IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10316 OF 2016

Sopana Bala Kadam
(since deceased through his legal heirs
& representative)
1a. Anandrao Sopanrao Kadam and
Ors. ***...Petitioners***

V/s.

Vijay Harishchandra Khaire and Ors. ***...Respondents***

WITH

WRIT PETITION NO.10265 OF 2016

Sopana Bala Kadam
(since deceased through his legal heirs
& representative)
1a. Anandrao Sopanrao Kadam and
Ors. ***...Petitioners***

V/s.

Vijay Harishchandra Khaire and Ors. ***...Respondents***

WITH

WRIT PETITION NO.10933 OF 2016

Dhyanadev Tukaram Kadam and Ors. ***...Petitioners***

V/s.

Vijay Harishchandra Khaire and Ors. ***...Respondents***

WITH

WRIT PETITION NO.10934 OF 2016

Dhyandev Tukaram Kadam and Ors. ***...Petitioners***

V/s.

MEGHA SHREEDHAR PARAB
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Vijay Harishchandra Khaire and Ors. ***...Respondents***

WITH
INTERIM APPLICATION NO.10848 OF 2024
IN
WRIT PETITION NO.10933 OF 2016

Dnyanadev Tukaram Kadam and Ors. ***...Applicants***

In the matter between:-
Sopana Bala Kadam (since deceased through LRs)
1a) Anandrao Sopanrao Kadam and Ors. ***...Petitioners***

V/s.

Vijay Harishchandra Khaire and Ors. ***...Respondents***

WITH
INTERIM APPLICATION NO.767 OF 2025
IN
WRIT PETITION NO.10316 OF 2016

Sopana Bala Kadam (since deceased through LR's
1a) Anandrao Sopanrao Kadam and Ors. ***...Applicants***

V/s.

Vijay Harishchandra Khaire and Ors. ***...Respondents***

INTERIM APPLICATION NO.768 OF 2025
IN
WRIT PETITION NO.10265 OF 2016

Sopana Bala Kadam (since deceased through LR's
1a) Anandrao Sopanrao Kadam and Ors. ***...Applicants***

V/s.

Vijay Harishchandra Khaire and Ors. ***...Respondents***

INTERIM APPLICATION NO.10845 OF 2024
IN
WRIT PETITION NO.10265 OF 2016

Sopana Bala Kadam (since deceased through LR's
1a) Anandrao Sopanrao Kadam and Ors. ***...Applicants***

V/s.

Vijay Harishchandra Khaire and Ors. ***...Respondents***

WITH
INTERIM APPLICATION NO.10846 OF 2024
IN
WRIT PETITION NO.10934 OF 2016

Dhyanadev Tukaram Kadam and Ors. ***...Applicants***

V/s.

Vijay Harishchandra Khaire and Ors. ***...Respondents***

Mr. Surel S. Shah, *Senior Advocate with Mr. Umesh Mankapure i/b. Mr. Nilesh M. Wable for the Petitioner in WP/10316/2016 and WP/10265/2016.*

Mr. Hemant Ghadigaonkar *for Petitioner in WP/10933/2016 & WP/10934/2016.*

Mr. N.V. Walawalkar, *Senior Advocate, with Mr. Aumkar Joshi for Respondent Nos.1, 3, 4(i) to 4(iii), 5(i) to 5(iii), 6 to 11, 13 to 15.*

CORAM: SANDEEP V. MARNE, J.

Judgment reserved on: 15 April 2025.

Judgment pronounced on: 25 April 2025.

Judgment:

1) **Rule**. *Rule* is made returnable forthwith. With the consent of the learned counsel appearing for parties, the Petitions are taken up for final disposal.

2) These Petitions challenge order dated 30 January 2016 passed by the Maharashtra Revenue Tribunal, Pune (**MRT)** by which the MRT has allowed revision filed by the Respondents (Revision Application No. P/VIII/3/2011) and has set aside order dated 14 July 2011 passed by the Sub Divisional Officer, Baramati (**SDO)** declaring that land bearing Gat Nos.28/1, 28/2, 28/3 and 28/4 admeasuring 18 Acres, 21 Guntha has been purchased by Petitioners and fixing its purchase price. Petitioners accordingly seek restoration of SDO's order dated 14 July 2011 to the extent of land bearing Gat Nos.28/1, 28/2, 28/3 and 28/4. Order dated 30 January 2016 is also challenged by the Petitioners to the extent it rejects their own revision (Revision No. P/IX/1/2011) in which they had challenged SDO's order dated 14 July 2011 to the extent of denial of tenancy rights in respect of land bearing Gat No.31. Accordingly, Petitioners seek declaration of their tenancy in respect of land bearing Gat No.31 as well and its purchase by fixing the price under Section 32G of the Maharashtra Tenancy and Agricultural Lands Act, 1948 (**Tenancy Act)**.

3) Following two lands at Village-Pilanwadi, Taluka-Daund, District-Pune are subject matter of present Petitions:

(i) Land bearing Gat Nos.28/1, 28/2, 28/3 and 28/4 (Old Gat No.1760 and old Survey No.323/1) admeasuring 7 Hectare 49 Ares (18 Acre 21 Guntha).

(ii) Land bearing Gat No.31(old Gat No.1763 and old Survey No.325 of 2012) admeasuring 6 Hectare 44 Ares (15 Acre 38 Guntha).

4) Both the pieces of lands were owned by Gulabrao Gopalrao Khaire. It is the case of the Petitioners that Shri Vishnu Limba Kadam was inducted as a tenant in respect of both the pieces of lands vide written agreement (*Lekhi Kabulayat Bhade Patta* dated 2 June 1935). According to Petitioners, said Vishnu was cultivating both the pieces of lands as tenant in pursuance of the said written agreement dated 2 June 1935. After death of Vishnu Limba Kadam, his son-Bala Vishnu Kadam continued to cultivate both the pieces of lands as tenant. After death of Bala Vishnu Kadam, his sons-Dinkar, Sopana and Tukaram continued to cultivate both the pieces of lands as tenants. Name of elder son-Dinkar Bala Kadam was entered into revenue records as protected tenant vide Mutation Entry No. 2724 certified on 8 October 1949 in respect of both the pieces of lands. According to Petitioners, this is how Kadam family became protected tenants under Section 3A of the Bombay Tenancy Act, 1939 (**Act of 1939).**

5) The Deed of Mortgage by conditional sale came to be executed between the landlord-Gulabrao Gopalrao Khaire (Mortgagor) and Bhiku Daulatrao Jarande & Sopana Bala Kadam (mortgagees), under which Rs. 5,500/- was advanced by Mr. Sopana Bala Kadam and Mr. Bhiku Daulatrao Jarande to the landlord and both the pieces of lands were mortgaged in favour of the mortgagees.

Under the Deed of Mortgage, the mortgage was to be redeemed within a period of 10 years, failing which both the pieces of lands were to be considered as sold in favour of the mortgagees. The Landlord's son-Rajaram Gulabrao Khaire filed Regular Civil Suit No.65 of 1974 in the Court of Civil Judge, Junior Division, Daund, District-Pune, seeking redemption of the mortgage. The Suit came to be decreed on 24 April 1979 directing the Plaintiff to pay to the Defendants Rs.5,500/-, who were directed to execute re-conveyance Deed in favour of the Plaintiff in respect of both the pieces of lands. The efforts made by Petitioners for setting aside the *ex-parte* decree dated 24 April 1979 did not yield any fruitful results. The Respondents-landlords filed execution proceeding being Regular Darkhast No.21 of 1979, in which order dated 11 January 1996 was passed directing deposit of the amount of Rs.5,500/- by the Plaintiffs in the Court and appointing officer of the Court to execute Re-conveyance Deed in favour of Plaintiffs. According to Petitioners, though re-conveyance was granted by the Executing Court, the prayer for possession of both the pieces of the lands was not granted by the Executing Court on the ground that the decree did not contain any specific direction for handing over possession. The decree-holders were however granted liberty to approach revenue court for seeking possession of the lands. The landlords filed Writ Petition No.2354 of 1996 challenging the order of Executing Court dated 11 January 1996, which came to be dismissed for default. The Executing Court thereafter finalised the draft of Re-conveyance Deed. Petitioners had objected to the draft of Re-conveyance Deed and insisted on recording in the Deed that possession of the lands continued with Kadam family. The said objection was upheld by the Executing Court but objection regarding recording of tenancy rights of Kadam was rejected. Petitioners unsuccessfully challenged the order of Executing Court before the

District Court, which dismissed their Appeal by order dated 6 January 2009. Petitioners filed Writ Petition No.1654 of 2009 in this Court challenging the order of the District Court, which came to be disposed of by recording Minutes of Order dated 11 February 2009, under which both the sides agreed that contention of Petitioners regarding their tenancy would be recorded in the Re-conveyance Deed without prejudice to the rights and contentions to be raised before the Revenue Authorities. Accordingly, Regular Darkhast No.21 of 1979 was disposed of executing reconveyance deed in favour of Respondents on 24 February 2009 containing a covenant about tenancy rights of the Petitioners without prejudice to the rights and contentions of the parties to be raised before the tenancy court.

6) Petitioners filed Tenancy Case No.5 of 2008 before Tehsildar and Agricultural Lands Tribunal, Daund (**ALT)** under Section 32G Tenancy Act for fixation of purchase price of both the pieces of lands. On the other hand, Respondents filed application under Section 70(b) of the Tenancy Act seeking negative declaration that Petitioners are not tenants in respect of the lands in question. By order dated 28 January 2010, the ALT proceeded to allow the application preferred by Respondents holding that Kadam family is not tenant in respect of the land in question. Consequently, application filed by Petitioners for fixation of purchase price under Section 32G of the Tenancy Act was dismissed by order dated 28 January 2010.

7) Aggrieved by order dated 28 January 2010 passed by the Tehsildar, Petitioners filed Tenancy Appeal No.1 of 2010 before the SDO, Baramati, which came to be partly allowed by order dated 14

July 2011. The SDO held that Petitioners are tenants in respect of the lands bearing Gat Nos.28/1 to 28/4 admeasuring 18 Acre, 21 Gunthas (7 Hectare, 49 Ares) and fixed purchase price under Sections 32G and 32H of the Tenancy Act. The SDO however, did not uphold the tenancy rights in respect of land bearing Gat No.31 granting liberty to the Petitioners to secure possession thereof through appropriate proceedings.

8) Both the sides filed cross Revision Applications before the MRT challenging SDO's order dated 14 July 2011. Respondents-landlords filed Revision Application No. P/VIII/3/ 2011 to the extent of declaration of tenancy rights of Petitioners in land bearing Gat Nos.28/1 to 28/4 whereas Petitioners filed Revision Application No. P/IX/1/2011 to the extent of denial of tenancy rights in land bearing Gat No.31. By judgment and order dated 19 May 2014, the MRT dismissed Petitioners' revision and allowed Respondents' revision holding that Kadam family was never a tenant in respect of either of the lands. Petitioners filed Writ Petition Nos.7416 of 2014 and 7131 of 2014 in this Court challenging the MRT's order dated 19 May 2014. By order dated 10 February 2015, this Court set aside MRT's order and remanded the revisions for fresh decision on the ground that proper opportunity of prosecuting the revisions was denied to them. After order of remand, the MRT has passed impugned order dated 30 January 2016 allowing the revision filed by Respondents and setting aside declaration of tenancy of Petitioners in land bearing Gat Nos.28/1 to 28/4 and dismissing the revision preferred by the Petitioners relating to land bearing Gat No.31. In short, MRT has held that Petitioners were never tenants of either of the pieces of the lands. MRT has accordingly upheld the order passed by the ALT on 28 January 2010 by setting aside order passed by the SDO on 14 July

2011. Petitioners have filed the present Petitions challenging MRT's order dated 30 January 2016.

9) Mr. Surel Shah, the learned senior advocate appearing for Petitioners in Writ Petition Nos. 10316 of 2016 and 10265 of 2016 would submit that the MRT has grossly erred in reversing SDO's order to the extent of land bearing Gat Nos.28/1 to 28/4. He would submit that MRT has also erred in dismissing Petitioners' revision to the extent of correctness of SDO's order not declaring Petitioners as tenants in respect of land bearing Gat No.31. He would submit that Petitioners clearly proved existence of tenancy rights of Kadam family in both the pieces of lands. He would take me through Mutation Entry No. 2724 dated 8 October 1949 recording name of Dinkar Bala Kadam as protected tenant under Section 3A of the Act of 1939 in respect of both the pieces of lands. He would also take me through entries in cultivation column of both the pieces of lands right since 1935-36 to bring home the point of personal cultivation of lands by Kadam family. He would also take me through the Plaint filed in Regular Civil Suit No.65 of 1974 by the landlord admitting that Kadam family was a tenant in respect of both the pieces of lands. He would also take me through evidence recorded in Regular Civil Suit No.65 of 1974 to prove that the witness of the Respondents specifically admitted that the lands were being cultivated by Kadam family as tenant at the time of execution of the Mortgage Deed. He would therefore submit that personal cultivation of both the pieces of lands by Kadam family was specifically admitted by the Respondents before Civil Court in suit for redemption of mortgage and that therefore they cannot now be permitted to turn around and question Petitioners' status as tenants.

10) Mr. Shah would further submit that execution of Mortgage Deed dated 23 May 1949 did not have any effect on tenancy rights or possession of the lands by Kadam family. He would rely upon provisions of Section 25A of the Tenancy Act in support of his contention that mere creation of mortgage does not destroy tenancy right of a tenant.

11) Mr. Shah would further submit that there is concrete evidence of existence of tenancy of Kadam family as on the date of execution of Mortgage Deed. He would rely upon *Lekhi Kabulayat Bhade Patta* dated 2 June 1935 creating tenancy in favour of Kadam family. Additionally, he would rely on revenue entries of personal cultivation of lands by Kadam family from 1935-36 onwards. He would submit that SDO had rightly appreciated the documentary evidence for upholding tenancy rights of the Petitioners in land bearing Gat Nos.28/1 to 28/4. He would submit that the MRT has grossly erred in reversing the well-considered decision of the SDO *qua* land bearing Gat Nos.28/1 to 28/4 despite observing that there are continuous entries of cultivation in the name of the tenant. That the MRT has erred in totally ignoring admissions given by the landlord before Civil Court about existence of tenancy rights. That such admissions would continue to bind the Respondents even in the tenancy proceedings. That the MRT has erroneously relied on Mutation Entry deleting the name of Kadam family as tenant. He would submit that such deletion occurred possibly on account of execution of Mortgage Deed. He would submit that once existence of tenancy on the date of execution of Mortgage Deed is established, Section 25A of the Tenancy Act protects such tenancy rights notwithstanding the fact that possession of the land could also be in capacity as a mortgagee. He would submit that Kadam family was a protected tenant under Section 3A of Act of

1939 and automatically became a tenant under Section 4A read with Section 2(18) of the Tenancy Act. He would submit that every tenant as defined under sub-section (18) of Section 2 of the Tenancy Act becomes entitled to purchase the tenanted land under Section 32 of the Tenancy Act. That it is not necessary for the protected tenant to prove personal cultivation of land as on Tiller's Day of 1 April 1957. Mr. Shah would therefore submit that MRT ought to have upheld tenancy rights in respect of both the pieces of lands. In support of his contention, he has relied upon judgment of the Apex Court in ***Dahya Lala and others v. Rasul Mahomed Abdul Rahim and others***[1] and ***Parmar Kanaksinh Bhagwansinh (dead) by L.Rs Vs. Makwana Shanabhai Bhikhabhai and another***[2]**.**

12) Mr. Shah would submit that the SDO has erred in not upholding the tenancy claim of Petitioners *qua* land bearing Gat No.31. That there cannot be any difference in respect of tenancy claim in respect of two pieces of land when *Lekhi Kabulayat Bhade Patta* dated 2 June 1935 as well as revenue entries in respect of both the lands are identical. That mere recovery of possession of land bearing Gat No.31 from Bhiku Daulatrao Jarande cannot be a reason for negativing Petitioners' tenancy claim *qua* land bearing Gat No.31. That Bhiku Daulatrao Jarande was a joint mortgagee with Kadam family and therefore provisions under Section 25A applied to the entire land covered by the Mortgage Deed. That the personal cultivation of land bearing Gat No.31 by Kadam family was not affected even after mortgage of the said land in favour of Bhiku Daulatrao Jarande. He would therefore submit that SDO and MRT

1 AIR 1964 SC 1320
2 1995 AIR SCW 188

ought to have upheld tenancy claim in respect of land bearing Gat No.31.

13) Without prejudice, Mr. Shah would rely upon Mutation Entry No.2970 of 17 January 1953 under which Bhiku Daulatrao Jarande and Sopana Bala Kadam had partitioned both the pieces of lands, under which land bearing Survey No. 325/2 (new Survey No.31) remained in possession of Bhiku Daulatrao Jarande whereas land bearing Survey No.323/1 (new Survey Nos. 28/1 to 28/4) remained in possession of Sopana Bala Kadam. He would submit that if there is any difficulty in not recognising tenancy claim of Petitioners of land bearing Gat No.31, their tenancy claim in respect of balance portion of land being Gat Nos.28/1 to 28/4 must be upheld on account of proof of possession and personal cultivation thereof by Sopana Bala Kadam. Mr. Shah would accordingly pray for setting aside order passed by the MRT.

14) Mr. Ghadigaonkar, the learned counsel appearing for the Petitioners in Writ Petition Nos.10933 of 2016 and 10934 of 2016 would adopt the submissions canvassed by Mr. Shah.

15) The Petitions are opposed by Mr. Walawalkar, learned senior advocate appearing for Respondent No.1-Khaire family (landlords). He would submit that the MRT has rightly appreciated the fact that the Kadam family never possessed or cultivated the lands in question at the time of execution of the Mortgage Deed. That the Mortgage Deed does not record so. That if indeed Kadam family was to personally cultivate the land at the time of execution of the Mortgage Deed, such cultivation would have been reflected in the

Mortgage Deed. That on the other hand, Mortgage Deed records handing over of possession of both the lands to Kadam and Jarande showing thereby that the land was never in possession or personal cultivation of the Kadam family. He would submit that the MRT has rightly appreciated the position that the revenue entries regarding cultivation are not consistent and that name of Kadams as tenant was deleted in the year 1954. That there is absolutely no evidence to indicate that there was personal cultivation of land by Kadams as on Tiller's Day of 1 April 1957.

16) Mr. Walawalkar would further submit that neither pleadings filed nor evidence recorded in Regular Civil Suit No.65 of 1974 would be binding on the tenancy authorities. That Civil Court did not have jurisdiction to record any finding with regard to possession or cultivation of lands as tenant. That such jurisdiction vested solely with the tenancy authorities. That therefore no pleading or statement made in evidence in the said suit can be utilised for inferring existence of tenancy rights in favour of the Petitioners. That the findings recorded by tenancy authorities would ultimately prevail over findings of the Civil Court.

17) Mr. Walawalkar would further submit that execution of the Mortgage Deed dated 23 May 1949 would in fact imply surrender of tenancy rights, if any, by Kadam family and taking over possession of land in capacity as mortgagee in possession. He would rely on provisions of Section 4(c) of Tenancy Act in order to support the contention that mortgagee in possession can never become a tenant. He would submit that provisions under Section 25A came to be inserted in the Tenancy Act on 25 October 1959 and cannot govern

the Mortgage Deed executed on 23 May 1949. That the Mortgage Deed was executed well before creation of right in favour of tenant under Section 25A of the Tenancy Act. That therefore execution of Mortgage Deed on 23 May 1949 must be construed to mean surrender of tenancy by the tenant.

18) In respect of land bearing Gat No.31, Mr. Walawalkar would submit that three authorities have concurrently rejected Petitioners' claim of tenancy *qua* that piece of land. That the said land was ultimately found in possession of Bhiku Daulatrao Jarande and the Court Commissioner has recovered possession thereof from Jarande family and handed over the same to the Respondents. That therefore there is no question of personal cultivation of land bearing Gat No.31 by any member of the Kadam family. He would therefore submit that claim of Petitioners *qua* land bearing Gat No.31 is totally baseless.

19) Mr. Walawalkar would further submit that what applies in respect of land bearing Gat No.31 would equally apply with full force in respect of land bearing Gat Nos.28/1 to 28/4. He would submit that both the pieces of lands were put in possession of Mr. Kadam family and Jarande family as mortgagees by Mortgage Deed dated 23 May 1949. That Jarande family was put in possession of 2/3rd of mortgaged land whereas Kadam family remained in possession of only 1/3rd of the mortgaged land. He would submit that Mortgage Deed has been registered and therefore division of land as reflected in the Mortgage Deed would prevail over any revenue records in the form of Mutation Entry No.2970 dated 17 January 1953. That therefore tenancy claim in respect of 2/3rd of both the pieces of lands, which was

possessed by Jarande family, is required to be rejected in the event any semblance of right is found in respect of land remaining in possession of Kadam family as a result of the Mortgage Deed. Mr. Walawalkar would accordingly pray for dismissing the Petitions.

20) Mr. Walawalkar would submit that Mortgage Deed dated 23 May 1949 is held by Courts to be a Deed of Mortgage relating to land and had to be a registered document and is accordingly registered. That Petitioners' reliance on Mutation Entry No. 2970 which seek to bind mortgagor by their mutual agreement which is not by any registered document and to which mortgagor is not a party and thus the mutation entry and mutual arrangement have no evidentiary value in view of law laid down by the Apex Court in ***S. Saktivel (Dead) by LRs. Vs. M. Venugopal Pillai and others***[3] wherein the Apex Court has held that a document for its validity or effectiveness is required by law to be in writing and, therefore, no modification or alteration or substitution of such written document is permissible by parol evidence and it is only by another written document the terms of earlier written document can be altered, rescinded or substituted.

21) Rival contentions of the parties now fall for my consideration.

22) The case presents a unique conundrum, where the landlord mortgaged both the pieces of lands not just in favour of the tenant but also in favour of a third party. The main issue for consideration is the effect such mortgage would have on tenancy rights of Kadam family. There is no dispute to the position that

[3] (2000) 7 SCC 104

written agreement (*Lekhi Kabulayat Bhade Patta*) dated 2 June 1935) was executed under which Gulabrao Gopalrao Khaire (landlord) inducted Vishnu Limba Kadam as a tenant in respect of both the pieces of lands. The rent agreement was apparently registered under which tenant was to share 1/2 of crop with the landlord instead of payment of rent in cash. Execution of written rent agreement (*Lekhi Kabulayat Bhade Patta*) dated 2 June 1935 is not seriously disputed by the Respondents. It is however their contention that though such written rent agreement was executed in the year 1935, the tenant never remained in continuous cultivation of the lands and his cultivation was disturbed from time to time. Petitioners have relied upon entries in the cultivation column since 1935-36. In the year 1935-36, there is entry of Vishnu Limba Kadam cultivating land bearing Survey No.323/1 (new Survey No.28/1, 28/2, 28/3 and 28/4) vide written agreement (*Lekhi Kabulayat Bhade Patta*) dated 2 June 1935. Similar entry is to be found in land bearing Survey No.325/2 for the year 1936-37. Cultivation by members of Kadam family under 'रीत ४' apparently continued upto year 1948-49. In the year 1940-50 there is an entry of 'Khudd (खुद्द)'. However, again there are entries in the name of Kadam family after 1950-51, which continued upto to the year 1952-53. There is also entry of Shri Dinkar Bala Kadam being a protected tenant vide Mutation Entry No.2724 dated 8 October 1949. Thus, there appears to be sufficient evidence on record about creation of tenancy in favour of Mr. Kadam family in respect of both the pieces of lands as well as personal cultivation thereof.

23) A twist got created on account of execution of Mortgage By Conditional Sale on 23 May 1949. It appears that landlord-Gulabrao Gopalrao Khaire was in need of funds and accordingly borrowed a sum of Rs.5,500/- jointly from Shri Bhiku Daulatrao

Jarande (third party) and Sopana Bala Kadam (tenant). In the Mortgage Deed there is reflection of fraction '2/3' against the name of Bhiku Daulatrao Jarande whereas the fraction '1/3' is indicated against the name of Sopana Bala Kadam. The landlord mortgaged both the pieces of lands as a security for borrowing sum of Rs.5,500/- and agreed to return the same within a period of 10 years. Mortgage Deed records the mortgagees being put in possession of both the pieces of lands on the date of execution of the Mortgage Deed. It was agreed that in the event of failure on the part of mortgagor to repay the borrowed amount, the lands would be considered as sold to the mortgagees.

24) Son of the Mortgagor thereafter filed Regular Civil Suit No.65 of 1974 for redemption of mortgage contending that the transaction was never intended as a sale. He showed willingness to refund borrowed amount of Rs.5,500/- and sought re-conveyance of both the pieces of lands as well as possessions thereof. In his plaint-Plaintiff-Rajaram Gulabrao Khaire contended that 'वादीचे वडिलास प्रतिवादींपैकी प्रतिवादी न. ३ सोपान बाळा कदम हा वादीचे वडिलांचा कुळ म्हणून सदन जमिनी वहिवाटीत होता.' Even in the evidence, Plaintiff's witness gave following admission :-

> *'at the time of execution deed suit land were being cultivated by Defendant No.2 in the capacity of tenant of my father'*

25) Branch of the Respondents thus specifically admitted cultivation of the land at the time of execution of Mortgage Deed by Kadam family. I am not impressed by the submissions made on behalf of the Respondents that the admission given in the Plaint would not bind the revenue authorities. True it is that the Civil Court does not have jurisdiction to rule on tenancy claim and the jurisdiction vests

solely with the tenancy authorities. However, it is well settled principle of law that admissions made in pleadings stand on higher footings than evidentiary pleadings and that the same are binding on party making them constituting a waiver of proof. Reference in this regard to the judgment of the Apex Court in ***Nagindas Ramdas vs Dalpatram Ichharam @ Brijram And Ors***[4] would be apposite**.** In para 27 of the judgment, it is held as under:

> 27. From a conspectus of the cases cited at the bar, the principle that emerges is, that if at the time of the passing of the decree, there was some material before the Court, on the basis of which, the Court could be prima facie satisfied, about the existence of a statutory ground for eviction, it will be presumed that the Court was so satisfied and the decree for eviction though apparently passed on the basis of a compromise, would be valid. Such material may take the shape of either of evidence recorded or produced in the case, or, it may partly or wholly be in the shape of an express or implied admission made in the compromise agreement, itself. Admissions, if true and clear, are by far the best proof of the facts admitted. **Admissions in pleadings or judicial admissions, admissible under Section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong.**
>
> *(emphasis added)*

It therefore becomes difficult to believe that Respondents can wriggle out of specific admission given in the Plaint filed in Regular Civil Suit No.65 of 1974 about Kadam family cultivating the land as tenants.

26) Coming back to the core issue involved in the Petition about the exact effect of execution of mortgage on tenancy rights of the tenant, Petitioners have relied upon provisions of Section 25A of the Tenancy Act, under which tenancy remains in abeyance during usufructuary

[4] 1974 (1) SCC 242.

mortgage in favour of tenant. Section 25A inserted vide Bombay Act 34 of 1951 provides thus:-

> **25A. Tenancy to be in abeyance during usufructuary mortgage in favour of tenant.**
>
> If any land is mortgaged by a landlord by way of a usufructuary mortgage to a tenant cultivating such land, the tenancy of such land shall be in abeyance during the period the mortgage subsists. After the expiry of the said period, it shall, notwithstanding any other law for the time being in force, be lawful to the tenant to continue to hold the land on the terms and conditions on which he held it before the mortgage was created.

27) Thus, under Section 25A of the Tenancy Act, if the tenanted land is mortgaged by the landlord in favour of a tenant cultivating the same, the tenancy of such land remains in abeyance only during subsistence of mortgage and after expiry of mortgage, the tenant continues to hold the land on same terms and conditions on which he held the same before creation of the mortgage. It is sought to be suggested by Mr. Walawalkar that Section 25A of the Tenancy Act came to be inserted on 25 October 1951 whereas the mortgage in the present case was created on 23 May 1949 and that therefore Section 25A cannot retrospectively operate in respect of the mortgage previously created. I am unable to agree. From plain language of Section 25A, the protection granted in favour of the tenant meant that provision would continue to apply in respect of even a subsisting mortgage created prior to 25 October 1951. As on the date of insertion of Section 25A in the Tenancy Act, the mortgage created for a period of 10 years on 23 May 1949 was subsisting and therefore it cannot be contended that execution of the Mortgage Deed automatically extinguishes tenancy rights of Kadam family. In my view therefore provisions of Section 25A of Tenancy Act would be attracted in the present case even *qua* Mortgage Deed dated 23 May 1949. The key to

decide the case is whether Kadam family was a tenant as on the date of execution of the Mortgage Deed. The moment it is proved that Kadam family was cultivating the land as a tenant as on the date of execution of the Mortgage Deed, the tenancy gets suspended and remains in abeyance only during currency of mortgage. Mere execution of mortgage by a landlord in favour of tenant and his possession of tenanted land as a mortgagee does not extinguish the tenancy rights of such tenant. The law provides for mere suspension of tenancy rights, which automatically gets revived immediately on expiry of tenure of mortgage. In the present case, there is sufficient documentary evidence to infer that Kadam family was a protected tenant as on the date of execution of Mortgage Deed dated 23 May 1949. There are consistent entries of personal cultivation in revenue records in addition to execution of registered *Lekhi Kabulayat* creating tenancy. In my view therefore provisions of Section 25A would ordinarily apply in the present case and would merely suspend tenancy right of Kadam family during currency of Mortgage Deed. This issue is squarely covered by judgment of Apex Court in ***Parmar Kanaksinh Bhagwansinh*** (supra). Question No.1 formed by the Apex Court in the said case was as under -

> 7. Questions which arise for out consideration and decision in the light of the aforesaid arguments of learned counsel for the contesting parties admit of their formulations thus:
>
> (1) Does the lease-hold of a tenant (lessee) in a property merge in mortgage security if the same property is given by the landlord (lessor) to the tenant (lessee) as a mortgage security under a mortgage by conditional sale, as would debar the tenant from desisting the suit of the landlord-mortgagor for recovery of possession of such property by obtaining a decree for redemption of the mortgage?

Question has been answered by the Apex Court in paragraphs 10 to 13 as under:-

10. Question (1): Interests of the lessee and the lessor in the whole of the property become vested at the same time in one person in the same right because of S. 111(d) of the T.P. Act. What is enunciated in S. 111(d) of the T.P. Act cannot be doubted is the doctrine of merger. Merger takes place when a lesser estate is merged or drowned in a greater estate. Lease-hold held by a tenant or a lessee being a lessor estate and the right of reversion of the landlord (lessor) being a higher estate, the lessee's lease-hold right in respect of the property merges in reversion when that right of reversion, i.e., the landlord's (lessor's) right of reversion comes to the tenant or lessee which happens when the landlord having a right to sell his reversion to the tenant holding the leasehold sells the whole of it to the tenant (lessee). But, in view of the arguments advanced on behalf of the plaintiff-appellant, what has to be seen is if the landlord of a property, the leasehold of which is already with the tenant, gives that very property as mortgage security to the tenant (lessee) by executing a mortgage by a conditional sale for the amount borrowed by him from the latter, does merger of lease-hold right in that mortgage security occur. When the landlord mortgages the lease-hold property of the tenant to the tenant himself, he does not part with the right of reversion which he has in respect of that property. If that be so, merger of leasehold estate in reversion cannot arise, inasmuch as, there cannot be any inconsistency or incompatibility in one person being the tenant and also the mortgagee of the same property, for in that event instead of the tenant paying rent to the landlord he may adjust it against the amount claimable by him as a mortgages from the landlord. Moreover, if a lessee of a property takes a mortgage of the same property from the landlord, it would be unreasonable to attribute to a tenant the intention to surrender the tenancy and to invoke the sophisticated doctrine of implied surrender as has been held by the Gujarat High Court in Patel Atmaram Nathudas v. Babubhai Keshavlal, AIR 1975 Guj 120.

11. In the present case, as has already been pointed out by us, the plaintiff appellant did not claim that the defendants or any of them were in possession of the suit properties as tenants and there was a surrender by then of the possession cither expressly or impliedly as would make the Court to come to the conclusion that the possession of the suit properties with the defendants was surrendered by them pursuant to the mortgage by conditional sale executed in their favour. If that be the position, there can be no bar for the defendants to claim the right to continue in possession of the suit properties as tenants under the BT and AL Act even if the plaintiff could obtain a decree for redemption of the suit properties, which relief was sought in the suit. The decision of this Court in Shah Mathuradas case (AIR 1976 SC 1565) (supra) and G. Appailaswamy case (AIR 1984 SC 1728) (supra) sought to be relied upon by learned counsel for the appellant-plaintiff in support of his arguments that there was a merger of the lease-hold right of the tenant in the suit properties when he took mortgages of those properties from the landlord as would deny him the right to continue in possession of those properties as a tenant, instead of supporting his argument

would go against it, as we shall presently point out. Shah Mathuradas case (AIR 1976 SC 1565) (supra) was that where the respondent had executed a mortgage in favour of the appellant respecting a premises of which he was a tenant. It was agreed under the terms of the mortgage deed that no interest need be paid by the respondent since the premises, the possession of which was given to the tenant pursuant to the mortgage was to be enjoyed in lieu of interest payable on the mortgage. When suit for redemption of the premises was filed by the respondent the appellant claimed, that after redemption, he was entitled to remain in possession of the premises because of the subsistence of his previous tenancy right. This Court held that the mortgage deed established beyond doubt that there was no subsistence or continuation of lease in that there was delivery of possession by the tenant to the landlord immediately before the mortgage and redelivery of possession to the tenant of the premises made by the landlord was pursuant to the mortgage as a mortgagee and not as a tenant. Secondly, this Court held that the appellant was not entitled to retain after redemption possession of the mortgage-property by reason of his previous night to be in its possession as a tenant. In the present case as we have pointed out earlier, when no surrender of possession of the suit properties had taken place before the coming into existence of mortgages in favour of the lessor-mortgagor, when no redelivery of possession had been given pursuant to the mortgage to the tenant, the decision under consideration can be of no assistance to the appellant. Since the following observations in the said case confirm the view we have taken on non-merger, they can be excerpted. (para 17 of AIR):

"For a merger to arise, it is necessary that a lesser estate and a higher estate should merge in one person at one and the same time and in the same right, and no interest in the property should remain outside. In the case of a lease the estate that is in the lessor is a reversion. In the case of a mortgage the estate that is outstanding is the equity of redemption of the mortgagor. Therefore, there cannot be a merger of lease and mortgage in respect of the same property since neither of them is a higher or lesser estate than the other."

12. Coming to G. Appallaswamy case (AIR 1984 SC 1728) (supra) which considered the question whether a sitting tenant who took property by a possessory or usufructuary mortgage in his favour was liable to deliver physical possession upon redemption to the mortgagor (former lessor). This Court dealing with the said question said that all depends upon whether there was an implied surrender of the lessee's rights when the usufructuary mortgage was executed in his favour by the lessor-mortgagor and only if an implied surrender of lessee's rights could be inferred then the mortgagor would be entitled to have delivery of physical possession upon redemption but not otherwise. Dealing with the question of non merger this Court approved the ratio of the decision in Shah Mathuradas (AIR 1976 SC 1565) (supra) thus (at p. 1730, para 5 of AIR):

> "In our view there can be no merger of a lease and a mortgage, even where the two transactions are in respect of the same property. It is well settled that for a merger to arise, it is necessary that lesser estate and a higher estate should merge in one person at one and the same time and in the same right and no interest in the property should remain outstanding. In the case of a lease, the estate that is outstanding in the lessor is the reversion; in the case of a mortgage, the estate that is outstanding is the equity of redemption of the mortgagor. Accordingly, there cannot be a merger of a lease and a mortgage in respect of the same property since neither of them is a higher or lesser estate than the other. Even if the rights of the lessee and the rights of the mortgagee in respect of a property were to be united in one person the reversion in regard to the lease and the equity of redemption in regard to the mortgage would be outstanding in the owner of the property and accordingly, there would not be a complete fusion of all the rights of ownership in one person."
>
> 13. Hence, the lease-hold of a tenant (lessee) in a property does not merge in mortgage security of that property, even if it is given to him by the landlord (lessor) on a mortgage by conditional sale as would debar the tenant from desisting the suit of the landlord mortgagor for recovery of possession of such property by obtaining decree for redemption of the mortgage.

28) Thus, there is no theory of merger of lease-hold rights of a tenant with possession as mortgagee. The law recognises subsistence of both the rights of tenancy as well as mortgagee in possession. In my view therefore, mere execution of the Mortgage Deed in favour of the tenant-Kadam family did not amount to surrender of tenancy rights as sought to be contended by Mr. Walawalkar. Having held that Section 25A of the Tenancy Act would govern the present case, the next issue for consideration is whether the said provision would apply in respect of both the pieces of land.

29) As observed above, in ordinary case, Section 25A of Tenancy Act would protect subsistence of tenancy rights notwithstanding execution of Mortgage Deed. However, further twist is created in the present case where the Mortgage Deed is not executed solely in the name of the tenant. The same is executed in the joint names of tenant-Sopana Kadam and a third party-Bhiku Jarande. Admittedly,

Bhiku Jarande was never a tenant in respect of either pieces of lands. He is a complete stranger to the landlord-tenant relationship. However, it appears that Bhiku Jarande possessed necessary funds for being lent to the landlord. It appears that out of funds of Rs.5,500/- lent to the landlord 2/3rd portion was lent by Shri Jarande whereas 1/3rd portion was lent by Tenant-Sopana Bala Kadam. This is a reason why the mortgage by way of conditional sale made by Jarande in respect of 2/3rd of the mortgaged land whereas tenant-Sopana Bala Kadam was to acquire ownership of 1/3rd of the mortgaged lands. Thus, this is not a case where the entire land was mortgaged in favour of tenant alone for the purpose of application of provision of Section 25A of the Tenancy Act. Majority of portion of land (2/3rd) was in fact mortgaged in favour of third party-Bhiku Daulatrao Jarande. The Mortgage Deed specifically records that '...वरील रुपयांस दहा १० वर्षाचे मुदतीने मुदत खरेदी देऊन आज रोजी तुमचे ताब्यात दिली आहे. येणारी उत्पन्न मर्जीप्रमाणे कसून खात जावे.' It further records that 'दहा १० वर्षाचे आंत कोणतेही साल अखेरीस वरील रुपये एकदम देऊन जमीन सोडवून घेईन'. The Mortgage Deed thus records that the mortgaged land was put in possession of Bhiku Daulatrao Jarande as well as of the tenant-Sopana Bala Kadam.

30) As observed above, Sopana Bala Kadam was actually personally cultivating both the pieces of lands as on the date of execution of the Mortgage Deed. If the Mortgage Deed was executed in his sole name, Section 25A would have come to his rescue and his tenancy right would have been protected though it would remain suspended during currency of the Mortgage Deed. This position would apply in respect of that portion of the mortgaged land, which continued to remain in possession of the tenant-Sopana Bala Kadam. Though he was personally cultivating the entire mortgaged land before the date of execution of Mortgage Deed, his possession and

cultivation continued only in respect of only part of the mortgaged land after execution of Mortgage Deed. Therefore, *qua* some portion of the mortgaged land (which remained in tenant's possession), Section 25A protected tenancy right of the tenant-Sopana Bala Kadam. However, since some portion of the tenanted land was handed over to an outsider (Bhiku Daulatrao Jarande), Section 25A would not protect the tenancy right *qua* such portion of the land. Admittedly, Bhiku Daulatrao Jarande was not a tenant and was a rank outsider. Tenant-Sopana Bala Kadam signed the Mortgage Deed, which recorded handing over possession of mortgaged land to both Bhiku Daulatrao Jarande and to the tenant. Thus, some portion of the mortgaged land no longer remained in possession of tenant-Sopana Bala Kadam for the purpose of application of provisions of Section 25A of the Tenancy Act. In my view therefore tenancy right of Kadam family was not protected in respect of such portion of the land which remained in possession of Bhiku Daulatrao Jarande and Kadam family cannot claim tenancy right in respect of said portion of the land.

31) The next issue for consideration is the exact land which remained excluded from application of provisions of Section 25A of the Tenancy Act. As observed above, Mortgage Deed recorded handing over of possession of 2/3rd portion of the mortgaged land in favour of Bhiku Daulatrao Jarande. The Mortgage Deed comprised of two pieces of lands bearing Survey Nos.325/2 (new Gat No.31 admeasuring 15 Acre 38 Guntha) and Survey No.323 (new Gat Nos.28/1 to 28/4 admeasuring 18 Acre 21 Guntha). The total mortgaged land thus admeasured about 34 Acre and 17 Gunthe and 2/3rd portion thereof would be 22 Acre 77 Gunthe, which would ordinarily remain in possession of Bhiku Daulatrao Jarande and remaining land admeasuring 11 Acre 38 Gunthe would ordinarily

remain in possession of Sopana Bala Kadam. However, it appears that mortgagees had a common understanding, under which Bhiku Daulatrao Jarande kept possession of land bearing Survey No. 325/2 (new Gat No.31) admeasuring 15 Acre 38 Gunthe, whereas tenant-Sopana Bala Kadam retained possession of land bearing Survey No.323/1 (new Gat Nos.28/1 to 28/4) admeasuring 18 Acre 21 Gunthe. This is evident from Mutation Entry No.2970 dated 17 January 1953, which records actual possession of respective portions of the lands by Jarande and Kadam families.

32) Mr. Walawalkar has strenuously objected to reliance by Petitioners on Mutation Entry No.2970 dated 17 January 1953 and has contended that the covenants of the registered Deed of Mortgage recording possession of 2/3rd portion of land by Jarande family and 1/3rd portion of land by Kadam family would prevail over the revenue entries. While ordinarily what Mr. Walawalkar contends could have been correct, in the present case, actual possession of the lands by respective mortgagees is the relevant factor. It has been ultimately found that Bhiku Daulatrao Jarande was possessing only land bearing Gat No.31 and possession thereof was taken away by him by the Court Commissioner towards execution of the decree. It has not come on record anywhere that Jarande family possessed any portion of land in Gat Nos.28/1 to 28/4. In my view therefore it would be safe to assume that the tenant–Sopana Bala Kadam continued to retain possession of land bearing Survey No.323/1 (new Gat Nos.28/1 to 28/4).

33) In short, provisions under Section 25A of the Tenancy Act would not apply to the land bearing Gat No.31, which remained in possession of a third party (Bhiku Daulatrao Jarande) after execution of Mortgage Deed dated 23 May 1949. The tenant-Sopana Bala

Kadam retained possession of only land bearing Gat Nos.28/1 to 28/4 after execution of the Mortgage Deed and his tenancy rights continued to subsist *qua* the land in his possession under Section 25A notwithstanding change of his role from tenant to that of mortgagee. This however, would not apply to land given in possession to a rank outsider (Jarande). The tenant-Sopana Bala Kadam admittedly lost possession of the land bearing Gat No.31 after execution of Mortgage Deed. He also admitted loss of possession of land bearing Gat No.31 before the revenue authorities on 17 January 1953 when Mutation Entry No.2970 was certified. Since tenant-Kadam did not retain possession of land bearing Gat No.31, there is no question of him being declared as tenant entitled to purchase land bearing Gat No.31 as on Tiller's Day of 1 April 1957 under Section 32 of the Tenancy Act.

34) Mr. Walawalkar has sought to advance an extreme proposition that once mortgage is executed in respect of a tenanted land, there is implied surrender of tenancy. I am unable to agree. In the present case, mortgage was executed on 23 May 1949 where provisions of Act of 1939 were in vogue. There was no provision for surrender of tenancy under the Act of 1939. Provision of surrender of tenancy came to be introduced for the first time in the Tenancy Act in the form of Section 15, which was inserted by Bombay Act 13 of 1956. Thus, there could not have been surrender of tenancy by the tenant nor such surrender can be inferred merely on account of execution of Mortgage Deed. In fact, contention raised by Mr. Walawalkar about the implied surrender of tenancy would render Section 25A otiose. In my view, therefore, *qua* land bearing Gat Nos.28/1 to 28/4 there can be no implied surrender of tenancy. Tenancy rights merely remained in abeyance during currency of the Mortgage Deed and same resurfaced after the mortgage ended in the year 1959.

35) It is also sought to be suggested by Mr. Walawalkar that as on the Tiller's Day of 1 April 1957, Kadam family was admittedly mortgagee *qua* land bearing Gat Nos.28/1 to 28/4 and therefore their rights of purchase cannot be recognised even *qua* land bearing Gat Nos.28/1 to 28/4. He has submitted that even going by provisions of Section 25A of the Tenancy Act, tenancy rights remained in abeyance upto the year 1959 and the only capacity in which the land was possessed by Kadam family as on 1 April 1957 was 'mortgagee in possession'. He has relied upon Clause (c) of Section 4(1) of the Tenancy Act in support of his contention that mortgagee in possession is specifically excluded from ambit of term 'deemed tenant'. In my view, the interpretation sought to be suggested by Mr. Walawalkar does not appear to be in consonance with the legislative object behind insertion of Section 25A of the Tenancy Act. The provision for recognition of tenancy rights even after creation of mortgage in favour of a tenant is aimed at ensuring that tenancy rights are not destroyed merely because a cultivator wears twin hats of tenant as well as of mortgagee for a limited period of time. Objective is to protect tenancy rights even if a mortgage is executed in favour of the tenant. The intention of the legislature is to recognise both the rights of cultivator of the land. In the event any right is to be exercised by the tenant based on mortgage created in his favour during currency thereof, he can utilise his status as a mortgagee. On the other hand, his tenancy rights do not get extinguished and merely remains in abeyance and resurfaces upon expiry of the mortgage. Since the intention of the legislature is to protect tenancy rights, it cannot be contended that the status as a tenant gets extinguished altogether as on 1 April 1957 for the purpose of creation of deeming fiction of purchase. I am therefore, not impressed by submission made on behalf of

Respondents that Kadam family was mere a 'mortgagee in possession' as on 1 April 1957 and was not entitled to purchase land bearing Gat Nos.28/1 to 28/4 on Tiller's Day of 1 April 1957. Their tenancy right was merely suspended and right to purchase the land under Section 32 came to life immediately after expiry of tenure of mortgage.

36) In my view, therefore SDO has rightly appreciated the position that tenancy right of Kadam family is restricted only *qua* Gat Nos.28/1 to 28/4 and that the same cannot be recognised *qua* Gut No.31, which went into possession of Jarande family from whom possession was taken away and restored in possession of landlord. The MRT has grossly erred in reversing the order of SDO *qua* land bearing Gat Nos.28/1 to 28/4. Findings recorded by the MRT, apart from being difficult to comprehend, are otherwise perverse *qua* land bearing Gat Nos.28/1 to 28/4. Despite existence of continuous entries in the cultivation column as well as factum of payment of land revenue by the tenant, the MRT has erroneously reversed tenancy claim of Kadam family *qua* land bearing Gat Nos.28/1 to 28/4. To this limited extent, order passed by the MRT is unsustainable and liable to be set aside.

37) Conspectus of the above discussion is that Petitioners are successful in establishing their tenancy claim in respect of land bearing Gat Nos.28/1 to 28/4, which admeasures 18 Acre 21 Gunthe (equivalent to 7 Hectare 49 Ares). However, Petitioners are unable to justify their tenancy claim *qua* land bearing Gat No.31 admeasuring 15 Acres 38 Gunthe (6 Hectare 46 Ares) which went into possession of Bhiku Daulatrao Jarande simultaneously with execution of Mortgage Deed on 23 May 1949.

38) The Petitions accordingly succeed partly and I proceed to pass the following order:

(i) Order passed by the MRT on 30 January 2016 is set aside *qua* land bearing Gat Nos.28/1 to 28/4, however, the same is sustained *qua* land bearing Gat No.31.

(ii) Consequently, order passed by the SDO on 14 July 2011 is confirmed by holding that Petitioners are entitled to purchase land bearing Gat Nos.28/1 to 28/4 under the provisions of Section 32 of the Tenancy Act. However, their claim for purchase of land bearing Gat No.31 is rejected.

39) Petitions are partly allowed in above terms. Rule is made absolute. There shall be no orders as to costs.

40) In view of disposal of the Writ Petitions, nothing survives in the Interim Applications and the same are accordingly disposed.

[SANDEEP V. MARNE, J.]

41) After the judgment is pronounced, Mr.Walawalkar would pray for stay of judgement for a period of 8 weeks. Request is opposed by Mr. Mankapure and Mr. Ghadigaonkar. They would however submit that in the event of this Court granting stay to the judgment, the Respondents shall not disturb the possession of the Petitioners *qua* land bearing gut Nos.28/1 to 28/4. The operation of the judgment and order shall remain stayed for a period of 8 weeks subject to the condition of Respondents not taking any steps for disturbing the possession of Petitioner *qua* Gut Nos.28/1 to 28/4.

[SANDEEP V. MARNE, J.]