
(2003) 05 BOM CK 0008

In the Bombay High Court

Case No : Writ Petition No's. 3378 of 2002 and 1046 and 1301 of 2003

Shivchandrai Jhunjhunwala, Charitable Trust and Others

APPELLANT

Vs

Govindprasad Ganeshprasad Dubey and Others

RESPONDENT

Date of Decision : 09-05-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 227

Citation : (2003) 3 ALLMR 1065 : (2004) 2 BomCR 441

Hon'ble Judges : D.D. Sinha, J

Bench : Single Bench

Advocate : Anjan De, Sunil Manohar, Kaptan, Sundaram, Sirpurkar, Khapre, Mehadia and Vyawahare, for the Appellant;

Judgement

D.D. Sinha, J.—The present writ petitions along with about three hundred other writ petitions are listed before this Court for admission wherein interlocutory orders passed by the Civil Courts during pendency of the suits are impugned. Majority of these writ petitions are filed after withdrawing civil revision applications, which were filed prior to amendment to section 115 of the CPC wherein same orders, which are impugned in these writ petitions, were impugned and, therefore, before adjudicating the issue on merits, at the outset the Bar was called upon to address this Court on the legal issue as to the power under Article 227 of the Constitution of India vested in the High Court, whether High Court can refuse to exercise the same, which otherwise would defeat the mandate of statutory provisions of law contained in section 115 of the Code of Civil Procedure, which stands substantially amended with effect from 1-7-2002 and interference by this Court u/s 115 of the Code is called for only if order is made by this Court in favour of the party applying for revision would finally dispose of the suit or other proceedings.

2. The issue was addressed by learned Counsel Shri Anjan De, Shri Sunil Manohar, Shri Kaptan, Shri Sundaram, Mrs. Sirpurkar, Shri Khapre, Shri Mehadia

and Shri Vyawahare. The arguments and legal contentions advanced by the learned respective Counsel and the judgments of the Apex Court and High Court cited and relied upon by them are summarised as follows :

3. The learned Counsel contend that power under Article 227 of the Constitution is a constitutional power vested in the High Court and amendment to section 115 neither curtails the said power nor the said power is affected in any way by such amendment. It is further contended that recommendations given by Law Commission of India for deletion of section 115 are relevant for this purpose and considered by this Court in the case of Rajabhau Rahate Vs. Dinkar Ingole, . The relevant portion of para (19) of the said judgment is reproduced thus :

"The Joint Committee of the Parliament considered this aspect also in great details and decided to retain section 115 in spite of the recommendation of the Law Commission of India itself, but was of the view that certain modifications to that section are necessary. The observations of the Joint Committee are also noteworthy. They throw a substantial light on intention of the Legislature in amending section 115 as it did in 1976.

"The question whether it is at all necessary to retain section 115 was carefully considered by the Committee. The Law Commission has expressed the view that, in view of Article 227 of the Constitution, section 115 of the Code is no longer necessary. The Committee, however, feel that remedy provided by Article 227 of the Constitution is likely to cause more delay and involve more expenditure. In remedy provided in section 115 is, on the other hand, cheap and easy. The Committee, therefore, feel that, in addition to the restrictions contained in section 115, an overall restriction on the scope of applications for revision against interlocutory orders should be imposed. Having regard to the recommendations made by the Law Commission in its Fourteenth and Twenty-Seventh Reports, the Committee recommended that section 115 of the Code should be retained subject to the modification that no revision application shall lie against an interlocutory order unless either of the following conditions is satisfied, namely :

- i) that if the orders were made in favour of the applicant, it would finally dispose of the suit or other proceeding, or
- ii) that the order, if allowed to stand, is likely to occasion failure of justice or cause an irreparable injury,

The Committee feel that expression case decided should be defined so that the doubt as to whether section 115 applies to an interlocutory order may be set at rest."

Learned Counsel contend that while recommending deletion of section 115, the Law Commission expressed that remedy provided under Article 227 of the Constitution is very much available to the aggrieved litigant, even if section 115 of the CPC is altogether deleted against such cause of actions.

4. It is further contended by the learned Counsel that observations of the learned Single Judge of this Court in the case of *Bharatkumar Agrawal, Mrs. Malli @ Madhulika Agrawal and Shri Jamnalal Bajaj Sewa Trust Vs. Anita Trust and Anita*, are relevant, which read thus :

"I have to weigh these rival contentions in the light of the legal provisions that always existed and are today existing after the extensive amendments by the Amending Act of 1999. Section 115 of the CPC existed in that Code from 1908 and till 1950 when the Constitution of India was introduced, that was the only remedy to invoke the power of superintendence of this Court. It was only for the first time by introduction of the Constitution and by Article 227 thereof that supervisory jurisdiction apart from and in addition to section 115 of CPC was created. From 1950 onwards, therefore, two jurisdictions were existing in the High Court, one statutory jurisdiction conferred on it by section 115 of the CPC and another constitutional jurisdiction conferred on it by Article 227 of the Constitution. Both these powers have co-existed all these years. Section 115 was extensively amended in the year 1976. At that time also, Article 227 was in existence. It is today amended extensively and today also the power under Article 227 exists. It is obvious, therefore, that two remedies or two forums were available to the revision applicant u/s 115. He could knock the doors of this Court u/s 115 and complain of injustice caused to him within the framework of section 115 or he could come to this Court, invoke or seek invoking of its powers under Article 227, which have no fetters and claim justice complaining of the injustice caused by the order impugned. When both these remedies were available, it was with conscious decision that the litigant has chosen to come before this Court for limited exercise of its jurisdiction u/s 115 of the Civil Procedure Code. Having found that this Court has taken a view, right or wrong, u/s 115 litigant cannot now turn round and say that Article 227 is also a power of superintendence with the Court, please exercise that."

Learned Counsel contend that in view of the above referred observations, it is evident that power under Article 227 is unfettered and can be invoked by the litigant and exercised by this Court even in respect of orders complained of and redressed u/s 115 of the Code. It is contended that exercise of power under Article 227 of the Constitution by this Court in respect of matters, which could have been dealt with by this Court u/s 115 of the Code, would not, therefore, amount to defeating mandate of amended section 115 of the Code.

5. The learned Counsel further contend that the learned Single Judge of this Court in the case of *Prabhudas Narayan Gedam and Others Vs. Municipal Council*, had an occasion to consider the scope of power of the High Court under Article 227 while entertaining challenge to the decision of the Civil Court against which remedy of revision u/s 115 was available before amendment of section 115 of the Code. It is contended that in the said judgment, the learned Single Judge has observed thus :

"Therefore, any amendment to the CPC would leave the judicial power under

Article 227 unaffected. However, the power under Article 227 must necessarily be understood in the light of the judgments cited above, which state clearly that this extra-ordinary jurisdiction be exercised only in appropriate cases. The power conferred upon the High Courts u/s 115 of CPC are of judicial character and now has been curtailed by the legislation. This curtailment, however, would have no effect upon the powers conferred on the High Court by Article 227, even if they appear to overlap with the powers u/s 115 of Civil Procedure Code, because such powers as falling expressly within Article 227 cannot be fettered even by a constitutional amendment. Where two views are possible, the High Court would be transgressing its limit in preferring one view to another on factual appreciation of evidence."

Learned Counsel submit that in view of ratio laid down by this Court in the above referred case, amendment to section 115 does not affect power conferred on the High Court by Article 227 and same cannot be fettered even by Constitution of India.

6. The learned Counsel also invited attention of this Court to the observations made by the Apex Court in para (6) of the judgment in *Sadhana Lodh v. National Insurance Company Ltd.* and another, 2000(1) SCALE 739. The relevant portion is reproduced thus :

"Where a statutory right to file an appeal has been provided for, it is not open to High Court to entertain a petition under Article 227 of the Constitution. Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy available to the aggrieved person is to file a revision before the High Court u/s 115 of the Code of Civil Procedure. Where remedy for filing a revision before the High Court u/s 115 of C.P.C. has been expressly barred by a State enactment, only in such case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of an illustration, where a trial Court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant temporary injunction has been rejected and a State enactment has barred the remedy of filing revision u/s 115 C.P.C., in such a situation a writ petition under Article 227 would lie and not under Article 226 of the Constitution."

The learned Counsel, therefore, contend that in view of above referred observations of the Apex Court, the petition under Article 227 is not only maintainable seeking similar relief, which was available u/s 115 of the Code before amendment, but this Court is entitled to exercise power under Article 227, which will not amount to defeating mandate of amended section 115 of the Code.

7. Similarly, reliance is placed by the learned Counsel on the observations made by the Apex Court in para (26) of the judgment reported in *Vadivelu Vs. Sundaram and Others*, , which read thus :

The appellant-election petitioner could not make out a case for recount of votes. He filed the application for re-count before the Returning Officer only after the

declaration of result and that was rightly rejected by the Returning Officer. The appellant had no case that the illegality or irregularity, if any, committed had materially affected the result of the election. Taking all the aspects into consideration, we are of the view that the learned Single Judge was perfectly justified in holding that the Election Tribunal erred in appointing a Commissioner and ordering the re-count of votes. The Counsel for the appellant contended that the powers of the revisional Court are not as wide as the powers of the Appellate Court and, therefore, the learned Single Judge should not have set aside the order passed by the Election Tribunal. We do not find any force in this contention. When there is error of jurisdiction or flagrant violation of the law laid down by this Court, by exercising the revisional powers, the Court can set aside the order passed by the Tribunal to do justice between the parties. The illegality committed by the Election Tribunal has been corrected by the revisional order. We find no merit in the present appeal and the same is dismissed."

It is, therefore, contended by the learned Counsel that when there is an error of jurisdiction or flagrant violation of law, this Court is entitled to exercise power under Article 227 of the Constitution of India to do justice between the parties and there is no embargo or prohibition on exercise of this power due to curtailment of power of this Court u/s 115 in view of amendment to the said section. It is submitted that power under Article 227 of the Constitution vested in the High Court is to see whether lower Court/Tribunal, has jurisdiction to deal with the matter and if so, whether impugned order is vitiated by procedural irregularity and, therefore, amended section 115 of the Code will not affect power and jurisdiction of this Court under Article 227 of the Constitution. In order to substantiate this contention, reliance is placed on the observations of the Apex Court in para (6) of the judgment in *Sugarbai M. Siddiq and Others Vs. Ramesh S. Hankare (D)* by Lrs., , which read thus:

"There can be little doubt that in an application under Article 227 of the Constitution, the High Court has to see whether the lower Court/Tribunal has jurisdiction to deal with the matter and if so, whether the impugned order is vitiated by procedural irregularity; in other words, the Court is concerned not with the decision but with the decision making process. On this ground alone, the order of the High Court is liable to be set aside."

8. On the backdrop of the law laid down by the Apex Court as well as High Court in the above referred judgments, the learned Counsel submit that the present writ petitions under Article 227 of the Constitution are maintainable and this Court is entitled to exercise power under Article 227 of the Constitution, which is unaffected by amended section 115 of the Code.

9. I have considered the contentions canvassed by the learned Counsel. Power under Article 227 of the Constitution of India is exercised by the High Court in its discretion and it cannot be claimed as of right by any party as has been held in *Nilkanth Prasad and Others Vs. State of Bihar*, . Since it is a discretionary power and cannot be invoked by the litigant as of right, while exercising this discretion

under Article 227, it will be necessary for this Court to consider various aspects of the proceedings through which power of the High Court under Article 227 is invoked.

10. The present proceedings by which discretionary power under Article 227 of the High Court is invoked, are against the orders passed by Civil Courts in various suits which are pending before the competent Civil Courts and against such orders, before section 115 of the CPC was amended by Amending Act of 1999, which came into operation from 1-7-2002, revision u/s 115 of the CPC was maintainable.

11. The CPC provides various procedures for conducting a civil suit and the same is, from time to time, amended keeping in view contemporary situation and the need for effecting such amendment. We all are aware that there is an enormous amount of pendency of suits in various Civil Courts in the country. The time factor is no more relevant and lost its relevance as far as the finality to such litigation is concerned and if effective steps are not taken by the Executive, Legislature and Judiciary in this regard, the perception of the society towards just system of administration of justice may change and shall destroy the basic fibre of faith and confidence in the system.

12. The Parliament, taking into consideration all these factors, thought it fit to amend the provisions of section 115 of the Civil Procedure Code, not only to curtail the powers of this Court u/s 115 of the Code of Civil Procedure, but to curtail the delay in disposal of suits to which CPC is applicable. The proviso, which is inserted in section 115 of the CPC by way of Amending Act of 1999, contemplates thus:---

"Provided that the High Court shall not under this section vary or reverse any order made, or any order deciding an issue, in course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings."

By virtue of this proviso, this Court under amended section 115 cannot vary or reverse the impugned order, except where such order if it had been made in favour of the party applying for revision, disposes finally the suit or other proceedings. The amended proviso to section 115 of the CPC substantially curtails the powers of the High Court u/s 115 of the Code by the Amending Act of 1999 with the sole intention to allow the proceedings of the civil suit to continue uninterrupted and to put an end to such suits as early as possible and to preclude High Courts from interfering with the interlocutory orders passed by the Civil Courts during the pendency of the suits which invariably culminate in delaying the proceedings of the suits for a number of years.

13. It cannot be said that while introducing the Amending Act of 1999 whereby powers of the High Court u/s 115 of the Code are curtailed substantially, the Parliament was not alive to the aspect of hardships it would cause temporarily to

some of the litigants. However, in the larger interest of the society at large as well as considering the contemporary perception of the society at large vis a vis system of administration of justice, the Parliament thought it fit to introduce such Bill and amended section 115, which has undoubtedly resulted in substantially curtailing the delay in deciding finally the civil suits though in the process some hardships would be caused to some of the litigants temporarily.

14. It is, no doubt, true that the jurisdiction vested in the High Court under Article 227 of the Constitution cannot be curtailed by any legislation, including the Amending Act of 1999, by which section 115 of the CPC is amended. However, the situation is whether the discretionary power vested in the High Court under Article 227 of the Constitution can be exercised in respect of such proceedings arising out of interlocutory orders passed by the Civil Courts during the pendency of the civil suit, against which a remedy of revision, which was available before the Amending Act of 1999 to section 115 of the Code and after 1-7-2002, when the said amendment came into force is permissible only in certain contingencies, in order to allow the proceedings of the civil suit to continue uninterrupted to give finality to the litigation as early as possible. I must express that I do not want to convey that proceedings against such orders are not maintainable under Article 227 or there is no jurisdiction to entertain such proceedings under Article 227 in the High Court. The question is of propriety, i.e., as to whether the High Court should exercise discretionary power under Article 227 in a situation like this which shall, undoubtedly, set at naught the very object and purpose of the Amending Act of 1999, by which section 115 stands substantially amended and the powers of the High Court are greatly curtailed. At the same time, it will have to be kept in mind that the Parliament must have never intended that when powers of the High Court u/s 115 of the Code are curtailed by the Amending Act with the specific object in mind, the High Court would ignore this aspect of the matter and exercise its discretion under Article 227 of the Constitution for the same cause, which would undoubtedly create similar situation existed before section 115 of the Code was amended.

15. It must be borne in mind that under Article 227 of the Constitution, the High Court is vested with the power of superintendence only over all courts and Tribunals throughout the territory in relation to which it exercises jurisdiction. It is also well-settled that power under Article 227 is a discretionary power and cannot be claimed as of right by any party. At the same time, what are the parameters and contingencies in which such discretion is to be exercised by the High Court is carved out by the various judicial pronouncements of the Apex Court. Article 227 provides that the power of superintendence conferred on High Court under Article 227 is in relation to administrative superintendence only. However, it is well settled that it includes the power of judicial review where no appeal or revision lies to the High Court under ordinary law. It is, therefore, clear that the discretionary power, which High Court exercises under Article 227, cannot be invoked as of right by the litigant, but it is for the High Court, in a given case, to exercise the same, if necessary, keeping in view the contingencies,

which are carved out in this regard in various judicial pronouncements made by the Apex Court.

16. On the backdrop of above legal aspects, I would like to express that in addition to parameters, which are carved out, in which High Court is expected to exercise discretionary power under Article 227 of the Constitution, the High Court needs to consider also the aims and object of the Amending Act of 1999 by which section 115 of the Code stands substantially amended and power of High Court under that section is greatly curtailed while exercising discretionary jurisdiction in respect of such orders, which are interlocutory in nature and passed by the Civil Court during the pendency of the suit against which remedy of revision u/s 115 of the Code is not available after 1-7-2002, i.e. the date on which Amending Act of 1999 came into force. In other words, considering the contemporary situation about the enormous amount of pendency of cases in various Courts of India, it is necessary to consider the extent of jurisdiction this Court can exercise under Article 227 of the Constitution. Some of the judgments of the Apex Court and ratio laid down therein are relevant for this purpose. One of them is in the case of *Laxmikant Revchand Bhojwani and another v. Pratapsingh Mohansingh Pardeshi*, deceased through his heirs and legal representatives 1997(3) Bom.C.R. 1 : 1996(1) Mh.L.J. 507. In that case, the Supreme Court had an occasion to deal with the case arising out of Bombay Rent Act and the Supreme Court has considered the extent of jurisdiction this Court can exercise under Article 227 of the Constitution in relation to special legislation like Bombay Rent Act. The observations of the Supreme Court in para (9) of its judgment are relevant, which are reproduced below:

"Before parting with this judgment we would like to say that the High Court was not justified in extending its jurisdiction under Article 227 of the Constitution of India in the present case. The Act is a special legislation governing landlord-tenant relationship and disputes. The legislature has, in its wisdom, not provided second appeal or revision to the High Court. The object is to give finality to the decision of the appellate authority. The High Court under Article 227 of the Constitution of India cannot assume unlimited prerogative to correct all species of hardship or wrong decisions. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principles of law or justice, where grave injustice would be done unless the High Court interferes."

The ratio laid down by the Apex Court in the above referred case does not curtail the jurisdiction of the High Court under Article 227 of the Constitution in any manner. However, it only provides guiding principle in respect of extent of jurisdiction this Court can exercise under Article 227 particularly in respect of order against which remedy of appeal or revision is specifically barred under such legislation with the sole object to give finality to the decision of the Authority or to end the litigation finally between the parties. This does not mean that jurisdiction of the High Court in such situation is taken away or curtailed. However, what is expected of the High Court is to consider these factors along

with usual parameters wherein such discretion is exercised by the High Court under Article 227 of the Constitution.

17. The aspect of discretionary power of High Court and in what situation such discretion can be exercised is well settled by the Apex Court as back as in 1960 in the case of Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, of its judgement, the Full Bench of Apex Court observed thus:

"We have noticed that in the application to the High Court, the respondent asked that Court to exercise its power of superintendence under Article 227 of the Constitution by the method of issuing a writ of certiorari or any other suitable writ. Article 227 corresponds to section 107 of the Government of India Act, 1915. The scope of that section has been discussed in many decisions of Indian High Courts. However, wide it may be than the provisions of section 115 of the Code of Civil Procedure, it is well established that the High Court cannot in exercise of its power under that section assume appellate powers to correct every mistake of law. Here there is no question of assumption of excessive jurisdiction or refusal to exercise jurisdiction or any irregularity or illegality in the procedure or any breach of any rule of natural justice. If anything it may merely be an erroneous decision which, the error not being apparent on the face of the record, cannot be corrected by the High Court in revision u/s 115 of the CPC or under Article 227."

The ratio laid down in the above referred judgment of the Apex Court in no uncertain terms conveys that merely because decision is erroneous, discretion under Article 227 of the Constitution need not be exercised unless the error of law is apparent on the face of the record.

18. Similarly, in the case of Khalil Ahmed Bashir Ahmed Vs. Tufelhussein Samasbhai Sarangpurwala, , the Apex Court in para (13) of its judgment has observed thus:

"The intention here is manifest. In any event this is a possible view that could be taken. This Court in Venkatlal G. Pittie and Another Vs. Bright Bros. (Pvt.) Ltd., and Beopar Sahayak (P) Ltd. and Others Vs. Vishwa Nath and Others, , held that where it cannot be said that there was no error apparent on the face of the record, the error if any has to be discovered by long process of reasoning, and the High Court should not exercise jurisdiction under Article 227 of the Constitution. See in this connection the observations of this Court in Satyanarayan Laxminarayan Hegde and Others Vs. Millikarjun Bhavanappa Tirumale, . Where two views are possible and the trial Court has taken one view which is a possible and plausible view merely because another view is attractive, the High Court should not interfere and would be in error in interfering with the finding of the trial Court or interfering under Article 227 of the Constitution over such decision."

The above referred observations of the Apex Court clearly mandate that where

two views are possible and view taken by the trial Court is possible and plausible, merely because another view is possible on the issue in question, the High Court should desist from exercising discretionary power under Article 227 of the Constitution. The Apex Court has gone further and observed that interference in such situation is not warranted under Article 227 of the Constitution by the High Court.

19. The Supreme Court had an occasion to decide the scope of the supervisory jurisdiction conferred on the High Court under Article 227 of the Constitution way back in 1984 in the case of Mohd. Yunus Vs. Mohd. Mustaqim and Others, , and in para (7) of its judgment, the Apex Court has observed thus :

"The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions within the limits of its authority" and not to correct an error apparent on the face of the record, muchless an error of law. In this case there was, in our opinion, no error of law muchless an error apparent on the face of the record. There was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principles of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. 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 re-weigh 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."

The ratio laid down by the Apex Court in the above referred judgment makes it clear that the purport of Article 227 of the Constitution is limited to seeing that the inferior Court or Tribunal functions within the limits of its authority or jurisdiction only and the High Court is not expected to exercise its discretionary power under Article 227 even to correct an error apparent on the face of the record muchless an error of law.

20. Looking to the contemporary situation in respect of delay in disposal of cases virtually resulting in denial of justice, the time has come not to exercise discretionary power under Article 227 of the Constitution blindly, but the power should be exercised only in a situation where it is really required and such interference shall not defeat the intention of any legislation and frustrate the object thereof.

21. It will be appropriate to consider the power as well as jurisdiction vested in the Supreme Court vide Article 142 of the Constitution of India. Article 142 of the Constitution contemplates that Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and until provision in that behalf is so made, in such manner as the President may by

order prescribe. The jurisdiction which is vested in the Supreme Court by this Article is unlimited, unfettered and above all existing legislations, laws and statutes, for doing complete justice between the parties. The power is absolute in nature and completely unfettered in character. The Supreme Court is vested with jurisdiction even in the area where there are no statutory provisions occupying the field. This is the ultimate jurisdiction vested in the Supreme Court notwithstanding any legislation, statute or law holding the field. The Supreme Court though vested with such absolute power, even then the Supreme Court in para (47) of the judgment in the case of Supreme Court Bar Association Vs. Union of India and Another, , observed thus:

"The plenary powers of this Court under Article 142 of the Constitution are inherent in the Court and are complementary to those powers, which are specifically conferred on the Court by various statutes though are not limited by those statutes. These powers also exist independent of the statutes with a view to do complete justice between the parties. These powers are of very wide amplitude and are in the nature of supplementary powers. This power exists as a separate and independent basis of jurisdiction apart from the statutes. It stands upon the foundation and the basis for its exercise may be put on a different and perhaps even wider footing, to prevent injustice in the process of litigation and to do complete justice between the parties. This plenary jurisdiction is, thus, the residual source of power which this Court may draw upon as necessary whenever it is just and equitable to do so and in particular to ensure the observance of the due process of law, to do complete justice between the parties, while administering justice according to law. There is no doubt that it is an indispensable adjunct to all other powers and is free from the restraint of jurisdiction and operates as a valuable weapon in the hands of the Court to prevent "clogging or obstruction of the stream of justice". It, however, needs to be remembered that the powers conferred on the Court by Article 142 being curative in nature cannot be construed as powers which authorise the Court to ignore the substantive rights of a litigant while dealing with a cause pending before it. This power cannot be used to "supplant" substantive law applicable to the case or cause under consideration of the Court. Article 142, even with the width of its amplitude, cannot be used to build a new edifice where none existed earlier, by ignoring express statutory provisions dealing with a subject and thereby to achieve something indirectly which cannot be achieved directly."

Similarly, in para (48), the Apex Court has observed thus:

"The Supreme Court in exercise of its jurisdiction under Article 142 has the power to make such order as is necessary for doing complete justice "between the parties in any cause or matter pending before it". The very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties by "ironing out the creases" in a cause or matter before it.

Indeed this Court is not a Court of restricted jurisdiction of only dispute-settling. It is well-recognised and established that this Court has always been a law-maker and its role travels beyond merely dispute-settling. It is a "problem-solver in the nebulous areas" see *K. Veeraswami v. Union of India*, but the substantive statutory provisions dealing with the subject matter of a given case cannot be altogether ignored by this Court, while making an order under Article 142. Indeed, these constitutional powers cannot, in any way, be controlled by any statutory provisions but at the same time these powers are not meant to be exercised when their exercise may come directly in conflict with what has been expressly provided for in a statute dealing expressly with the subject."

In view of above observations of the Apex Court, it is implicit that though the ultimate absolute power is enjoyed by the Apex Court vide Article 142 of the Constitution to be exercised for doing complete justice between the parties, even then the Supreme Court has categorically observed that same normally should not be exercised by ignoring mandate of the statute dealing expressly with the subject. It is also emphatically put forth by the Apex Court that power under Article 142 of the Constitution being curative in nature, the very nature of the power must lead the Court to set limits for itself within which to exercise those powers and ordinarily it cannot disregard a statutory provision governing a subject, except perhaps to balance the equities between the conflicting claims of the litigating parties. These observations are very relevant while construing jurisdiction and power vested in the High Court under Article 227 of the Constitution.

22. The question is not whether in the existing situation the proceedings against interlocutory orders passed by the Civil Court during pendency of the suit are maintainable. Of course, as I have already observed hereinabove, they are maintainable. However, the real question which needs to be kept in mind is whether this Court should exercise power under Article 227 of the Constitution in respect of matters where the remedy of revision u/s 115 of the Code is available after amendment in certain contingencies only. Vesting of power and exercise of power are two distinct and independent factors and need to be understood in their right perspective. The Court may have a power or jurisdiction but for legitimate and adequate reasons, the Court may refuse to exercise the same in a given case. It is no doubt true that proceedings against interlocutory orders passed by the Civil Court during pendency of the suit are maintainable under Article 227 and this Court also in a given case for a legitimate cause and for compelling reasons as well as in an extra-ordinary situation, may exercise the same. However, routine exercise of power under Article 227 of the Constitution by this Court against all kinds of interlocutory orders passed by the Civil Court during pendency of the suit undoubtedly not only shall violate the mandate of amended section 115 of the Code of Civil Procedure, but also frustrate the very purpose and object of the amendment. What is expected in the situation like this and in view of the settled legal position is that the High Court can exercise power under Article 227 of the Constitution, however, same should be only in the rarest

of the rare situation where failure to exercise power under Article 227 of the Constitution by this Court would not only result in miscarriage of justice, but would also lead to perpetuating gross illegality, which is apparent on the face of record. The High Court would be justified in exercising power under Article 227 of the Constitution only in the above circumstances and not otherwise, which will not only set at naught mandate of amended section 115 of the Code of Civil Procedure, but would also result in violating the law laid down by the Apex Court in the case of Supreme Court Bar Association (cited supra). It must be understood that all these powers ultimately are vested in the Court to administer justice in its right perspective. However, that does not clothe the courts with jurisdiction to violate contemporary laws and statutes, which are holding field, vis a vis the subject involved. These powers by their very nature and source cannot be exercised loosely and in any and every kind of situation. Such exercise which frustrates the mandate of the statute or law though statutorily not prohibited, is not expected at all from the courts in utter disregard to the mandate of the laws and statutes.

23. Similarly, law laid down by the Apex Court in Prem Chand Garg Vs. Excise Commissioner, U.P., Allahabad, , is very relevant for the issue in question. In para (12) of its judgment, the Apex Court has observed about powers vested in it under Article 142 of the Constitution and the same reads thus:

"The powers of this Court are no doubt very wide and they are intended to be and will always be exercised in the interest of justice. But that is not to say that an order can be made by this Court which is inconsistent with the fundamental rights guaranteed by Part III of the Constitution. An order which this Court can make in order to do complete justice between the parties, must not only be consistent with the fundamental rights guaranteed by the Constitution, but it cannot even be inconsistent with the substantive provisions of the relevant statutory laws. Therefore, we do not think it would be possible to hold that Article 142(1) confers upon this Court powers which can contravene the provisions of Article 32."

The law which emerges from the above observations of the Apex Court is implicit that the power vested in the Supreme Court under Article 142 of the Constitution though absolute in nature, normally cannot be exercised ignoring the substantive laws and statutes. On the backdrop of this well-settled legal proposition, when I compare power under Article 227 of the Constitution vested in the High Court, vis-a-vis power under Article 142 of the Constitution vested in the Supreme Court, the clear picture which emerges is that the power of superintendence vested in the High Court is comparatively quite restrictive in nature and in the normal set of circumstances is required to be exercised when order impugned passed by the subordinate Court or Tribunal is without jurisdiction, in excess of jurisdiction or there is a patent illegality apparent on the face of record, etc. and not otherwise. Such restrictive and limited power of superintendence cannot be equated with the absolute power vested in the Supreme Court under Article 142

of the Constitution and in view of law laid down by the Supreme Court, even the Supreme Court cannot ignore the statutory provisions on the subject while exercising ultimate power under Article 142 of the Constitution. If that is so, the question of ignoring mandate of the statute by the High Court while exercising power of superintendence under Article 227 of the Constitution does not arise. Such restrictive power in any eventuality should not be exercised in a situation, which would result in frustrating mandate of substantive law or statute or would give go-bye to such laws, which would frustrate mandate of such statutes and laws. The Apex Court in no uncertain terms observed in the above referred judgments that even the Apex Court though vested with absolute power under Article 142 of the Constitution is not expected to exercise such power de hors of the statutory provisions and laws, but in an extra-ordinary situation and that too, only in order to do complete justice between the parties. It is, therefore, evident that though instant proceedings are maintainable under Article 227 of the Constitution and though this Court does have a jurisdiction and can exercise power under Article 227 of the Constitution, however, such exercise will be justified only if it is done in exceptional situation and for extra-ordinary reasons. I am afraid that frequent exercise of power of superintendence in each and every situation without caring for the mandate of section 115 of the CPC and giving go-bye to the object of the said statute would undoubtedly violate the settled legal position in this regard and, therefore, such exercise of power under Article 227 is not expected from the High Court in such situation.

24. The scenario, which emerges from the backdrop of the above referred situation, is that High Court when it exercises power under Article 227 of the Constitution particularly in relation to proceedings against interlocutory orders passed by the Civil Courts during pendency of the suits, apart from the regular parameters within which the High Court is expected to exercise power under Article 227, is also required to keep in mind mandate of amended section 115 of the CPC and as far as possible, is expected not to violate the same unless and until extra-ordinary situation emerges, which requires such exercise.

25. So far as legal contentions canvassed by the learned respective Counsel and judgments cited and relied upon by them and law laid down by the Apex Court are concerned, there is no quarrel in regard to the legal proposition, which emerges from these judgments. Even otherwise, it is well settled that power under Article 227 of the Constitution vested in the High Court is not affected by any statute or law muchless amended section 115 of the Code of Civil Procedure. Such power is independent and distinct and is the basic structure of the Constitution and, therefore, remains unaffected and is normally required to be exercised within the parameters evolved by the judicial pronouncement of the Apex Court and High Court. So far as case of *Bharatkumar Agrawal, Mrs. Malli @ Madhulika Agrawal and Shri Jamnalal Bajaj Sewa Trust Vs. Anita Trust and Anita*, is concerned, there is no difficulty in holding that before amendment of section 115 of the Code of Civil Procedure, there were two jurisdictions existed in the High Court. One statutory jurisdiction conferred on it by section 115 of the

Code and another constitutional jurisdiction conferred on it by Article 227 of the Constitution. Both these powers have co-existed all these years. Section 115 was extensively amended in the year 1976. At that time also, Article 227 was in existence. It is today amended extensively and today also the power under Article 227 exists.

26. The question in issue is not whether the writ petitions against the interlocutory orders passed by the Civil Courts during pendency of the suits against which revisions are maintainable only in respect of contingencies mentioned therein after amendment of section 115 of the Code of Civil Procedure, are maintainable under Article 227 of the Constitution. They are maintainable and there is no curtailment of jurisdiction/power of this Court under Article 227 of the Constitution because of the amended section 115 of the Code of Civil Procedure. The real question which is considered in the present writ petitions is what should be the criteria while exercising power under Article 227 by this Court in such situation. We must bear in mind that the Constitutional Court, i.e. High Court is the Court of equity and justice and is expected to interpret law or statute and is not vested with the jurisdiction or power to legislate or re-write the legislation or statute. Even the Apex Court is of the view that while exercising absolute power under Article 142 of the Constitution, it cannot, in the normal circumstances, ignore the mandate of the statute on the subject and, therefore, by necessary implication there is an implied duty cast upon the courts not to violate or breach the mandate of the legislation, statute or law holding field on the subject. It is well-settled that the power of judicial interference under Article 227 of the Constitution with the orders of judicial and quasi judicial nature is not greater than the power under Article 226 of the Constitution. Under Article 226, power of interference may extend to quashing of the impugned order on the ground of mistake apparent on the face of record. But under Article 227, power of interference is limited to seeing that the Tribunal or Court below functions within its limit or authority. It is, therefore, apparent that power of superintendence under Article 227 cannot be invoked even to correct an error of fact, which only a superior Court can do in exercise of statutory power as the Court of Appeal and the High Court cannot in exercise of its jurisdiction under Article 227 convert itself into Court of Appeal. The Apex Court in the case of *Sugarbai M. Siddiq and Others Vs. Ramesh S. Hankare (D)* by Lrs., , observed referred to above and those observations of the Apex Court in no uncertain terms convey that this Court while exercising power under Article 227 of the Constitution is not basically concerned with the decision of the lower Court or Tribunal, but with the decision making process. Therefore, it is implicit that the power under Article 227 of the Constitution cannot be exercised merely to correct the defect in the decision of the Court below or Tribunal, but High Court can interfere when the process of decision making itself is not based on the established norms resulting in miscarriage of justice and failure to interfere may lead to perpetuating the illegality caused by such decision. It is evident that jurisdiction which is conferred on the High Court under Article 227 of the

Constitution being restrictive in nature and is expected to be exercised in a particular situation alone, it is imperative for the High Court in view of the above referred decisions of the Apex Court not to exercise the same in a case where such exercise would result in frustrating the mandate of the statute or law on the subject.

27. So far as case of Prabhudas Narayan Gedam and others v. Municipal Council, Bhadrawati, 2003(1) Mh.L.J. 275, cited and relied on by the learned Counsel is concerned, there is absolutely no quarrel with the proposition laid down by the learned Single Judge of this Court in the said judgment that any amendment to the CPC would lead to judicial power under Article 227 of the Constitution unaffected and this extra-ordinary jurisdiction be exercised only in appropriate cases. In fact, it is a well-settled legal position since long that the constitutional power conferred upon the High Court under Article 227 cannot be curtailed by any legislation or statute and, therefore, the amending legislation of 1999 whereby section 115 of the CPC is substantially amended, resulting in curtailment of power of this Court to a great extent u/s 115 of the Civil Procedure Code, does not affect the jurisdiction under Article 227 of the Constitution. However, the legal question which we are faced with in the present writ petitions is not one of jurisdiction, but of exercise of jurisdiction.

28. So far as judgments of the Apex Court in Sadhana Lodh v. National Insurance Company Ltd. and another, 2000(1) Scale 739, and Vadivelu Vs. Sundaram and Others, , cited and relied on by the learned Counsel are concerned, they primarily deal with the jurisdiction of the High Court under Article 227 of the Constitution and there is absolutely no quarrel with the proposition laid down by the Apex Court in the said judgments. However, as I have already observed hereinabove, the question with which this Court is faced with in these writ petitions is not whether this Court has a jurisdiction to entertain these writ petitions against interlocutory orders passed by the Civil Courts during pendency of the suits, but is that of exercise of such jurisdiction---whether warranted particularly when it would set at naught the mandate of the amended section 115 of the Civil Procedure Code. It must be borne in mind that the High Court as a matter of routine course is not expected to exercise power under Article 227 of the Constitution ignoring mandate of the statute or legislation on the subject, i.e. provisions of amended section 115 of the Civil Procedure Code. However, in an extra-ordinary situation and for a legitimate reason or cause, power under Article 227 of the Constitution can be exercised not as a matter of course, but in case of exception only.

29. In view of the facts and law referred to hereinabove, there is no quarrel whatsoever that the power under Article 227 of the Constitution vested in the High Court can be exercised whenever order impugned is without jurisdiction, in excess of jurisdiction or same is manifestly illegal and illegality is apparent on the face of record, keeping in view the law that such power cannot be exercised merely to correct every wrong order. However, in addition to this, there is

something more, which the High Court needs to keep in mind while exercising power under Article 227 of the Constitution other than the above referred parameters and that is, not to ordinarily exercise such power, which would frustrate the object and mandate of statute in general and section 115 of the CPC in particular and exercise such power only in an extra-ordinary situation to prevent miscarriage of justice and should refuse to exercise in each and every kind of situation. The legal proposition is answered accordingly.

30. On the backdrop of the above referred facts and law, every writ petition will have to be considered individually.