

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 1424 OF 2004
WITH
CIVIL APPLICATION NO. 221 OF 2013 IN F.A. NO. 1424 OF 2004

Shivram Mahadev Shinde (Decd.)			
by Kusum Shivram Shinde & Ors.	...		Appellants
Vs.			
Maharashtra Housing & Area Development			
Authority & Anr.	...		Respondents

CIVIL APPLICATION NO. 3962 OF 2006
IN
FIRST APPEAL NO. 1424 OF 2004

Janabhumi Co-op. Housing Society Ltd.			Applicant
Vs.			
Kusum Shivram Mahadev Shinde & Ors.	...		Respondents

CIVIL APPLICATION NO. 44 OF 2008
IN
FIRST APPEAL NO. 1424 OF 2004

Dynamic Cooperative Housing Society Ltd.			Applicant
Vs.			
Shivram Mahadev Shinde (Decd.)			
by Kusum Shivram Shinde & Ors.	...		Respondents

CIVIL APPLICATION NO. 2163 OF 2013
IN
FIRST APPEAL NO. 1424 OF 2004

Maharashtra Housing & Area Development			
Authority & Anr.	...		Applicants
Vs.			
Shivram Mahadev Shinde (Decd.)			
by Kusum Shivram Shinde & Ors.	...		Respondents

**CIVIL APPLICATION NO. 4436 OF 2013
IN
FIRST APPEAL NO. 1424 OF 2004**

Kamruddin Alla Baks Ansari & Ors.	...	Applicants
Vs.		
The State of Maharashtra through Govt. Pleader & Anr.	...	Respondents

**CIVIL APPLICATION NO. 4678 OF 2013
IN
FIRST APPEAL NO. 1424 OF 2004**

Ayub Mohd Amir Shaikh	...	Applicant
Vs.		
Shivram Mahadev Shinde (Decd.) by Kusum Shivram Shinde & Ors.	...	Respondents

CIVIL APPLICATION (St.)NO. 24273 OF 2015 IN FA. NO.1424 OF 2004

Shivram Mahadev Shinde (Decd.) by Kusum Shivram Shinde & Ors.	...	Appellants
Vs.		
Maharashtra Housing & Area Development Authority & Anr.	...	Respondents

CONTEMPT PETITION NO. 27 OF 2013

Kusum Shivram Shinde & Ors.	...	Petitioners
Vs.		
Maharashtra Housing & Area Development Authority & Ors.	...	Respondents

**CIVIL APPLICATION NO. 126 OF 2015
IN
CIVIL APPLICATION NO. 4061 OF 2004 IN FA. NO. 1424 OF 2004**

Anwar Hussein Baba Miya Dafedar alias Annu alias Prasserulla Annu	...	Applicant
Vs.		
Kusum Shivram Shinde & Ors.	...	Respondents

Mr. Kevic Setalvad, Senior Advocate a/w. Mr. Deepak Chitnis, Daisy Dubhash, Awais Ahmedji and Mangesh Parte i/b. M/s. Deepak Chitnis Chiparirkar & Co., Advocate for the appellants/applicants/petitioners.

Ms. P.D. Anklesaria, Senior Advocate a/w. Ms. Aparna Murlidharan i/b. Mr. P.G. Lad. Advocate for respondent no. 1/MHADA.

None for the respondent/State.

Mrs. Sulbha A. Dhamale, Advocate for the applicant in CAO/126/2015.

CORAM : **MRS.MRIDULA BHATKAR, J.**
RESERVED ON : **18th DECEMBER, 2015**
PRONOUNCED ON : **23rd DECEMBER, 2015**

JUDGMENT:

This Appeal is directed against the judgment and order dated 20th September, 2004 passed by the learned Judge of the City Civil Court thereby dismissing the Short Cause Suit No. 1357 of 1979. The original plaintiff no. 1 Shivram Mahadev Shinde claiming adverse possession against the Government, filed a suit for possession and injunction in respect of land admeasuring 25 acres and 12.34 gunthas bearing Survey no. 29 (Part), 30-C, 30-D, 41/1 (Part), 41/2, 41/3 and 41/4 (Part), 41-B/1, 42-B/2 and Plot Nos. 1 to 11-12 (Part) of private scheme No. "A" at Village Pahadi, Goregaon Taluka, Borivali, Mumbai.

2. It is the case of the plaintiff no. 1/Shivram Shinde that he was in possession of the suit land since 1944. He has entered into an agreement with one Jagan Babu Thakur on 15th June, 1949 for cultivating the land for two years, i.e., from 15th June, 1949 to 14th June, 1951 (Exhibit 6). On 9th April, 1970 Tahsildar of Village Pahadi issued notice that in the year 1956 that the original plaintiff had encroached upon the

land and cultivated para grass. It is his case that panchnama was conducted by Talati, which shows that the land was in possession of the plaintiff/appellant, so he paid the penalty for that and continued to do so. He entered into Sale Deed with plaintiff no. 2 in the year 1955 of the suit land. It is also a case of the plaintiff no. 1 that he had lodged written complaint to P.S.I. on 5th January, 1979 against MHADA board and Tahsildar. On 26th August, 1979 the appellant entered into an agreement with one Devraj Gundecha/plaintiff no. 2 and sold the said land by registered agreement of sale. Therefore, the plaintiff/appellant claimed that he is in possession of the suit land without any interruption since last more than 30 years and claimed declaration of title by way of adverse possession and also injunction against the defendants. The written statement was not filed by the State, but it was filed by MHADA/defendant no. 1 who denied that the plaintiff no. 1 was in possession of the land. All the averments made and contentions raised by the plaintiff are denied by the defendants in the written statement. It is contended that the State of Maharashtra is the owner of the land and has acquired this land for MHADA for the purpose of constructing houses for public. He submitted that the award was passed of the said land and name of Government of Maharashtra and MHADA were entered in the record of rights of the said land. It was further specifically denied that appellant is having a hostile and open possession since last 30 years,

however, the Government has sent a notice in the year 1970 demanding penalty for unauthorized occupation by the plaintiff. The fact of possession of the entire land for 30 years is also denied. It is further contended that the plaintiff is not cultivating para grass on the entire land and the suit be dismissed.

3. After considering the pleadings in the plaint and the written statement, the trial Court framed issues and gave findings as follows:

S.No.	Issues	Findings
1	Whether this Court has jurisdiction to entertain and try the suit	This Court has jurisdiction to try the suit.
2	Whether the plaintiffs prove that the suit lands are in their possession openly, continuously and adversely for 12 or more years ?	Plaintiffs have failed to prove that the suit lands are in their possession openly, adversely for 12 or more years.
3	Whether the order of the Tahsildar, Borivali, dated 11.4.1979 in Case No. RTS/WS/183 is not binding on the plaintiffs?	Not proved, Plaintiffs should have adopted proper course.
4	Whether the plaintiffs are entitled to claim Rs.5000/- together with interest @ Rs.6% p.a. as damages from the defendants	Plaintiff is not entitled to any damages.
5	Whether the plaintiffs are entitled to claim Rs.1080/- as loss of income or profit for the period from January 1979 till the date of the suit together with interest @ 6% p.a. of the amount?	Against plaintiff
6	Whether the plaintiffs are entitled to menses profit from the date of the suit till removal of earth dumped at the rate of 500/- per month	Against plaintiff
7	Whether the plaintiff is entitled to	Against plaintiff

	declaration and injunction prayed for	
8	What order and decree	Suit is dismissed

4. The plaintiffs have examined one witness PW-1 Ramakant Yashwant Desai. The original plaintiff Shivram Shinde was not alive when the matter reached for evidence. So witness Mr. Desai, who claimed to be present at the time of transactions by plaintiff no. 1 and the actions taken by the plaintiff in respect of suit property, gave evidence. The Government did not file written statement and did not examine any witness. However, MHADA filed its written statement, cross-examined the witness of the plaintiff and also examined witnesses D.W. Rajendra Kotecha on their behalf. After considering the oral as well as documentary evidence of both the parties, the trial Court answered the issues as above. The trial Court dismissed the suit with costs. Being aggrieved by the said judgment and order, this Appeal is filed.

5. The points of determination are - (i) Whether the appellants/original plaintiffs have perfected title by adverse possession and entitled to reliefs as prayed? (ii) Whether the learned trial Judge has erred in appreciating evidence to decide plaintiffs' claim of adverse possession.

Submissions of the appellants

6. The learned counsel Mr. Setalvad for the appellants submitted that

the suit is for the adverse possession and the possession of the appellants is in fact admitted by the Government. The appellant is in possession of the suit premises since 1944. By notice dated 9th April, 1970, the Tahsildar demanded penalty from the appellants by showing encroachment by them from 1956. The learned counsel submitted that the appellants have adduced documentary evidence to show that the appellants are in possession of the suit property at least from 15th June, 1949. He relied on the agreement entered into by the original plaintiff Shivram Shinde with Jagan Babu Thakur dated 15th June, 1949 for cultivation of para grass for a period of two years from 15th June, 1949 to 14th June, 1951 (Exhibit 6). He relied on Agreement of Sale dated 25th April, 1955 (Exhibit 7) between Shivram Shinde and Devraj Gundecha for 11 acres of land. He further relied on judgment dated 11th September, 1959 in Case No. 535/P/1969 (Exhibit 8) which was given against the plaintiff by the Court of Presidency Magistrate, 24th Court, Borivli. He submitted that these documents establish that original plaintiff was in possession of the suit premises at that relevant time. He further relied on other documents, i.e., a letter of Tahsildar dated 9th April, 1970 (Exhibit 9) for unauthorized cultivation of grass stating that there is encroachment since 1956. He pointed out that original plaintiff Shivram Shinde sent letter to Tahsildar, Borivali on 20th January 1978, which is marked at Exhibit 10, very specifically claiming adverse possession. Thereafter on

4th April, 1978 Tahsildar recorded the statement of Shivram Shinde which is marked at Exhibit 11. Pursuant to that correspondence, a panchnama of the spot was drawn on 11th April, 1978 (Exhibit 12). Thereafter on 11th April, 1978 original plaintiff entered into Supplementary Agreement of 25 acres of the land by way of rectification of the earlier agreement dated 25th April, 1955 wherein the area of suit land was mentioned as 11 acres (Exhibit 13). He further submitted that on 25th January, 1979 Shivram Shinde/original plaintiff made written complaint to P.S.I. against MHADA board and Tahsildar (Exhibit 14) and on 26th August, 1979 original plaintiff entered into Agreement of Sale with Devraj Gundecha (Exhibit 15). He submitted that all the agreements are registered on 26th September, 1979 and Power of Attorney was executed by Shivram Shinde in favour of Gundecha Builders (Exhibit 16). He pointed out that Power of Attorney (Exhibit 16) was signed by Ramakant Desai (PW-1) as witness and thus, his evidence is authentic and supported by this document. Shivram Shinde died in 1982 after filing of the suit. His death certificate dated 23rd September, 1982 (Exhibit 17) is produced. After death of Shivram Shinde, his minor son Dhanesh and wife were brought on record. The learned senior counsel argued that no effective cross is taken on the documents by the defendants. He submitted that Government was aware that the plaintiff was in possession of the land and it was open, hostile and continuous possession. The Government though relied on

number of documents especially on Section 4 notice and award under Land Acquisition Act, no documentary evidence is produced by either by Mhada or Government. The Government did not file written statement to show that the Government was not interested in the property and was fully aware that the plaintiff is having his long possession. The evidence of plaintiff is uncontroverted by the defendants. Though it was claimed that award was passed on 6th September, 1951 it was not placed on record. He submitted that though it was contended in the written statement and said on oath by the witness of the defendants that the State has taken possession of the land at the time of acquisition, nothing is placed on record to show physical or symbolic possession was taken by MHADA. Moreover, actual physical possession is contemplated under the acquisition. He further submitted that the learned Judge of the Trial Court has committed an error in rejecting the case of the plaintiff on the ground of adverse possession. The learned Judge did not properly examine the documentary and oral evidence produced by the plaintiffs to show that they are in hostile and continuous possession since 1944. The defendants failed to produce documents in support of their claim of acquisition and passing award, therefore, fact of acquisition should not have been accepted by the trial Court.

7. Mr. Setalvad argued that when Contempt Petition No. 131 of 2010

was filed, settlement talks continued between the parties. The Government has introduced a policy known as 60:40 policy, i.e., to offer 40% of the share to the occupants and use 60% for development by MHADA. The petitioners have received a letter from the Chief Officer of MHADA on 29th August, 2001. In response to that, the appellants sent letter on 17th September, 2001. Another letter dated 18th October, 2001 was sent by MHADA. The letter dated 19th October, 2001 was sent by the lawyer of plaintiff to MHADA showing the willingness to accept the proposal. MHADA prepared an office note on 29th August, 2008 in respect of settling the matter by availing of 60:40 policy. However, thereafter the respondents committed contempt, as the talks were not materialized and on 3rd December, 2012 a contempt notice was sent by Chitnis Vaiti, lawyer of the petitioner. However, the said notice is not replied by the respondents. As on today, the respondents did not deny taking forceful possession of the northern portion of the property and thus, they have committed clear contempt of Court. He relied on the reply dated 8th March, 2013 filed by Vandana Georikar, Assistant Land Manager MHADA. He submitted that affidavit filed by the respondents is with complete impunity and contempt by the respondents is writ large and obvious, so the consequence must follow.

8. The learned senior counsel Mr. Setalvad on the point of adverse

possession relied on the following decisions:

- (i) Balwant Narayan Bhagde vs. M.D. Bhagwat & Ors., reported in (1976) 1 SCC 700.
- (ii) Pralhad Singh & Ors. vs. Union of India & Ors., reported in (2011) 5 SCC 386 on the point of acquisition of land and passing award.
- (iii) Bajranglal Gangadhar Khemka & Anr. vs. M/s. Kapurchand Ltd., reported in 1951 Indian Law Reports 125 on the point of contempt proceedings.
- (iv) Bank of Baroda vs. Sadruddin Hasan Daya & Anr., reported in (2004) 1 SCC 360 on the point of contempt.

Submissions of the respondents

9. The learned senior counsel Ms. Anklesaria appearing for MHADA has submitted that it is a case of land grabbing by the builder Gundecha, i.e. plaintiff no.2. She submitted that this builder is claiming suit land illegally in the name of original plaintiff Shivram Shinde, who was illiterate, poor person and was never in possession of a single guntha of the suit land. It is a very peculiar modus operandi of this builder to claim adverse possession of a huge Government land. She submitted that the land which is shown as 25 acres and 12½ guntha is in fact much more, i.e. upto 50 acres of land having market value of more than 500 crores.

The plaintiff was never having open, hostile & continuous possession of Government land and the claim of the plaintiffs in the property by adverse possession is false and not tenable in law. Though there was a conveyance between Shivram Shinde and Gundecha in the year 1955 and thereafter in the year 1978, that is a bogus transaction. It was claimed that Shivram Shinde, who is in actual possession of the suit property, has transferred the land to Gundecha, and if it was so, how can Shivram claim adverse possession from the Government when he was not in possession of the suit land when he filed the suit and thereafter till Gundecha was impleaded in 1998 as plaintiff no. 2. The suit is not filed by Gundecha, i.e. plaintiff no. 2. She submitted that in Suit No. 1357 of 1979, Gundecha Builders were not party initially but they joined as a party to the suit on 23rd August, 1998 and therefore, there are no pleadings against Gundecha in the written statement filed by MHADA. She submitted that this land of Government was "Gurcharan" land (cattle grazing) and same fact is mentioned in the so-called agreement entered into by Gundecha and Shivram Shinde. In the year 2009, Dhanesh, son of Shivram Shinde attained majority and therefore, Deed of Affirmation was executed by Gundecha and Dhanesh Shinde. This is a massive fraud played by Gundecha on the Court. Shivram Shinde died and thereafter Deed of Conveyance was executed on 13th February, 2008 between Kusum Shinde and Gundecha builders. She submitted that this

Agreement was admitted in rejoinder and therefore, it can be relied by the Government. In the said agreement it is mentioned that it was a "Government Gurcharan land" (cattle grazing). She argued that the description of suit land is very vague and deliberately nothing specific is mentioned in the suit. The portion of survey numbers are mentioned, however, their areas are not mentioned. She submitted that assuming if decree was to be passed, in whose favour could the decree have been passed, as admittedly Shivram Shinde has sold and transferred the land to Gundecha and Gundecha was not a plaintiff initially when title by adverse possession was claimed. In support of her submissions, she referred to section 6(a) of the Transfer of Property Act, which puts bar on transfer, which in anticipation the person will acquire title. She submitted that there is difference in permissive possession and adverse possession and encroachment. Shivram Shinde may be encroacher for some portion of the land but he was never in continuous, open and hostile possession of the suit land. She argued that the plaintiff did not plead that he was in actual physical possession of the suit land. In support of her submissions on adverse possession, she relied on the judgment of the Hon'ble Supreme Court in the case of **Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors., reported in AIR 2009 SC 103** in which the Hon'ble Supreme Court has very heavily shunned the instances of such land grabbing. From the date of entry of the person, the period for

adverse possession is required to be computed. In the present case, no date of entry of the original plaintiff on the suit land is mentioned so there is no such adverse possession. Thus, the period of necessary 30 years of adverse possession is missing. She further submitted that Shivram Shinde is no more and personal cause of action dies with the person.

She submitted that under section 20 of the Maharashtra Land Revenue Code, all open lands belong to the Government. Therefore, encroachment notice is given by Tahsildar under section 22 of the Code and thereafter the plaintiff was charged with penalty for encroachment of the land, which he was liable to pay for encroachment. She submitted that grass cutting agreement (Exhibit 6) was only for two years and it is bogus. She submitted that on 27th September, 1986 the plaintiff wrote to Government and demanded the land to be given to him on lease. The learned counsel submitted that if such demand is made, then the claim of adverse possession is destroyed by the plaintiff himself. She argued that name of Government and MHADA is shown on 7/12 extract. The evidence of Ramakant Desai is doubtful. She submitted that Shivram/original plaintiff was staying at Malad and hence it is not possible for him to be in possession of a huge land of 25 acres situated at village Pahadi. She further submitted that it is the plaintiff who has to prove his case independently and weakness in the case of the defendant cannot be used to prove the case of the plaintiff.

10. The learned senior counsel Ms. Anklesaria relied on the following decisions:

- (i) Gurudwara Sahib vs. Gram Panchayat Village Sirthala delivered on 16th September, 2013 in Civil Appeal No. 8244 of 2013.
- (ii) Amirchand Tulsiram Gupta vs. Vasant Dhanaji Patil, reported in 1992 (2) Bom. C.R. 22.
- (iii) Dharamarajan & Ors. vs. Valliammal & Ors. reported in AIR 2008 SC 850 on the point of adverse possession.
- (iv) Chatti Konati Rao & Ors. vs. Palle Venkata Subba Rao, reported in AIR 2011 SC 1480.
- (v) Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan & Ors., reported in AIR 2009 SC 103.
- (vi) Union of India & Ors. vs. Vasavi Coop. Housing Society Ltd. & Ors., reported in AIR 2014 SC 937.
- (vii) Shanmugam vs. Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam, reported in AIR 2012 SC 2010.

11. The learned senior counsel Ms. Anklesaria relying on the case of **Shanmugam** has submitted that the Court would be fully justified if heavy punitive costs will be imposed on the appellants for abuse of legal process.

12. The learned senior counsel Mr. Setalvad, by way of reply, has argued that the submissions of learned counsel that the possession cannot be tacked on is incorrect. He relied on number of judgments:

- (i) Full Bench judgment of the Supreme Court in the case of Gurbinder Singh & Anr. vs. Lal Singh & Anr., reported in AIR 1965 SC 1553 (V 52 C 262).
- (ii) Ram Piari vs. Budh Sen, reported in (1920) Volume XLIII 165 (Allahabad).
- (iii) Rajasekaran & Ors. vs. Elumalai Goundan & Ors. reported in (1976) 1 MLJ 1288.
- (iv) Sajjad Husain vs. Qurban Ali Beg, reported in AIR 1926 Allahabad 697.
- (v) Balkrishan vs. Satyaprakash & Ors., reported in (2001) 2 SCC 498.
- (vi) Ramayya vs. Kotamma & Ors., reported in Indian Law Report Reports Volume XLV 370.

13. In reply, he further argued that law of tacking on and breaking the continuity of possession is totally different. The person who claims adverse possession can get the benefit of the period of adverse possession enjoyed by his predecessor and that period can be joined and it is available to the person who claims adverse possession. On the point of examination and appreciation of evidence, he relied on the

following decisions:

- (i) State of UP cs. Nahar Singh (Dead) & Ors., reported in (1998) 3 SCC 561. He relied on paragraphs 13 and 14 of the said ruling.
- (ii) The National Insurance Co. Ltd. vs. Dayanand Margeppa Pedde, Prakash Dhanraj Soniminde and Sudhakar Baburao Shinde, reported in 201 Vol. 112 (2) Bom. L.R. 0677.

The learned senior counsel Mr. Setalvad had vehemently argued that the neither the Government nor MHADA tendered any documentary evidence except one and thus the Court cannot look into the other documents which are only produced by the defendants. So, the fact of acquisition by Government is not at all proved. Hence, the judgment and order of the trial Court be set aside and the Appeal be allowed and action be taken as prayed in the Contempt Petition.

Reasoning – on Law

14. The first point formulated by me is in respect of proof of title by adverse possession. The law of adverse possession branches out of the law of limitation. Article 65 states that if the possession for immovable property or any interest therein based on title is of 12 years, then the possession of the defendant becomes adverse to the plaintiff. A title by adverse possession can be prescribed also against the Government, so

the Government does not enjoy any immunity or privilege where the adverse possession is claimed. However, some concession of longer period of claiming adverse possession is given in favour of the Government under Article 112 of the Limitation Act where the period of limitation to run is for 30 years. In the corresponding Article 149 of the Limitation Act of 1908 (old), it is made clear that the Article applies also to Government like a private person. The concept of adverse possession is borrowed from British Law. The common law recognizes the theory earlier of "*nullum tempus occurrit regi*", which means, no time affects the Crown. The reason for this was that the State should not suffer for the negligence of its officers or for their fraudulent hand-in-glove transactions with the adverse party. However, common law fixed a period of 60 years limitation in respect of suits on behalf of or against the Crown and the same was adopted by the Indian Law under Article 149 (Old) and subsequently by way of amendment period is reduced from 60 to 30 years under Article 112 (new). However, the reason for giving a longer period to the Government when a party claims adverse possession is obvious; because the Government is not one person but is a body of persons taking decisions following procedural wrangles and moving like a python who is very slow in its action. There is no dispute that adverse possession must be proved for the whole period which is claimed. It cannot be proved piecemeal. There must be proof as to the date, time

and manner in which the possession became open and adverse and the owner is out of the possession. It is to be remembered that a person pleading adverse possession cannot claim equity in his favour since he is trying to defeat the rights of the true owner. The acquisition by adverse possession is an exception to law of acquisition of title through lawful means and therefore, it is to be pleaded with certainty and to be proved to the hilt. Thus, for the claim of adverse possession, a person should be in continuous, exclusive, open and peaceful possession for 12 years when he claims against the private parties and for 30 years, when he claims against the Government.

15. In the case of **Hemaji Waghaji Jat** (*supra*) the Hon'ble Supreme Court while dealing with the issue of adverse possession under Articles 64 and 65 of the Limitation Act has expressed that there is urgent need of a fresh look regarding the law on adverse possession and they have recommended the Union of India to seriously consider and make suitable changes in the law of adverse possession. The Division Bench has expressed that the law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who has illegally taken possession of the property of the true owner.

16. In the case of **Union of India & Ors. vs. Vasavi Coop. Housing**

Society Ltd. (*supra*), the Hon'ble Supreme Court held "It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff."

17. In the case of **Shanmugam** (*supra*), a watchman claimed title by adverse possession over one "Dharamshala". The Hon'ble Supreme Court held that only by obtaining ration card and the house tax receipts, the appellant cannot strengthen his claim of adverse possession. The Division Bench laid down that certain facts are to be established by the person who claims possession; the date of entry into possession, how he came into possession, who is in possession of the titled documents so also the subsequent conduct are to be answered.

18. In the case of **Balwant Narayan Bhagde** (*supra*), the mode of taking possession of the land under sections 16 and 17(1) of Land Acquisition Act, 1894 was discussed. The Hon'ble Supreme Court made distinction between symbolical possession and delivery of actual possession. It was held that taking possession under section 16 and 17 means taking possession on the spot and it is neither possession on paper nor symbolical possession which is understood in civil law. It can

be in the form of a declaration by beat of drum or by a written declaration. As to the mode of taking possession, the act is silent. In the case in hand, the case of the defendant is that the land was acquired by the Government and the possession was handed over to MHADA along with a huge land of 203 acres. Therefore, the acquisition of the said land can be proved by presenting the award before the Court. In the present case, the acquisition of the land is not challenged by the persons from whom the land was acquired. Moreover, a bigger portion of the land is acquired by the Government. Here, the facts on which the claim of adverse possession is made are entirely different.

19. In the case of **Prahlad Singh** (*supra*) the Hon'ble Supreme Court has held that panchnama is to be prepared in the presence of independent witnesses and signature is to be obtained on panchnama. Until the actual possession is not taken, legal presumption of vesting cannot be raised. However, the Hon'ble Supreme Court in the said case held that no hard and fast rule can be laid down as to what act would be sufficient to taking of possession.

20. In the case of **Gurudwara Sahib** (*supra*), the Hon'ble Supreme Court held that if the plaintiff is found in adverse possession, he cannot seek declaration to that effect that such adverse possession has matured

in ownership. The adverse possession can be used as a shield or defence.

21. In the case of **Amirchand Tulsiram Gupta** (*supra*), the Division Bench of Bombay High Court while dealing with Article 65 of the Limitation Act of adverse possession, held that it is necessary for the party claiming adverse possession to set out the dates from which the parties started claiming adversely to the other party.

22. In the case of **Dharamarajan** (*supra*) the Hon'ble Supreme Court has taken a view that in the absence of any revenue record, there is no question of title over the land and the claim of adverse possession on the suit property by the plaintiff fail.

23. In the case of **Balkrishan** (*supra*), the appellant who is the original plaintiff had filed the suit for declaration of his title on the ground of adverse possession. The appellant had purchased the land from two persons in the year 1960 and the suit land was under attachment by orders of the Tahsildar. Inter alia, the suit property was auctioned and one Mr. Mohan Singh had purchased it in the name of his minor son Rajendra Singh. Thereafter Rajendra Singh through his father filed an application under the Land Revenue Code against the appellant for restoration of

possession. So, the suit was filed by the appellant for declaration. The suit was dismissed on the ground that the sale was not valid. In the year 1970 Tahsildar ordered the appellant to put the heir of Mohan Singh in possession of the suit land. The said order was challenged before the SDO. The suit was filed for declaration. The trial Court found that the appellant was in continuous possession of the suit land and perfected his title by adverse possession, therefore, the suit was decreed. The appeal was dismissed by the District Judge. The Second Appeal preferred by the respondents was allowed rejecting the claim of adverse possession, hence Civil Appeal was filed before the Hon'ble Supreme Court.

The question before the Hon'ble Supreme Court was when the order of Tahsildar to deliver the possession of the suit land was passed against the appellant, whether appellant had perfected his title by adverse possession. The Hon'ble Supreme Court stated that the claimant had to show that his possession is adequate in continuity, in publicity and in extent. The Hon'ble Supreme Court held that though the Tahsildar had passed the order and if that order is not acted upon or executed, the appellant continued in possession of the suit land and, therefore, the continuity of his possession was neither interrupted, nor lost. Mere passing of an order of ejectment against a person claiming to be in adverse possession neither causes his dispossession, nor discontinuation of his possession which alone breaks the continuity of

possession. The facts of the present case are entirely different. In the case of **Balkrishna** there was an attachment order running against the appellants. In the present case, the award was passed and lands were acquired from the previous land owners during the period which is claimed. Moreover, the plaintiff no. 1 could not prove his continuous, peaceful, hostile possession over the suit land.

24. In the case of **Ramayya** (*supra*) it is held that there was continuity of possession, the person holding possession being the next presumptive heir of the deceased. Such adverse possession in succession if continuous and without break, would bar the true owner under article 142 of the Limitation Act.

25. **Nahar Singh** (*supra*) case was in respect of explaining the delay in filing the FIR. In the said case, it is stated that in the absence of cross-examination on the explanation of delay, the evidence of PW-1 remained unchallenged and it should have been believed by the Court.

26. Thus a person who claims adverse possession against a private person and the Government has to establish his claim by adducing sufficient evidence on the point that he was enjoying continuous, uninterrupted, peaceful possession for a period of 12 and 30 years

respectively. Thus, the adverse possession is not a pure question of law but blended with facts. On this background, as First Appeal is a continuation of the suit, the documentary as well as oral evidence adduced by the plaintiffs as well as the defendants is required to be looked into.

27. This is a civil trial. A document needs to be proved as per the procedure laid down in the Evidence Act. On mere presentation of the document, it never gets proved except upon some exceptions under the law. In the case of **Dayanand Margeppa Pedde** (*supra*), while dealing with the issue of compensation and proof of insurance policy, the Division Bench held that “Mere production of the policy without getting it admitted in evidence in accordance with law would not enable the Insurance Company to place any reliance on it.” A person who relies on it has to prove the contents therein. Unless the contents in the documents are proved, it cannot be admitted and read in the evidence. In admitting or exhibiting the document, parties are made aware that the court is going to take into account the contents therein for the purpose of determining the issues before the Court. It is a responsibility of the Court while accepting the document in the evidence, i.e., admitting the same in the evidence, to exhibit it so that the evidence is identified. Thus, the parties are aware that they must meet that evidence. This basic procedure of proving the

documents thus ensures fair trial to the parties. No strict proof of the facts is required in civil trial. On the basis of preponderance of probabilities which are brought before the Court, the parties can prove their assertions. However, a party who asserts a case has to prove it. In a civil suit also, the initial burden is on the plaintiff and never on the defendants but onus shifts after plaintiff discharges his burden to prove his case and then the defendants' evidence can be looked into.

28. The law on claim by way of tacking on the period of adverse possession enjoyed by his predecessor against the real owner is settled. The submissions of learned senior counsel for the respondents are not acceptable to that extent. In the case of **Gurbinder Singh** (*supra*) the Supreme Court had an opportunity to deal with Article 144 and Section 2(4) of the Limitation Act, 1908. The said case was a case of one trespasser trespassing against another trespasser and there is no connection between the two, therefore, in law, their possession could not be tacked on to one another. The Hon'ble Supreme Court held that the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of the suit and for computation of this period, he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of independent trespassers. In the said case, though the Hon'ble Supreme

Court dismissed the Appeal, it held that tacking on period from earlier trespasser is permissible in law.

29. In the case of **Ram Piari** (*supra*) the Allahabad High Court held that “a person who is in possession of land without title has, while he continues in possession and before the statutory period has elapsed, a transmissible and inheritable interest in the property, but that interest is liable at any moment to be defeated by the entry of the rightful owner and if such person is succeeded in possession by one claiming through him who holds till the expiration of the statutory period, such a successor has then as good a right to the possession as if he himself had occupied for the whole period.” (Halsbury's Laws of England, Vol. 19, p.157).

30. In the case of **Rajasekaran** (*supra*), the appellants were the owners of the suit land. The respondents/defendants claimed adverse possession. The appellants' case was that the defendants were independent trespassers and that a trespasser could not tack on the previous adverse possession of an earlier trespasser. It was held that the defendants are entitled to tack on the period of adverse possession of the person through whom they derived title and thus, they can prove adverse possession over the statutory period.

31. In the case of **Sajjad Husain** (*supra*) it is said that tacking of the periods of possession by two successive trespassers is permissible when one derives title from the other.

32. Therefore, Gundecha, as per the case of the plaintiffs, got actual possession in the year 1955 of some portion of the suit land. So they are entitled to claim possession since 1944 claimed by their predecessor Shivram Shinde as they have stepped in the shoes of Shivram Shinde if it is proved accordingly. However, on facts, plaintiffs Shivram Shinde and Gundechas both have miserably failed for want of cogent, credible evidence to establish 12 or 30 years continuous, peaceful open possession. If this is the case of the plaintiff, then Shivram Shinde, who filed the suit in the year 1979, in fact cannot claim adverse possession against the Government because as per his case, he had lost the possession of the part of the suit land , i.e., 11 acres of the suit land in the year 1955 and thereafter in the year 1978. As per the case of the plaintiff, Shivram Shinde had given possession of the 11 acres of the suit land to Gundecha in the year 1955. Thus, Shivram Shinde who claimed adverse possession was not in possession of the entire suit land for 12 years or more than that. He claims the starting point of possession in the year 1944. Since then if it is calculated and his case is accepted as it is, he had handed over the possession of the 11 acres out of entire suit land

in the year 1955 to Gundecha. Gundechas were impleaded in the suit in the year 1998 so they are not plaintiffs who filed the suit. In fact as per Shivram Shinde's case in the plaint he had handed over the possession to Gundecha in the year 1955, he has lost the actual possession as per his case. The said portion of 11 acres of land is also not identifiable and not shown as measured and marked separately. This is the first and basic flaw in the claim of adverse possession. Thus, no cause of action was available to Shivram Shinde based on adverse possession. He was a material witness. Gundechas are entitled to claim the benefit of years for which plaintiff no.1/ Shivram Shinde was in possession of the suit land adverse to the title of the owner. However, plaintiff no. 2/Gundecha who should have stepped in the box, did not do so. The evidence of plaintiffs, i.e., Shivram Shinde or Gundechas cannot be substituted by Ramakant Desai.

On witnesses

33. In the present suit, both the parties have tendered evidence of one witness each. One Ramakant Desai was examined by the plaintiffs and Rajendra Kotecha by the defendants. Let me discuss the evidence of Ramakant Yashwant Desai. He has stated that he is residing at Goregaon (West), i.e., the premises belonging to Housing Board. He was working as a Clerk in the Police Department since 1945. He stated

that he knew the original plaintiff-Shivram since 1948 through one friend Joseph Gulban and Joseph was a common friend of Shivram and the witness. This is how they became friends in the year 1948. Shivram was residing at Malad and he was cultivating para grass near Goregaon on several plots, admeasuring 25 acres and 12.3/4 gunthas. Then he pointed out a plan which is marked as Annexure-I and he identified the boundaries. Annexure-I is a paper plan which is drawn by City Survey officer. There is a marking of red line made by a person who drew the plan. Nothing can be proved on the basis of Exhibit 5.

34. His evidence that the original plaintiff was cultivating and in possession of the land since 1948 is merely an oral evidence except one agreement of 1949, he has not produced or proved that fact. Any person can come and stand in the box and depose in such a manner. It is necessary that the family members of Shivram Shinde or legal heirs should have produced some proof of cultivating of para grass, sale of the para grass and the amount earned by him. Ramakant Desai deposed that cultivation and possession was known to the concerned revenue officers, i.e. Talathi and Tahsildar. That evidence has no value because evidence of a person about the fact of knowledge of other person in absence of any corroboration cannot be accepted. The corroboration claimed is of Exhibit 9, a letter of demand of penalty. However, that is

only for encroachment for cultivating grass as an encroacher for some years and not on complete possession. Rather the Tahsildar has objected to it and interrupted the encroachment. Ramakant Desai stated that Shivram was illiterate and he could only put his signature. Thus, it shows that whatever correspondence was brought on record by Shivram Shinde was not in fact done by him but it can be safely inferred that it was done by present plaintiff nos. 2 Gundecha in the name of Shivram. His evidence that Shivram Shinde used to take him to Talati's office and the Talati used to question him about the possession and cultivation of grass is a clever manipulation. He deposed that he knew everything what Shinde did about the land. Such evidence can be given by any person who is tutored, trained and planted as a witness. The witness makes a statement on oath that Shivram has constructed several sheds and chawls on the land. However, bare statement cannot be believed by the Court unless financial capacity of Shivram Shinde is brought on record. So also the census number of the structures could have been produced. It is not shown that Shinde was financially so well off to construct such chawls or sheds and manage a big property of minimum 25 acres. proved. Desai speaks about agreement dated 15th June, 1949 with Jaganbabu Thakur for cutting grass from 15th June, 1949 to 14th June, 1951 (Exhibit 6) which is a trump card of the plaintiffs. Desai claims that he was present at the time of agreement and he also identified the thumb

impression of Jaganbabu Thakur who had put it in his presence and in the presence of one witness Sakaram Joshi. The signature of Sakaram is on the document and Desai's signature is not seen on the document. As per the Evidence Act, the author of the document or the witnesses before whom it is executed has to prove the document. Either Shivram Shinde or Jaganbabu Thakur or Sakaram Joshi should have entered the box. The best evidence is to be produced by the party. Whether Sakaram Joshi or Jaganbabu Thakur was available at the time of evidence is not brought on record. If at all Ramakant Desai was so close to Shivram as stated by him, it was conspicuous to note that Shivram did not obtain signature of Ramakant Desai as a witness on the said agreement and also the agreement of sale of land in the year 1955. He stated that the agreement was entered into on 25th April, 1955 and this person was present throughout, however, he is not a witness to such an important evidence, i.e. Agreement to sell the land. He has deposed that he was aware that in 1968 Shivram Shinde started paying agricultural assessment charges. He is also fully aware that Shinde was arrested on 2nd January, 1969 at 8 a.m. for committing theft of grass on the land. He remembered the date of judgment, i.e., 11th September, 1969 when Shivram Shinde was acquitted. He knew that original plaintiff has received Tahsildar's notice dated 9th April, 1970 regarding payment of agricultural assessment charges. On 20th January, 1978 Shinde wrote a

letter to Tahsildar, Borivali in his presence. He identified the signature on the said letter. At the time of recording of the statement of Shinde by the Tahsildar, he was present. Again, when supplementary agreement dated 11th April, 1978 was made between Gundecha and Shivram Shinde, he was present. On 5th January, 1979 original plaintiff filed a written complaint against the State for illegally filling soil on his land. He is also aware that Power of Attorney was executed by Shinde in favour of Gundecha in 1979.

35. This cannot be considered as an evidence contemplated under the Evidence Act which is to be believed and relied upon by a Judge. Under Order 18 Rule 4 examination-in-chief of the witness shall be on affidavit and copy thereof shall be supplied to the opposite party. However, it is expected that the witness should state the true facts of whatever he has witnessed. The present affidavit-in-chief is nothing but a copy of the plaint. Desai is not the plaintiff. If this witness was present throughout at the time of all important instances in respect of the suit land along with Shivram, then in the plaint, Shivram Shinde ought to have mentioned Desai's name as a witness. Nowhere in the plaint the name of this witness is appearing. He did not sign as a witness to any document, i.e. Agreement dated 15th June, 1949 between Shivram Shinde and Jaganbabu Thakur (Exhibit C), Agreement of Sale dated 25th April, 1955

(Exhibit 5) between Shivram Shinde and Devraj Gundecha, judgment dated 11th September, 1959 in Case No. 535/P/1969 (Exhibit 8), Tahsildar recorded the statement of Shivram Shinde (Exhibit 11), a panchnama of the spot was drawn on 11th April, 1978 (Exhibit 12). original plaintiff entered into Supplementary Agreement on 11th April, 1978 (Exhibit 13), on 25th January, 1979 Shivram Shinde made written complaint to P.S.I. against MHADA board and Tahsildar (Exhibit 14) and on 26th August, 1979 original plaintiff entered into Agreement of Sale with Devraj Gundecha (Exhibit 15). Only Power of Attorney (Exhibit 16) is signed by Ramakant Desai (PW-I) as a witness. Except this, nowhere name of Ramakant Desai is appearing on any contemporaneous document. Shivram Shinde died on 23rd September, 1982 and minor son of Shivram Shinde was definitely 18 years old on 23rd September, 1982 when he was brought on record.

36. These all statements and evidence of Ramakant Desai that he was present at the time of all relevant agreements or transactions are completely shadowed with dishonesty and falsity and have failed to inspire confidence in the Court. His presence looks like a comet. This witness is used for the only purpose of proving the so-called documents. The document of 1949 to 1951 of cutting of para grass cannot be believed because neither of the parties nor witness were examined. The

submissions of the learned senior counsel that when the evidence of Ramakant Desai was recorded in the year 2002, the document was 30 years old and therefore, it is to be read in evidence under the presumption of Section 90 is correct. A document can be taken on record if it is 30 years old. Under Section 90 if the document is produced from proper custody, the presumption exists about the execution and attestation of that document. Such presumption is rebuttable. Moreover, though execution and attestation is presumed, the truthfulness of the contents therein is a matter of challenge and proof. The document of 1949 is proved only to the extent that it was entered into between the parties. However, the contents therein cannot be believed as true because of the false evidence of Mr. Ramakant Desai and the inconsistent conduct of the plaintiffs. If such agreement of grass cutting was entered into in the years 1949 to 1951, then further agreements or any provision regarding grass cutting should have been produced or brought on record. The case of the plaintiff was that throughout 30 years he was cultivating para grass which is a special type of grass, then obviously he must have entered into contracts of grass cutting for further 25 years. However, nothing is shown to that effect. Obviously, it is a sham agreement to meet the requirement of the time to show starting point of adverse possession. It is an eyewash.

37. The witness says that he was present at the time of all the transactions pertaining to said land with Shivram Shinde. The competency of this witness to give evidence in this matter is to be questioned. Undoubtedly he is a puppet witness of present appellant no. 2. The presence of witness at all relevant times should be natural and supported by corroboration and it should create confidence in the mind of the Judge to accept his presence as natural. That is not the case.

38. It is the case of Ramakant Desai that Shivram Shinde wrote a letter to Tahsildar on 20th January, 1978. In 1978 he claimed 35 years of the enjoyment of the land and constructed several huts on it and he was producing rice. There were paddy fields, however, he has not produced any evidence to show that he was cultivating grass and paddy fields in all 25 acres of land. It is not possible for one person to cultivate and look after 25 acres of land without the help of the labourers. If at all Shivram Shinde was really cultivating the land and taking the crop of paddy, then it was easily possible to produce documentary evidence to show sale of paddy crop, accounts thereof, so also evidence of labourers/some villagers. He has not produced any evidence of Shinde's financial capacity to maintain such huge land. The letter dated 20th January, 1978 (Exhibit 10) is in fluent English and this cannot be written by Shivram Shinde. Ramakant Desai deposed that he was present when Shivram

wrote letter to Tahsildar. He also mentioned that Shivram Shinde was illiterate and he could only sign. If this was so, then he should have stated who had written this letter for Shinde. Nothing is mentioned by him and this shows that Shivram Shinde was definitely not the author of this letter, but it is written by somebody else for Shivram Shinde and the witness has no knowledge about it. The evidence of witness Desai is a specimen of how the litigant abuses the process of law and can lie on oath before the Court for his wrongful gain.

39. His deposition in the cross-examination that the recitals in the affidavit are as per his memory cannot be believed. This witness was working as a clerk in the Police department since 1945. He gave evidence in the year 2002 when he was 80 years old. In the year 1948-49 he was around 27 years of age. It is not acceptable that he could give the dates of the agreements from 1949, so also the dates of letter, complaint given by Shivram Shinde and the contents therein. In the cross-examination, he stated that in 1958 he resigned from Government service and was looking after the affairs of Shivram Shinde, Khaskar Bros. Joseph and Ors., on remuneration, depending on the nature of work. If this was true, why was his name not mentioned as a witness? He was not given Power of Attorney by Shivram Shinde when he filed the suit, as Shivram Shinde was illiterate. It was necessary for the legal heirs

of Shivram Shinde to come forward and give evidence for Shivram Shinde. Similarly, plaintiff no. 2 also did not tender any evidence to show that they were in possession of the suit land for more than 30 years, as they stepped in the shoes of Shivram Shinde.

40. If evidence of Mr. Desai is accepted, then anybody can prove any document by deposing that “though I cannot identify the signature or thumb impression of the persons, I was present at the time of execution” and the documents can be exhibited. Such evidence can be given, however, it should be credible to inspire confidence in the mind of a Judge which can be easily tested on the basis of other circumstances and then only that document can be accepted as genuine. He has deposed that he knew Devraj Gundecha who was a person referred in the Agreement dated 25th April, 1955 (Exhibit 7). He admitted that he did not know the office of Advocate Talathi and whatever he has deposed in paragraph 13 that he used to visit the office of Advocate Talathi with Shivram Shinde is incorrect. He stated that he did not know whether Tahsildar has rejected Shinde's application for correction of record of rights. He was given an opportunity to substantiate his evidence by some documentary proof about his presence at the time of agreement or any draft of the agreement corrected by him, however he could not.

41. I have no hesitation to state that to protect the property of the State or the nation, is the responsibility of the Government. The Government is a bundle of persons holding different posts with power and authority. If one or two officers in the said system succumb to different pressures or temptations or are totally inert and perform their functions which are ex-facie contrary to the interest of the State or of the nation, then those decisions or the correspondence or the omissions should be weighed cautiously. Sometimes the power is used or unused in such a skilful, flexible manner that no illegality can be seen on the surface. However, after close scrutiny, if a Judge finds that it is against the interest of the State, then the Judge needs to marshal evidence, reading between the lines, to reach the truth, the whole truth, as for the said purpose oath is administered to the witness by the Judge.

42. The learned senior counsel on the point of adverse possession took support of the interim order passed by the learned Judge of the City Civil Court at Exhibit 5 dated 27th April, 1979 and by that order, the relief of injunction was granted in favour of the plaintiffs. However, it was an interim order passed when the parties had not tendered evidence. Thus, that cannot be given much importance when the oral as well as documentary evidence is tendered by the parties and suit is dismissed on merits.

43. The respondent/defendant MHADA examined one witness, namely, Rajendra Kotecha, who was in employment of MHADA. He denied the case of the plaintiffs totally on the point of possession, so also continuous hostile possession. He gave evidence consistent with the contentions raised in the written statement which was filed on 26th March, 1979 by one Mr. A.B. Thakur, Executive Engineer of MHADA. No useful admissions are sought in the cross-examination of the witness Rajendra Kotecha. He was an Assistant Land Manager in MHADA. His evidence was criticized further on the point that he had no personal knowledge in respect of land as he joined MHADA in the year 1978. A witness may not have a personal knowledge, as it is an act of semi-government organization but he was competent to give evidence because of his post and the job assigned to him. The record maintained by the office is useful and authentic source of knowledge. He has stated that in the year 1948 MHADA/defendant no. 1 gave proposal for acquisition of vacant land admeasuring total about 242 acres, which includes the suit lands and the entire procedure of land acquisition was followed by the State of Maharashtra for MHADA and award was passed in respect of the said lands on 6th September, 1951. The physical possession was taken over by the Government from the respective owners of the land during 1949 to 1951. The State Government also paid the compensation of nearly about 14 lakhs to these owners. Then these owners preferred Reference under

section 18 of the Act for enhancement. By the judgment dated 10th November, 1953, the compensation amount was increased by learned Civil Judge Senior Division, Thane. The certified copy of the said judgment dated 30th November, 1953 is produced, which is marked as Exhibit 21, in support of his evidence. He deposed that on or about 12th October, 1955, as per the policy of the Government, MHADA gave back possession to the Government, as MHADA did not have sufficient funds to develop the land. However, in the year 1960, again these lands were handed over by the Government to MHADA and the possession was also given by the Government to the Housing Board to protect the suit land. He has deposed that on this land, MHADA has taken the possession of the suit land for development of their various housing schemes for public. Some huts and structures were found in the year 1976 and they were censused and identity cards were also issued by the Government. However, no structure of the plaintiff was found on the land.

44. Referring on Exhibit 9, the letter of the Tahsildar, the learned senior counsel Mr. Setalvad argued that the Government thus was aware of the encroachment made by the plaintiffs and the Government has accepted the penalty and assessment charges for the same but did not file any suit for possession against the plaintiffs. This argument is an abortive attempt to foist admission of possessory title of the plaintiffs in

the mouth of the respondents/defendants. The Government has never admitted the possession of the plaintiffs on such a huge land of 25 acres and that is for a long period of 12 years much less of the 30 years. The Government claims its possession and has given MHADA actual possession though some formalities were not completed. The case of the plaintiffs fall in the category of encroachers who have encroached upon some portion of the land and the plaintiffs have no documents or any other evidence to show their actual physical continuous possession for 30 years of the entire suit land. Besides Exhibit 6, which is the agreement between private parties of the year 1949 and 1955, no document is produced showing actual possession prior to 1970. Tahsildar gave notice on 9th April, 1970 (Exhibit 9) for unauthorized cultivation of grass and stated that it is an encroachment since 1956. Besides this, all the documents are of 1978 and thereafter.

45. The learned senior counsel Mr. Setalvad for the appellants, on the point of adverse possession and the right of the owner who is having the title in the land, placed more reliance on the judgment of the Full Bench of Supreme Court in the case of **Gurbinder Singh** (*supra*). He submitted that in the said judgment, the Hon'ble Supreme Court held that when a defendant in possession of the property is sued by a person who has title to it but is out of possession, what he has to show in defence is that he or

any one through whom he claims has been in possession for more than the statutory period. He submitted that today plaintiff no. 2 is in possession of the suit land since long and if the respondent/MHADA wants the possession back, it has to file a suit for possession. However, MHADA chose not to file a suit for possession since so many years atleast from the year 1979 till today and therefore, any claim of MHADA is hereafter time barred. These arguments are fallacious. The facts and law laid down in the case of **Gurbinder Singh** (*supra*) cannot be stretched to apply to the facts of the present case. In the case of **Gurbinder Singh**, there was a dispute between the private parties and the Supreme Court had to consider whether under Article 144 of the Limitation Act the suit is barred by time and what was the starting point of limitation set out in Column 3 of Article 144 of the Limitation Act of 1908. In the said ruling, the status of an independent trespasser and whether the possession can be tacked on in respect of independent trespasser to constitute adverse possession for required period was the issue dealt with. In the case in hand, the Government was already in possession of the suit premises and the Government has acquired the land including the suit land from its true owners by paying compensation. This fact cannot be dislodged and ignored by the Court. From the facts, it appears that the Government never lost its possession against the plaintiffs, who were encroachers on the Government land and it was continuously

objected to, interfered with and thus was never peaceful and continuous. Hence, there was no need for the Government to file a suit for possession against the plaintiffs. The Government was restricted from ousting the plaintiffs by the order of the Court in the year 1979 since the suit was filed.

46. A person who claims adverse possession has to show the exclusion of the possession of the owner. In the present case, the Government was throughout in the possession, however, the appellants oft and on might have been in possession of some portion of land by way of encroachment, but the Government did not lose its possession. To claim adverse possession, it is necessary to establish that the Government was excluded from the possession. The suit land is an open Government 'Gurcharan' land' (cattle grazing land). Under section 20 of the Maharashtra Land Revenue Code it belongs to the Government. However, under section 22 of the Code, it can be used by the people but the Collector has right to preserve that land for specific purpose and can impose penalty for encroachment or unauthorized use of the same. In the present case, no exclusion of the Government was proved at any time.

47. In the present case, the learned senior counsel for the appellants/

defendants rightly pointed out that neither MHADA nor State of Maharashtra tendered documentary evidence on the point of acquisition, except only one document Exhibit 18, i.e. the order passed by the Civil Judge, Thane dated 30th November, 1953. In the present case, the learned trial Judge of the City Civil Court in the impugned judgment in paragraph 16 has considered three documents - (i) award under section 11 of the Land Acquisition Act; (ii) order passed by the Civil Judge, Thane on 30th November, 1953; and (iii) the resolution of the Government dated 1st October, 1979. However, the learned senior counsel Mr. Setalvad has objected that two documents, i.e. award under section 11 of Land Acquisition Act and resolution of the Government dated 1st October, 1979 were never produced before the Court and therefore, these two documents ought not to have been referred or relied by the learned trial Judge. However, the order passed by the Civil Judge, Thane dated 30th November, 1953 (Exhibit 18) is the order of the Court which can be relied fully on the point of the findings and contents therein.

48. It is true that in fact the award was produced. However, the learned trial Judge did not exhibit the said document. May be by mistake. Therefore, I also cannot rely on the said document. The award is the direct evidence on the point of acquisition. However, the fact of acquisition can be proved by indirect but other concrete documentary

evidence. The defendants produced a very important document, i.e., the judgment of the Civil Court in group of Reference matters in the land acquisition cases bearing no. 49 of 1957 & Ors. The said judgment is the certified copy of the Civil Court and marked as Exhibit 21. The contents in the said judgment can be very well read in the evidence and on the basis of the order passed therein, the facts of acquisition, compensation and existence of real owners are satisfactorily established by the defendants. The Reference under section 18 was filed because there was acquisition of lands. In the absence of acquisition and award by the Government, there would not have been payment of compensation and no reference would have been filed by the owners of the land. It is to be noted that the judgment passed by the Civil Court is elaborate touching all the aspects of acquisition. The list of the acquired land is also mentioned in paragraph 2 of the said judgment. Survey numbers which is the subject matter of this suit are also the numbers of those suit lands and are mentioned in the list. Thus, it shows that the claimants, who were the real owners of the lands have received compensation and as the Civil Court has accepted that after acquisition, the possession and title of the land vests in the Government. Thus, it shows that the true owners came forward when their lands were acquired and they were dispossessed of the lands. The plaintiffs did not come forward and did not file any claim. The submissions of learned senior counsel for the

appellants that the defendants could not prove the acquisition of the land and possession taken by the Government at the time of acquisition thus cannot be accepted.

49. A criminal case No. 535 of 1969 in State of Maharashtra vs. Gangaram Gangu, one more and Shivram Shinde was filed and it was in respect of theft of para grass in the year 1969, i.e., on plot no. 30B Meeta nagar Colony, Goregaon under section 179 of the Indian Penal Code. The incident had taken place on 2nd January, 1969 at around 8 a.m. In the said criminal trial, Shivram and other two persons were acquitted. The Presidency Magistrate in the judgment has mentioned that the appellant appears to be in possession of the plot no. 30B. The learned senior counsel tried to capitalize this finding of the Presidency Magistrate in favour of the appellant. After going through the said judgment, it is found that FIR was given by the watchman of MHADA, who was appointed by MHADA to protect the lands which includes suit land. He caught these three persons when they were cutting para grass. It is to be noted that it was not a suit for title or possession but it was a criminal case about the theft. In the judgment the trial Court has stated that whether it was a para grass or not or whether plot no. 30B belonged to MHADA or not could not be proved and so these persons were acquitted. On the contrary, this shows that the so-called possession of the appellant

was neither peaceful nor continuous. MHADA has appointed a watchmen to take care of the property since 1969.

50. Certain documents produced by the plaintiffs are required to be assessed. In the letter written by Shivram Shinde to Tahsildar on 20th January, 1978 (Exhibit 10), he has mentioned that the names of different persons are shown in the piece of land in the revenue record. In 1953-54 MHADA's name was mentioned. Pursuant to the complaint, the statement of Shivram was recorded on 4th April, 1978 by Talati (Exhibit 11). The contents in the letter reveals that he has stated that he did not get compensation at the time of acquisition. This shows that he himself was aware of the acquisition and if at all he did not receive the compensation, why he did not challenge the award as other owners did? Thus it can be safely inferred that at the most he has encroached intermittently on some portions of the suit land which is not sufficient evidence to prove adverse possession. This shows that his claim of adverse possession was inconsistent and interfered with and not peaceful. In the said letter he has mentioned that he has been cultivating para grass on the land and money for cultivation was paid by Devraj Gundecha. Thus, it appears that he was cultivating para grass for Gundecha in the year 1978. Exhibit 12 is the Supplementary Agreement of Sale dated 11th April, 1978 between Shivram Shinde and Devraj

Gundecha. Earlier by an Agreement dated 20th April, 1955 Shivram Shinde has given the possession of 11 acres of land to Gundecha and by this Supplementary Agreement, remaining 16 acres and odd land was given to him. The Agreement shows that the vendee was put in sole and absolute possession of the land on 26th August, 1979.

51. According to the plaintiff, the suit was filed by Shivram Shinde for adverse possession on 13th March, 1979 and 5-6 months thereafter he handed over the possession to Gundecha. Immediately in the year 1979-80, Gundecha did not apply to implead himself as a party-plaintiff, but plaintiff no. 2 Gundecha joined suit in the year 1998. Thus, from August 1979 till 1998 in fact the plaintiff who claimed adverse possession was not in possession of the suit land and in fact even if plaintiff's case is taken as it is, he has lost the cause of action in respect of so called 11 acres of unidentified land in the year 1955 itself.

52. The learned counsel has referred to 60:40 policy where a person claims adverse possession against the Government, 60% is kept by the Government and 40% is offered to the transferee who is in possession of the property. In present case, such talks were going on and the officer of the MHADA has sent letters to these appellants and the learned counsel, therefore, submitted that there is an option open for the Government to

give him 40% land. The learned senior counsel Ms. Anklesaria has denied that such policy can be offered to the appellants. She submitted that the appellant does not deserve to get any portion of the land of the Government and even though some correspondence was made by some officers in MHADA, ultimately the Government has closed such offer.

53. It appears from the submissions of learned senior counsel Ms. Anklesaria that the Government is not interested in giving any offer to the appellant and the Government denies his claim of adverse possession and claims full land, as the Government has already acquired and is in possession of the entire land.

54. Thus, considering this legal position and the evidence in this case, I am of the view that the appellants have failed to prove their case. The judgment of the trial Court is hereby maintained. First Appeal is dismissed with costs.

55. It is to be noted that in the pending Appeal, four to five parties have filed applications and out of them, Ayub Mohd. Aamir Shaikh appears to be a slum lord and many huts are constructed therein. Those structures are scattered. Therefore, nobody knows when these structures were constructed. Thus, it is evident that the appellants were not in

possession of the entire land when they filed the suit. Some structures were censused in the year 1976-77. A commissioner was appointed by the City Civil Court in Suit No. 1678 of 2008 which was filed by Kusum Shivram Shinde against Anwar Hussein Baba Miya Dafedar & Ors. Some temporary structures are created in some portion of the suit land. It is to be noted that this is a huge Government land which the Government has handed over to MHADA for construction of houses for lower and middle income group. So, this land is going to be used for public purpose. It is not physically possible for the Government to supervise the suit land especially in Mumbai when the land is aggressively encroached by the people due to over population. A judicial note is taken that in case of Government land for which some scheme is launched for the public cause, it is stalled immediately either by the slum lords or by the encroachers by approaching the Court and by manipulating the facts and documents. These attempts are required to be defeated, otherwise public cause gets frustrated and the land is grabbed by encroachers illegally only on the basis of muscle power. To preserve the land of the government for public cause for which it is reserved, is the duty of the Court to uphold the Rule of Law. Therefore, I am of the view that the suit filed by the appellants is entirely bogus, malafide and false with the only intention to grab the land with the help of some Government employees which ought not to be allowed. It is only

possible by imposing exemplary costs on appellant no.2, considering the damage to the public cause and State wealth. For this, I rely on the judgment of the Supreme Court in the case of **Shanmugam vs. Ariya Kshatriay Rajakula Vamsathu Madalaya Nandhavana Paripalanai Sangam (supra)**. Accordingly, the costs of Rs.1,00,00,000/- (Rupees One crore only) is imposed on appellant No.2 M/s.Gundecha Builders, which shall be paid to MHADA, within a period of four weeks from today.

Civil Application No. 3962 of 2006

56. The applicants Jhanbhumi Cooperative Housing Society Ltd. has made this application to allow the applicants to intervene in this Appeal and direct the respondent no. 3/Gundecha Builders and respondent no. 4/State of Maharashtra to modify the order dated 21st December, 2004.

57. On 21st December, 2004. this Court granted injunction against the original respondent not to restrict the plaintiffs from entering and using the suit land, so also not to carry out any development. The applicants are a Cooperative Housing Society representing 350 members having their huts on the suit land and they have been residing there. They formed this Housing Society and they want it to be declared as a slum colony. So, they approached the State Government for the same, however, the Collector by a letter dated 7th June, 2005 informed that their scheme cannot be considered in view of the order of injunction granted by the High Court in favour of the appellants.

58. The applicants cannot be impleaded as party to the proceedings, as the applicants have no locus. Hence the Civil Application is dismissed.

Civil Application No. 44 of 2008

59. This Application is filed by Dynamic Cooperative Housing Society (Proposed). It represents 380 hutment dwellers who are occupying 5013.44 sq. mtrs, CTS No. 50A (Part) and it is contended that their property is known as Old Hanuman Nagar, Teen Dongree. It is declared as slum in Government Gazette dated 13th October, 1977. They moved an application for declaration as slum colony, however, nothing is done by the Government.

60. The applicants are neither necessary nor proper parties in the original suit to determine the issues therein and, therefore, Civil Application is dismissed.

Civil Application no. 2163 of 2013

61. This Application is filed by MHADA against the plaintiffs for seeking permission to clear properties on suit land which are illegally encroached by slum dwellers and evict them in accordance with law and permit MHADA to utilize the vacated land for public purpose.

62. As the Appeal is dismissed, MHADA is free to carry on the activity

for public purpose. Civil Application is allowed.

Civil Application No. 4678 of 2013

63. This Application is moved by Ayub Mohd. Amir Shaikh praying that he is proper and necessary party and therefore, he be allowed to intervene in the Appeal. He learnt that respondent/MHADA are in the process of distributing the suit property with the appellants in the ratio of 60:40 and he claims that he is the owner of the property bearing S.No. 29, CTS No, 1 Part, CTS No. 2 Part, CTS No. 50, CTS No. 50/1 to 149 at Village Goregaon Pahadi admeasuring 27 acrs and 12 ½ gunthas since 2004. He submitted that he has filed Suit No. 293 of 2013 in the High Court in respect of suit property. This applicant was not party to the suit. He claims that he has filed separate suit No. 239 of 2013 and on 8th October, 2013, this Court has directed that whatever construction of the applicant is standing on the land, the defendants in that suit were restrained from demolishing the same without due process of law. Under such circumstances, the Application is rejected especially in view of the fact that he has not told from whom he has purchased the land and also because of the finding of this Court that MHADA is the owner of the suit land and has title and possession over the suit land through the Government.

64. Civil Application is dismissed.

Civil Application No. 4436 of 2013

65. 151 applicants have filed this application that they be allowed to intervene the matter as the party respondents in First Appeal. According to them, Ayub Mohd. Aamir Shaikh is the owner of the property and he is a landlord. From this, it appears that Ayub Mohd. Aamir Shaikh is a slum lord. The applicant is neither a proper nor a necessary party to determine the issues in this suit upon his mere claim of ownership without particulars. Hence, this Application is not required to be entertained. Hence, Civil Application is dismissed.

Civil Application (St.) No. 24273 of 2015

66. This application is filed by Kusum Shivram Shinde, Dhanesh Shinde, partner of Gundecha Builders and Paras Devraj Gundecha against MHADA and it is prayed to direct the respondents to consider the applicants' proposal for settlement submitted by them pursuant to Architect's letter dated 7th November, 2008.

67. The learned senior counsel for the appellants has pointed out and referred to a letter of their counsel dated 17th September, 2001 written to Chief Officer, MHADA regarding the proposal of 60:40 and their willingness to accept 60:40 formula with some conditions.

68. This issue is already dealt with in the main appeal. Hence, the Civil application is dismissed.

Civil Application No. 126 of 2015

69. This Application is filed by Anwar Hussein Baba Miya Dafedar. He has submitted that he is in possession of a structure admeasuring 25.20 sq. mtrs. bearing census no. 170(10), Id. no. 68LHS given by MMRDS and so he be made party to the proceedings. It is submitted that a Court Commissioner was appointed and his report dated 14th October, 2008 was submitted and the existence of his structure is shown in the Court Commissioner's report.

70. The applicant is not a necessary or proper party to determine the issues in the above suit merely by virtue of having a structure on the suit land. Therefore, the Application is rejected.

Civil Application no. 221 of 2013

71. This Application is filed by the applicant Kusum Shivram Shinde praying for temporary injunction restraining respondent nos. 1 and 2 and their employees/servants including security guard from distributing the appellant's possession on the entire suit land and also digging work and carrying out construction. Thus, this Application is mainly for directing the defendants not to deploy security guards.

72. In the Application, the applicant has referred to the injunction granted by this Court on 21st December, 2004 in Civil Application no. 4061 of 2004 and also the earlier interim order passed in Suit No. 1357 of

1979 on 26th April, 1979 by the City Civil Court and same was continued by an order dated 21st December, 2004. It appears that in between, MHADA deployed security guards to protect the property.

73. No order is required to be passed in this Application, as the Appeal is disposed of. Hence, Civil Application is dismissed.

Contempt Petition No. 27 of 2013

74. This Contempt Petition was filed by the appellant/petitioner. A suit was filed for adverse possession by the plaintiffs and as the plaintiffs were in actual possession of the suit land, they prayed for injunction against the defendants that they should not start any development activities especially like filling the land or entering on the land. The learned senior counsel submitted that MHADA was never put in possession by the Government. The learned Judge of the City Civil Court while allowing the motion of plaintiff no. 1, enjoined the defendants by an order dated 26th April, 1979 in Notice of Motion No. 1188 of 1979 from entering the open land and to do other developmental activities. In Civil Application No. 4061 of 2004 filed by the appellants, the learned Single Judge of this Court, while admitting the appeal, by an order dated 21st December, 2004 granted injunction in terms of prayer clause (a). Thereafter, pending Appeal, Civil Application No. 5670 of 2005 was filed by MHADA for vacating the order dated 21st December, 2004. He relied on the order passed by the High Court on 22nd December, 2006 in Civil

Application No. 1626 of 2006 for expeditious hearing of First Appeal. He further submitted that as the persons from MHADA entered the land and were carrying on the activity of levelling the land, the plaintiff filed another Contempt Petition No. 131 of 2010 before the High Court in this Appeal. In the said Petition, when MHADA and Government appeared before the learned Single Judge of this Court, they gave undertaking to the Court that they did not want to take possession. The said undertaking was accepted by this Court and accordingly an order was passed on 25th January, 2012. The learned Judge observed that no case is made out to initiate action for contempt, as the undertaking is accepted that the defendants did not want to take possession from the petitioners. It is contended that thereafter, MHADA employed their security guards on the land and violated the undertaking given before this Court. Therefore, the petitioners are constrained to file second Contempt Petition No. 27 of 2013 against MHADA.

75. In the case of **Bajranglal Gangadhar Khemka** (*supra*), it was held that when a party gives an undertaking to the Court which is accepted by the Court, then it has a force of the order of the Court and breaking of such undertaking amounts to willful disobedience of the Court's order.

76. This Contempt Petition is filed by the original plaintiffs against the respondents that the respondents be sentenced to civil imprisonment for six months for committing contempt - (i) by appointing security guards on

the northern side portion of the suit properties; (ii) temporarily preventing the petitioners and their security guards and other persons claiming through the petitioners from entering the northern side portion of the suit properties; and (iii) taking steps to carry out development and construction work on the northern side portion of the suit properties; thereby violating the order passed by this Court on 21st December, 2004 in Civil Application No. 4061 of 2004.

77. The plaintiffs have filed Civil Application No. 4061 of 2004 in First Appeal praying that the respondents be restrained by an order of injunction from obstructing, disturbing or interfering in any manner with the peaceful and quiet possession and enjoyment of applicant no. 2, i.e., Gundecha Builders, of the suit properties. On this Application, this Court by an order dated 21st December, 2004 passed an order as follows:

“In view of the facts and circumstances, the Application is made absolute in terms of prayer clause (a). However, liberty is granted to the respondents to move the Court for early hearing, if they so wish.”

78. The learned senior counsel for the petitioners submitted that the petitioners/plaintiffs were in possession of the suit land. Interim order was already passed by the learned Judge of the City Civil Court on 27th April, 1979. On the point of possession, he relied on paragraph 15 of the said order of the City Civil Court. The learned Judge has held that mere perusal of the extract from the record of rights would show that the name

of Housing Commissioner which was entered at one stage has been deleted by pencil entered in respect of plot nos. 6 and 7 which is a part of the suit land. The learned senior counsel highlighted a portion in the order when counsel Mr. Pandit who is appearing for the respondent has conceded before the Court that defendant no. 1, i.e., MHADA had not been officially put in possession of the suit lands by virtue of any resolution passed by the State Government. The learned senior counsel submitted that a statement made by the counsel is to be accepted as true and thus it shows that MHADA was never in possession of the suit land and thus the plaintiffs were in possession of the suit land and as the defendants have appointed their security guards and have entered on the northern portion of land, have committed breach of the order of this Court.

79. The learned senior counsel Ms. Anklesaria opposed this petition and submitted that no contempt is committed of the order passed by this Court. She submitted that plaintiffs/appellants had filed one more Contempt Petition bearing no. 131 of 2010 which was decided by this Court by its order dated 25th January, 2012. At that time, the State Government has given a public notice claiming the ownership and has directed to remove the encroachment on the property. She submitted that this Court has held that the case was not made out to initiate action against civil contempt under Contempt of Courts Act, 1971. So also, any

further relief of injunction which was prayed in the said application was refused in contempt proceedings.

80. The fact that the land belongs to the Government is not disputed. It is the case of the Government of acquisition of the suit land for MHADA for construction of the houses for the people. Therefore, the Government has handed over the land to MHADA. The meaning and import of the statement made by the counsel Mr. Pandit for the defendant/respondent as mentioned in paragraph 15 of the interim order passed by the City Civil Court on 29th April, 1979 is not what it is projected by the plaintiffs. The statement is made that defendant no. 1 had not been officially put in possession of the suit lands by virtue of any resolution passed by the State Government. It does not mean that MHADA was not put in possession of the lands. The meaning is that the necessary notification was not taken out to take the possession officially, but the State Government has handed over the informal possession to MHADA as a caretaker. In the said paragraph, Mr. Pandit has pointed out the contents of the letter dated 29th January, 1976 which states that Housing Commissioner of MHADA shall protect the lands (as if the lands belongs to the Board) pending the final orders of the Government. Thus, it shows that de facto MHADA was in possession of the suit lands. The order of this Court was not to prevent, obstruct, disturb or interfere the possession and enjoyment, if any, of the plaintiffs. The plaintiffs are seen to be

encroachers and thus, there is no such evidence to show that their movements were obstructed by MHADA. The appointment of security guards to protect the property cannot be labelled as wilfull disobedience of the order. The ownership vests with MHADA and therefore, it was necessary for MHADA to appoint the security guards to protect the property from further encroachment. Thus, protection given to the lands cannot be interpreted as obstruction caused to the encroachers in the land which has already been encroached upon.

81. Under such circumstances, no case is made out for contempt of the willful disobedience. Hence the Contempt Petition is rejected.

82. The learned Counsel for the appellants submits that the interim injunction which was continued throughout right from 1979 till today, be continued. However, the learned Counsel for the Respondents opposes this prayer.

83. In the circumstances, as the interim injunction was granted earlier by the trial Court and also continued by this Court, it is extended till 29.1.2016.

84. In the result, the First appeal and the Contempt Petition are dismissed. Civil applications are also disposed for the reasoning given above.

(MRS.MRIDULA BHATKAR, J.)