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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL ST NO. 32661 OF 2016**

Savita Bhiku Kadam

...Appellant

Versus

Volley D'Mello

...Respondent

Mr SA Abhyankar, i/b Anjali Helekar, for the Appellant.

CORAM: G.S. PATEL, J

DATED: 5th July 2017

PC:-

1. Heard.

2. This First Appeal will have to be decided immediately. It is against an order dated 24th October 2016. The Plaintiff came to Court seeking a declaration, rightly or wrongly, that she acquired prescriptive title, i.e., by adverse possession, to land at Poisar, Taluka Borivali admeasuring 2479.8 sq mtrs. The Defendant did not appear despite substituted service.

3. For some reason, the learned Judge thought it appropriate to frame a preliminary issue. It is unclear under what provision of law this was done. It could not have been under Order 14 of the Code of Civil Procedure, 1908 and most certainly not under Section 9A of the CPC. Under Section 9A an objection as to jurisdiction has to be

taken by one of the parties to the litigation. The learned Judge seems to have decided that the kind of declaration that the Plaintiff sought could not be granted in view of the decision of the Supreme Court in *Gurudwara Sahib v Gram Panchayat Village Sirthala & Anr.*¹

4. It is not necessary to discuss at this stage the submission that the decision of the Supreme Court in *Gurudwara Sahib* is *per incurium* for not noticing the previous decisions of a three-Judge Bench of the Supreme Court in *Kshitij Chandra Bose v Commissioner of Ranchi*² and a previous decision of a two-Judge Bench of the Supreme Court in *Balkrishnan v Satyaprakash & Ors.*³ It is stated that neither of these decisions were noticed in *Gurudwara Sahib* and in both of them the Plaintiff sought a declaration of title *inter alia* by prescription or adverse title. The finding in *Gurudwara Sahib*, a decision of 2014, says in terms that a claim to title by adverse possession is only available as a shield, not a sword; i.e., it can only be set up by a defendant against a claim for title by the true owner.

5. Whatever be the position in law, that is not the issue in this Appeal. For, the Plaintiff might well have been able to show on evidence that she had title otherwise. Relief might have been moulded. An amendment might have been sought. The next prayer for protection of possession might equally have been granted if the Plaintiff showed some sort of possessory right or title, even if this had not matured into complete ownership. All these were distinct possibilities. More: the Defendant might yet have appeared at any

1 2014 (4) Mh LJ 74 (SC).

2 AIR 1981 SC 707.

3 (2001) 2 SCC 498.

stage of the proceedings. It was not for the Court to take upon itself in this fashion the task of sending the suit to so premature a death.

6. The impugned order is set aside. S.C. Suit No. 1369 of 2015 is restored to file. It will be heard in the regular course.

7. Until the final disposal of the suit, there will be an ad-interim injunction in terms of prayer clause (c) of the plaint:

"c) Pending hearing and final disposal of the suit, the Hon'ble Court be pleased to issue temporary order of injunction restraining the Defendant or her servants and agents in any way dispossessing the Plaintiff and/or interfere with the Plaintiff's possession in respect of the suit property, viz., all that piece and parcel of land situate, lying and being at Kadam chawl, Borsapada, Poisar, Village Kandivali, Taluka Borivali, M.S.D.; Mumbai bearing CTS Nos. 29, 29-1 to 8 and 30 totally admeasuring about 2479.8 sq mtrs or thereabouts together with structures standing thereon."

8. Liberty to the Defendant to apply to the Trial Court for a variation, modification or recall of this order provided such an application is made with at least four weeks' prior written notice to the Advocate for the Plaintiff.

9. The First Appeal is disposed of in these terms. No costs.

(G. S. PATEL, J)