

**PAPER PRESENTATION ON THE TOPIC OF**

**ADVERSE POSSESSION**

**VERSUS**

**RIGHT TO PROPERTY**

**BY**

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## **ADVERSE POSSESSION Versus THE RIGHT TO PROPERTY**

### **(I). INTRODUCTION :**

#### **(A). ORIGIN :**

The doctrine of adverse possession that was recognized at the earliest point of time dates back to about 2000 BC in the Code of Hammurabi which explained that if a man left his house, garden or field and another person possessed and used it for three years the new comer retained the land.

In early England the King generally owned all the land but when disputes between private individuals began to arise, actual possession of land was often treated as the best evidence of ownership. Thus the doctrine of adverse possession served to clear the title to real property.

Much of Indian law has its roots in English law and the doctrine of Adverse Possession is no exemption. For the first time the limitations for these type of Suits was prescribed in English laws as Twenty (20) years with the passage of time, where under the Indian law which incorporated the doctrine of Adverse Possession the period of limitation for the same is also prescribed by the Limitation Act, 1963.

#### **(B). Concept of Doctrine of Adverse Possession Vis- a- Vis Indian Law :**

In India the concept of Adverse Possession mean that a trespasser or a stranger who comes into possession of the land must be in exclusive and continuous possession and without interruption for a certain period of time typically 12 to 30 consecutive years depending upon the classification of ownership (i.e, Private or Government) of the land. That the statute of Limitations is intended to give true owners ample time to check on and protect their property from another's adverse claim. If the true owners fail to do that for a protracted period, he is bound to loose the land.

The law of Adverse Possession is contained in the Article 65 Sch-I of the Limitation Act, 1963 which prescribes a limitation of 12 years for a suit for possession of an immovable property or any interest therein based on title.

**(C). Provisions governing under the Limitation Act, 1963 :**

The Limitation Act 1963 is a key piece of legislation elaborating on adverse possession. Under Section 3 of the Limitation Act, 1963 no cognizance can be taken by the Court if the suit is barred by limitation whether defence taken by the defendant or not, however, it is to be noted that the said provision bars only the remedy of the person filing the suit and not his right as available to him under law. However there is an exception regarding extinguishment of right under the Limitation Act, 1963 as provided under Section 27 which provides that in case the person has not taken any action for recovery of possession during the period of limitation then his rights get extinguished.

So in a situation where a person does not take any action for recovery of possession of land within a period of twelve years as provided under Article 65 in Schedule I of the Limitation Act, 1963 his rights get extinguished and therefore the land is left in abeyance. But the law of adverse possession is based upon the principle that a land cannot be left in abeyance for a long time as already stated above. Hence someone has to be the owner of the land when the rightful owner has lost his rights once failed to take action as provided Section 27 of the Limitation Act. So, in the said situation the person is adverse possession of the land becomes the rightful and absolute owner of the land as per Article 65. It also has to be kept in mind that limitation period of twelve years starts only when the possession has become adverse to the true owner and not otherwise.

**CASE LAW:**

The concept of adverse possession has been well settled by the judicial committee of the Privy Council in 1907 in **Perry v Clissold** (1907) AC 73, at 79 wherein it was held :

"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 forever extinguished and the possessory owner acquires an absolute title. "

The decisions of the Privy Council though not binding on the Supreme Court but still the said decision was upheld by three judges of the Hon'ble Supreme Court in the case of **Nair Service Society v K.C. Alexander** reported in AIR 1968 SC 1165. Thus it can be said that till date it is a good law, that if a person in hostile possession of the land though not being the true owner, becomes the absolute owner if the rightful owner of the said land does not come forward within the statutory period of twelve years as provided under the Limitation Act, 1963.

**(II). WHAT ARE THE ESSENTIALS FOR CLAIMING ADVERSE POSSESSION ?:**

**(A). To constitute the adverse possession, the stranger or trespasser who is in such possession has to establish or fulfill the following conditions:**

**(1). Actual possession of the property:**

Adverse possession consists of actual occupation of the land with the intent to keep it solely for oneself. Merely claiming the land or paying taxes on it, without actually possessing it, is insufficient. Entry on the land, whether legal or not, is essential. A trespass may commence adverse possession, but there must be more than temporary use of the property by a trespasser for adverse possession to be established. Physical acts must show that the possessor is exercising the dominion over the land that an average

owner of similar property would exercise. Ordinary use of the property—for example, planting and harvesting crops or cutting and selling timber—indicates actual possession. In some States acts that constitute actual possession are found in statute.

**(2). Such possession should be open and notorious to the use of the property:**

An adverse possessor must possess land openly for the entire world to see, as a true owner would. Secretly occupying another's lands does not give the occupant any legal rights. Clearing, fencing, cultivating, or improving the land demonstrates open and notorious possession, while actual residence on the land is the most open and notorious possession of all. The owner must have actual knowledge of the adverse use, or the claimant's possession must be so notorious that it is generally known by the public or the people in the neighborhood. The notoriety of the possession puts the owner on notice that the land will be lost unless he or she seeks to recover possession of it within a certain time.

**(3). Exclusive possession and use of the property:**

Adverse possession will not ripen into title unless the claimant has had exclusive possession of the land. Exclusive possession means sole physical occupancy. The claimant must hold the property as his or her own, in opposition to the claims of all others. Physical improvement of the land, as by the construction of fences or houses, is evidence of exclusive possession.

**(4). Such possession should be hostile or adverse to the true owner :**

Possession must be hostile, sometimes called adverse, if title is to mature from adverse possession. Hostile possession means that the claimant must occupy the land in opposition to the true owner's rights. One type of hostile possession occurs when the claimant enters and remains on land under color of title. Color of title is the appearance of title as a result of a deed that seems by its language to give the claimant

valid title but, in fact, does not because some aspect of it is defective. If a person, for example, was suffering from a legal disability at the time he or she executed a deed, the grantee-claimant does not receive actual title. But the grantee-claimant does have color of title because it would appear to anyone reading the deed that good title had been conveyed. If a claimant possesses the land in the manner required by law for the full statutory period, his or her color of title will become actual title as a result of adverse possession.

**(5). Such possession should be a continuous one without any interruption:**

All elements of adverse possession must be met at all times through the statutory period in order for a claim to be successful. The statutory period, or “statute of limitation”, is the amount of time the claimant must hold the land in order to successfully claim “adverse possession”. Mere long possession of defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land. A possession is adverse only if in fact one holds possession by denying title of the lessor or by showing hostility by act or words or in cases of trespassers as the case may be as against lessor or other owner of the property in question.

**(B). The possession above stated should be understood to mean dispossession of the true owner:**

**(i) Dispossession of the true owner :**

In reference to this point the term dispossession and discontinuance of possession are relevant. In dispossession a person comes in, and drives out another from possession. In discontinuance of possession, the person in possession goes out and is followed into possession by others. To constitute discontinuance of possession, there must be dereliction by the person who has right and actual possession by another, whether adverse or not.

**(ii). Possession of another essential for dispossession :**

“Dispossession” implies the coming in of a person and driving out of another person from possession. “Dispossession” implies ouster and the essence of ouster is that the person ousting is in actual possession of the property. The mere finding that the persons are not in possession of the disputed property does not decide the question, whether there was dispossession. Dispossession occurs only when a person comes in and drives out another from possession.

**(III). What acts do not amount to dispossession ?:**

(1). To constitute dispossession, the other side must take and keep possession with the intention to acquire the property for himself. Acts between neighbours, occasional acts of interference which are naturally explained by the desire of the person doing them to protect their own property do not amount to dispossession.

**(2). Permissive possession does not amount to dispossession :**

A true owner is neither dispossessed nor does he discontinued his possession, if a third person takes possession with his permission. It is however true that, if the person in permissive possession changes his animus and continues to hold with an open and continuous assertion of a hostile title, his possession becomes adverse to the owner. A person put into the occupation of property, or person put into permissive possession of that property, does not occupy it as of right. In such cases, the owner of the property is properly considered to be in possession. An owner who accommodates a poor relation in his premises, does not necessarily part with the possession of his property occupies by such poor relation. The possession of such poor relation is the constructive possession of the owner and the later may retain and continue to exercise his proprietary and possessory rights so as to rebut the presumption that he has parted with the possession of the property and prevent the operation of the statute of limitation. If an owner allows

his gardener, or servant, or work man employed upon his estate, to live in a cottage thereon, rent-free, their possession is his possession, however long it may be continued. If an owner, for motives of kindness or charity, allows a relative or friend to occupy a cottage and land upon his estate, and the owner, during such occupation, continues to exercise acts of ownership over the land so occupied, e.g., he repairs the building, or cuts down plants, trees, or causes drains to be made through the land or quarries away stone, all such acts of dominion do not show that he had ever parted with the possession of his property, although he had allowed another person to occupy it.

**(3). Mere non-user by the owner is not dispossession :**

The meaning of the word “dispossession” is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not, thereby, discontinue his possession. Constructively his possession continues, until he is dispossessed and upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. Dispossession must be actual and the person dispossessing must have physical control and exercise acts of ownership, which would mark him as occupier. He must possess the desire to possess. Acts of dispossession must be such as are inconsistent to the character of the property possessed and the purpose for which it is used by the owner. Only slight acts of user on the part of the owner may, in certain circumstances be sufficient to preserve his possession unless such acts are inconsistent with the positive acts of exclusive ownership exercised by the trespasser. There is no dispossession until someone else takes possession.

**If one satisfies the above ingredients then only a claim can be made for Adverse Possession.**



#### **(IV). PLEADINGS AND BURDEN AND PROOF:**

To claim title through adverse possession it is necessary to take into consideration what is actually required to be pleaded and what not.

The Hon'ble Supreme Court in *Karnataka Waqf Board* reported in 2004 (10) SCC 779 regarding the pleadings to be made by a person while claiming title over an immovable property on the basis of adverse possession held as follows :

“Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show :

- (a) on what date he came into possession,
- (b) what was the nature of his possession
- (c) whether the factum of possession was known to the other party,
- (d) how long his possession has continued, and
- (e) his possession was open and undisturbed.

A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession”.

The Court further held that whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property therefore, the pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.

In *Dagadabai (Dead) By Lrs v Abbas @ Gulab Rustum Pinjari* reported in (2017) 13 SCC 705 held that a person first admit the ownership of the true owner over the property before claiming ownership on the strength of adverse possession.

Inconsistent plea cannot be taken by a party when claiming title by way of adverse possession i.e. a party cannot claim his ownership over a property on the basis of title and by way of adverse possession

simultaneously as both such pleas are mutually inconsistent. Interestingly one such plea, however, alternative and not inconsistent was allowed by the Hon'ble Supreme Court in L.N. Aswathama And Anr v P. Prakash reported in 2009 (13) SCC 229. In this case a person 'A' was tenant under 'B' and 'A' subsequently purchased the property from 'B' and became its owner. Another person 'C' who claims to be the true owner filed a suit or title and possession against 'B' stating therein that he was the true owner and not 'B'. The person 'A' denied the title of 'C' over the suit property by stating that he became the owner of the property by purchasing it from 'B' but in case 'B' did not have title and consequently his claim based on title was rejected, then having regard to the fact that he had been in possession by setting up title in 'B' and later in himself, his possession was hostile to the true owner i.e. 'C'; and if he was able to make out such hostile possession continued for more than 12 years, he could claim to have perfected his title by adverse possession.

The burden of proof in respect to adverse possession is on the person who claims title by way of adverse possession. As per Article 142 and 144 respectively of the Limitation Act, 1908 in a suit, the plaintiff (that time only plea of adverse possession could be taken only by defendant) had to prove that he had the title and had been in the physical possession of the property since last 12 years. But under the present Limitation Act, 1963 the burden has now shifted. Now true owner just have to prove ownership and the onus shifts on the person claiming title by way of adverse possession.

#### **(V). RELEVANT CASE LAWS:**

The Hon'ble Supreme Court of India has dealt with the concept of Adverse Possession in various cases and some of the leading case laws are as follows:

1. As stated above, the person claiming Adverse Possession must be in continuous possession without any interruption. Possession does not become adverse when the intention to hold adversely is wanting. Person holding property by way of adverse possession must publish his intention to deny right of the real owner. His intention of adverse possession must be within notice, knowledge of the real owner. If there

are circumstances showing open and notorious act of taking possession, knowledge may be presumed. Where the assertion of right is secret and not open, the possession cannot be held to be adverse. In the case of **Bhimrao Dnyanoba Patil Vs State of Maharashtra, 2003 (1) Bom. L.R. 322; 2003(1) All MR 565 ; 2003 (2) LJSoft 131**, it has been held that, unless enjoyment of the property is accompanied by adverse animus, mere possession for a long period even over a statutory period, would not be sufficient to mature the title to the property by adverse possession.

2. Adverse possession was defined by the Supreme Court in *Amarendra Pratap Singh v Tej Bahadur Prajapati* as: “A person, though having no right to enter into possession of the property of someone else, does so and continues in possession setting up title in himself and adversely to the title of the owner, commences prescribing title into himself and such prescription having continued for a period of 12 years, he acquires title not on his own but on account of the default or inaction on part of the real owner, which stretched over a period of 12 years results into extinguishing of the latter’s title.”

3. In *SM Karim v Mst. Bibi Sakina* following the equitable principle of **nec vi nec clam nec precario** (without force, without secrecy, without permission), it was held that adverse possession must be adequate in continuity, in publicity and extent, and a plea is required, to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.

4. The Limitation Act, 1963, lays down a limitation period of 12 years for suit of possession of immovable property or any interest based on the title. The period for limitation for the government, however, is 30 years by virtue of article 112. The law of adverse possession was judicially summed up by the Judicial Committee of the Privy Council in *Perry v Clissold*, where it was observed that if a rightful owner does not claim his right against a possessor within a given time, his ownership right stands extinguished and the same was approved by in *Nair Service Society Limited v KC Alexander*.

5. It was further clarified in *Karnataka Wakf Board v Government of India* that the question of adverse possession is a mixed question of fact and law as the trespasser needs to prove a continued possession of more than 12 years with animus possidendi (intention to possess) against the original owner. Further, the starting point of limitation commences when the defendants’ possession becomes adverse (*Vasantiben Nayak v Somnath Muljibai and Others.*).

6. However, the understanding of adverse possession has evolved in recent times and the Supreme Court has reiterated the need to take a fresh look. The Supreme Court, in *PT Munichikkanna Reddy and Ors v Revamma*, was guided by the Judgment of the European Court of Human Rights (ECHR) in *JA Pye (Oxford) Ltd v United Kingdom*, which had

critiqued the law of adverse possession and urged re-examination in light of changes in the law.

7. The Supreme Court in **Hemaji Waghaji v Bhikhabhai Khengarbhai** criticized the law and stated that it was irrational, illogical and wholly disproportionate. The court directed the Ministry of Law to take a fresh look at the law of adverse possession. The then government tasked the Law Commission with preparing a consultation paper. While noting that the ECHR judgment was overturned, it stated that there was a need to strike a balance between the pros and cons of the law.

8. The Hon'ble Supreme Court had further narrowed the scope for establishing a claim of adverse possession in **Dagadabai v Abbas@Gulab Rustum Pinjari** by ruling that the possessor must necessarily first admit the ownership of the true owner over the property and the true owner has to be made a party to the suit.

9. It was restricted further in **Mallikarjunaiah v Nanjaiah** where the Hon'ble Court observed, "Mere continuous possession, howsoever long it may have been qua its true owner is not enough to sustain the plea of adverse possession unless it is further proved that such possession was open, hostile, exclusive and with the assertion of ownership right over the property to the knowledge of its true owner."

10. However, in the recent Judgment of **Ravinder Kaur Grewal and others v Manjit Kaur and others** reported in AIR 2019 SC 3827, the Hon'ble Supreme Court held a contrary position that a plaintiff can file a suit for perfection of title by adverse possession.

The question for consideration before the Court was "Whether Article 65 of the Limitation Act, 1963 only enables the person to set up a plea of adverse possession as a shield and such a plea cannot be used as a sword by a Plaintiff to protect the possession of the immovable property or recover it in a case of dispossession?".

The Hon'ble Supreme Court in Para 59 of the Judgment held as follows "...In our opinion, consequence is that once the right, title or interest is acquired it can be used as a sword by the Plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected his title by way of adverse possession, can file a Suit for restoration of possession in case of dispossession....". The Hon'ble Supreme Court overruled the decision in **Gurudwara Sahab Vs. Gram Panchayat Village Sirthala** as well as the subsequent judgments of the Supreme Court which relied on it.

## **(VI). CONCLUSION :**

### **Whether any relook required in the present law ?**

There is a need to revamp this archaic law because it goes against equity. Due to the law of adverse possession sometimes there arise situations when true owners of immovable property are dispossessed just because of their non-deliberate inactions, poverty or some other reasons due to which those true owners are unable to approach the Court to avail the remedies to them under the law.

The Hon'ble Supreme Court in Hemaji Waghaji Jat v Bhikhabhai Khengarbhai Harijan & Others reported in 2009 (16) SCC 517 observed that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The Court while asking the Government of India to reconsider the law of adverse possession further held, the law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

In State Of Haryana v Mukesh Kumar & Others reported in 2011 (10) SCC 404, the Hon'ble Supreme Court gave certain suggestions that in case the law of adverse is not abolished then the Parliament might simply require adverse possession claimants to possess the property in question for a period of 30 to 50 years, rather than a mere 12 years. Such an extension would help to ensure that only those claimants most intimately connected with the land acquire it, while only the most passive and unprotected owners lose title. The Hon'ble Supreme Court vide this Judgment recommended the Union of India to consider either to make necessary amendments concerning the law of adverse possession or abolish it for good.

Keeping in view of the above mentioned judgments passed by the Hon'ble Supreme Court, the Law Commission of India prepared a

consultation paper cum questionnaire having 11 questions related to adverse possession of immovable property which are as follows:

**Questionnaire on Adverse Possession :**

1. Do you think that the law of adverse possession under which the legal owner and title holder of immovable property is precluded from bringing an action to recover the possession from a person in occupation of the property for a continuous period of twelve years openly, peacefully and in a manner hostile to the interest of legal owner should be retained in the statute book or the time has come to repeal it? Are there good social reasons or considerations of public policy for retaining the legal acquisition of title through adverse possession?.
2. Do you think that having regard to the conditions in our country such as lack of reliable record of rights, title registration, the problem of identity of property and the difficulties of even genuine occupants to back up their possession with formal title deeds, the law of adverse possession should remain or should it be scrapped?.
3. (a) Do you think that certain exceptions and qualifications should be carved out by law so as to ensure that the plea of adverse possession should not be made available to those who dishonestly enter the land with full consciousness that they were trespassing into another's land?.
- (b) In other words, whether it is just and proper to make the plea of adverse possession available to a naked trespasser entering the land without good faith?.
- (c) In any case, whether the bona fide purchasers from a trespasser should be allowed to plead adverse possession. ?.
4. If the benefit of acquisition of title by adverse possession is to be denied to a rank trespasser, should he be paid compensation for the improvements made or other expenditure incurred for preservation of land?.
5. Do you think that the real owner who did not evince any interest in the land should at any distance of time be permitted to claim back the land irrespective of a string of changes in land occupation and improvements made thereto ?.
6. If adverse possession is allowed to remain, do you think that the real owner should be compensated in terms of market value as per the rate prevailing on the date when the person claiming adverse possession started possessing the land? Or, could there be any other principle of working out compensation or indemnification without hassles?.
7. If adverse possession is retained, is there a case for enlarging the present period of limitation of 12 years and 30 years (in the case of Govt. land) ? If so, to what extent?
8. As far as the property of the State is concerned, the Limitation Act prescribes thirty year period for filing a suit against a person in adverse possession. Is there a case for abolition of adverse possession in relation to Government property? Should it be left to the Government to claim possession

of its land at any time irrespective of the long chain of events that might have occurred and inaction on the part of Government?.

9. Whether the law which extinguishes the right to property vested with the true owner by reason of the lapse of prescribed period of adverse possession of another can be tested by the standards laid down in Article of the 1<sup>st</sup> Protocol<sup>21</sup> to the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and be faulted on the ground of being 'irrational' and 'disproportionate'?

10. (a) In what way the NRIs would be more handicapped than resident Indians by reason of application of the law of adverse possession?.

(b) What safeguards and remedies if any should be provided to the N.R.Is to check illegal encroachment of their immovable properties? Should there be longer period of limitation in respect of the property owned by N.R.Is. ?.

11. Do you think that the principles governing adverse possession and its proof should be provided explicitly in a Statute?.

As stated above, the questions put in the questionnaire were - Whether the law of adverse possession should remain in the statutes or is it time to repeal them, should the trespasser be compensated by the true owner for the improvements done by him to the land, etc. However, there are no further developments whether to continue with this law after having certain changes or abolish it completely.

Till the time any changes are brought by the legislatures the current provisions of law and precedents would have to be followed in the country.

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