

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND
THE STATE OF ANDHRA PRADESH**

SECOND APPEAL No.383 OF 2004

Between:

Meenugu Mallaiah and others.

... Appellants.

And

Ananthula Rajaiah and another

... Respondents.

JUDGMENT PRONOUNCED ON 09.09.2016

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

- 
1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? -No-
 2. Whether the copies of judgment may be
marked to Law Reporters/Journals -Yes-
 3. Whether Their Ladyship/Lordship wish to
see the fair copy of the Judgment? -Yes-

*** THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

+ SECOND APPEAL No.383 of 2004

% 09.09.2016

Meenugu Mallaiah and others.

....Appellants

v.

\$ Ananthula Rajaiah and another

.... Respondents

! Counsel for the Appellants : Sri T.Ramulu.

Counsel for Respondents: Sri P.Sri Raghuram for
Sri Ch.Ravinder

<Gist :

>Head Note:

? Cases referred:

1. (1996) 1 Supreme Court Cases 639
2. (2014) 1 SCC 669
3. (2016) 3 SCC 78
4. (2010) 14 SCC 316
5. (2005) 11 SCC 115
6. AIR 2012 SC 1727
7. AIR 1934 PC 23
8. AIR 1964 SC 1254
9. (1995) 6 SCC 309
10. (1997) 7 SCC 567
11. 2008 (6) ALD 121 (SC)
12. 2010 (2) ALD 115 (SC)
13. 2007 (14) SCC 308
14. 2007(6) SCC 59
15. 2006 (7) SCC 570
16. 2009 (13) SCC 229
17. AIR 2001 SC 1968
18. (2004) 10 SCC 779
19. (2004) 10 SCC 65
20. (1983) SLSC 3
21. 1974 (3) All E.R. 575 at 580
22. 49 L.J.Q.B. 220
23. 401 N.E.2d 560
24. (1929), 337 Ill. 488, 169 N.E.237
25. (1908), 236 Ill. 169, 86 N.E.212
26. (1972), 53 Ill. 2d 325, 291 N.E.2d 641.

27. (1902), 197 Ill. 156, 64 N.E. 395.
28. (1958), 12 Ill. 2d 608, 147 N.E.2d. 356.
29. 1994 (1) BLJR 648
30. 1991 (3) SCC 410
31. (1907) AC 73, at 79
32. AIR 1968 SC 1165
33. AIR 1981 SC 707
34. 2011 (10) SCC 404
35. (2005) 49 ERG 90
36. 2003 1 AC 419
37. AIR 1966 Ker 179
38. AIR 2016 SC 1294
39. (2015) 8 MLJ 807
40. (2015) 3 GLR 2015
41. (2011) 1 CALLT 459 (HC)
42. (2012) 8 SCC 148
43. AIR 2014 SC 937
44. (1995) 3 SCC 33
45. AIR 2008 SC 2594



HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.383 of 2004

JUDGMENT:

Defendants in O.S.No.813 of 1993 on the file of Junior Civil Judge at Sulthanabad, who are the respondents in A.S.No.27 of 2001 on the file of Senior Civil Judge at Peddapalli, preferred this Second Appeal under Section 100 of the Code of Civil Procedure, 1908 ('CPC' for short) challenging the decree and judgment passed by the Appellate Court holding that the plaintiff is the owner of the property by reversing the findings recorded by the trial Court.

For convenience of reference, the ranks given to the parties before the trial Court in O.S.No.813 of 1993 will be adopted through out the Judgment.

The plaintiff filed the suit initially for perpetual injunction restraining the defendants and their men from ever interfering with his possession and enjoyment of the schedule property and later he converted the suit into a declaratory suit claiming declaration of title over the suit schedule property.

It is the case of the plaintiff, that he purchased the land admeasuring Ac.3.09 cents in Sr.No.187 situated at Rayakaldevpalli Village in Julapalli Mandal out of Ac.4.32

guntas from late Samudrala Bhadraiah for consideration of Rs.4,000/- and since then the plaintiff is in continuous possession and enjoyment of the suit schedule property. The plaintiff mortgaged the property in favour of Cooperative Agricultural Development Bank (CADB) and obtained agricultural loan and he has been paying land revenue to the department since the date of purchase.

The unregistered Sale Deed is not traced despite exercising due diligence and the efforts of the plaintiff became invain to trace the document and therefore, the plaintiff relied on secondary evidence to substantiate his contention.

It is contended that the plaintiff also perfected his title by adverse possession. The plaintiff pleaded that unregistered Sale Deed was scribed by Manda Rajesham, executed by Samudrala Bhadraiah and attested by Erravelli Rama Rao and M. Veeramallu.

Defendant No.1 is the sole legal heir of the original pattadar—Late Samudrala Bhadraiah and Defendant No.2 is the purchaser of total extent of Ac.4.36 guntas from D.1 by registered Document No.1083/93 dt.29.07.1993 situated at Rayakaldevpalli Vilalge of Julapalli Mandal. The alleged transfer is a sham transfer and in pursuance of the purchase, Defendant Nos. 1 to 11 made an attempt to

interfere with his peaceful possession and enjoyment over the schedule property. The alleged Sale Deed executed by D.1 in favour of D.2 is invalid for the reason that Defendant No.1 had no land in Sy.No.187. Though the plaintiff is in possession of the schedule property, the defendants denied the title of the plaintiff, by obtaining document bearing No.1083/93 dt. 29.07.1993 and they are openly proclaiming in the village that they will cut the crop in the land, hence, he filed the present suit against the defendants for the aforesaid reliefs.

Defendant No.1 remained *ex parte*. Defendant No.2 filed Written Statement contending that the alleged purchase by the plaintiff under unregistered Sale Deed is neither true nor valid and it was never executed by late Samudrala Bhadraiah during his life time and that the plaintiff was never in possession and enjoyment of the suit schedule property and that the claim of the plaintiff is barred by limitation.

It is specifically contended by the defendant that the total extent in Sy.No.187 is Ac.19.17 gunts. Out of it, one Mangalapalli Narayana was the owner of half share i.e., Ac.9.23 guntas and the other half belongs to Samudrala Rajaiah and Badhraih, who are entitled to claim half of Ac.9.23 guntas and thus, Rajaiah and Badhraiah got

Ac.4.32 cents each and the suit schedule property was allotted to Samudrala Bhadraiah, father of D.1. Defendant No.2 purchased Ac.3.09 guntas from late Bhadraiah during his life time at the first instance more than 20 years ago and the remaining share of Bhadraiah was divided upon his son/D.1 after his death and from him, Defendant No.2 purchased and since then he is in possession and enjoyment of the property in his own right and obtained unregistered Sale Deed and his name was mutated in the revenue records. When Defendant No.2 approached the bank for loan, the Agricultural Development Bank advised him to obtain a registered Sale Deed, accordingly, he obtained Sale deed No.1083/93, dt. 29.07.1993 from D.1, the pattadar of the land. Thus, D.2 perfected his title by adverse possession as he is in continuous possession and enjoyment of the schedule property without any interruption to the knowledge of the plaintiff and therefore, the plaintiff is not entitled to claim any right in the schedule property and finally prayed for dismissal of the suit.

During pendency of the suit, Defendant No.2 died, D.3 to D.9 were impleaded as legal heirs of the deceased Defendant No.2, who filed Additional Written Statement, denying the alleged purchase of the land by plaintiff from Bhadraiah for consideration of Rs.6000/- under un-registered Sale Deed, which was attested by Eravelli Rama

Rao and Manda Veeramallu and scribed by Mandal Rajesham and that part of the property was purchased by D.2 from Bhadraiah during his life time and the remaining share of Bhadraiah was purchased by D.2 and later obtained Registered Sale Deed from D.1, prayed for dismissal of the suit.

On the strength of the above pleadings, the trial Court framed the following issues and additional issues for trial:

1. Whether the plaintiff is entitled to the decree declaring that he is the owner and possessor of the suit land ?
2. Whether the plaintiff is entitled to the decree declaring that Registered Sale Deed Dt. 29.07.1993 is null and void ?
3. Whether the plaintiff is entitled to perpetual injunction against the defendants as prayed for ?
4. To what relief ?

Additional Issues:

1. Whether the plaintiff purchased the suit land from Samudrala Bhadraiah under an unregistered sale deed ?
2. Whether the suit of the plaintiff for declaration of title over the suit land basing upon an unregistered sale deed is maintainable ?
3. Whether the plaintiff has got title over the suit land by way of adverse possession ?

During trial, on behalf of Plaintiff, PWs. 1 to 6 were examined and Exs. A.1 to 20 were marked. On behalf of defendants, Dws. 1 to 3 were examined and Exs. B.1 to B.13 were marked.

Upon hearing argument of both counsel, the trial Court dismissed the suit holding that the plaintiff is not entitled to claim declaratory relief as well as permanent injunction restraining the defendants from ever interfering with the peaceful possession and enjoyment of the schedule property.

The plaintiff being aggrieved by the decree and judgment of the trial Court, preferred first appeal before Senior Civil Judge at Peddapalli in A.S.No.27 of 2001 and the same was allowed by the Appellate Court, reversing the findings of the trial Court by its decree and judgment dt. 31.10.2003 and thereby declared that the plaintiff is the owner of the schedule property of an extent of Ac.3.09 guntas situated in Sy.No.187 of Rayakaldevpalli village in Julapalli Mandal while answering Issue No.4.

Aggrieved by the decree and judgment of the appellate Court, the present Second Appeal is filed raising several contentions by the defendants being unsuccessful before the appellate Court.

The appellants/defendants formulated several substantial question of law and this Court by decree and judgment dt.3.03.2011 allowed the appeal setting aside the decree and judgment of the appellate Court restoring the decree passed by the trial Court in O.S.No.813 of 1993 dt. 2.11.2001. Later, the matter was carried to Supreme Court by the unsuccessful plaintiff before this Court, but the Apex Court set aside the decree and judgment of this Court in the second appeal with the following direction:

“ The Impugned Order passed by the High Court is liable to be set aside, and is hereby set aside. The second appeal pending before the High Court is restored to its original number. The same shall be adjudicated upon by the High Court in accordance with law, after framing an appropriate question of law, and after hearing learned counsel for the rival parties.

The appeal is disposed of in the manner indicated above”.

In view of the direction issued by the Apex Court in S.A.No.383 of 2004 by Order dt. 09.01.2015, this Court formulated the following substantial questions of law:

1) Whether the findings of the first appellate Court in reversing judgment and decree of the trial Court is perverse, contrary to the pleadings as well as oral and documentary evidence on record; and

2) Whether a declaration of a title can be granted in favour of plaintiff without there being any proof of his continuous possession over a period of 12 years ?

During hearing, Sri T. Ramulu, learned counsel for appellants/defendants would contend that the plaintiff is not entitled to raise inconsistent pleas. The basis for the claim of the plaintiff is un-registered Sale Deed, which has not seen the light of the day and he also claimed perfection of title to the property by adverse possession. There is no factual foundation in the pleadings as to when the plaintiff claimed hostile title against defendant No.2 or his predecessors in title to claim a declaratory relief perfecting title by adverse possession and no evidence is brought on record as to the date of commencement of hostile claim to the knowledge of D.1 and D.2 and his continuation thereafter for a period of 12 years; and to claim prescription title. In the absence of pleadings and evidence in support of his claim, the plaintiff is not entitled to claim declaratory relief and also drawn the attention of this Court to a Judgment of Apex Court reported in *Mohan Lal (deceased) through his Lrs.Kachru and others v. Mirza Abdul Gaffar and another*¹. Finally, it is contended that the plaintiff is not competent to set up adverse possession to claim declaratory relief i.e., ownership over the schedule property, and he placed reliance on the judgment reported in *Gurdwara Sahab v. Gram*

¹ (1996) 1 Supreme Court Cases 639

*Panchayat Village Sirthala and another*² and mostly, he relied on the principle laid down in *Gurdwara Sahab's* case (2 supra) and sought to set aside the decree and judgment passed by the first appellate Court while restoring the decree and judgment of trial Court and dismiss the suit by allowing this Second Appeal.

Per contra, Sri P. Raghuram, learned Senior Counsel appearing on behalf of respondent/Plaintiff mainly contended that the jurisdiction of this Court under Section 100 of CPC is limited to a substantial question of law and this Court must confine its decision only to the substantial question of law and placed reliance on a judgment of Apex Court reported in *Damodar Lal v. Sohan Devi and others*³. He further contended that in case the plaintiff is not entitled to claim declaratory relief, he is entitled to protection under Section 53-A of Transfer of Property Act and he is entitled to protect his possession by obtaining a preventive relief of perpetual injunction restraining the defendant from ever interfering with his peaceful possession and enjoyment over the schedule property and finally prayed to dismiss the appeal confirming the decree passed by the first appellate Court in A.S.No.27 of 2001 on the file of Senior Civil Judge at Peddapalli.

² (2014) 1 SCC 669

³ (2016) 3 SCC 78

In view of the rival contentions, it is the duty of this Court is to decide the substantial questions of law, which were framed by brother judge of this Court on 1.02.2016.

SUBSTANTIAL QUESTION NO.1:

Sri T. Ramulu, learned counsel for appellants/defendants while reiterating the contentions referred to above, drawn the attention fo this Court to pleadings in the plaint and evidence on record since he pointed out perversity in the findings of first appellate Court. A bare look at the plaint, the suit was initially filed for grant of permanent injunction restraining the defendant Nos. 1 and 2 and their men from ever interfering with the peaceful possession and enjoyment of the plaintiff. The claim of the plaintiff is based on the unregistered Sale Deed, which has not seen the light of the date. In the Cause of Action para, it is specifically pleaded that the cause arose on 29.09.1993 when the defendants denied the title and propagated to interfere with the possession to reap the crop over the suit land. The suit was filed only in 1993 itself i.e., on 14.10.1993. If the pleadings in para No.6 of the plaint is taken as it is, defendant Nos. 1 and 2, for the first time denied the title while declaring to interfere with the possession and enjoyment of the plaintiff and cut the crop. Curiously, in the entire pleadings, the plaintiff did not

disclose the actual date of purchase of the property from late Bhadraiah during his life time while admitting the purchase of the property by registered Document No.1083/93, dt. 29.07.1993 by the second defendant from defendant No.1. In the absence of details of purchase of the property by the plaintiff under unregistered Sale Deed, inducting him into possession by late Bhadraiah, it is highly difficult for the Court to decide the actual date of commencement of adverse possession claiming hostile title against the true owner i.e., Samudrala Bhadraiah or his son, defendant No.1, the person who acquired the title from his father and in turn sold the same to Defendant No.2 herein by executing Registered Document No.1083/93. The plaintiff produced certified copy of Phani of Rayakaldevpalli Village for the year 1981-82 to 1991-1992 marked as Exs. A.1 to A.11, wherein the name of the plaintiff was recorded as the person in possession, but in Column No.12 of Ex.A.1, the Pattadars are: Mangalapalli Narayana, Samudharla Bhadraiah and Samudrala Rajaiah and the Column No.13 is meant for the name of occupiers and the names mentioned in that column are Vinugu Mallaiah, Samudrala Rajaiah, Mangalapalli Rajaiah and Ananthala Rajaiah, the plaintiff herein. Ananthala Rajaiah, by virtue of document Ex.A.1 i.e., Village Account, would show that Rajaiah is in occupation of land along with three others, referred supra,

in Sy.No.187 of Rayakaldevpalli Vilalge in Julapalli Mandal. The nature of occupation was not noted in Column No.15 and extent.

In Ex.A.2, there is a slight change and in Column No.12, the name of pattadars are Mangalapalli Narayana, Samudrala Rajaiah and Samudrala Bhadraiah and in Column No.13, the names of occupiers were noted as Samudrala Rajaiah, Munugu Mallaiah and Ananthula Rajaiah for the agricultural year 1982-83 and nature of occupation was not mentioned specifically in Column No.15; whereas in Adangal i.e., Cultivation Account for the year 1983-84, there is a slight change, according to it, the pattadars are same and the occupiers are seven in number and they are: 'Ramchandramu, Ramanandham, Ramsundari, Ramnarayana, Munugu Mallaiah, Samudrala Rajaiah and Ananthula Rajaiah'. Munugu Mallaiah's possession is described as 'Sada/Sontham, 'it means own"; whereas Ramchandramu and Ramnarayana are shown in possession of Ac.4.34 cents and Ac.4.35 cents respectively and the nature of occupation was noted as "registered document". The same were carried in the Adangal for the agricultural year 1984-85,1985-86, 1986-87, 1987-88, 1988-89 and 1989-90, which were marked as Exs. A.2 to A.9 respectively. Whereas in the Adangal i.e., Cultivation Account for the agricultural year 1990-91, the specific

extent of Ac.3.09 guntas was noted against the name of Ananthula Rajaiah and similarly, for the agricultural year 1991-92, which were marked as Exs. A.10 and Ex.A.11 respectively. These documents at best disclosed that the plaintiff is also in possession of the property along with other persons, but only under EXs.A.9 and Ex.A.10, it was specifically mentioned that the said Rajaiah, the plaintiff, is in possession of Ac.3.09 guntas of agricultural land in S.No.187 of Rayakaldevpalli Vilalge. Therefore, the possession of an extent of Ac.3.09 guntas is only from the agricultural year 1990-91 and mere possession itself would not create any adverse title on the plaintiff over the suit schedule property. The pleadings in the plaint is bereft of any details as to when the plaintiff claimed hostile title against the true owner over the schedule property. Even in the oral evidence, there are no details as to when the plaintiff started claiming hostile title against the true owner to his knowledge. In the absence of details as to when the plaintiff set up hostile title to the knowledge of true owner, it is difficult to uphold the contentions of the plaintiff that he perfected his title by adverse possession, as he is in possession of the property for a period of 12 years from the date of set up of hostile title against the defendants.

When the plaintiff is claiming perfection of title by adverse possession, it can safely be concluded that the

defendant Nos. 1 and 2 are the owners of the property, otherwise, the plaintiff is not entitled to set up plea of adverse possession against a 3rd party, that means, he admits that defendant Nos. 1 and 2 are the owners of the property due to lack of title to execute registered sale deed vide Document No.1083/93, in favour of D.2. Therefore, by virtue of Registered Sale Deed marked as Ex.A.17, Defendant No.2 became the owner of the property. It is settled law that to claim adverse possession, the plaintiff has to furnish the details of commencement of possession after setting up hostile title against true owner to their knowledge for a period of twelve years openly and continuously.

Sri P. Ramulu, learned counsel for appellants/defendants, drawn the attention of this Court to a judgment of Apex Court reported in *Chatti Konati Rao and others v. Palle Venkata Subba Rao*⁴, wherein the Apex Court re-stated the onus of proof and necessary ingredients would be proved to claim adverse possession, in Para No.14 and 15 held that *Animus possidendi* as is well known is a requisite ingredient of adverse possession and mere possession does not ripen into possessory title until the possessor holds the property adverse to the title of the

⁴ (2010) 14 SCC 316

true owner for the said purpose. The person, who claims adverse possession, is required to establish the date on which he came in possession, nature of possession, the factum of possession, knowledge of the true owner, duration of possession and that possession was open and undisturbed. A person pleading adverse possession has no equities in his favour as he is trying to defeat the rights of the true owner and hence, it is for him to clearly plead and establish all facts necessary to establish adverse possession. The Courts always take unkind view towards statutes of limitation overriding property rights. The plea of adverse possession is not a pure question of law but a blended one of fact and law.

In *B. Leelavathi v. Honnamma and another*⁵, the Apex Court held that adverse possession is a question of fact, which has to be specifically pleaded and proved. In the absence of any plea of adverse possession, framing of an issue and evidence led on the point could not hold that the plaintiff perfected title by adverse possession.

The above two principles laid down by the Apex Court is with regard to the pleadings required where a claim is based on adverse possession and proof of those facts.

⁵ (2005) 11 SCC 115

The pleading is the foundation for the claim of adverse possession or any right in the property and it is heart and sole of Civil cases. In the absence of any plea whatever evidence adduced either oral or documentary to support the contention of the plaintiff that he perfected his title by adverse possession cannot be looked into. The importance and purity of pleadings in Civil cases is highlighted by the Apex Court in *Maria Margarida Sequeria Fernandes v. Erasmo Jack De Sequeria*⁶.

“61. In civil cases, pleadings are extremely important for ascertaining the title and possession of the property in question.

68. In order to do justice, it is necessary to direct the parties to give all details of pleadings with particulars. Once the title is prima facie established, it is for the person who is resisting the title holder's claim to possession to plead with sufficient particularity on the basis of his claim to remain in possession and place before the Court all such documents as in the ordinary course of human affairs are expected to be there. Only if the pleadings are sufficient, would an issue be struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

71. Apart from these pleadings, the Court must insist on documentary proof in support of the pleadings. All those documents would be relevant which come into existence after the transfer of title or possession or the encumbrance as is claimed. While dealing with the civil suits, at the threshold, the Court must carefully and critically examine pleadings and documents.

72. The Court will examine the pleadings for specificity as also the supporting material for sufficiency and then pass appropriate orders.

⁶ AIR 2012 SC 1727

74. If the pleadings do not give sufficient details, they will not raise an issue, and the Court can reject the claim or pass a decree on admission. On vague pleadings, no issue arises. Only when he so establishes, does the question of framing an issue arise. Framing of issues is an extremely important stage in a civil trial. Judges are expected to carefully examine the pleadings and documents before framing of issues in a given case.

75. In pleadings, whenever a person claims right to continue in possession of another property, it becomes necessary for him to plead with specificity about who was the owner, on what date did he enter into possession, in what capacity and in what manner did he conduct his relationship with the owner over the years till the date of suit. He must also give details on what basis he is claiming a right to continue in possession. Until the pleadings raise a sufficient case, they will not constitute sufficient claim of defence.

77. The Court must ensure that pleadings of a case must contain sufficient particulars. Insistence on details reduces the ability to put forward a non-existent or false claim or defence. In dealing with a civil case, pleadings, title documents and relevant records play a vital role and that would ordinarily decide the fate of the case.”

A similar question relating to claim based on adverse possession came up before Privy Council in *Secretary of State for India v. Debendra Lal Khan*⁷, wherein it is held that it is the duty of the parties to plead and prove the requirements which are essential for claiming adverse possession; otherwise, the party, who set up adverse possession is not entitled to claim any right and the ordinary classical is that it should be ‘*nec vi, nec clam, nec precario*’ and possession required must be adequate in continuity, in publicity and in extent to show that

⁷ AIR 1934 PC 23

possession is adverse to the competitor. These three requirements mentioned in the above judgments are sine quo non to defend the claim of the plaintiff basing on adverse possession, in a suit filed for recovery of possession.

In *S.M.Karim v. Bibi Sakina*⁸ and in *R. Chandavarappa and others v. State of Karnataka and others*⁹ and *D.N.Venkatarayappa and another v. State of Karnataka and others*¹⁰, the Apex Court highlighted the crucial pleadings to constitute adverse possession and held that in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the land in question claiming right, title and interest in the land in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession. Therefore, it is obligatory on the part of the plaintiff to plead necessary requirements, more particularly, as to when the plaintiff set up hostile title against the defendant and his continuation for the period of 12 years from the date of such claim of hostile title. In the absence of such details, the evidence whatever adduced to

⁸ AIR 1964 SC 1254

⁹ (1995) 6 SCC 309

¹⁰ (1997) 7 SCC 567

constitute adverse possession is of no assistance to establish the claim of title by adverse possession over the immovable property. In the present case, there is neither pleading nor evidence as to when the plaintiff set up hostile title against Defendant Nos. 1 and 2 to their knowledge except to plead that he is in possession and enjoyment of the property. In view of the law declared by the Apex Court, referred supra, mere continuation in possession would not constitute adverse possession and it can never be ripen into adverse possession.

In *Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and others*¹¹, the Apex Court had an occasion to consider the requirements of adverse possession and held in para No.23 as follows:

“There is another aspect of the matter, which needs to be carefully comprehended. According to Revamma’s case, the right of property is now considered to be not only a constitutional or statutory right but also a human right. In the said case, this Court observed that ‘ Human rights have been historically considered in the realm of individual rights such as, right to health, right to livelihood, right to shelter and employment, etc. but now human rights are gaining a multifaceted dimension. Right to property is also considered very much a part of the new dimension. Therefore, even claim of adverse possession has to be read in that context. The activist approach of the English Courts is quite visible from the Judgments of *Beaulane Properties Limited v. Palmer*(2005) 3 WLR 554 and *JA Pye (Oxford) Limited v. United Kingdom* (2005) 49 ERG 90. The Court herein tried to read the human rights position in the context of adverse possession. But, what

¹¹ 2008 (6) ALD 121 (SC)

is commendable is that the dimensions of human rights have widened so much that now property dispute issues are also being raised within the contours of human rights”.

In *Mandal Revenue Officer v. Goundal Venkaiah and another*¹² and *Anakili v. A. Vedanayagam*¹³, the Apex Court reiterated the requirements to constitute an adverse possession and according to it, claim by adverse possession has two elements; (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain possession for a period of 12 years thereafter. Animus Possidendi as is well known is a requisite ingredient of adverse possession and it is now a well settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only *animus possidendi* must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a title.

¹² 2010 (2) ALD 115 (SC)

¹³ 2007 (14) SCC 308

Similar view was expressed in *P.T. Munichikkana Reddy v. Revamma*¹⁴ and *T. Anjappa and others v. Somalingappa and another*¹⁵, *L.N.Aswathamma and another v. P. Rakash*¹⁶, by the Apex Court reiterating the requirements for establishing the adverse possession or prescription of title by adverse possession and burden of proof and in all the judgments the Apex Court highlighted intention of the possessor i.e., *animus possessendi* and continued in possession of the property more than 12 years prescribed by Limitation Act from the date of setting up of hostile title and mere continuation in possession would not constitute adverse possession. Therefore, it is the duty of the plaintiff to plead and prove the requirements to constitute adverse possession by adducing cogent and satisfactory evidence.

In the present case, there is absolutely no pleading and evidence as to when the adverse possession commenced and the possession is ripened into adverse possession. Therefore, the trial Court after appraising entire evidence concluded that the plaintiff is not entitled to claim hostile title by adverse possession. But, the appellate Court reversed the finding of the trial Court without assigning specific reasons to disagree with the findings

¹⁴ 2007(6) SCC 59

¹⁵ 2006 (7) SCC 570

¹⁶ 2009 (13) SCC 229

recorded by the trial Court and even without looking into the requirements to constitute adverse possession, referred to supra, while exercising power under Section 96 of CPC by the Appellate Court. The Appellate Court has to re-appraise entire evidence with reference to law since the first appellate Court is a final Court of fact and record an independent conclusion assigning specific reasons as to why the appellate Court is disagreeing with the findings recorded by the trial Court, but the judgment of first Appellate Court is bereft of any reasoning and thereby, the findings of the appellate Court stands to any legal scrutiny as it is in contravention of Section 96 r/w Order 41 Rules 30, 31 and 33 CPC. Therefore, the findings of first appellate Court are perverse on the face of the record since its findings are not based on pleadings and evidence in support of it and it is contrary to the law laid down by the Apex Court in various judgments referred supra. Hence, I hold that the judgment of the Appellate Court is perverse and the same is liable to be set aside. Accordingly, the substantial question of law is answered against the plaintiff and in favour of the defendants.

SUBSTANTIAL QUESTION NO.2:

The basis for claim of the plaintiff is perfection of title by adverse possession while pleading that he purchased the

property under unregistered Sale Deed, which has not seen the light of the day. Though the plaintiff claimed both declaration of title to the schedule property and perpetual injunction independently based on possession, the trial Court dismissed the suit in toto, but the appellate Court declared that the plaintiff is the owner of the property as he perfected his title by adverse possession.

Acquiring title to the property may be derivative or possessory. Derivative title may be by way of succession either testate or intestate or by any of the recognized modes under Transfer of Property Act or under any other law for the time being in force. Possessory title can be acquired only by negative prescription, but the right to enjoy the property of others can be acquired by positive prescription. Claiming prescription of title by adverse possession is a negative prescription.

Prescription: Prescription may be defined as the effect of lapse of time in creating and destroying rights; it is the operation of time as a vestitive fact. It is of two kinds viz., (1) positive or acquisitive prescription and (2) negative or extinctive prescription. The former is the creation of a right, the latter is the destruction of one, by lapse of time. An Example of the former is the acquisition of the right of way by the de facto use of it for twenty years. An instance of latter is the destruction of the right to sue for recovery of debt after

expiry of limitation. This lapse of time has two opposite effects. In positive prescription it is a title of right, but in negative prescription it is a divestitive fact.

The Apex Court in “*Syndicate Bank v. Mr. Prabha D. Naik and Anr. etc*”¹⁷ adverted to negative prescriptions while deciding the case under Portuguese Civil Code and held that Article 535 dealt with Negative Prescription, which is as follows:

“Whoever has assumed an obligation to do for, or to do something to another, stands relieved of the obligation, if its performance is not demanded for a period of 20 years, and the obligant stands in good faith, at the end of the prescription period, or when the performance is not demanded for a period of 30 years, regardless of good faith or bad faith, except where special prescriptions are provided in law”

Therefore, in view of the principle laid down in the above said judgment, when a person failed to take necessary steps under law either for performance or to do something after expiry of the period prescribed under the Limitation Act, the person who has to perform would be relieved of his obligation and it is in the nature of negative prescription.

Jurisprudentially there are many modes of acquiring ownership. On the principle of *occupatio*, a person may become the owner of a *res nullius* by taking possession of

¹⁷ AIR 2001 SC 1968

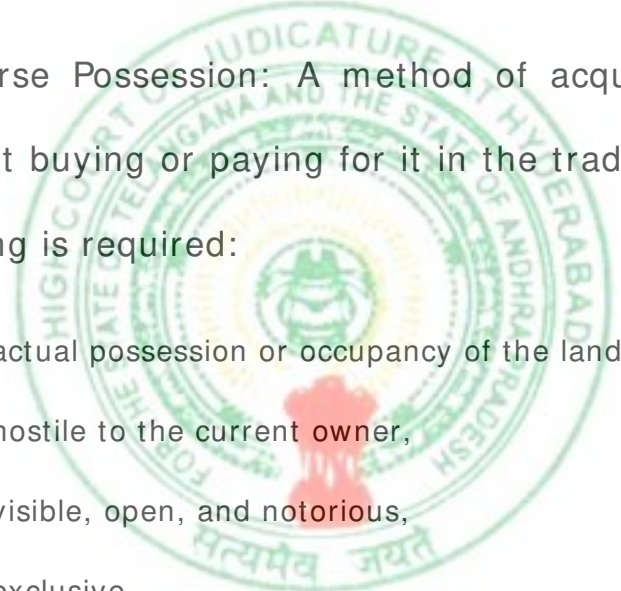
it. The thing concerned did not belong to anybody. However, in modern times, things without owners are rare. Ownership may be acquired by long possession or prescription. By positive prescription, the lapse of time confers a title on the person who had enjoyed the right for the prescriptive period. For instance, the enjoyment of a right of way over the land of another for 20 years confers a prescriptive right under Section 15 of Indian Easements Act on the person who has enjoyed the right for the prescriptive period. Similarly, enjoying the property of another setting up hostile title against the true owner, but his enjoyment and continuing in possession therein for a long period of 12 years, title by adverse possession can be acquired due to lapse of time prescribed under Article 65 of Limitation Act. It is settled law that the lapse of time may not only bar the remedy but extinguish the right itself more particularly when the title by adverse possession claimed and it is known as negative prescription. Such long continuous hostile possession for over a period prescribed under the Limitation Act extinguishes right of the original owner creating ownership to the person in occupation claiming hostile title for continuous period of 12 years prescribed under Article 65 r/w Section 27 of Limitation Act.

The concept of “adverse possession” may be understood as, such possession commencing in “wrong”

and being continued as against right. It is actual hostile possession as against true owner by express or implied denial of title. The expression adverse possession means a hostile possession, that is the possession which is in denial of the title of the true owner. It must be adequate in continuity, in publicity and in extent to show that it was possession adverse to the real owner. In WEST's Legal Thesaurus Dictionary the word "adverse possession" is defined as follows:

"Adverse Possession: A method of acquiring title to land without buying or paying for it in the traditional sense.

The following is required:

- 
- (a) actual possession or occupancy of the land that is
 - (b) hostile to the current owner,
 - (c) visible, open, and notorious,
 - (d) exclusive,
 - (e) continuous for a statutorily defined number of years, and
 - (f) maintained under a claim of right as against everyone else.

Thus, mere continuing in possession entering into possession of the property lawfully under unregistered sale deed, such possession is permissive in nature and it would not ripen into adverse possession, unless, the person in possession set up hostile title against the owner of the property. Ignoring the unregistered sale deed, continuing

in possession openly and notoriously for more than 12 years from the date of setting up hostile title would constitute adverse possession.

In the present case, the plaint is totally silent as to when the plaintiff set up hostile title or adverse claim denying the title of the 1st defendant, who was an admitted owner of the property and the evidence is also silent regarding the date of commencement of adverse claim denying the title of the true owner i.e. first defendant herein.

The question of perfection of title by adverse possession would arise only when the real owner failed to file a suit within the time prescribed under Article 65 of the Limitation Act, from the date of setting up hostile title to his knowledge. But continuing in possession even for a long period would not constitute adverse possession and such acquisition is only due to lapse of limitation.

Halsbury's Laws of England 4th Edition at paragraph 769 prescribed the requirement of adverse possession is as follows:

"An owner of land may cease to be in possession of it by reason of dispossession or discontinuance of possession. Dispossession occurs where a person comes in and puts smother out of possession; discontinuance of possession occurs where the person in possession goes out and another person takes possession, and that possession must be continuous and exclusive."

“The true test whether a rightful owner has been dispossessed or not is whether an action for possession of the land will lie at his suit against some other person. The rightful owner is not dispossessed so long as he has all the enjoyment of the property that is possible, or leaves it unoccupied pending the materialisation of some future use which he has in mind. Where land is not capable of use and enjoyment, there can be no dispossession by mere absence of use and enjoyment, but where the owner has no future use for the land in mind and merely leaves it derelict, possession taken by a trespasser may be adverse even though the owner suffers no inconvenience. To constitute dispossession, acts must have been done which were inconsistent with the enjoyment of the soil by the person entitled for the purposes for which he had a right to use it, and with the intention of establishing dominion and not merely with the intention of using the land until prevented from doing so,…”

In view of the principle pertaining to adverse possession in Halsbury’s law the claimant in possession under the Statute of Limitations must prove dispossession of the true owner or discontinuance of possession by the true owner by pleading and evidence in support of it.

The Apex Court in “*Karnataka Board of Wakf v. GOI*”¹⁸ had an occasion to decide as to when the person in possession entitled to claim perfection of title by adverse possession. According to it in the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won’t affect his title. But the position will be altered when another person takes possession of the property and asserts rights over it and

¹⁸ (2004) 10 SCC 779

the person having title omits or neglects to take legal action against such person for years together.

The process of acquisition of title by adverse possession springs into action essentially by default or inaction of the owner as held in "*Amrendra Pratap Singh v. Tej Bahadur Prajapati*"¹⁹ The essential requisites to establish adverse possession are that the possession of the adverse possessor must be neither by force nor by stealth or under the license of the owner. It must be adequate in continuity, in publicity and in extent to show that the possession is adverse to the real owner.

In "*Yillah v. Hedjazi*"²⁰ the Full Bench of the Supreme Court of Sierra Leone consisting of 5 Judges had an occasion to decide a similar question by relying on judgments in "*Wallis Cayton Bay Holiday Camp Ltd v. Shell-Mex and B.P.*"²¹ and "*Leigh v. Jack*"²² wherein certain guidelines were laid down in, so for determining the issue of dispossession. On the strength of the principles in the above judgments, it is held that the possession by itself is not enough to give a title, it must be adverse possession. The true owner must have discontinued possession or have been dispossessed and another must have taken it

¹⁹ (2004) 10 SCC 65

²⁰ (1983) SLSC 3

²¹ 1974 (3) All E.R. 575 at 580

²² 49 L.J.Q.B. 220

adversely to him. There must be something in the nature of an ouster or the true owner by the wrongful possession. When the true owner of land intends to use it for a particular purpose in the future, but meanwhile has no immediate use for, leaves it unoccupied, he does not lose his title to it simply because some Possession by itself is not enough must have discontinued possession or have been dispossessed and another must have taken it adversely to him. There must be something in other person enters on it and uses it for some temporary purpose, like stacking material or for some personal purpose, like growing vegetables, not even if this temporary or seasonal purpose continues year after year for 12 years or more. The reason is not because the user does not amount to actual possession. The line between acts of user and acts of possession is too fine for words. The reason behind the decision is because it does not lie in the trespasser's mouth to assert that he used the land of his own wrong as a trespasser. Rather his user is to be to the license or permission of the true owner. By using the land knowing that it does not belong to him; he impliedly assumes that the owner will permit it; and the owner, by not turning him off, impliedly gives permission.

In “*Elmer Klingel v. Orvel J Kehrer*²³” a question regarding adverse possession came up for consideration and by relying on a judgment in “*Wylie v. Fisher*²⁴” held that Whenever a person having color of title, made in good faith, to vacant and unoccupied land, shall pay all taxes legally assessed thereon for seven successive years, he or she shall be deemed and adjudged to be the legal owner of said vacant and unoccupied land, to the extent and according to the purport of his or her paper title.

Whatever may be the literal import of the words used in the section, yet it is only as a limitation law that it can constitutionally become operative, and statutes of limitation work upon the basis of a possession. When the color of title made in good faith, and the payment of taxes for seven successive years on vacant and unoccupied land, have become united with the actual possession of the holder of such color of title, then, and not until then, the bar of said section of the statute becomes complete, operative and available against the holders of the true title. This has long been the law of this State and a settled rule of property.

In “*Lesourd v. Edwards*²⁵” the Supreme Court of N.E. stated the general rule and held that It has frequently

²³ 401 N.E.2d 560

²⁴ (1929), 337 Ill. 488, 169 N.E.237

²⁵ (1908), 236 Ill. 169, 86 N.E.212

been said in reference to acts necessary to constitute possession, that every case must rest upon its own facts, and that it is difficult to state any general rule as to what character of improvements or acts will be sufficient for this purpose, and that the acts necessary to constitute possession depend, to some extent, upon the nature and locality of the property, the use to which it may be applied and the situation of the parties; that a variety of circumstances necessarily have to be taken into consideration in determining the question. Any acts of dominion exercised over the property by the party claiming to hold title thereto that clearly indicate to others an appropriation thereof to the purposes for which it may ordinarily be used are generally regarded as sufficient.

In “*Slatin's Properties, Inc. v. Hassler*”²⁶ and “*Stalford v. Goldring*”²⁷ and in long line of decisions of other Courts it is held that the mere payment of taxes and special assessments levied on vacant city lots is clearly not sufficient to show possession. Nor is the doing of "some useless thing" such as picking a flower. Nor is a mere survey of land sufficient to establish possession. Whether particular acts are sufficient to constitute possession under the facts of a particular case is a question of fact. Proof that

²⁶ (1972), 53 Ill. 2d 325, 291 N.E.2d 641.

²⁷ (1902), 197 Ill. 156, 64 N.E. 395.

land was generally reported to belong to the ancestor of the adverse claimant is competent as tending to establish notoriety of possession. The boundaries of the land claimed by adverse possession must be proved by clear and unequivocal evidence; this is also a question of fact. Where it is apparent that the acts of an adverse possessor extend to a river to the extent that the character of the land permits, the significance of the fact that the river creates a natural boundary cannot be overlooked in determining the claim to the entire tract as held in “*Hunsley v. Valter*”²⁸

From the legal principles laid down in the above judgments, it is clear that mere continuance in possession by itself would not constitute adverse possession and mere payment of taxes to the Government and continuing in possession is not enough to claim adverse possession.

In India Article 65 of Limitation Act prescribed limitation to recover possession from the person in wrongful possession is 12 years from the date when the person in possession set up hostile title or adverse title, continuing in possession.

Article 65, Schedule I of The Limitation Act prescribes limitation of 12 years for a suit for possession of immovable property or any interest therein based on title. It is

²⁸ (1958), 12 Ill. 2d 608, 147 N.E.2d. 356.

important to note that the starting point of limitation of 12 years is counted from the point of time “when the possession of the defendants becomes adverse to the plaintiff”. Article 65 is an independent Article applicable to all suits for possession of immovable property based on title i.e., proprietary title as distinct from possessory title. Article 64 governs suits for possession based on possessory right. 12 years from the date of dispossession is the starting point of limitation under Article 64. Article 65 as well as Article 64 shall be read with Section 27 which bears the heading – “Extinguishment of right to property”. It runs as follows:

“At the determination of the period hereby limited to any person for instituting the suit for possession of any property, his right to such property shall be extinguished.”

If Article 65 and Section 27 of the Limitation Act are read conjointly, it indicates that where a cause of action exists to file a suit for possession and if the suit is not filed within the period of limitation prescribed, then, not only the period of limitation comes to an end, but the right based on title or possession, as the case may be, will be extinguished. Article 65 of the Limitation Act assists the person in possession to acquire prescriptive title by adverse possession. When the title to property of the previous owner is extinguished, it passes on to the possessor and the possessory right gets transformed into ownership.

Section 27 of Limitation Act lays down a substantive law by declaring that after the lapse of the period, the title ceases to exist and not merely the remedy. It means that since the person who had a right to possession has allowed his right to be extinguished by his inaction, he cannot recover the property from the person in adverse possession and as a necessary corollary thereto, the person in adverse possession is enabled to hold on to his possession as against the owner not in possession.

The concept of adverse possession and its consequences wherever attracted has been recognized in the statute dealing with limitation. The first codified statute dealing with limitation came to be enacted in 1840. The Act 14 of 1840 in fact was an enactment applicable in England but it was extended to the territory of Indian continent which was under the reign of East India Company, by an authority of Privy Council in the *East India Co. v. Oditchurn Paul*, 1849 (Cases in the Privy Council on Appeal from the East Indies) 43. The law of Prescription prescribes the period at the expiry of which not only the judicial remedy is barred but a substantive right is acquired or extinguished. A prescription, by which a right is acquired, is called an 'acquisitive prescription'. A prescription by which a right is extinguished is called 'extinctive prescription'. The distinction between the two is not of much practical

importance or substance. The extinction of right of one party is often the mode of acquiring it by another. The right extinguished is virtually transferred to the person who claims it by prescription. Prescription implies with the thing prescribed for is the property of another and that it is enjoyed adversely to that other. In this respect it must be distinguished from acquisition by mere occupation as in the case of *res nullius*. The acquisition in such cases does not depend upon occupation for any particular length of time.

In “*Jageshwar Teli v. State of Bihar and Ors.*”²⁹ the Patna High Court discussed about the Section 27 of Limitation Act regarding Extinguishment of right to property and held that it is now well-known that where a person comes in possession of any land by reason of an illegal transfer, he begins to possess adversely as against the transferee to the extent of his transferor’s interest based on “*Kalawatibai v. Soiryabai and Ors.*”³⁰. Thus, once a person acquires title by reason of his being in adverse possession of such lands in terms of Article 65 of the Limitation Act, he acquires a vested right and consequently the right of the original owner of the land in view of Section 27 of the Limitation Act becomes extinct. When a person acquires title to the property also by

²⁹ 1994 (1) BLJR 648

³⁰ 1991 (3) SCC 410

adverse possession, he acquires a right in the said property within the meaning of Article 300-A of the Constitution of India.

To assess a claim of adverse possession, two-prolonged enquiry is required viz.,

1. *Application of limitation provision thereby jurisprudentially “willful neglect” element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.*
2. *Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper-owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.”*

Acquisition of easements by prescription is provided for by Section 25 of the Limitation Act.

In early time in “*Perry v. Glissold*”³¹ the Judicial Committee of the Privy Council succinctly laid down the guidelines as to what constitute adverse possession and held as follows:

“It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of

³¹ (1907) AC 73, at 79

the statute of Limitation applicable to the case, his right is for ever extinguished and the possessory owner acquires an absolute title.”

While approving the statement of law laid down by Privy Council in “*Perry v. Clissold*” (referred supra) the Apex Court in “*Nair Service Society Ltd. v. K.C.Alexander*³²” held as follows:

“The cases of the Judicial Committee are not binding on us. But we approve of the dictum in 1907 AC 73. No subsequent case has been brought to our notice departing from that view. No doubt, a great controversy exists over the two cases of (1849) 13 QB 945 and (1865) 1 QB 1. But it must be taken to be finally resolved by 1907 AC 73. A similar view has been consistently taken in India and the amendment of the Indian Limitation Act has given approval to the proposition accepted in 1907 AC 73 and may be taken to be declaratory of the law in India.”

It was clarified by a three-Judge Bench of the Apex Court in “*Kshitish Chandra Bose v. Commissioner of Ranchi*³³” that “all that the law requires is that the possession must be open and without any attempt at concealment. It is not necessary that the possession must be so effective so as to bring it to the specific knowledge of the owner. Such a requirement may be insisted on where an ouster of title is pleaded. It was further clarified in series of decisions that while possession shall be open and exclusive and in assertion of one’s own right, the fact that

³² AIR 1968 SC 1165

³³ AIR 1981 SC 707

the possessor did not know who the real owner was, will not make his possession any, the less adverse.

In such circumstances, it is difficult to prove the adverse possession to the notice of the real owner because the person claiming adverse possession is not aware about the real owner of the property. As such, it is difficult to prove adverse possession by person in possession even after more than 12 years from the date of claiming hostile title continuing in effective possession if the requirement of law is that it must be to the knowledge of the real owner, such possession can never ripen into adverse possession to regulate the possessory title of the person in possession.

In *P.T. Munichikkana Reddy v. Revamma and Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and others* (referred supra) and in “*State of Haryana v. Mukesh Kumar*”³⁴ the Apex Court heavily relied on the law of Limitation more particularly Articles 64 and 65 of Limitation Act making serious comments which are as follows:

“Adverse possession allows a trespasser – a person guilty of a tort, or even a crime, in the eye of the law – to gain legal title to land which he has illegally possessed for 12 years. How 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling. This outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible. The doctrine of adverse possession has troubled

³⁴ 2011 (10) SCC 404

a great many legal minds. We are clearly of the opinion that time has come for change.”

The learned Judge of the Apex Court posed a question as to how 12 years of illegality can suddenly be converted to legal title is, logically and morally speaking, baffling” and then observed as follows:

“We are clearly of the opinion that time has come for change”.

In the same judgment, apart from the said observation, made the comments against the Government instrumentalities including Police, while observing that in the instant case have attempted to possess land adversely. This, in our opinion, is a testament to the absurdity of the law and a black mark upon the justice system’s legitimacy”. Then, it was said

“if this law is to be retained according to the wisdom of Parliament, then at least the law must require those who adversely possess land to compensate the title owners according to the prevalent market rate of the land or property”.

Further, in paragraph 40, the Apex Court observed that Parliament must seriously consider at least to abolish “bad faith” adverse possession i.e., adverse possession achieved through intentional trespassing. In paragraph 41, it was also observed that if the Parliament decides to retain the law of adverse possession, the duration of possession

(i.e., limitation period) under the law of Limitation should be extended to 30 to 50 years, “rather than a mere 12”. It was further pointed out that “a longer statutory period would decrease the frequency of adverse possession suits and ensure that only those claimants most intimately connected with the land acquire it, while only the most passive and unprotective owners lose title and made a recommendation to the Union of India to immediately consider a seriously deliberate either abolition of law of adverse possession and in the alternate, to make suitable amendments in the law of adverse possession. Even after passing these judgments, the Legislation of Limitation was not suitably amended by the Parliament. However, the basis for such serious comments by the Apex Court is the Judgment of European Court of Human Rights (ECHR) reported in “*J.A.Pye (Oxford) Ltd. v. United Kingdom*”³⁵, wherein the Court had taken an unkind view against the concept of adverse possession.

In the earlier judgment in “*J A Pye (Oxford) Ltd. v. Graham*”³⁶ the House of Lords held that “What is really meant, in my judgment, is that the animus possidendi involves the intention, in one’s own name and on one’s own behalf, to exclude the world at large, including the owner

³⁵ (2005) 49 ERG 90

³⁶ 2003 1 AC 419

with the paper title, if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow.”

In view of these two judgments, the Apex Court in *P.T. Munichikkana Reddy v. Revamma and Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan and others* and in *State of Haryana v. Mukesh Kumar* (referred supra) had taken a serious view. If that is the case what will happen to the person, who is continuing in possession for a longer period with the notice of owner, who was disabled to enjoy the property for such long period. When a person in occupation of the property though entered into wrongfully either committing crime or tort and after passing sometime he is bound to pay taxes to the Government and sometimes improve the property raising huge or massive constructions or reasonable constructions to the knowledge of real owner, when suddenly real owner woke-up and approach the Court for recovery of possession, certainly it would cause huge loss to the person in possession and similarly the real owner would also put to hardship, but the benefit of limitation can be extended to a person, who is not dormant and at the same time the person who entered into wrongful possession is not entitled to claim equities in his favour. In those circumstances, it is difficult to decide such situation either in favour of the real

owner or in favour of person in wrongful possession for a statutory period of 12 years. Perhaps, this is the reason for fixing 12 years period as limitation to claim right over the property by the real owner or to ripen the wrongful possession into adverse possession after completion of continuous possession of 12 years to the knowledge of the real owner. In that view of the position, One oft mentioned explanation can be summed up as “you snooz, you loose”. According to this sleeping theory adverse possession acts as civil penalty for the wrong doers. The wrong doers are those who sleep on their rights and the penalty is to loose those rights. The law shifts rights away from those who do not use their land because they no longer deserve to hold title. Similarly, those who abstain from suing no longer deserve the right to sue. In either case, the shifting of rights from one person is desirable because it balance the scale of justice.

Put this way, the sleeping theory is hard to accept as justification for adverse possession today. To my eyes, the person who leaves land unattended or refrains from suing someone who is not culpable; he has not behaved reprehensively and does not deserve the loose his rights. While the sleeping theory might once have fit social norms, it runs against them today.

The rationale behind adverse possession rests broadly on the considerations that title to land should not long be in doubt, the society will benefit from some one making use of land, the owner leaves idle and that persons who come to regard, the occupant as owner may be protected. The maxim that law and equity does not help those who sleep over their rights is invoked in support of prescription of title by adverse possession. In other words, the original title holder who neglected to enforce his rights over the land cannot be permitted to re-enter the land after a long passage of time.

In view of Section 27 of Limitation Act, the title of the real owner would be extinguished after expiry of the limitation prescribed to recover possession of the property based on title.

When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. Therefore, in view of Section 100 of Evidence Act, the burden initially rests on the person, who asserts that the person in possession is not the owner of the property. When such a person discharged his initial onus of proof, the person in possession may claim adverse title to the property. Since Possession by itself is a substantive right recognized by law and has legal incidents

attached to it apart from ownership. Even before the acquisition of statutory title by adverse possession for the requisite period under the Limitation Act, the possessory owner has well defined rights in property. It is now settled beyond any pale of doubt that this interest is heritable, devisable and transferable. This interest is referred to as possessory title as distinct from proprietary title. A person having such interest must be allowed to enforce those rights against all the world except those who have a better title or better right than himself as held in "*Kuttan Narayanan v. Thomman Mathayi*"³⁷

In view of the principles laid down in the above judgments, the possessory title is heritable since the possession is "nine points of the law." Quotation of Justice Oliver Wendell Holmes is worthy of reference in the contest that "*man like a tree in the cleft of a rock, gradually shapes his roots to the surroundings, and when the roots have grown to a certain size, can't be displaced without cutting at his life*". The said quotation is akin to adverse possession, who entered wrongfully in possession of the property raised constructions cannot be displaced except by removal in accordance with law. Therefore, a person in possession over a long period setting up hostile

³⁷ AIR 1966 Ker 179

tile is entitled to protect his possession, but subject to proof of the requirements laid down by the Apex Court in catena of decisions referred supra while deciding Point No.1.

Recently, the Apex Court in “*Bangalore Development Authority v. N.Jayamma*”³⁸ reviewing the entire law on adverse possession expressed its view that in the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is “*nec vi, nec clam, nec precario*”, that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

³⁸ AIR 2016 SC 1294

The concept of adverse possession had taken colour of human right, the Apex Court in “*Lalaram and Ors. v. Jaipur Development Authority and Ors.*”³⁹, and the judgment of High Court of Gujarat at Ahmedabad in “*Vijay Vallabhbhai Patel and Ors. v. State of Gujarat and Ors.*”⁴⁰ and the judgment of the High Court of Calcutta in “*Rahul Dey Sarkar and Ors. v. The State of West Bengal and Ors.*”⁴¹, are of the view that it is the duty of the Government to protect human rights of the individuals and dispossession or conferring title on a person, who is in wrongful possession would amount to violation of human right guaranteed under the Universal declaration of human rights and other International Covenants on Civil and Political Rights, to which India is a party. If such principle is applied to the adverse possession, it is difficult to regulate the title of a person, who is in possession over a period of 12 years against the true owner and it may lead to eclipse of the very concept of adverse possession.

In the present facts, the plaintiff allegedly purchased the property under unregistered sale deed, which has not seen the light of the day, till today. It is not his case that he wrongfully entered into possession of the property by dispossessing the original owner, but allegedly entered into

³⁹ (2015) 8 MLJ 807

⁴⁰ (2015) 3 GLR 2015

⁴¹ (2011) 1 CALLT 459 (HC)

the possession of the property as a purchaser by unregistered sale deed, that means permissive possession, it would never ripen into adverse possession unless the plaintiff is continuing in possession of the property for over a period of 12 years after setting up hostile title to the knowledge of the original owner disclaiming his right under unregistered sale deed. There is absolutely no iota of evidence and pleading as to when the plaintiff set up hostile title against the 1st defendant, from whom he allegedly purchased the property and disclaiming right under unregistered sale deed. Therefore, the plaintiff is not entitled to claim declaration of his title by adverse possession.

In “*Gurdwara Sahib v. Gram Panchayat Village Sirthala and another*” (referred supra), the Apex Court held that the plaintiff is not entitled to claim declaration of title due to perfection of title to the property by adverse possession. However, he is entitled to protect his right under Section 53-A of Transfer of Property Act. But a contrary view was taken earlier to the extent of entitlement to invoke Section 53-A of Transfer of Property Act in “*Mohan Lal (deceased) through his Lrs. Kachru and others v. Mirza Abdul Gaffar and another*” (referred supra) and held as follows:

“The appellant’s first plea of adverse possession is inconsistent with his second plea regarding retention of

possession under Section 53-A of Transfer of Property Act. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years i.e., up to completing the period of his title by prescription *nec vi, nec clam, nec precario*. Since the appellant's claim is founded on Section 53-A, he admits by implication that he came into possession of the land lawfully under the agreement and continued to remain in possession till the date of the suit. Thereby the plea of adverse possession is not available to the appellant."

The Judgment of the Apex Court in *Mohan Lal (deceased) through his Lrs.Kachru and others v. Mirza Abdul Gaffar and another* (referred supra), which is earlier in point of time, and later the judgment in *Gurdwara Sahib v. Gram Panchayat Village Sirthala and another* (referred supra) made it clear that the plaintiff is not entitled to claim declaration of title based on adverse possession.

In *Mohan Lal (deceased) through his Lrs.Kachru and others v. Mirza Abdul Gaffar and another* (referred supra) the position is clarified since the plea of adverse possession is inconsistent with the plea of part performance under Section 53-A of Transfer of Property Act, unless the person, who set up such plea has disclaimed his right under agreement of sale or unregistered document, he is not entitled to claim independent right perfecting his title by

adverse possession. Therefore, the person who purchased the property under agreement of sale or under unregistered sale deed is not entitled to set up a plea of adverse possession while invoking Section 53-A of Transfer of Property Act to protect his possession, but he is entitled to claim right either by adverse possession or by part performance subject to establishing requirements. But in the present case, the plaintiff filed suit for declaration of title based on negative prescription i.e. adverse possession and at the stage of hearing this appeal noticing the principle laid down in *Gurdwara Sahib v. Gram Panchayat Village Sirthala and another* requested this Court to give liberty to invoke Section 53-A of Transfer of Property Act in case the Court declined to grant declaratory relief. But in view of the principle laid down in *Mohan Lal (deceased) through his Lrs.Kachru and others v. Mirza Abdul Gaffar and another* it is difficult for me to accept this contention. However, it is made clear that it is open to the parties to raise any plea in a suit filed by the owner for recovery of the possession and the Court has to decide such plea independently.

In view of my foregoing discussion based on the above principles, the plaintiff is not entitled to claim declaration of title by adverse possession.

The declaratory relief under Section 34 of Specific Relief Act is purely a discretionary and equitable relief. To claim such equitable and discretionary relief, the plaintiff has to approach the Court with clean hands. The plaintiff himself claimed that he perfected his title by adverse possession that means wrongful possession. When the plaintiff being a wrong doer is not entitled to claim an equitable relief of declaration of title under Section 34 of Specific Relief Act.

The Apex Court in “*Union of India (UOI) v. Ibrahim Uddin And Anr.*”⁴² clearly held that the relief of declaration under Section 34 of Relief Act is a discretionary relief and unless the plaintiff approached the Court with clean hands, he is not entitled to claim declaration of title.

In “*Union of India (UOI) and Ors. v. Vasavi Co-op. Housing Society Ltd. and Ors.*”⁴³ the Apex Court while deciding the appeal relating to declaration of title, is of the view that the legal position, therefore, is clear that the plaintiff in a suit for declaration of title and possession could succeed only on the strength of its own title and that could be done only by adducing sufficient evidence to discharge the onus on it, irrespective of the question whether the defendants have proved their case or not. In

⁴² (2012) 8 SCC 148

⁴³ AIR 2014 SC 937

view of this Court even if the title set up by the defendants is found against, in the absence of establishment of plaintiffs own title, plaintiff must be non-suited.

It is trite law that, in a suit for declaration of title, burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants would not be a ground to grant relief to the plaintiff.”

In view of the principles laid down in the above judgments and applying in the principles laid down in *Gurdwara Sahib v. Gram Panchayat Village Sirthala and another and Mohan Lal (deceased) through his Lrs.Kachru and others v. Mirza Abdul Gaffar and another* (referred supra), the plaintiff is not entitled to claim declaratory relief, which is equitable and discretionary one, on this ground also the plaintiff has to be non suited for the relief of declaration of title to the property.

The plaintiff also claimed permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the property. Undisputedly, father of the 1st defendant is the owner of the property, after his death the 1st defendant became the owner, from whom the other defendants purchased the property. Plaintiff did not seek relief of Specific

performance, though he allegedly purchased the same under unregistered sale deed, but he filed the suit for declaration based on alleged unregistered sale deed and permanent injunction.

According to Section 41 (h) of the Specific Relief Act, when equally efficacious remedy is available to the plaintiff, the plaintiff is disentitled to claim permanent injunction. In the present facts of the case, equally efficacious remedy available to the plaintiff is to seek specific performance, in such case he is not entitled to claim permanent injunction, apart from Section 41 (h), when the plaintiff has no personal interest in the property in view of the bar under Section 41 (j) of Specific Relief Act the plaintiff is not entitled to equitable relief of injunction.

Yet the other contention of the plaintiff is that he is in continuous possession and enjoyment of the property and thereby entitled to protection under Section 53-A of Transfer of Property Act. No doubt, if the plaintiff is in possession and enjoyment of the property being the purchaser under a written agreement of sale subject to satisfying the other conditions to claim benefit under Section 53-A of Transfer of Property Act, he is entitled to protect his possession by invoking Section 53-A of the Transfer of Property Act, but it cannot be used to claim

permanent injunction. Moreover, the unregistered sale deed (in writing) was not produced by the plaintiff to invoke protection under Section 53-A of Transfer of Property Act. On the other hand, it is settled law that no injunction can be granted against the true owner as held by the Apex Court in "*Mahadeo Savlaram Shelke and Ors. v. Puna Municipal Corporation and Anr.*"⁴⁴. In the said judgment when a question arose before the Apex Court that "whether injunction could be granted against rightful owner in favour of person who remains in unlawful possession?", the Apex Court held that no injunction could be granted against true owner at the instance of the person, who is in wrongful possession. If the principle laid down in the Puna Municipal Corporation and Another is applied to the present facts of the case, the plaintiff, who is claiming possession wrongfully against the true owner, is not entitled to claim permanent injunction against the defendants. Therefore, the plaintiff is not entitled to claim permanent injunction against the defendants in view of the bar under Section 41 (h) and (j) of the Specific Relief Act, so also in view of the principle laid down by the Apex Court in the judgment referred supra. Accordingly, the substantial question of law is answered.

⁴⁴ (1995) 3 SCC 33

One of the major contentions raised before this Court is that the jurisdiction of this Court in second appeal is limited to substantial question of law only and the Court cannot enter into deciding any other aspect based on pleadings and placed reliance on a judgment of the Apex Court in “*Damodar Lal v. Sohan Devi and others*” (referred supra), wherein the Apex Court held that the interference of the Court in the second appeal is not permissible unless such findings are based on no evidence or are perverse, then it should determine whether finding(s) concerned are perverse. Said determination should be based on a reasonable man’s inference on facts. To the reasonable man, if conclusion on facts in evidence made by court below is a possible one, there is no perversity, and if not, the finding is perverse. Inadequacy of evidence or a different reading of evidence is not perversity, nor will a wrong finding of fact by itself constitute a question of law. Therefore, in order to constitute a question of law, the wrong finding should stem out of a complete misreading of evidence or it should be based only on conjectures and surmises.

There is no dispute about the law laid down by the Apex Court, but in the present facts of the case, the plaintiff is not entitled for declaration of title in the absence of evidence and pleading since the pleading is

heart and soul of civil litigation. When a question which goes to the root of the case, such question can be said to be a substantial question of law as held by the Apex Court in “*State Bank of India and Ors. v. S.N.Goyal*⁴⁵”. By applying the law decided in *State Bank of India and Ors. v. S.N.Goyal* (referred supra) the substantial questions formulated by this Court, which would go to the root of the case and are liable to be answered and accordingly answered in earlier paragraphs.

On an overall consideration of the entire material available on record, the 1st appellate Court even without advertng to the law declared by the Apex Court and relevant provision in the Limitation Act and Specific Relief Act, granted declaratory relief in the operative portion of the judgment, but during discussion in paragraph No.28 the 1st appellate Court held that the plaintiff is entitled for declaration as owner and possessor of the suit land and he is entitled for perpetual injunction. In any view of the matter, the decree passed by the 1st appellate Court is contrary to the settled principles of law referred supra.

In view of my foregoing discussion, the judgment and decree passed by the trial court is in accordance with

⁴⁵ AIR 2008 SC 2594

law and the same is restored by setting aside the decree and judgment of the 1st appellate Court.

In the result, the appeal is allowed without costs setting aside the decree and judgment dated 31.10.2003 passed in A.S.No.27 of 2001 on the file of the Senior Civil Judge at Peddapalli and confirmed the decree and judgment dated 02.11.2001 passed in O.S.No.813 of 1993 on the file of the Junior Civil Judge at Sulthanabad.

The miscellaneous petitions pending, if any, shall also stand closed.



JUSTICE M. SATYANARAYANA MURTHY

Date:09-09-2016.
Eha/ Ksp

Note:

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