

THE HONOURABLE SRI JUSTICE M. SATYANARAYANA MURTHY

SECOND APPEAL No.215 OF 2013

JUDGMENT:

This second appeal, under Section 100 of the Code of Civil Procedure, 1908 (for short, 'CPC'), is filed challenging the concurrent finding recorded by the XI Additional District Judge, Gudivada, in A.S. No.203 of 2010 (old A.S. No.37 of 2007), whereby affirmed the Decree and Judgment in O.S. No.74 of 2001 passed by the Junior Civil Judge, at Gannaravaram, dismissing the suit filed for declaration of title.

The ranks given to the parties in O.S. No.74 of 2001 will hereinafter be adopted throughout this Judgment, for convenience of reference.

The plaintiff filed suit in O.S. No.74 of 2001 for declaration of title, and for permanent injunction, restraining the defendants and their men from interfering with his peaceful possession and enjoyment, over the schedule property, alleging that defendants 1 and 2 are brothers and the third defendant is the son of eldest brother of defendants 1 and 2. Originally the plaintiff schedule site and the site to its North and South belong to one Nalluri Sobhanadri and two others, who are potters, in Telaprolu Village. Even by the year 1950, the said Nalluri Sobhanadri and others removed earth in plaintiff schedule and also in the site its North and South to a depth 2½ yards for purpose of manufacturing pots and other articles. In the year 1955, Tiyyagura Adinarayana Reddy - father of defendants 1 and 2 and grand father of third defendant, orally exchanged the site

at Telaprolu and took the plaint schedule site and the site to its North and South and became owner of the property. In the year 1958, the plaintiff purchased the plaint schedule site for Rs.375/-, paid entire consideration and took delivery of possession of the property, but did not obtain registered sale deed from Tiyyagura Adinarayana Reddy - father of defendants 1 and 2 and grand father of the third defendant, as he did not obtain registered sale deed from Nalluri Sobhanadri and others. The said Adinarayana Reddy promised to execute regular registered sale deed as and when he obtain exchange deed from Nalluri Sobhanadri and others. Since the date of purchase, the plaintiff is in exclusive possession and enjoyment of the property, filled pit with their own labour and used to keep hayrick and manure heap in the plaint schedule site and also raised cattle shed and used to tether cattle in the cattle shed constructed by him. He also raised thatched hut with mud walls and residing therein since 1968, paying property tax to the departments concerned. The said Tiyyagura Adinarayana Reddy also sold part of the site towards South of the plaint schedule site to one Dasari Bandarayya. Subsequently, the said Dasari Bandarayya sold the same to Kagga Rama Rao about 17 years back prior to filing of the suit and all the sales are oral sales. The defendants never raised any objection to enjoy the property by the plaintiff and other purchasers- Dasari Bandarayya and Kagga Rama Rao. Thus, the plaintiff became absolute owner of the property, even otherwise, he is continuing in possession and enjoyment of the property without any interruption by neighbour, for the last 42 years, consequently, he perfected his title by adverse possession against defendants 1 to 3. Therefore, he

sought for declaration of title to the schedule property and consequential permanent injunction against the defendants.

The first defendant resisted the claim by filing written statement and the same was adopted by defendants 2 and 3. Their specific case is that Adinarayana Reddy exchanged his property with Varahapurapu Krishnamma and others in the year 1952 and got 1600 square yards including plaint schedule property under registered exchange deed dated 22.04.1952. The plaintiff is the owner of the house opposite to the house site of the defendants which includes the plaint schedule property, the house tax receipts, filed along with plaint, pertaining to the house referred above, and the site towards South of plaint schedule property was sold to Kagga Venkata Rama Rao and others by Adinarayana Reddy by registered document alone. The Southern side compound wall to the schedule property was constructed by Kagga Rama Rao. The plaintiff is allowed to stay in the 1/3rd extent of schedule property on its West, to enjoy with permission as it happens to be vacant and the remaining 2/3rd extent on its East and entire extent on the North is exclusively in possession and enjoyment of the defendants and their family members by keeping hayrick, dung heap and other wooden materials, dried trees and stones. From the last one year, the defendants and their family members are demanding the plaintiff to vacate and handover possession of about 100 sq. yards, which is in his possession, but the plaintiff did not heed to the words and resorted to the present litigation by filing suit and thus the plaintiff did not perfect his title by adverse possession and prayed for dismissal of the suit.

Based on the above pleadings, the trial court framed the following issues:

1. Whether the plaintiff acquired right and title to the plaint schedule property by way of adverse possession?
2. Whether the plaintiff is in permissive possession of 1/3rd extent in the plaint schedule property on its West? If so, whether the defendants are in possession and enjoyment of remaining 2/3rd extent in the schedule property on its East and entire extent on the North?
3. Whether the suit is bad for non-joinder of necessary and proper parties?
4. Whether the plaintiff is entitled to declaration as prayed for?
5. Whether the plaintiff is entitled to permanent injunction as prayed for?
6. To what relief?

During trial, on behalf of plaintiff, P.Ws.1 to 3 were examined and Exs.A.1 to A.28 were marked and on behalf of defendants, D.Ws.1 and 2 were examined and Exs.B.1 to B.4 were marked.

Upon hearing argument of both the counsel, considering the oral and documentary evidence, the trial court dismissed the suit negating both the main and consequential reliefs.

Aggrieved by the Decree and Judgment of the trial court, the plaintiff, being unsuccessful, preferred (A.S. No.37 of 2007 (old)) A.S.203 of 2010 (new) on the file of XI Additional District Judge, at Gudivada, and also filed a petition under Rule 27 of Order XLI of CPC to receive additional evidence and to mark the said documents on his behalf, and accordingly, the first appellate court received documents as additional evidence and marked them as Exs.A.29 to A.57.

After hearing argument of both the counsel, the first appellate court dismissed the appeal, affirmed the Decree passed by the trial court assigning its own reasons.

Aggrieved by the concurrent finding recorded by the trial court and the first appellate court, the present second appeal is filed on various grounds, but no substantial question of law was formulated. However, when this court took an objection about the maintainability of the second appeal in the absence of formulating the substantial question of law, the appellant filed a Memo dated 06.08.2016 containing substantial question of law. But, none of the questions are substantial questions of law and mostly based on facts.

Learned counsel for the appellant/ plaintiff, during argument, at the stage of admission, filed written argument, reiterating the grounds urged before the trial court and placed reliance on the Judgment of this Court in **SARASWATI BHAGAT v. ESHWARAMMA @ LAKSHMAMMA (DIED) PER L.R. AND OTHERS**¹ in support of his contention, wherein this Court drawn distinction between the facts of case referred above and the facts in **GURDWARA SAHIB v. GRAM PANCHAYAT VILLAGE SIRTHALA AND ANOTHER**².

At the stage of admission, this Court heard both the counsel at length on substantial question of law and on other grounds.

It is the case of the plaintiff that there was exchange of immovable property between Adinarayana Reddy and Nallari Shobanadri orally and due to failure to obtain a regular exchange deed, the plaintiff could not obtain registered sale deed for Rs.375/- in respect of the schedule property, but continuing in possession of the property. Whereas the defendants contention is that the said Adinarayana Reddy got an extent of 1600 square yards inclusive of schedule property and the property sold to Dasari Bhadraiah, and in

¹ 2016(4) ALT 17

² (2014) 1 SCC 669

turn Dasari Bhadraiah sold the said property to Kagga Venkata Rama Rao, under registered exchange deed dated 22.04.1952.

Therefore, the plea of the plaintiff that he could not obtain registered sale deed, since the alleged vendor - Adinarayana Reddy did not obtain registered exchange deed is false, however, the defendants produced Ex.B.1-original exchange deed dated 22.04.1952 and sale deeds executed by Adinarayana Reddy in favour of Dasari Bhadraiah and in turn the said Dasari Bhadraiah sold the schedule property to Kagga Venkata Rama Rao and another dated 29.01.1985, 28.03.2000 and 28.03.2000, which clinchingly established that Adinarayana Reddy-father of defendants 1 and 2 got this schedule property and other property under registered exchange deed from Varahapurapu Krishnamma and others, but not under oral exchange. In fact, the purchase of property for Rs.375/- orally is not substantiated by any material, and it is not valid sale in view of Section 54 of the Transfer of Property Act read with Section 17 of the Registration Act, since the value of the said immovable property is exceeded Rs.100/- and such sale must be by way of registered document, as it is compulsorily registerable, but the lame excuse pleaded by the plaintiff for his failure to obtain registered sale deed that Adinarayana Reddy did not obtain registered sale deed, which is *ex facie* false in view of Exs.B.1 to B.4. Therefore, on this ground the oral purchase cannot be believed.

The claim of plaintiff is on the basis of oral purchase, which has not proved. In the entire pleadings, the plaintiff did not disclose the actual date of purchase of the property from Adinarayana Reddy during his life time while contending the purchase of the property orally. In the absence of details of purchase of the property by the

plaintiff orally, inducting him into possession by the said Adinarayana Reddy, it is highly difficult for the Court to decide the actual date of commencement of possession claiming title against the true owner i.e. Adinarayana Reddy or his sons-defendant No.1 and 2, the persons who acquired the title from his father and in turn sold the same to Dasari Bhadraiah and Kagga Venkata Rama Rao. The plaintiff produced electricity bills Exs.A.1 to A.27, wherein the name of the plaintiff was recorded as the person in possession. These documents, at best, disclosed that the plaintiff is also in possession of the property, but mere possession itself would not create any adverse title on the plaintiff over the suit schedule property. Whereas the defendants produced Ex.B.1-original exchange deed dated 22.04.1952 through which the said Adinarayana Reddy exchanged his property with Varahapuram Krishnamma and others.

The pleadings in the plaint are bereft of any details as to when the plaintiff claimed 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 title against the true owner to his knowledge. In the absence of details as to when the plaintiff set up 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 while pleading purchase of property orally which is permissive without disclosing right as purchaser.

When the plaintiff is claiming perfection of title by adverse possession, it can safely be concluded that defendant Nos. 1 to 3 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 Adinarayana Reddy was the owner of the property, due to lack of title, he did not execute registered sale deed. 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.

In **CHATTI KONATI RAO AND OTHERS V. PALLE VENKATA SUBBA RAO**³, 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 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**⁴, the Apex Court held that adverse possession is a question of fact, which has to

³ (2010) 14 SCC 316

⁴ (2005) 11 SCC 115

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. 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**⁵.

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

62....

63....

64.....

65.....

66.....

67.....

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

⁵ AIR 2012 SC 1727

struck and the matter sent to trial, where the onus will be on him to prove the averred facts and documents.

69.....

70.....

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.

73....

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.

76.....

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**⁶, 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 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**⁷ **R. CHANDEVARAPPA AND OTHERS V. STATE OF KARNATAKA AND OTHERS**⁸ AND **D.N.VENKATARAYAPPA AND ANOTHER V. STATE OF KARNATAKA AND OTHERS**⁹, 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 title

⁶ AIR 1934 PC 23

⁷ AIR 1964 SC 1254

⁸ (1995) 6 SCC 309

⁹ (1997) 7 SCC 567

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 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 Defendants 1 to 3 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. BHIKHABHAL KHENGARBHAI HARIJAN AND OTHERS**¹⁰, the Apex Court had an occasion to consider the requirements of adverse possession and held in para No.23 as follows:

“23....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,

¹⁰ 2008 (6) ALD 121 (SC)

what 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 ANOTHER¹¹** and **ANAKILI V. A. VEDANAYAGAM¹²**, 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.

A similar view was expressed in **P.T. MUNICHIKKANA REDDY V. REVAMMA¹³ AND T. ANJAPPA AND OTHERS V. SOMALINGAPPA AND ANOTHER¹⁴, L.N.ASWATHAMMA AND ANOTHER V. P. RAKASH¹⁵**, by the Apex Court reiterating the requirements for establishing the adverse possession or prescription

¹¹ 2010 (2) ALD 115 (SC)

¹² 2007 (14) SCC 308

¹³ 2007(6) SCC 59

¹⁴ 2006 (7) SCC 570

¹⁵ 2009 (13) SCC 229

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 continuation 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 and the first appellate court, after appreciating entire evidence concluded that the plaintiff is not entitled to claim title by adverse possession without looking into the requirements to constitute adverse possession, referred to *supra*.

The basis for claim of the plaintiff is perfection of title by adverse possession while pleading that he purchased the property orally and failed to prove as per fact findings. Though the plaintiff claimed both declaration of title to the schedule property and perpetual injunction independently based on possession, the trial Court and the first appellate court dismissed the claim in toto.

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. ETC¹⁶”** 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

¹⁶ AIR 2001 SC 1968

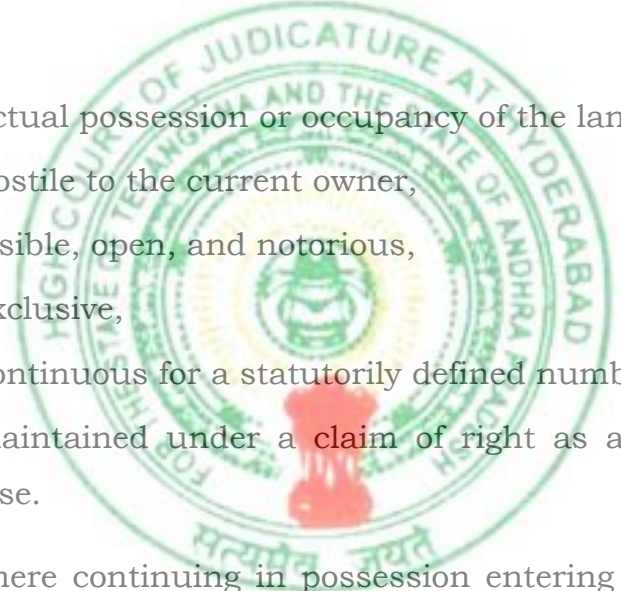
prescribed under the Limitation Act, the person who has to perform would be relieved of his obligation and it is in the nature of negative prescription.

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 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 by oral purchase, 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 oral purchase, continuing in possession openly and notoriously for more than 12 years from the date of setting up hostile tile 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 defendants 1 to 3, who were 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 another 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**"¹⁷ 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 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**"¹⁸ 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**"¹⁹ the Full Bench of the Supreme Court of Sierra Leone consisting of 5 Judges had an occasion to decide a

¹⁷ (2004) 10 SCC 779

¹⁸ (2004) 10 SCC 65

¹⁹ (1983) SLSC 3

similar question by relying on judgments in “**Wallis Cayton Bay Holiday Camp Ltd v. Shell-Mex and B.P.**”²⁰ and “**Leigh v. Jack**”²¹ 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 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

²⁰ 1974 (3) All E.R. 575 at 580

²¹ 49 L.J.Q.B. 220

the owner will permit it; and the owner, by not turning him off, impliedly gives permission.

In “**ELMER KLINGEL V. ORVEL J KEHRER**²²” a question regarding adverse possession came up for consideration and by relying on a judgment in “**WYLIE V. FISHER**²³” 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**²⁴” the Supreme Court of N.E. stated the general rule and held that It has frequently 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

²² 401 N.E.2d 560

²³ (1929), 337 Ill. 488, 169 N.E.237

²⁴ (1908), 236 Ill. 169, 86 N.E.212

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. HASSLER²⁵”** AND **“STALFORD V. GOLDRING²⁶”** 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 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

²⁵ (1972), 53 Ill. 2d 325, 291 N.E.2d 641.

²⁶ (1902), 197 Ill. 156, 64 N.E. 395.

cannot be overlooked in determining the claim to the entire tract as held in “**HUNSLEY V. VALTER**²⁷”

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 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:

²⁷ (1958), 12 Ill. 2d 608, 147 N.E.2d. 356.

“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.**”²⁸ 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.**”²⁹. 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

²⁸ 1994 (1) BLJR 648

²⁹ 1991 (3) SCC 410

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 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.”

In early time in “**PERRY V. CLISSOLD**³⁰” 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 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

³⁰ (1907) AC 73, at 79

“NAIR SERVICE SOCIETY LTD. V. K.C.ALEXANDER³¹” 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 RANCHI³²”** 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 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

³¹ AIR 1968 SC 1165

³² AIR 1981 SC 707

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. BHIKHABHAL KHENGARBHAI HARIJAN AND OTHERS** (referred supra) and in “**STATE OF HARYANA V. MUKESH KUMAR**³³” 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 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

³³ 2011 (10) SCC 404

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**

KINGDOM³⁴”, 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**³⁵” 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 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. BHIKHABHAL 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

³⁴ (2005) 49 ERG 90

³⁵ 2003 1 AC 419

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**”³⁶

³⁶ AIR 1966 Ker 179

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

Recently, the Apex Court in **“BANGALORE DEVELOPMENT AUTHORITY V. N.JAYAMMA³⁷”** 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

³⁷ AIR 2016 SC 1294

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.

The concept of adverse possession had taken colour of human right, the Apex Court in “**LALARAM AND ORS. V. JAIPUR DEVELOPMENT AUTHORITY AND ORS.**”³⁸, and the judgment of High Court of Gujarat at Ahmedabad in “**VIJAY VALLABHBHAI PATEL AND ORS. V. STATE OF GUJARAT AND ORS.**”³⁹ and the judgment of the High Court of Calcutta in “**RAHUL DEY SARKAR AND ORS. v. THE STATE OF WEST BENGAL AND ORS.**”⁴⁰, 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 oral sale without disclosing details of sale like date etc. It is not his case that he wrongfully entered into possession of the property by dispossessing the original owner, but allegedly entered into the possession of the property as a purchaser by oral sale for consideration, that means permissive possession, it would never ripen into adverse possession unless the plaintiff is continuing

³⁸ (2015) 8 MLJ 807

³⁹ (2015) 3 GLR 2015

⁴⁰ (2011) 1 CALLT 459 (HC)

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 oral sale. 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 oral sale. 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 oral sale 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. In view of the principle laid down in **GURDWARA SAHIB v. GRAM PANCHAYAT VILLAGE SIRTHALA AND ANOTHER** and in **MOHAN LAL (DECEASED) THROUGH HIS LRS.KACHRU AND OTHERS v. MIRZA ABDUL GAFFAR AND ANOTHER**. The plaintiff is not entitled to equitable relief of declaration of title.

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.”**⁴¹ 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.”**⁴² 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 view of law declared by the Apex 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

⁴¹ (2012) 8 SCC 148

⁴² AIR 2014 SC 937

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 defendants 1 and 2 is the owner of the property, after his death, defendants 1 to 3 became the owners. The Plaintiff did not seek relief of Specific performance, though he allegedly purchased the same under oral sale, but he filed the suit for declaration based on alleged oral sale 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.

In view of my foregoing discussion, the decree and judgment in O.S. No.74 of 2001 passed by the Junior Civil Judge, Gannavaram, which was affirmed by decree and judgment in A.S. No.203 of 2010 (old A.S.No.37 of 2007) by the XI Additional District Judge, Gudivada, is in accordance with law. As such I find no substantial question of law.

In the result, the appeal is dismissed at the stage of admission without costs confirming the decree and judgment dated 04.12.2012 in A.S.No.203 of 2010 (Old A.S.No.37 of 2007) passed by the XI Additional District and Sessions Judge, Gudivada. No costs.

Miscellaneous petitions, if any, pending in this second appeal shall stand closed.

M. SATYANARAYANA MURTHY, J

25.10.2016
BV

