b. *Suraj Kumari Vs. District Judge, Mirzapur*, AIR 1991 Allahabad 75. In that case, application under Order IX, Rule 13 read with Section 151 of C.P.C. was filed for setting aside ex-parte decree. The learned Single Judge of the Allahabad High Court held that the Court below was justified in refusing to entertain application at the instance of the petitioner, who was not party to the proceedings, under Order IX, Rule 13 of C.P.C. for setting aside decree, which was arrived at on the basis of the compromise;
- c. *Lagandeo Singh Vs. Satyadeo Singh*, AIR 1992 Patna 153, and in particular paragraph 19. The Division Bench of Patna High Court considered the provisions of Order XLIII, Rule 1-A(2) of C.P.C.;

- d. **Pradip Kumar Das Vs. Abanti Das, AIR 1998 Orissa 26**, and in particular paragraphs 8 and 11 thereof;
- e. **Siddalingeshwar Vs. Virupaxgouda, AIR 2003 Karnataka 407**, and in particular paragraphs 11 and 14 thereof; and
- f. **Khalil Haji (supra)**.

11. Mr. Walvekar submitted that in any case this is not a fit case for invocation of powers under Article 227 of the Constitution of India that too suo motu as the respondents have an equal efficacious alternate statutory remedy of filing substantive suit challenging the compromise decree or filing application before the Court which passed the compromise decree. In support of this proposition, he relied upon following decisions :

- i. **Waryam Singh and another v. Amarnath and another, AIR 1954 SC 215** and in particular paragraphs-13 and 14.
- ii. **Miss. Maneck Custodji Surjarji v. Sarafazali Nawabali Mirza, AIR 1976 SC 2446** and in particular paragraph-6.
- iii. **Mohd. Yunus v. Mohd. Mustaqim and others, AIR 1984 SC 38** and in particular paragraphs-6 and 7.

- iv. **A. Venkatasubbiah Naidu v. S. Chellappan and others, AIR 2000 SC 3032 and in particular paragraph-20.**
- v. **Surya Dev Rai v. Ram Chander Rai and others, AIR 2003 SC 3044 and in particular paragraph-38.**
- vi. **Ranjeet Singh v. Ravi Prakash, AIR 2004 SC 3892 and in particular paragraph-4.**
- vii. **Shalini Shyam Shetty and another v. Rajendra Shankar Patil, (2010) 8 SCC 329 and in particular paragraph-4.**
- viii. **Sameer Suresh Gupta, through PA Holder v. Rahul Kumar Agarwal, (2013) 9 SCC 374 and in particular paragraphs-6 and 7.**
- ix. **Radhey Shyam and another v. Chhabi Nath and others, (2015) 5 SCC 423 and in particular paragraph-23 onwards.**

12. On the other hand, Mr. Rajure relied upon the following decisions:

- a. **Bombay Province Vs. W. I. Automobile Assocn., AIR 1949 Bombay 141;**
- b. **Banwari Lal Vs. Chando Devi, AIR 1993 SC 1139; and**
- c. **Hardevinder Singh Vs. Paramjit Singh, (2013) 9 SCC 261 to contend that provisions of Section 96, Order XLI do**

not enumerate the categories of persons who can file an appeal. If the judgment and decree prejudicially affects a person, he can prefer an appeal subject to obtaining leave of the Court.

13. Mr. Rajure submitted that the decree passed in question is not a compromise decree, but is a decree passed on admission that is referable to Order XII, Rule 6 of C.P.C. Mr. Rajure further submitted that earlier Regular Civil Suit No.524/1990 was instituted by (1) Shiva Rau Turuke, (2) Parashram Shankar Turuke and (3) Smt. Parubai Shankar Turuke for partition, separate possession and enquiry into the mesne profits against (1) Rangrao Bhiwa Turuke, (2) Raghunath Bhiwa Turuke, (3) Smt. Annubai Bhiwa Turuke, (4) Sarjerao Maruti Turuke, (5) Raosaheb Marutu Turuke, (6) Smt. Laxmibai Maruti Turuke and others, wherein the respondents were defendants No.18 and 19. By order dated 29.9.2003, the learned 3rd Jt. Civil Judge, Junior Division, Kolhapur decreed the suit. Aggrieved by that decision, defendant No.3 Annubai Bhiva Turuke preferred Regular Civil Appeal No.449/2003. By order dated 23.6.2008, the learned District Judge decreed the suit. Said decree attained finality. In that appeal on behalf of the appellant/defendant No.3 Shri S.K. Chitnis, Advocate appeared.

14. On 17.1.2013, Smt. Annubai Turuke instituted Regular Civil Suit No.110/2013 against (1) Rangnath Turuke, (2) Raghunath Turuke, (3) Sonabai Dhotare, and (4) Savitribai Mane for partition and separate possession.

15. On 20.3.2013, the suit was compromised. A perusal of the compromise decree shows that the vendors of the respondents, namely, Rangrao Turuke and Raghunath Turuke who had sold the entire Survey No.331/4 admeasuring 32 R and 331/13 admeasuring 8 R were not allotted any share in the partition as per the compromise decree. This was with a view to nullifying the decree dated 23.6.2008 passed by District Court in R.C.A. No.449/2004 thereby depriving the respondents from getting these properties sold by Rangrao Turuke and Raghunath Turuke. The respondents were also not made party in the suit. He, therefore, submitted that even if this Court holds that the impugned order granting leave to appeal is not maintainable, the compromise decree may be set aside by suo motu invoking extraordinary jurisdiction of this Court under Article 227 of the Constitution of India thereby restoring R.C.S. No.110/2013 by directing the plaintiff Anubai Turuke to implead the respondents as party defendants and thereafter proceed

with the suit on merits.

16. I have considered the rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. The matter was heard at length on 24.2.2017 and by order dated 24.2.2017, the parties were put to notice that the Court will consider petitioners challenge to the impugned orders as also invoking suo motu powers under Article 227 of the Constitution of India for testing the correctness of the compromise decree passed in R.C.S. No.110/2013 in the event of Court coming to conclusion that the respondents cannot challenge compromise decree by filing appeal as they were not party in the proceeding. Accordingly, I have heard the learned Counsel appearing for the parties on this aspect.

17. In my opinion, following questions arise for determination in the present case :

- 1.** Whether the learned District Judge was justified in granting leave to appeal to the respondents, who are admittedly not party to the compromise decree ?
- 2.** Whether even if the appeal is held to be not maintainable

against the compromise decree this is a fit case for exercising suo motu powers under Article 227 of the Constitution of India to consider the validity of compromise decree instead of relegating the respondents for filing suit under Order XXIII Rule 3A or filing application before the Court which passed the compromise decree.

Q.1. Whether the learned District Judge was justified in granting leave to appeal to the respondents, who are admittedly not party to the compromise decree:

18. Mr. Walvekar submitted that perusal of the order dated 17.7.2013 granting leave to appeal shows that the learned District Judge did not consider the reply filed by the petitioners opposing stay application as also condonation of delay application. Even the impugned order does not show that after hearing the petitioners, the impugned order is passed. In other words, the impugned order is passed in gross violations of principles of natural justice. Mr. Rajure was not in a position to controvert this submission. I, therefore, find merit in this submission.

19. Mr. Walvekar relied upon the decision of this Court in *Khalil Haji (supra)* . In that case, the learned Single Judge of this

Court considered the provisions of Order XXIII Rule 3A as also Order XLIII Rule 1-A. The learned Single Judge also referred to the decisions of Allahabad High Court in *Smt. Sooraj Kumari v. District Judge, Mirzapur and others*, AIR 1991 Allahabad 75 and Karnataka High Court in *Siddalingeshwar and others v. Virupaxgouda and others*, AIR 2003 Karnataka 407. After considering the judgments, in paragraph-17 it was observed thus :

“17. Order 23 of CPC deals with adjustment/compromise of a suit. An appeal is a continuation of the suit. Section 107(2) CPC provides that subject to sub-section 1, the appellate Court shall have same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein. Therefore, the provisions of Order 23 apply in full force to appeal proceedings. By amendment of CPC, Rule 3A has been inserted in Order 23 to bar a suit to set aside a decree on the ground that the compromise on which the decree is based is not lawful. Therefore, if a party to a suit who enters into a compromise in terms of which a consent decree is made, wants to challenge it on the ground that it is not lawful, the remedy available to him, is either to file an application in the very suit to recall the consent decree on the ground that compromise is not lawful, or is vitiated by fraud, or to file an appeal under Order 43 Rule 1A CPC, contending that the compromise was not lawful and that it ought not to have been recorded. A compromise decree is based on the agreement arrived at between the parties, which gets a seal of approval from the Court. A stranger to the suit is obviously a stranger to the agreement of

compromise. He cannot file an application either in the suit or in the appeal proceedings to challenge a compromise decree as he is not a party to the suit. Therefore, the bar under Rule 3A of Order 23 cannot be extended to him. The provision must confine only to the parties to the suit, who are parties to the agreement to compromise. Hence, I am in respectful agreement with the decisions of the Allahabad High Court and Karnataka High Court, holding that a stranger to a compromise decree cannot file an application in a suit or an appeal to challenge a compromise, as not being lawful, but must file a separate suit for the purpose. The application filed by the applicants, therefore, is required to be dismissed as not maintainable. Since the application is not at all maintainable, there is no need to enter into discussion on the rival contentions as regards the merits of the application. The Civil Application is dismissed.”

20. The learned Single Judge of this Court has held that if a party to a suit who enters into a compromise in terms of which a consent decree is made, wants to challenge it on the ground that it is not lawful, the remedy available to him, is either to file an application in the very suit to recall the consent decree on the ground that compromise is not lawful, or is vitiated by fraud, or to file an appeal under Order XLIII Rule 1A CPC. A stranger to the suit is obviously a stranger to the agreement of compromise. He cannot file an application either in the suit or in the appeal proceedings to challenge a compromise

decree as he is not a party to the suit. Therefore, the bar under Order XXIII Rule 3A of C.P.C. cannot be extended to him.

21. In the light of the above discussion, it has to be held that the learned District Judge was not justified in granting leave to appeal to the respondents who are admittedly not party in R.C.S. No.110/2013. Question No.1 is answered accordingly.

Q.2. Whether even if the appeal is held to be not maintainable against the compromise decree this is a fit case for exercising suo motu powers under Article 227 of the Constitution of India to consider the validity of compromise decree instead of relegating the respondents for filing suit under Order XXIII Rule 3A or filing application before the Court which passed the compromise decree.

22. This brings me to question No.2, namely, whether this is a fit case for invocation of suo motu powers under Article 227 of the Constitution of India for testing the validity of the compromise decree passed on 20.3.2013 in R.C.S. No.110/2013. In paragraph-22 of *Surya Dev Rai* (supra), Apex Court has observed thus :

“22. Article 227 of the Constitution confers on every High Court the power of superintendence over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction excepting any court or tribunal constituted by or under any law relating to the armed forces. Without prejudice to the generality of such power the High Court has been conferred with certain specific powers by sub-Articles (2) and (3) of Article 227 with which we are not concerned hereat. **It is well-settled that the power of superintendence so conferred on the High Court is administrative as well as judicial, and is capable of being invoked at the instance of any person aggrieved or may even be exercised suo motu. The paramount consideration behind vesting such wide power of superintendence in the High Court is paving the path of justice and removing any obstacles therein. The power under Article 227 is wider than the one conferred on the High Court by Article 226 in the sense that the power of superintendence is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction.**

(emphasis supplied)”

23. In paragraph-38, Apex Court sum-up the conclusions in a nutshell. Conclusions-4, 5, 6 and 7 read thus :

“(4) 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 thereby, the High Court may step in to exercise its supervisory jurisdiction.

(5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.

(6) A patent error is an error which is self-evident, i.e., which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view the error cannot be called gross or patent.

(7) 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. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at

that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.”

24. In the light of the principles laid down by Apex Court in **Surya Dev Rai (supra)** and more particularly “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. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred there against and entertaining a petition invoking certiorari or supervisory jurisdiction of High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings” it is necessary to consider the compromise decree passed in R.C.S. No.110/2013. As noted earlier that suit was instituted against defendant No.3 Anubai Turuke among

others for partition and separate possession. The suit was decreed on 29.9.2003. Aggrieved by that decision, she preferred Regular Civil Appeal No.449/2003. In that appeal, she was represented by Advocate Mr.S.K. Chitnis. I have already reproduced clauses (b) and (e) of the operative part of the order dated 23.6.2008.

25. A perusal of clause (b) shows that defendant No.1 Rangrao Turuke, defendant No.2 Raghunath Turuke, defendant No.3 Annubai Turuke, defendant No.14 Shantabai Sawarde, defendant No.15 Sonabai Dhotre were allotted 1/4th share together. Perusal of clause (e) of the operative part shows the partitions of land from gat No.331 Hissa No.4 and Gat No.334 Hissa No.13 which were sold by defendants No.1 and 2 to the respondents herein, who were defendants No.18 and 19 therein, shall as far as possible be allotted to the shares of defendants No.1 and 2 at the time of partition of the suit lands. Though the appeal was decided on 23.6.2008, it is not in dispute that no proceeding was preferred against that decision. In other words, said decision had attained finality. Instead of challenging that order, Annubai Turuke (defendant No.3 in R.C.S. No.524/1990) instituted R.C.S. No.110/2013 on 17.1.2013 through Advocate

S.K. Chitnis. It is material to note that the respondents herein who were defendants No.18 and 19 were not made party in that suit. Suit was not contested and in a short span of two months, the suit was compromised. It is material to note that Advocate Mr.S.K. Chitnis who appeared for the appellant in that appeal also appeared on behalf of the plaintiff in R.C.S. No.110/2013. By entering into compromise, the shares are allotted in such a manner that Gat No.331, Hissa No.4 and Gat No.331, Hissa No.13 are not allotted to defendants No.1 & 2 so as to nullify the effect of judgment dated 23.6.2008. Not only that though defendant No.1 Rangrao Turuke and defendant No.2 Raghunath Turuke were allotted shares wife of defendant No.1 Rangrao Turuke was allotted Gat No.347/2 to the extent of 5 R. Wife of defendant No.2 Raghunath Turuke was also allotted 5 R from Survey No.347/2, which was impermissible. That apart reply dated 21.8.2013 filed by the petitioners herein opposing stay application and condonation of delay application was also drafted by none other than by Advocate S.K. Chitnis.

26. Mr. Walvekar submitted that the respondents can very well execute the decree passed in R.C.A. No.449/2003. The submission however overlooks that in view of the subsequent

compromise decree, defendants No.1 and 2 are not allotted any share in Gat No.331/4 and 334/13. Thus even if the respondents were to file darkhast for execution of the decree passed in R.C.A. No.449/2003 they will not in a position to execute the decree in view of the compromise decree dated 20.3.2013 in R.C.S. No.110/2013.

27. Mr.Walvekar further submitted that the respondents can file suit challenging the compromise decree and as they are not party to R.C.S. No.110/2013, bar under Order XXIII Rule 3A of C.P.C. will not be applicable as held by this Court in **Khalil Haji** (supra). Alternatively, the respondents can also consider filing application before the same Court which passed that compromise decree. The argument at its first blush appears to be attractive and in ordinary circumstances the Court would have relegated the respondents to avail either of these remedies. If the respondents were to file either suit or application before the Court which passed compromise decree challenging said decree, parties will be required to lead evidence and the order passed therein would be subject matter of further challenges before different fora. Thus, the attempt of the petitioners is to protract

execution of decree passed in R.C.A. No.449/2003 which has attained finality and delay handing over possession to the respondents. In the present case, in view of the District Court's order dated 23.6.2008 in R.C.A. No.449/2003 directing the portions of land sold from Gat No.331 Hissa No.4 and Gat No.331 Hissa No.13 by defendants No.1 and 2 to defendants No.18 & 19 shall as far as possible be allotted to the shares of defendants No.1 & 2 at the time of partition of the suit lands, defendant No.3 should have challenged that decree. Instead of challenging that decree, defendant No.3 instituted suit without impleading the respondents herein as party defendants. Advocate who appeared in R.C.A. No.449/2003 also appeared for the plaintiff in R.C.S. No.110/2013. Though the suit was instituted on 17.1.2013, within a span of two months it was disposed of on 20.3.2013 in terms of the compromise terms. The compromise terms are arrived at in such a manner so as to deprive the respondents benefits of decree dated 23.6.2008 passed in R.C.A. No.449/2003. Unfortunately even Advocate was also part of the strategy. Be that as it may. As the Advocate S.K. Chitnis is not before this Court, I do not want to dwell upon his role. At the same time, Gat No.331/4 and 331/13 are

allotted strategically to the persons other than defendants No.1 & 2. The entire attempt is made with a view to nullifying the decree passed on 23.6.2008 in R.C.A. No.449/2003 that too without challenging the decree and also with a view to depriving the respondents benefits available under that decree.

28. Applying the tests laid down by Apex Court in ***Surya Dev Rai*** (supra), in my opinion, this is an imminent case to invoke suo motu powers under Article 227 of the Constitution of India for setting aside the compromise decree otherwise there will be failure of justice or grave injustice would occasion. The error in passing the compromise decree is manifest and apparent on the face of the proceedings and the petitioners are instrumental in obtaining the compromise decree. This is a fit case for exercising supervisory jurisdiction as the judicial conscience of this Court dictates it to act lest a gross failure of justice or grave injustice would occasion.

29. Mr. Walvekar relied upon the decisions referred in paragraph-11 above. In paragraph-14 of ***Waryam Singh*** (supra), Apex Court referred to the decision of Hon'ble Harries, Chief Justice in *Dalmia Jain Airways Ltd. vs. Sukumar Mukherjee*,

AIR 1951 Cal 193, wherein it is held that the power of superintendence conferred by Article 227 is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate Courts within the bounds of their authority and not for correcting mere errors.

30. In *Maneck Surjarji* (supra), the respondent had inducted the appellant under agreement dated 1.6.1972 whereby the appellant allowed the respondent to occupy and utilize one bed-room together with a bath room and a furnished kitchen in the flat as a “paying guest” for a period of eleven months commencing from 1.6.1972 on payment of compensation at the rate of Rs.350/- per month. During pendency of this agreement, Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 was amended by introduction of Section 15A which gave protection against eviction to the person who was in possession of the premises as licensee on 1.2.1973 by deeming to be tenant of the landlord. The respondent instituted suit in Small Causes Court on 4.4.1973 claiming that he was a deemed tenant in respect of entire flat and prayed for fixation of standard rent. He also obtained exparte injunction from the Small Causes Court on 24.4.1973 restraining the appellant and her father from

taking forcible possession of the flat from the respondent without due process of law or interfering with his possession of the flat. The appellant instituted suit No.3413/1973 in City Civil Court on 26.4.1973 for recovery of possession on the ground that the respondent was a paying guest and the period of his agreement having come to an end he was bound to remove himself together with belongings from the said portion of the flat. After interlocutory proceedings, the learned trial Judge decreed the suit in favour of the appellant on 2.8.1975. Instead of preferring substantive appeal under Section 96, the respondent instituted Special Civil Application No.2936/1975 in High Court under Article 227 of the Constitution of India for setting aside the decree of the City Civil Court. The petition was disposed of finally on 18.11.1975. The learned Single Judge did not interfere with the decree passed by the City Civil Court, but, merely stayed the execution of the decree until the earlier suit filed by the respondent against the appellant was decided by the Small Causes Court and observed that it would be open to the Small Causes Court to arrive at its own conclusion without being in any way bound by the decision of City Civil Court. It is in that context, in paragraph-6, Apex Court observed that ordinarily the

High Court does not in exercise of its discretion, entertain a special civil application under Article 227 of the Constitution where an adequate alternative legal remedy is available to the applicant. It is true that this principle is not rigid and inflexible and there can be extraordinary circumstances where despite the existence of an alternative legal remedy, the High Court may interfere in favour of an applicant. *(emphasis supplied)*

31. In paragraph-7 of *Mohd. Yunus* (supra), Apex Court observed that in exercising the supervisory power under Article 227, the High Court does not act as an Appellate Court or Tribunal. It will not review or reweigh the evidence upon which the determination of the inferior Court or Tribunal purports to be based or to correct errors of law in the decision.

32. In paragraph-20 of *A. Venkatasubbiah Naidu* (supra), Apex Court has observed that though no hurdle can be put against the exercise of the constitutional powers of the High Court it is a well recognized principle which gained judicial recognition that the High Court should direct the party to avail himself of such remedies one or the other before he resorts to a constitutional remedy.

33. In paragraph-4 of *Ranjeet Singh* (supra), Apex Court referred to the decision of *Surya Dev Rai* (supra) and observed that the error committed by the Court or authority on whose decision High Court was exercising jurisdiction, should be an error which is self-evident. An error which needs to be established by lengthy and complicated arguments or by indulging into a long drawn process of reasoning, cannot possibly be an error available for correction by writ of certiorari.

34. In paragraph-49 of *Shalini Shetty* (supra), Apex Court after analyzing the decisions, formulated the principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution of India. Clauses (c), (g), (k), (l), (m) are to the following effect :

“49. On an analysis of the aforesaid decisions of this Court, the following principles on the exercise of High Court's jurisdiction under Article 227 of the Constitution may be formulated:

(a) XXXXXX

(b) XXXXXX

(c) High Courts cannot, on the drop of a hat, in exercise of its power of superintendence under Article 227 of the Constitution, interfere with the orders of tribunals or Courts inferior to it. Nor can it, in exercise of this power, act as a Court of appeal over the orders of Court or tribunal subordinate to it. In cases where an

alternative statutory mode of redressal has been provided, that would also operate as a restraint on the exercise of this power by the High Court.

- (d) XXXXXX
- (e) XXXXXX
- (f) XXXXXX
- (g) Apart from the situations pointed in (e) and (f), High Court can interfere in exercise of its power of superintendence when there has been a patent perversity in the orders of tribunals and Courts subordinate to it or where there has been a gross and manifest failure of justice or the basic principles of natural justice have been flouted.
- (h) XXXXXX
- (i) XXXXXX
- (j) XXXXXX
- (k) The power is discretionary and has to be exercised on equitable principle. In an appropriate case, the power can be exercised suo motu.
- (l) On a proper appreciation of the wide and unfettered power of the High Court under Article 227, it transpires that the main object of this Article is to keep strict administrative and judicial control by the High Court on the administration of justice within its territory.
- (m) The object of superintendence, both administrative and judicial, is to maintain efficiency, smooth and orderly functioning of the entire machinery of justice in such a way as it does not bring it into any disrepute. The power of interference under this Article is to be kept to the minimum to ensure that the wheel of justice does not come to a halt and the fountain of

justice remains pure and unpolluted in order to maintain public confidence in the functioning of the tribunals and Courts subordinate to High Court.”

35. In paragraph-6 of *Sameer Gupta* (supra), Apex Court referred to the decision in *Surya Dev Rai* (supra). In paragraph-7 reference was made to the decision in *Shalini Shetty* (supra).

36. In the case of *Radhey Shyam* (supra), Apex Court was considering the question as to whether the view taken in *Surya Dev Rai* (supra) that a writ lies under Article 226 of the Constitution against the order of the civil court, is the correct view? In paragraph-29.1, Apex Court held that judicial orders of the civil Court are not amenable to writ jurisdiction under Article 226 of the Constitution.

37. In my opinion, in the facts and circumstances of the present case, this is an imminent case to exercise *suo motu* powers. In the present case as held by Apex Court in *Surya Dev Rai* (supra) as also in *Ranjeet Singh* (supra), the mischief of the petitioners in entering into compromise is evident and said mischief is self-evident. It does not involve any lengthy and complicated arguments or by indulging into a long drawn process of reasoning.

38. In view thereof, the compromise decree dated 20.3.2013 passed in R.C.S. No.110/2013 deserves to be set aside thereby restoring R.C.S. No.110/2013. It is also necessary to direct petitioner No.1 who is plaintiff there, to implead the respondents as party defendants.

39. Learned Counsel appearing for the parties state that the parties will appear before the trial Court on 15.3.2017 and for that purpose no fresh notice be issued to them.

40. In the light of above discussion, Petition is disposed of in the following terms :

- i. Impugned orders dated 17.7.2013 and 21.8.2013 are quashed and set aside. Appeal preferred by the respondents stands dismissed.
- ii. Compromise decree dated 20.3.2013 passed by the learned 9th Jt. Civil Judge, Junior Division, Kolhapur in R.C.S. No.110/2013 is quashed and set aside. R.C.S. No.110/2013 is restored to the file of the trial Court. Petitioner No.1 shall implead respondents as defendants in the suit by suitably amending the plaint. Respondents shall file written statement after service of amended plaint. The learned trial

Judge will thereafter proceed with the suit in accordance with law.

- iii. Pendency of R.C.S. No.110/2013 will not preclude the respondents from filing of execution proceedings for execution of decree passed in R.C.A. No.449/2003 as also will not preclude the executing Court from proceeding with the darkhast.
- iv. The parties to appear before the trial Court on 15.3.2017 and for that purpose no fresh notice be issued to them. All contentions of the parties on merits are expressly kept open.
- v. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)