

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO.29 OF 2003

1. Nana s/op Balwant Idhate (Died) through Legal Heirs APPELLANTS
- 1A. Kisan Nana Idhate,
Age – 62 years, Occ – Agriculture
R/o Korgavhan, Post Nimbavi,
Taluka – Shrigonda, District – Ahmednagar
- 1B. Bhika Nana Idhate,
Age – 60 years, Occ – Service
R/o Bhaskar Nagar, Buva Pada,
Near Mandapuri Bhor High School,
Ambarnath, District – Thane
- 1C. Maruti Nana Idhate,
Age – 58 years, Occ – Service
R/o Sagar Kirana Store,
Pritampur, Taluka – Dhar
District – Dhar (UP)
- 1D. Smt. Chandrabhaga Bhivaji Shinde,
Age – 64 years, Occ – Nil
R/o Kalkup, Pot Bhalavani,
Taluka – Parner, District – Ahmednagar
- 1E. Sau. Gangubai Bapurao Bhujbal,
Age – 56 years, Occ – Household
R/o Daithane (Gunjal), Taluka – Parner
District – Ahmednagar
- 1F. Smt. Ranjana Mahadu Pund,
Age – 54 years, Occ – Household
R/o Sagar Kirana Store,
Pritampur, Taluka – Dhar
District – Dhar (UP)
- 1G. Sau. Mangal Bhanudas Mehetre,
Age – 50 years, Occ – Household
R/o Kolgaon, Taluka – Shrigonda
District – Ahmednagar

2. Sukhdeo s/o Balwant Idhate
Age – 61 years,
3. Mahadeo s/o Balwant Idhate
Age – 55 years,

All Occ – Agriculture
R/o Koregawhan, Taluka – Shrigonda
District - Ahmednagar

VERSUS

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|---|--------------------|
| <ol style="list-style-type: none"> 1. Sakharam s/o Maruti Tambe
Age – 70 years, Occ – Labour
R/o Rahuri Factory, Taluka – Rahuri,
District – Ahmednagar 2. Kisan s/o Nana Idhate,
Age – 41 years, Occ – Agriculture 3. Bhika s/o Nana Idhate,
Age – 38 years, Occ – Agriculture 4. Maruti s/o Nana Idhate,
Age – 38 years, Occ – Agriculture <p>Respondents No.2 to 4 All R/o Koregawhan,
Taluka – Shrigonda, District – Ahmednagar</p> <ol style="list-style-type: none"> 5. Bansi s/o Nana Idhate
(Died) through LR <p>Smt. Kamal Bansi Idhate,
Age – 33 years, Occ – Household
R/o Koregavhan, Taluka – Shrigonda
District – Ahmednagar</p> | <p>RESPONDENTS</p> |
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Mr. P. B. Sirsath, Advocate for appellants
Mr. A. B. Gatne, Advocate for respondent No.1

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SECOND APPEAL NO.28 OF 2003

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|---|-------------------|
| <ol style="list-style-type: none"> 1. Nana s/op Balwant Idhate
(Died) through Legal Heirs 1A. Kisan Nana Idhate,
Age – 62 years, Occ – Agriculture
R/o Korgavhan, Post Nimbavi, | <p>APPELLANTS</p> |
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Taluka – Shrigonda, District – Ahmednagar

- 1B. Bhika Nana Idhate,
Age – 60 years, Occ – Service
R/o Bhaskar Nagar, Buva Pada,
Near Mandapuri Bhor High School,
Ambarnath, District – Thane
- 1C. Maruti Nana Idhate,
Age – 58 years, O cc – Service
R/o Sagar Kirana Store,
Pritampur, Taluka – Dhar
District – Dhar (UP)
- 1D. Smt. Chandrabhaga Bhivaji Shinde,
Age – 64 years, Occ – Nil
R/o Kalkup, Pot Bhalavani,
Taluka – Parner, District – Ahmednagar
- 1E. Sau. Gangubai Bapurao Bhujbal,
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2. Sukhdeo s/o Balwant Idhate
Age – 61 years,
3. Mahadeo s/o Balwant Idhate
Age – 55 years,
- All Occ – Agriculture
R/o Koregawhan, Taluka – Shrigonda
District – Ahmednagar

VERSUS

1. Sakharam s/o Maruti Tambe

RESPONDENTS

- Age – 70 years, Occ – Labour
R/o Rahuri Factory, Taluka – Rahuri,
District – Ahmednagar
2. Kalabai Bansi Gadilkar,
Age – 68 years, Occ – Household
R/o Ralegaon (Karkheli)
Taluka – Shirur, District - Pune
 3. Subhadrabai Parvati Bhujbal,
Age – 64 years, Occ – Household
R/o Kanhur, Taluka – Parner
District - Ahmednagar
 4. Sulochanabai Dnyandeo Gore,
Age – 52 years, Occ – Household
R/o Pimpalner, Taluka – Parner
District – Ahmednagar
 5. Leelabai Haribhau Dome
Age – 66 years, Occ – Household
R/o Ralegaon (Karkheli)
Taluka – Shirur, District - Pune

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Mr. P. B. Sirsath, Advocate for appellants

Mr. A. B. Gatne, Advocate for respondents No.1 to 5

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CORAM : SUNIL P. DESHMUKH, J.

DATE : 21st OCTOBER, 2016

ORAL JUDGMENT :

1. Succinct reference to following background emanating two second appeals 28 and 29 of 2003 may facilitate appreciation of the matter in controversy.
2. Subject matter of dispute is land now bearing Gut No.95, (erstwhile survey No.26/1) admeasuring about 1 Hectare and 28 *Are*, situated at Mouje Koregawhan, Taluka – Shrigonda, District – Ahmednagar [hereinafter “the suit land / property”]

3. Parties hereto would be required to be referred to by their surnames as "the Idhates" and "the Tambes" which would avoid mix-up over their status in the suits instituted against each other.

4. Regular Civil Suit No.8 of 1985 had been instituted by the Idhates as plaintiffs on 9th of January, 1985 against the Tambes as defendants.

5. The Tambes – as plaintiffs instituted Regular Civil Suit No. 41 of 1985 on 16th February, 1985 against the Idhates.

6. The Idhates in Regular Civil Suit No.8 of 1985 averred that suit land is their ancestral property and Balwant Idhate, their predecessor had been owner and in possession of the same. Relations between Balwant Idhate and Maruti Tambe, predecessor of the Tambes had been cordial and Balwant used to repose confidence in Maruti. Taking disadvantage of the situation, Maruti got some document executed from Balwant and based on the same caused revenue entry in ownership column in his favour, however, Balwant continued to be in possession as owner and that Maruti had never been in possession of the subject property.

7. It is contended that even if it is assumed that Maruti had claimed ownership yet, Balwant continued to possess the land in the character as owner. All along him and the Idhates have been

cultivating land as owners and revenue entries particularly seven/twelve extracts bear the same. While Maruti had attempted to take over possession, the same came to be foiled by Balwant and Maruti was whisked away from the land and Balwant continued to own and possess the land and have its produce.

8. It is averred that from the very beginning and ever since summer of 1941 Balwant Idhate had denied ownership of Maruti Tambe and had not let in the Tambes occupy suit land and the Idhates have been cultivating the land for over a period of more than twelve years, without any interruption. Predecessor of the Idhates – Balwant died in 1963 and after him his heirs have been cultivating suit land in the same character of ownership rights of their predecessor and are enjoying income derived from the land. They have asserted their right of ownership and had dug a well around 1958 in the land and have converted it into an irrigated land.

9. In 1966, Maruti – predecessor of the Tambes died. Neither Maruti during his lifetime nor after him his heirs had ever been in possession of suit property. Although, names of heirs of said Maruti have been entered into ownership column of revenue record, but the same is only hollow entry. The Tambes have no right of ownership over the suit property. Son of Maruti – Sakharam is working as labourer in sugar factory and daughters of Maruti have

been staying in their respective matrimonial houses.

10. It is contended that in collusion with Talathi, entries in revenue record for the years 1979-80 and 1982-83 have been got changed showing possession with the persons in ownership column. There has been complaint in respect of such cultivation entries and proceedings had been taken up.

11. Around 6th January, 1985, the Tambes threatened to take away produce and under the circumstances, regular civil suit No.8 of 1985 ensued for reliefs *inter alia*, declaration that the Idhates have become owners by adverse possession, for declaration that entries in revenue record showing ownership of the Tambes have been hollow and to declare that the Tambes have no right to suit property and for injunction against them.

12. The defendants – the Tambes filed written statement, denying claims of the plaintiffs – the Idhates that the suit property is being cultivated by the plaintiffs – the Idhates, that the trust had been reposed in defendants' – the Tambes' father and he had deceived Balwant Idhate and had got something in writing from him and also denied contention that entry of the Tambes name in the 7/12 extract had been caused at their behest. The contention that the suit land was being cultivated by father of the Idhates around 1940-41 and that the Tambes had tried to take over their possession and had been whisked by the Idhates is denied. Entries

of the Idhates names have been denied. It is further denied that the Idhates had been enjoying the income from the land in the capacity of owners, as also the claim with regard to land being possessed by the Idhates. The claim of hostility to the title to the property over twelve years continued before death of their ancestor and after his death by the Idhates, has been denied. It is additionally contended that after execution of the registered sale-deed in favour of their father by Balwant Idhate – the Tambes have been owners in possession of suit property. They have been cultivating it as owners and accordingly, their names have been appearing in revenue record – 7/12 extracts.

13. It is contended that around 1972, as there had been famine and no income could be derived and the family being big, the defendants – the Tambes were required to leave their usual place of residence for their sustenance. Since the relations between the Tambes and the Idhates were cordial, the Idhates were requested to look-after suit land. However, the Idhates with ill intention to claim right to the property, caused their names enter revenue record which the Tambes could come to know four years later, on their return and had taken back possession of the land and started cultivating it in their capacity as owners. It was contended that the suit by the Idhates in the form as filed is not tenable and is liable to be dismissed. It is contended that, with a view to grab the land, a story had been created by the plaintiffs.

14. The Tambes on the other hand instituted suit as plaintiffs bearing regular civil suit no.41 of 1985 against the Idhates and other persons as defendants claiming that suit property had been of ownership of the Tambes from their forefathers and is being cultivated by them since 1940 after purchasing it from the Idhates and as such, the Tambes are the owners of suit property. Defendants - the Idhates are more in number and, as such, are taking disadvantage of the same and are trying to disturb possession of the Tambes over suit land. The Tambes have taken *jawar* crop. The Idhates had attempted to disturb agricultural operations and were trying to cause disturbance in the same which was detrimental to the interest of the Tambes and as such, suit had been instituted by them for injunction against the Idhates. Alternatively, the Tambes had sought, in case the court considers them to be not in possession, then the land be put in their possession as owners.

15. The Idhates, in their written statement as defendants in Regular Civil Suit No.41 of 1985 had denied claims under the suit by the Tambes. It had been averred that the suit would not proceed with as it would be hit by section 10 of the Civil Procedure Code. It was denied that Maruti Tambe had purchased the land from Balwant Idhate. They denied the claim of the Tambes being in possession since 1940 and averred that the Tambes had never

been in possession of the suit land and as such, the contention that the Idhates, have been obstructing their possession is false and is a manufactured plea. It was denied that the Tambes had ever taken *Jawar* crop or that the Idhates have interfered with their possession while the Tambes were trying to water the crop. It was denied that there was any cause of action for the suit. It was contended that while injunction has been claimed, claim for possession could not be claimed and would not be tenable. It is averred that the Idhates' predecessor Balwant Idhate had been a man of simple and unsuspecting nature and taking disadvantage of the same, something in writing had been obtained by predecessor of the Tambes. However, no sooner Balwant had realized that he is being deceived, than Maruti Tambe had never been allowed entry over suit land and that since 1940 till date, predecessor of the Idhates and now the Idhates have been in possession as owners of the suit land and also that the suit for possession is outside the period of limitation and has been mischievously filed. It is further averred that from last forty to forty-five years, the Tambes have been residing at Rahuri Sugar Factory and they had never been to Koregawhan and there is no substance in their claim about them being in possession. The Idhates, as such, claimed compensatory costs of Rs.10,000/- and prayed for dismissal of suit with costs.

16. In suit No. 8 of 1985 issues were framed to the effect whether the Idhates prove that they are entitled to be declared as

owners, whether they prove to be in possession of suit land, whether there was any obstruction by the Tambes to their possession and about their entitlement to injunction. Whereas, in the other suit bearing No.41 of 1985 instituted by the Tambes, issues were, whether the Tambes prove their title over suit property as well as possession, whether there had been obstruction at the hands of the Idhates to their possession and whether the Idhates prove that they had perfected their title by adverse possession and whether the Tambes are entitled to possession and whether the Idhates prove the suit by the Tambes to be outside limitation.

17. Both the suits bearing regular civil suit no.8 of 1985 and 41 of 1985 were tried before the same court and common oral evidence was considered at the request of parties.

18. The trial court decided all the issues simultaneously. The trial court appreciated that in or after 1940, name of Maruti Tambe started appearing in ownership column of 7/12 extracts whereas name of Balwant Idhate continued to be shown in cultivation column and the position continued till about 1978 and there had been alteration in the same around 1979-80 and the Tambes name started appearing in cultivation column as well as ownership column in 7/12 extracts and same continued till 1983-84. The trial court considered that the sale-deed is of 1940 and has referred to

that in 1947, there had been suit instituted by the Tambes for possession bearing no. 8 of 1947 and further that under the judgment and decree therein, the Idhates were required to pay a sum of Rs.268.80 to the Tambes towards mortgage amount. None of the parties had challenged the decision in regular civil suit No. 8 of 1947. It was further considered that, said amount had not been paid by the Idhates to the Tambes nor any proceedings had been initiated by the Idhates for redemption of mortgage and that the limitation prescribed for filing suit for redemption of mortgage is 30 years. The court, upon said background has considered that the relationship of mortgagor and mortgagee subsisted till 1978. In the circumstances, the court found that there was no propriety in the claim of the Idhates to claim possession as owners. The court has also taken into account submissions made on behalf of the Idhates that when decree had been passed declaring entitlement of the Tambes to recover amount of Rs.268.80 from the Idhates why the Tambes had not filed suit for recovery of mortgage amount. It appears to have been considered by court that failure to adopt proceeding for redemption would tantamount to denial to act as mortgagor and the Idhates did not utilise the opportunity coming their way to make use of the position and continued to be under impression of their possession being adverse without doing anything.

19. The court had considered that since no movement for

redemption of mortgage had been made by the Idhates, the Tambes properly and diligently got their names mutated in the possession column on expiry of period of limitation for redemption of mortgage. According to trial court, on expiry of thirty years' period for redemption, the mortgage recoiled to its position of it being a sale giving title as owners to the Tambes as the mortgage was considered to be a mortgage by conditional sale.

20. It appears to have been considered by trial court that it would be difficult to believe that the Idhates would wait for thirty years from the date of decree in regular civil suit No. 8 of 1947. The Tambes neither have got money back nor they did have possession under the transaction of 1940 and in the circumstances, the court considered that the claim of the Tambes to be probable one.

21. It appears to have been considered that the Idhates had challenged the revenue entries which then were showing the Tambes to be in possession, however, against the order of sub-divisional officer, the Idhates had not made any approach. The Idhates were paying land revenue of the suit field on behalf of the Tambes which position is clear from the receipts which had been produced. In the circumstances, the trial court held that the Idhates were not entitled to claim adverse possession and that the Tambes had been cautiously taking action.

22. Although it was submitted that since there is no dispute so far as facts are concerned, the decision would rest on the law points, but the trial court had considered that in its opinion, the suit is neither based on facts nor on law points, but clearly on logical conclusions. It thus, appears, trial court has considered that on expiry of period of limitation for redemption of mortgage, the Tambes got into possession of the suit land. It has been observed that throughout the proceedings the Idhates laid emphasis on the possession of the land being adverse to the interest of the Tambes.

23. The trial court referred to judgment of supreme court in the matter of "*Bhojumandal vs. Deb Nath Bhagar*", reported in *AIR 1963 SC 1906* and considered that the authority is applicable to the facts and circumstances of the case on hand, whereas authority cited on behalf of the Idhates viz; *Nayar Service Society Limited vs. K.S. Alexander*, reported in *AIR 1968 SC 1965*, was considered to be non-applicable to the facts.

24. Thus, the trial court concluded that the Idhates are not entitled to be declared as owners in possession and that there is no proof of obstruction to their alleged possession and consequently, they would not be entitled to secure injunction. It was considered that the Tambes proved their title as well as possession over the suit land and obstruction at the hands of the

Idhates and since the Tambes being in possession of suit property, resultantly entitled to the injunction.

25. The trial court under common judgment delivered on 17-03-1997 had dismissed regular civil suit No. 8 of 1985 instituted by the Idhates and decreed regular civil suit No. 41 of 1985 instituted by the Tambes and restrained the Idhates from obstructing the Tambes possession over the suit land.

26. At the instance of the Idhates, matters were carried in two appeals bearing regular civil appeal No. 211 of 1997 and regular civil appeal No. 212 of 1997 against the judgments and decrees in regular civil suit No. 8 of 1985 and 41 of 1985, respectively and both the appeals were dismissed under judgment and decree dated 25th September, 2002.

27. The appellate court had simultaneously dealt with the two regular civil appeals framing a single point for determination, as to whether interference is called for in the judgments and decrees passed by the trial court dated 25th September, 2002.

28. The appellate court found that the transaction of 1940 had been considered to be of the nature of mortgage in the decree passed by court in suit by the Tambes bearing regular civil suit No. 8 of 1947. The appellate court further considered that Maruti Tambe had not been in possession of suit land in the year 1948

and 7/12 extracts on record show that he was being shown as owner of the suit land since 1935-36. However, in the year 1941-42, Balwant Govind Mali was cultivating the land and position continued as observed by the trial court till 1973-74 and from 1974-75 till 1977-1978. After the death of Maruti Tambe, name of his son started appearing in ownership column. Since 1979-80 to 1982-83 and thereafter, name of son of Maruti Tambe – Sakharam, started appearing in cultivation column. The appellate court considered that 7/12 extracts from 1974-75 till 1977-78 shown name of Sakharam Maruti Tambe, son of Maruti Tambe in ownership column and from 1979-80 till 1982-83, name of Nana Balwanta was appearing in column of possession and thereafter position had been changed and name of Sakharam Maruti Tambe started appearing in column of cultivation. The appellate court has observed that in the years 1981 to 1984, Sakharam Maruti Tambe's name is appearing in ownership as well as possession column and the suit of Sakharam Maruti Tambe for grant of injunction is of 1985. The appellate court has considered the revenue entries show name of Maruti Tambe in cultivation column for the years 1964-65 and 1965-66 and thereafter, name of Maruti is appearing in ownership column till 1973-74 and further name of Balwant Idhate is shown in column of other rights and from there it culled out the inference that possession was of the Idhates. It has further been noted by appellate court that the the Idhates denied

to admit the ownership of the Tambes. Record depicts that the land revenue was being paid by the Idhates for the Tambes. The revenue entries according to appellate court depict the relationship as appearing would show that the Idhates would not be able to stake claim to title by way of adverse possession against the Tambes. It is further considered that the relief of injunction is discretionary and as the Idhates were not in possession of the land in the year 1982-83, they are not entitled to injunction, finding that Sakharam Maruti Tambe had been in possession over the land in the year 1982-83, his name was appearing in ownership column as well as possession column. As such, the decision rendered by the trial court has been confirmed by the appellate court.

29. While two appeals, against the decisions in regular civil appeals No. 221 and 222 of 1997 bearing second appeals No. 28 of 2003 and 29 of 2003 respectively, were admitted, Honourable Judge of this court under order dated 11th July 2007 has framed following substantial questions :

“ (i) Whether in the facts and circumstances of the present case, the first appellate court committed patent error while deciding the appeal only by raising single point for determination which is rather of sweeping nature and that the judgment of the first appellate court does not reach to the close quarters of the reasoning of the trial court in context of the controversial issues ?

(ii) Whether in the facts and circumstances of the present case, mere declaratory decree granted by the civil court in the previous suit

(R.C.S. No.8/47) by itself could give right to the respondents to enter into possession of the suit land without execution of the said decree in any manner or that without there being subsequent redemption of mortgage and actual delivery of possession by the deceased father of the appellants or the appellants themselves ?

(iii) Whether both the courts have committed patent illegality and perverse findings on the relevant issues ? ”

30. Heard learned counsel Mr P.B. Shirsath for the appellants – the Idhates in both the second appeals and Mr A.B. Gatne for appearing respondents – the Tambes in the same extensively.

31. At the outset, learned counsel Mr Shirsath submits that the Idhates have been enjoying the suit land in their capacity as its absolute owners without disturbance to their such enjoyment. He submits that the record as it subsists would show that continuously all along uninterruptedly the Idhates have been enjoying suit property with the benefits accruing therefrom, even after the date of alleged sale-deed of 1940. He submits, the Idhates have been claiming title to suit land as owners and declaration is sought with reference to the same in the suit.

32. He submits, pleadings in the matter will have to be looked at as are appearing in the plaint in regular civil suit no. 8 of 1985. He submits that averments in the plaint would depict that the plaintiffs are asserting title as owners and alternatively, claim is by adverse possession. He submits that the pleadings are by parties from

mofussil area and will have to be construed liberally. He contends that the trial as well as appellate courts have unnecessarily got swayed by unwarranted impression carried, about the claim being of title only by adverse possession and it had been considered that during hearing title is claimed by adverse possession and the relief is claimed accordingly.

33. He submits that not only pleadings but the evidence as well, especially by production of certified copy of judgment Exhibit-65 getting reinforced under the decree which has been placed on record at Exhibit - 45 in Regular Civil Suit No. 41 of 1985 would show that the Idhates had not lost their title. In such a case, according to him, the pleadings would have to be construed with colour that it would get from the matter on record particularly by evidence under Exhibits - 45 and 65.

34. Mr. Shirsat contends that may be the Idhates have not been able to establish, for the sake of argument, as considered to have been claimed title to the property by adverse possession, yet position emerges that the Idhates' title to the suit land continued all along.

35. He submits that what weighed with the trial as well as appellate court are revenue entries immediately preceding the suits to consider the Tambes to be in possession. However, he submits that courts have not determined as to who was in

possession on the dates of suits.

36. He further goes on to submit that the revenue record continuously almost for all the years till 1979-80 shows the Idhates in possession of suit property. Whereas the paper entries as are occurring from 1979 onwards showing Sakharam Maruti Tambe to be in possession up to 1983-1984, would seldom be able to reflect actual state affairs of possession. He submits that additionally, evidence with respect to possession would tilt the scale in favour of the Idhates being possession of suit property all along. Even if one is to go by revenue entries, continued possession of the Idhates over suit land is shown for about 40 years till 1979-80. Even going by the ascertainment of the courts that the Idhates were in possession till 1979-80, then, whether there is evidence given in respect of taking over possession by the Tambes.

37. Learned counsel Mr. Sirsath for Idhates contends that the two courts hitherto have dismissed the claim of the Idhates only with reference to the revenue entries. By preponderance, it is easily discernible that the Idhates as on the dates of the suits were in possession. The two courts, however, have gone merely by paper entries and, as such, missed out on the main and vital aspect germane for consideration about possession on the date of the suit filed by the Idhates they were in possession of the suit property and further that there is evidence given on their behalf in

this respect whereas though the Tambes contend to be in possession pursuant to the revenue entries, no evidence in this respect on their behalf save and except testimony of plaintiff - Tambe in regular civil suit no. 41 of 1985 has been given. Such an evidence could not have been relied on, especially having regard to the background and the circumstances under which the entries in revenue record had been made.

38. In the circumstances, according to him, if that be so, the long standing revenue record would not be dislodged by subsequent ephemeral entries appearing.

39. Learned counsel Mr. Shirsath for the appellants submits that the court ought to have considered that no injunction could be issued against the true owners and in the present case, the ownership of the Idhates is beyond doubt in the wake of evidence as had come on record. He, for said purpose, relies on judgment of the supreme court in the matter of *Anathula Sudhakar Vs. P. Buchi Reddy (Dead) by L. Rs. and Ors.*, reported in *AIR 2008 SC 2033*

40. He refers to and lays stress on the judgment and decree in regular civil suit No. 8 of 1947 declaring the transaction to be of nature of a mortgage and as such, right to redeem the property cannot be said to have been lost to the Idhates. He further adds that it is a simple mortgage. It would not be a mortgage by conditional sale or any other type of mortgage. Right to redeem

mortgage is not at all lost.

41. He submits that since the decree considered the transaction to be between mortgagor and mortgagee, as the adage goes, once a mortgage, always a mortgage. He further draws to the fore observation of the supreme court that, it is not only '*once a mortgage, always a mortgage*' and '*nothing but a mortgage*'. He further submits that there is no concept in law of that a mortgage would transform mortgagee's right into ownership.

42. He for said purpose relies on a supreme court decision in the case of *Achal Das Durgadas Oswal Vs. Ramvilas Gangabisan Heda*, reported in 2003 DGLS (SC) 40, particularly paragraphs 7, 10, 12 and 13 of the same which are quoted hereinbelow for ready reference:

“ 7. Mr. Mohta, learned senior counsel appearing on behalf of the respondents on the other hand, would submit that whereas Order XXXIV Rule 7 would apply both in respect of the suit for foreclosure and redemption of mortgage, Order XXXIV; Rule 8 thereof refers to final decree in redemption suit only. The learned counsel would contend that having regard to the well- established rule "*Once a mortgage always a mortgage*", the right of a mortgagor to redeem the mortgage would continue unless the same is extinguished either by reason of a decree passed by a court of law by an agreement of parties. The learned counsel pointed out that in this case the application for drawing up of a final decree was filed within a period of three year from the date of making the deposit and thus the same was not barred by limitation.

10. The right of the mortgagor, it is now well-settled, to deal with

the mortgaged property as well as the limitation to which it is subject depends upon the nature of his ownership which is not absolute, but qualified by reason of the right of the mortgagee to recover his money out of the proceedings. The right to redeem the mortgage is a very valuable right possessed by the mortgagor. Such a right to redeem the mortgage can be exercised before it is foreclosed or the estate is sold. The equitable right of redemption is dependent on the mortgagor giving the mortgagee reasonable notice of his intention to redeem, and on his fully performing his obligations under the mortgage.

12. *A right of redemption, thus, was statutorily recognized as a right of a mortgagor as an incident of mortgage which subsists so long as the mortgage itself subsists. The proviso appended to Section 60, as noticed hereinbefore, however, confines that said right so long as the same is not extinguished by act of the parties or by decree of court.*

13. *In the Law of Mortgage by Dr. Rashbehary Ghose at page 231-232 under heading 'Once a mortgage, always, a mortgage' it is noticed. "In 1681 Lord Nottigham in the leading case of Harris v. Harris firmly laid down the principle: Once a mortgage, always a mortgage'. This is a doctrine to protect the mortgagor's right of redemption: It renders all agreements in a mortgage for forfeiture of the right to redeem and also encumbrances of or dealings with the property by the mortgagee as against a mortgagor coming to redeem. **In 1902 the well-known maxim, 'once a mortgage, always a mortgage, was supplemented by the words 'and nothing but a mortgage' added by Lord Davey in the leading case Noakes v. Rice, in which the maxim was explained to mean 'that a mortgage cannot be made irredeemable and a provision to that effect is void.'** The maxim has been supplemented in the Indian context by the words 'and therefore always redeemable', added by Justice Sarkar of the Supreme Court in the case of Seth Ganga Dhar v. Shankarlal.*

It is thus evident that the very conception of mortgage involves three principles. First, there is the maxim: 'Once a mortgage, always a

*mortgage'. That is to say, a mortgage is always redeemable and if a contrary provision is made, it is invalid. And this is an exception to the aphorism, *modus et conventio vincunt legem* (custom and agreement overrule law). Secondly, the mortgagee cannot reserve to himself any collateral advantage outside the mortgage agreement. Thirdly, as a corollary from the first another principle may be deduced, namely, 'once a mortgage, always a mortgage, and nothing but a mortgage'. In other words, any stipulation which prevents a mortgagor from getting back the property mortgaged is void. That is, a mortgage is always redeemable.*

The maxim 'once a mortgage always a mortgage' may be said to be a logical corollary from the doctrine, which is the very foundation of the law of mortgages, that time is not of the essence of the contract in such transactions; for the protection which the law throws round the mortgagor might be rendered wholly illusory, if the right to redeem could be limited by contract between the parties. Right to redeem is an incident of a subsisting mortgage and is inseparable from it so that the right is co- extensive with the mortgage itself. The right subsists until it is appropriately and effectively extinguished either by the acts of the parties concerned or by a proper decree of the competent court ”.

43. He refers to yet another decision of supreme court in the case of *Mhadagonda Ramgonda Patil and ors., Vs. Shripal Balwant Rainade and ors.* reported in *AIR 1988 SC 1200*. The head note of the same and the passages which have been pressed into service, paragraphs 14 and 15 are reproduced hereinbelow for ready reference;

“ 14. The Federal Court had also occasion to consider whether a second suit for redemption was barred. Kania, C.J. Speaking for the Court observed as follows :

“ The right of redemption is an instance of a subsisting mortgage and

it subsists so long as the mortgage itself subsists. As held by the Privy Council in Raghunath Singh's case, (1934) 61 Ind App 362 : (AIR 1934 PC 205) the right of redemption can be extinguished as provided in S. 60, T.P. Act, and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with form prescribed for the purpose. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not therefore barred.

15. *Therefore, the contention made on behalf of the appellants that as a final decree was passed in the earlier redemption suit, there was a merger of the mortgage-debt in the decretal-debt and, as such, the second suit for redemption is barred, is without any substance and is rejected ”.*

44. Learned counsel also adverts to a decision of this court in the case of “*Anaji Tambaji Patil Vs. Ragho Bhivraj Patil*”, reported in *AIR 1973 Bombay 75*. Paragraphs No. 22, 23 and 24 therein read, thus;

“22. *The mortgage was admittedly a simple mortgage and the incidents of such a mortgage are clearly laid down in Section 58 (b) of the Transfer of Property Act which defines a simple mortgage as follows :*

" Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage-money, and agrees, expressly or impliedly, that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage-money, the transaction is called a simple mortgage and the mortgagee a simple mortgagee." The essential characteristic of a simple mortgage therefore is that possession is not given to the

mortgagee of the mortgaged property. That is expressly provided in the definition itself. All the rights which the mortgagee has are these: First to recover the money which he has loaned. His second right is that in the event of non-payment, "the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied in payment of the mortgage-money." Therefore, the mortgagee under a simple mortgage has no right whatsoever to actual possession of the mortgaged property or any possession at all. In fact, this is what makes the crucial difference between a simple mortgage and usufructuary mortgage. In an usufructuary mortgage possession is given to the mortgagee (see clause (d) of Section 58) whereas in a simple mortgage the possession of the mortgaged property remains with the mortgagor.

23. *If then the only right which the mortgagee had in the present case was to the recovery of his money or in case of default of payment of his money to have the mortgaged property sold and the sale proceeds applied in satisfaction of his debt, can it be said that the lease created in favour of the petitioner by Bhikchand, who stepped into the shoes of the mortgagor by virtue of his purchase, in any way affects those rights? Notwithstanding the mortgage, the original owner Deoji in whom inhered the equity of redemption, continued to be the owner of the property. The right which he transferred to the mortgagee was not the ownership of the property. Mulla in his commentary on the Transfer of Property Act, 5th Edition, 382 puts it thus :-*

"A simple mortgage consists of (1) a personal obligation, express or implied, to pay and (2) the transfer of a right to cause the property to be sold. The right transferred to the mortgagee is not ownership."

Therefore the ownership continues with the mortgagor as well as the possession of the property. Section 65-A permits the mortgagor to lease the property and it was under that right that the purchaser

from the mortgagor who for all purposes is the mortgagor (see Section 59-A) granted the lease to the petitioner. A lease is merely a transfer of right to enjoy the property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, therefore, by the lease in favour of the petitioner Bhikchand merely transferred possession and the right to enjoy such property to the petitioner. None of these rights inhered in the mortgagee as we have shown. The mortgagee had not got the right of possession nor the right to enjoy the property. How then can it be said that the transfer, (the lease in the present case) assuming that it was during the pendency of the suit, was made "so as to affect the rights of any other party" to the suit? In our opinion, no right of the mortgagee was in any manner affected by the grant of the lease to the petitioner by Bhikchand in this case. If so, assuming that the other conditions for the application of the doctrine of lis pendens as laid down in Section 52 are fulfilled, still the essential consequence prescribed by the section does not follow and, therefore, Section 52 would be wholly inapplicable in the present case.

24. *It is not disputed that if the petitioner is held to be lawfully cultivating the field on the date on which the lease was granted to him at the commencement of the agricultural year 1943-44, then he would be protected by the provisions of the then operative Tenancy Act and by the Tenancy Act of 1948 which replaced it and he would be protected by all the provisions of the Act. Upon this discussion the first question posed for our decision must be answered in the negative and the second question in the affirmative."*

45. Mr. Shirsath adverts to the decision of the appellate court and contends that a singular point for determination in the matter as such had not been sufficient and proper in the circumstances and as such, the appellate court had erred in not framing

appropriate points for determination under Order XLI, Rule 30 of the Code of Civil Procedure and for said purpose, relies on a decision of Honourable Single Judge of this court in the case of *Smt. Anita M. Harretto Vs. Abdul Wahid* reported in *AIR 1985 Bombay 98*. He submits that the appellate court for want of proper framing of points could not reach to the close quarters of decision by the trial court in the context of controversial issues, particularly about the possession on the date of the suit and consequentially injunction.

46. He further contends in respect of second substantial question of law, such as, rightly framed as possession has been claimed by the Tambes is without execution of decree under regular civil suit No. 8 of 1947 and there is no evidence whatsoever on record as to how the Tambes could be said to have been come in possession of the suit property. He, therefore, urges this court to decide all the three substantial questions of law in favour of the Idhates and to hold that the courts have committed error in giving findings which are not only not in tune with but also are contrary to the facts and evidence on record.

47. He submits that may be it is the case as the other side is likely to contend, a suit for declaration of title on the basis of adverse possession would not be maintained, yet it cannot be said that the title of the Idhates to the suit land has been lost.

48. He alternatively, without giving up the contentions, submits that, if not for the relief of declaration of title by adverse possession, yet the suit of the Idhates ought to have been decreed holding their title in their own rights and at least to the extent of injunction having regard to the background and that the shrouded revenue entries would seldom disprove the factual position with regard to actual possession of the Idhates. He submits that none of the courts hitherto have referred to possession as had been subsisting on the dates of respective suits.

49. He submits that the Idhates' claim to possession has not been properly considered and in the circumstances, the matter will have to be remanded to the trial court for deciding this vital aspect involved in the matter and would be entitled to address on the issue and shall be required to be given opportunity to give evidence in this respect. He submits that situation calls for remand of the matters. He thus urges this court to frame the substantial question in this respect.

50. He, therefore, submits that trial as well as appellate court have committed grave error in dismissing regular civil suit no. 8 of 1985 of the Idhates and decreeing regular civil suit no. 41 of 1985 by the Tambes. He craves for decision on all substantial questions in favour of appellants.

51. Learned advocate for appellants submits, in the unlikely

event of dismissal of second appeals, right to remedy should not be foreclosed on his clients.

52. Mr Gatne learned advocate appearing on behalf of the defendants in Regular Civil Suit No.8 of 1985 and plaintiffs in Regular Civil Suit No.41 of 1985 the Tambes – the respondents in the second appeals - countering aforesaid submissions on behalf of appellants – the Idhates, submits, while the matters were being contested, not even by whisper it had been the contention on behalf of the Idhates that they had ever asserted claim to the title of the property in their own right and alternatively by adverse possession. The Idhates themselves have treated the matter accordingly and claimed title to the property by adverse possession and as such, according to him, at the stage of final hearing of second appeals, the appellants – the Idhates, thirty years down, would seldom be allowed to turn around and contend that they are asserting their claim in their own right and not by adverse possession.

53. Mr. Gatne, submits that as a matter of fact, taking into account the settled position of law, suit for declaration to ownership on the basis of adverse possession would not be tenable. Mr. Gatne submits, a claim to title by adverse possession can seldom be a matter of attack, rather it would always be a shield and a defence to be taken. He further submits that such

being the position, the suit of the Idhates could not be maintained at all.

54. Heavy emphasis has been placed by Mr. Gatne on the judgment in the case of “*Gurudwarda Sahib V/s Gram Panchayat Village Sirthala and Another*” reported in (2014) 1 SCC 669 and particularly underscoring the observations as appearing in head note “A” and paragraphs No.1, 2, 8 and 10 of said judgment, reading thus:-

“A. A contract and Specific Relief – Specific Relief Act, 1963 – S. 34 – Declaratory decree – Declaration of ownership of land on basis of adverse possession cannot be sought by plaintiff – But claim of ownership by adverse possession can be made by way of defence when arrayed as defendant in proceedings against him – While recording finding that appellant-plaintiff was in adverse possession of suit land, held, trial court rightly refused to grant decree declaring that plaintiff's adverse possession matured into ownership - Appellant-plaintiff being in possession of suit land for long (more than 12 yrs) and having been granted decree of injunction restraining respondent-defendants from dispossessing plaintiff therefrom, its possession cannot be disturbed except by due process of law – Though appellant's suit seeking declaration of ownership by adverse possession stood dismissed, in case of respondents' filing suit for possession and/or ejectment of appellant, it would be open to appellant to plead in - At that stage it would also be open to appellant to plead that previous finding regarding appellant's adverse possession operated as res judicata – Civil Procedure Code, 1908 – S. 11 – Property Act – Adverse possession – Limitation Act, 1963, S. 27 and Arts. 64 to 66. ”

“ 1. Leave granted. The appellant herein is the original plaintiff which had filed the suit for decree of declaration to the effect that it had become

owner of the suit property by adverse possession. Declaration was also sought to the effect that the Revenue record showing ownership of respondent No.1 herein i.e. Gram Panchayat (defendant in the suit) is liable to be corrected in the name of the appellant and the auction already held by the Gram Panchayat of the land in dispute is null and void. Consequential relief of permanent injunction restraining Gram Panchayat from dispossessing the appellant from the disputed land was also prayed for. This suit was partly decreed by the trial court granting relief of injunction. First Appeal against that part of the judgment whereby relief of declaration was denied was dismissed by the learned Additional District Judge and the Second Appeal preferred by the appellant has also been dismissed by the High Court of Punjab and Haryana vide judgment dated 22nd September 2011. Undeterred by successive failures, the appellant has knocked at the door of this Court with the plea that its suit be decreed in entirety.

2. The appellant claims ownership by adverse possession on the ground that it is in possession of the land in dispute for sufficiently long period which fact has been established and, therefore, his suit could not be dismissed. We, however, find that this relief of declaration has been denied on the ground that suit for such a prayer was not maintainable inasmuch as declaration to this effect on the basis of adverse possession cannot be sought and the plea of adverse possession is available only as a defence to the defendant.

8. There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the appellant and appellant is arrayed as defendant that it can use this adverse possession as a shield/defence.

10. As the appellant is in possession of the suit property since 13.4.1952 and has been granted the decree of injunction, it obviously

means that the possession of the appellant cannot be disturbed except by due process of law. We make it clear that though the suit of the appellant seeking relief of declaration has been dismissed, in case respondents file suit for possession and/or ejectment of the appellant, it would be open to the appellant to plead in defence that the appellant had become the owner of property by adverse possession. Needless to mention at this stage, the appellant shall also be at liberty to plead that findings of issue No.1 to the effect that the appellant is in possession of adverse possession since 13.4.1952 operates as res-judicata. Subject to this clarification, the appeal is dismissed. ”

55. He submits, suit by the Idhates was predominantly being for declaration of title to the property by adverse possession is a foregone conclusion in the wake of conduct of proceedings and decisions and the second appeals by the Idhates are unmaintainable. He submits that although learned counsel for the appellants – the Idhates contends that the suit is basically for declaration of title and alternatively by way of adverse possession, such a contention does not at all to carry any substance looking at the submissions and underlying intention in pleadings indeed is to secure title by adverse possession.

56. He submits, title to property by adverse possession by now is well-known that can be used as a shield and not as a sword. He, therefore, submits that the suit by the plaintiffs for declaration of ownership by adverse possession is not maintainable and both the courts have rightly discarded the claim of the of the plaintiffs and in second appeal, the court should be extra cautious, to digress

with a situation as emerging from legal position from the citations relied upon. He submits having regard to settled position of law a title to the property on the ground of adverse possession and its declaration is not possible under a suit by the plaintiff.

57. He further refers to and relies on three more judgments on said point viz.; “*Krishnamurthy S. Setlur V/s O. V. Narasimha Setty and Others*” reported in (2007) 3 SCC 569; “*P. T. Munichikkanna Reddy and Others V/s Revamma and Others*” reported in (2007) 6 SCC 59 and in the case of “*Hemaji Waghaji Jat V/s Bhikhabhai Khengarbhai Harijan and Others*” reported in (2009) 16 SCC 517.

58. Mr. Gatne, alternatively goes on to submit that even if it comes to a case to consider the claim of the plaintiffs for adverse possession, according to him, same would be untenable on several counts. In the first place, right from 1940 onwards, continually, the Tambe's name have been appearing in revenue record in ownership column. There has been no disturbance at the instance of the Idhates or any complaint about record being maintained showing the Tambes as owners giving indication of that the Idhates all along believed and accepted the Tambes to be owners and have treated the Tambes accordingly. He submits that not only about the character of the Idhates in cultivation appearing in all its variations is showing that they had accepted title of the Tambes to the suit property, but also, further referring to the revenue receipts,

which according to him establish that the title of Tambe's to suit property had long been accepted and treated so as those show that the revenue is being paid by the Idhates on behalf of the owners - the Tambes. In fact there has been an attempt under an overt action by the Idhates to seek declaration under tenancy law to be a purchaser of the suit property, albeit said attempt did not bear fruit and stood rejected. It cannot be said that there had been any hostility to the title being possessed by the Tambes over the suit property.

59. He submits apart from aforesaid, it will have to be considered that even otherwise plea of adverse possession is untenable as necessary particulars in respect of the same are found wanting in the present matter.

60. He thus submits that taking into account all aforesaid, it can hardly be said that claim for adverse possession at the behest of the plaintiffs would have any basis to stand on. He submits that there is no hostility at all or disturbance to the title of the Tambes to the suit property. He submits that as such, the Idhates' effort to claim title to the suit property is not tenable on any count and has rightly resulted into failure.

61. He further goes on to contend that even otherwise the claim by the Idhates for title is running simultaneously on two horses because on one hand they claim title to the suit property on the

basis of adverse possession as would easily emerge from the contents and prayers of the plaint in suit No. 8 of 1985 and on the other, now assert the claim by declaration of title to the suit property allegedly in their own right. According to him, these two pleas would not be able to coexist. In the circumstances, the Idhates if they are considered to have an option they have already opted taking up a plea of adverse possession as would plainly emerge from the conduct and treatment to the proceedings on their behalf. He further submits that any variation in the stand would tantamount, in the facts and circumstances, to nothing less than *volte-face* and as such, according to him, the Idhates are estopped from attempting to recoil and now claim title to the property as is now sought to be claimed.

62. He submits that it has never been the plea of the Idhates that they had denied the Tambes were owners of the suit land and had not relied on the decision in suit No. 8 of 1947. He submits that, even if that be so, it is the case where it can easily be said that decree had never been invoked by the parties and in the circumstances, the decree as it emerges was treated by parties not be acted upon at all.

63. Effect under the declaration under the decree of the court in 1948 gets extinguished according learned advocate, by admission of title of the Tambes and conduct of the Idhates.

64. Learned counsel Mr. Gatne stresses on that while interpreting the document executed between Idhates and Tambes, the same indeed appears to be a sale deed as the document depicts transaction under the same to be an out and out sale.

65. Mr. Gatne further contends that it is case of Idhates that the transaction is a sale deed with a condition to re-purchase. As such, he submits that the document vests the Tambes with title to the property and divests that of the Idhates from the same and in the absence of re-purchase or re-conveyance, it cannot be deemed that the title acquired under the document can be said to have lost by the Tambes.

66. He submits that even if it is to be considered as a mortgage, as has been considered by trial court, at the most it would be of mortgage by conditional sale meaning thereby according to him that there is confirmed sale with a condition, and only if or when conditions are satisfied, then it can be mortgage. Learned counsel submits that a distinction ought to have been drawn that the mortgage with conditional sale and a sale with a condition to re-purchase. According to him having regard to the provisions of section 58 (c) of the Transfer of Property Act unless the condition of re-purchase is embodied in the document itself, it cannot be treated as mortgage by conditional sale which according to him, is not the case and as such, it can hardly be treated as mortgage by

conditional sale. He submits that it is not a simple mortgage since the document shows that the possession had to be parted with. In the circumstances, he submits that as far as the case of mortgage is concerned, the same will have to be viewed with the decision rendered, particularly from paragraph no. 18 in suit No. 8 of 1947.

67. Second leg of submission of Mr. Gatne is that since right to redemption appears to have been lost, the title vested by the transaction has become absolute. The sale stands confirmed.

68. Additionally, Mr. Gatne refers to the position as occurring after introduction of the Limitation Act, 1963 the period of limitation, having regard to transitional provisions, for redemption of mortgage would continue only for a period of seven years after 1963 which expired long back in 1970. Thus, according to him, the Tambes are the owners and are as such entitled to possession of the property and are accordingly in possession of the same.

69. The gist of the submissions of Mr. Gatne is that clear title has been vested under the document in favour his clients-the Tambes and unless its re-conveyance takes place, title or possession would not be amenable to revert to the Idhates. He submits that for more than thirty years from the date of contended right has been accrued, there is no action for redemption. In the circumstances, the sale in favour of the Tambes stands confirmed and they have acquired absolute ownership.

70. In such circumstances, he submits that it is not the case at all wherein it can be said that the decree in regular civil suit No.8 of 1947 had affected the title, acquired and vested in the Tambes to the suit property under the executed document of 1940 and the parties have accepted the treatment to be given to the same and decree has not been accordingly acted upon at all. It is not open for the Idhates to contend that despite such treatment and their conduct, they would now assert title to suit property as owners. He, therefore, contends that in the circumstances, there is absolutely no case which can be said to have been made out by the Idhates to claim title to the suit on any count either in fact or in law.

71. Learned counsel Mr. Gatne contends that the courts have found that the Idhates could not establish their possession and the revenue entries of immediate past were in favour of the Tambes, giving sufficient indication of the Tambes being in possession as on the dates of the suits. He, therefore, contends that while there are concurrent findings of fact in respect of possession, appreciation with reference to the evidence on record would seldom be liable to be disturbed at the second appellate stage. He, therefore, submits that there is no substance in the contentions on behalf of the Idhates for remand of the case and no such question may be said to have arisen.

72. Learned advocate Mr. Gatne submits, in view of above, the suit by the Idhates deserved to be dismissed and urges to maintain the decisions hitherto.

73. Before dealing with the substantial questions of law, as have been framed while admitting the second appeals, it would be pertinent to refer to a few facts about which there may not be any dispute.

74. Subject land had been originally belonging to predecessor of the Idhates i.e. Balwant Idhate and that he had been in possession of the same as its owner. Maruti Tambe, predecessor of the Tambes had a dealing with him in respect of subject land under an executed transaction dated 29th May, 1940. Revenue record, after execution of instrument between Balwant Idhate and Maruti Tambe, started showing Maruti Tambe as owner in relevant column, whereas in cultivation column, it was Balwant Idhate whose name was being shown. Said position continued till 1947. In 1947 it appears that Regular Civil Suit No.8 of 1947 before Joint Civil Judge, Parner had been instituted by Maruti Tambe against Balwant Idhate seeking possession of suit land pursuant to aforesaid instrument. Said proceedings ended up in a decree dated 30th June, 1948, reading, thus -

"२६.५.१९४० सालचे खरेदीखत गहाणस्वरूपी असे ठरविण्यात येत आहे. प्रतिवादीकडून रु. २६८.८

वादीस हिशोबाआंती घेणे निघते. पक्षकारास काही खर्च झाला असल्यास तो त्यांनी आपापला सोसावा”

75. Even after aforesaid decree, position continued in the revenue record showing Maruti Tambe to be owner and Balwant Idhate to be cultivator of the subject land, albeit, with alteration for couple of years 1964-65 and 1965-66, the same continued long up to 1978-79, in the interregnum, there have been some variations occurring about capacity in which land was being cultivated by the Idhates.

76. By 1978-79, names of heirs of parties to the instrument had already entered into revenue record. From 1979 onwards, however, name of son of deceased Maruti – the Tambes were being shown in column of possession as well as ownership in respect of the subject land and the situation continued till 1983-84. In view of this change, it appears, some movement had been carried at the instance of the Idhates in respect of entries in revenue record. It has come forth that while before revenue authority of first instance, complaint on behalf of the Idhates had been sustained, however, in appeal therefrom it is contended on behalf of the Idhates that the matter had been remanded. This turbulence in the revenue record appears to have given anxious moments to the Idhates.

77. Regular Civil Suit No.8 of 1985 was instituted by the Idhates

seeking declaration of ownership in respect of subject land and injunction from interfering with their possession against the Tambes. A counter suit bearing Regular Civil Suit No. 41 of 1985 had been filed by the Tambes for injunction against the Idhates alternatively praying for possession, before Civil Judge, Junior Division, Shrigonda.

78. Having heard learned counsel as aforesaid, one thing clearly emerging in the face of the supreme court decision in the case of *Gurudwara Sahib vs Gram Panchayat Village Sirthala and Another*, reported in (2014) 1 SCC 669, is that the suit i.e. regular civil suit no. 8 of 1985 instituted by the plaintiffs i.e. the Idhates so far as it relates to relief seeking declaration of title with reference to adverse possession, it will have to be considered that relief to that extent in the suit would not be possible to be granted.

79. Appreciation of revenue entries by appellate court and its observations appear to be at little variance at some places with those of the trial court. So far as possession of suit land is concerned, the courts hitherto appear to have gone by revenue entries of the immediate past.

80. The courts hitherto appear to be in oblivion about the aspect which may have bearing on the outcome of the matters, as to when possession had been taken over by the Tambes from the

Idhates. Especially, in the background that it is the case in pleadings of the Tambes that they were in possession of the suit land and were forced to be away due to over stretching famine in order to eke out their existence and after coming back they had taken over the possession. The aspect as to whether the Tambes had ever been in possession of subject land as contended is a matter which would require consideration.

81. The courts appear to have considered that since there had been no redemption of mortgage within the period of limitation, the Tambes have come in possession upon expiry of period of limitation. It does not appear to be case of either side.

82. Thus, the pleadings of the parties and partial consideration of the same, so also non-appreciation of oral evidence, by the courts leads to a situation wherein it cannot even by preponderance be said that coming into possession of the Tambes at any particular occasion / time is effectively considered and decided. Pleadings by parties and treatment to proceedings and evidence and its appreciation in the circumstances appears to be deficient of proper appreciation and consideration.

83. In the absence of evidence in the first place, of instance of taking over possession from the Idhates by the Tambes around 1979-80 in such a case it would be a hazardous proposition to rely solely on revenue entries of immediate past, irrespective of

evidence required to see possession on the dates of suits.

84. As far as injunction sought is concerned, what would be crucial to consider is the possession as on the dates of the suits. The evidence as adduced and position as emerging therefrom appear to be deficient to come to any conclusive position about possession as on the dates of the suits. In the circumstances, in respect of possession as on the dates of the suits, the judgments hitherto by the courts fall short of consideration of this vital aspect involved in the matter.

85. It will have to be considered that as regards possession, appreciation of evidence and the evidence as has been led on either side do not inspire confidence in order to reach to any definitive conclusion about possession of either of party as on the dates of the suits. As such, it was imperative for the appellate court to refer to and deal with specifically about possession of parties on the dates of the suit. It would not be appropriate for this court to appreciate such a position on the evidence which does not inspire confidence.

86. Having regard to submissions as have been advanced on behalf of the Idhates by Mr. Sirsath and resisted on behalf of Tambes by Mr. Gatne, having canvassed and dealt with their respective cases in regard to remand, the question, therefore, substantially emerges for consideration in the matter, apart from

the ones as have been framed and referred to earlier on, is -

“ As to whether the matters deserve to be remanded to the trial court for finding in respect of possession as on the dates of the suits, as also to give finding about whether the Tambes had come in possession at a particular point of time during period from 1948 to 1983/84 by framing an issue in this respect and letting opportunity to the parties to address themselves on the same with opportunity to lead evidence? ”

87. Having regard to submissions as advanced on either side, it appears that the single point for determination as framed by the appellate court in the two regular civil appeals before it had not been conducive in decision making in the peculiar facts and circumstances involved in the matter. Various aspects appear to have been addressed to on either side by the parties. As such, it would be imperative that proper points for determination would have been expedient.

88. The other aspect hinted at by learned counsel Mr. Sirsath is about treatment to be given to the decree in suit No.8 of 1947 and its consequences and / or rights emerging therefrom had not been the subject matter of the litigation. Reliance is being placed on the observations, as have been referred to hereinabove earlier, from

the citations relied on by appellants for said purpose. There is no assertion of rights of ownership by the parties hitherto with reference to decree of suit No. 8 of 1947. In the circumstances, the cases on either side may boil down to that as regards title, it is for the parties to decide how to go about the same.

89. There does not, as on the date, appear to be any evidence which has been relied upon on either side that there had ever been any action or not, pursuant to the decree in regular civil suit No.8 of 1947, that the decree had been put in execution or for that matter there had been any delivery of possession by the appellants' side. The decree and the judgment in Regular Civil Suit No.8 of 1947 have been placed on record without any pleadings, as such, it cannot be considered either way.

90. In any case, mere declaratory relief without execution may not give any right, however, actual physical possession will have to be considered on the dates of the suits. As there were no pleadings in respect of the decree granted by civil court in Regular Civil Suit No. 8 of 1947 and as it has been considered that it is for the parties to decide as how to go about the same, the question as referred to in clause No.ii, referred to in paragraph No.29, it will have to be said that in the absence of pleadings, especially in view of the fact that the matters are being remanded, it is for the parties to decide as to how to go about the decree in Regular Civil

Suit No.8 of 1947, would be required to be answered, if the parties resort to decision with reference to title, said question would emerge for being answered. Accordingly, second substantial question of law stands answered.

91. Having regard to aforesaid discussion, it will be expedient that the decree in regular civil suit no. 8 of 1985 shall stand confirmed to the extent it relates to dismissal of the suit seeking declaration on the basis of adverse possession.

92. Under the circumstances, as observed hereinbefore, the decree to the extent it refuses declaration of title on the basis of adverse possession claimed by the Idhates is not disturbed, however, rest of the judgments and decrees in respect of other reliefs passed by the trial court and confirmed by the appellate court stand set aside.

93. The matters are remitted to trial court. In the circumstances, the trial court to give finding as to the position about possession over the suit property on the dates of the respective suits and parties will have to be given opportunity in respect of above to lead evidence as also in respect of claim of Tambes having come in possession during period from 1948-1983/84, by framing issues as to whether respective parties prove to be in possession on the dates of the suits, as to whether Tambes prove that they had come in possession at a particular point of time during the period from

1948-1983/84 and had continued with their such possession till the dates of the suits and also by framing other issues arising from pleadings of parties apart from the ones which had been framed. Accordingly, questions, the one under clause (iii) as substantial one and the other for remand framed hereinabove earlier stand answered.

94. In the circumstances, both the suits stand restored before the trial court to the stage of framing of issues as indicated above and suits be tried accordingly afresh from the stage of framing of issues. The evidence, if any, lead by parties shall be in addition to the evidence already led. As far as title to the property is concerned, as observed hereinbefore in the body of judgment, it is for the parties to decide how to go about the reliefs in respects of the same. The suits shall, however, be proceeded with expeditiously and disposed of within a period of a year from the date of receipt of writ of this order.

95. Second Appeals are accordingly partly allowed and are disposed of without any order as to costs.

96. In view of disposal of second appeals, pending civil applications do not survive and stand disposed of.

**SUNIL P. DESHMUKH,
JUDGE**