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IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das & Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

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NOTE AND COMPILATION ON LIMITATION & POSSESSION IN SUIT 3 OF 1989

BY
DR. RAJEEV DHAVAN, SENIOR ADVOCATE

(PLEASE SEE INDEX INSIDE)

ADVOCATE-ON-RECORD: EJAZ MAQBOOL

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NOTE ON LIMITATION & POSSESSION

1. During the course of argument it was suggested that it would be possible to 'save' Nirmohi Akhara from limitation on the following grounds:

   A. The flexibility of the concept of possession.

   B. The use of word 'belonging' in the pleadings (without any foundation on facts)

   C. The invocation of the concept of continuous wrong in Section 23 of the Limitation Act 1908.

   D. The invocation of the Article 142 of the Limitation Act 1908 (partially corresponding to Article 64 of the Limitation Act 1963.)

   These are elaborated as follows:

A. Possession as a flexible concept:

2. Although the concept of 'possession' is very wide ranging and covers a lot of applications. Its flexibility should not detract from the fact that in each fact situation, only certain legal consequence occur.

   - *Extracts of "A Textbook of Jurisprudence' by George Whitecross Paton" 1964 Edition;*

   - *UP Gandhi Smarak Nidhi Vs. Aziz Mian (2013) 4 ALJ 149 (Manupatra copy) at pr.77*

     'Article 142 contemplates earlier possession before dispossession or discontinuance thereof. This bring us to understand the term 'Possession'. It has a variety of meanings. It is a juristic concept distinct from title and can be independent of it. It is both physical and legal concept. The concept of possession implies "corpus possession" coupled with "animus

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possidendi". Actual user without animus possidendi is not a possession in law. In fact, possession is a polymorphous term having different meanings in different context. It has different shades of meaning and very elastic in its connotation. This has already been discussed above in detail.'

B. Belonging to:

3. Much emphasis has been laid on the word 'belonging to' in the pleadings without any further details. It should be noted that question of the area of 'belonging to' does not arise because the shebait can never own title to the disputed site or any other area on which the idol is placed.

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Note:

Detailed submission has been separately made on the word 'belonging to'

See also: All India Bank Employees Association vs. National Industrial Tribunal (1962) 3 SCR 269 at pg. 290

C. Continuous Wrong

4. It is submitted that there can be no continuing wrong in this case because the Nirmohi Akhara has only claimed managerial and charge rights of the disputed structure against the order of appointing the receiver on 05.01.1950. Limitation begins on that date which constitutes the cause of action, which is further, self evident from the relief claimed and the previous paragraph indicating the urgency to get management and charge rights.

Extract of the prayer clause of Suit 3 of Nirmohi Akhara:

'(a) A decree to be passed in favour of the plaintiffs against the defendants for the removal of the defendant no. 1 from the management and charge of the said temple of Janam Bhoomi and for delivering the sa,me to the plaintoff through its Mahant and Sarbarhrahkar Mahant Jagannath das.'

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Note: Detailed submission has separately been made on the concept of 'Continuing Wrong' and its application in this case.

D. Invoking Article 142 of the Limitation Act 1908

5. For convenience, the relevant provisions are set out in the table below:

	Article 142 of the 1908 Act	**Article 64 of the 1963 Act**
Description of Suit:	For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.
Period of limitation:	Twelve years	Twelve years
Time from which period begins to run:	The date of dispossession or discontinuance	The date of dispossession

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6. It appears that there has been considerable controversy over the invocation of Article 142 as explicated in detail by the judgment of Justice Sudhir Agarwal in *UP Gandhi Smarak Nidhi Vs. Aziz Mian (2013) 4 ALJ 149.*

   a) In this case, after exhaustive review of case laws (at pr. 59 to 105), the High Court laid down that such a plea is only available when the plaintiffs, while in possession or when discontinued from possession, claim that the possession of the defendants has become adverse to the plaintiffs.

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b) The plaintiff appellants sought removal of construction raised by defendant respondents on the grounds that the same is unauthorized and illegal.

c) It was held in the favour of the plaintiff and was found that the plaintiff has to prove the exact nature of dispossession in the pleadings and the plaintiff claimed adverse possession against the defendant to sustain this right.

When all this is not demonstrated, the residuary Article 120 would apply.

7. In *Railway Electrification Vs. Malti Devi, (2017) 3 UPLBEC 2225 (Manupatra copy)* the plaintiffs sought a declaration that it was the owner of the property in question which was the subject matter of acquisition. The Court observed: (at pr. 96-97)

'96. The arrangement of above Articles 120, 142 and 144 in L.A. 1908 remained the same, i.e., Articles 120, 142 and 144 and are verbatim:

Description of suit	Period of limitation	Time when period begins to run
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

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97. The doctrine of limitation is founded on consideration of public policy and expediency. It does not give a right where there exist none, but to impose a bar after a certain period to the remedy for enforcing an existing right. The object is to compel litigants to be diligent for seeking remedies in Courts of law if there is any infringement of their rights and to prevent and prohibit stale claims. It fixes a life span for remedy for redressal of legal injury, if suffered, but not to continue such remedy for an immemorial length of time. Rules of limitation do not destroy right of the parties and do not create substantive rights if none exist already. However, there is one exception i.e. Section 28 of L.A. 1908, which provides that at the determination of period prescribed for instituting suit for possession of any property, his right to such property shall stand extinguished and the person in possession, after expiry of such period, will stand conferred title. The law of limitation is enshrined in the maxim "interest rei publicae ut sit finis litium" (it is for the general welfare that a period be part to litigation).'

Further the Court held: (at pr. 104)

'Article 142 applies where plaintiff while in possession, has been dispossessed or has discontinued his possession. Where a persons has been dispossessed or discontinued of his possession of the property, he can bring an action seeking restoration of possession of immovable property within 12 years. It pre-supposes possession of such person over immovable property before he is dispossessed or discontinued. Article 144, however, applies where any other provision specifically providing for restoration of immovable property or interest therein is not available and there also, period of limitation is 12 years but limitation runs from the date when possession of defendants becomes adverse to plaintiff. Commonly it is said that this provision is in respect to the cases where defendant's possession is said to be adverse. Though distinction is quite evident but in the complex nature of society

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and the disputes which arise, at times Courts find difficulty in maintaining distinction between the two and there appears to be some conflicting views also as to the scope of Article 142 L.A. 1908 and its applicability. What has been ultimately realised is that the question would basically that of pleading.'

8. *Ramiah Vs. N. Narayana Reddy (2004) 7 SCC 541*

For the applicability of Article 142 of the Limitation Act, 1908 (partly corresponding to Article 64 of the Limitation Act, 1963), it must be shown that the suit is, in terms, as well as in substance, based on the allegation of the plaintiff having been in possession within 12 years and having subsequently lost the possession, either by dispossession or by discontinuance, irrespective of title as on the basis of pleadings. *(See pr. 9)*

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9. Conclusions:

It will thus be clear that:

a. Possession was not claimed as a relief in this case;

b. The plaintiff did not have the ingredients of adverse possession against any defendants;

c. In any event, when the plaintiff has not led evidence to show possession over the 'inner courtyard', the question of adverse possession does not arise;

d. Such possession that might have been gained from trespass was clearly illegal and could not give rise to any rights or claims;

e. Clearly, the residuary Article 120 applies in this case.

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A TEXT-BOOK OF
JURISPRUDENCE

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XXII

THE CONCEPT OF POSSESSION

§ 122. Introduction

As with most words in the English language, the word 'possession' has a variety of uses and a variety of meanings. Reference to any reasonably comprehensive English dictionary provides sufficient illustration. As a noun from the transitive verb *to possess*, 'possession' is given as: the action or fact of possessing something or of being possessed. Depending on the context, the lexicographer may be found to give meanings such as the following: the holding of something as one's own; actual occupancy as distinguished from ownership; a territory subject to a sovereign ruler or state; the fact or action of a demon possessing a person or the fact of being possessed by a demon; the action of an idea or feeling possessing a person; the action of keeping oneself under control—as in self-possession.[1] The lexicographer, in attempting to assign the meaning of the word as used in English law, may well find himself saying something like the following: 'The visible possibility of exercising over a thing such control as attaches to lawful ownership; the detention or enjoyment of a thing by a person himself or by another in his name; the relation of a person to a thing over which he may at his pleasure exercise such control as the character of the thing permits, to the exclusion of other persons....'[2]

It should be clear at the outset, then, that different meanings may be ascribed to the word 'possession', depending upon context and use, and that the search for one 'proper' meaning for the word is likely to be a fruitless one. It may be objected, however, that it is the concept of possession in the law that is of interest here, and not the varied uses to which the word 'possession' may be put in the English language. It may be, and has been, urged that there is a unitary concept of possession so far as the law is concerned, and that the analysis and explanation of that concept is the proper function of jurisprudence. It is not difficult to demonstrate, however, that the search for a unitary concept of possession in the law is one doomed

[1] *The Shorter Oxford English Dictionary* (3rd ed.), vol. ii, 1550.
[2] *The Shorter Oxford English Dictionary*, loc. cit.

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From those illustrative cases and rules, a surprising number of propositions about possession can be extracted—for example:

(i) Possession of a chattel is not acquired when mere physical control is taken; such acquisition waits upon knowledge by the taker of the nature of the thing acquired: See e.g., *R.* v. *Ashwell*; *R.* v. *Hudson.*

(ii) The owner and possessor of land may be in possession of a chattel on his land in spite of the fact that he does not know the nature of the thing or even that it exists: See e.g. *Elwes* v. *Brigg Gas Co.*; *R.* v. *Rowe*; *South Staffordshire Water Co.* v. *Sharman.*

(iii) The owner and possessor of a shop is not in possession of chattels on the floor of his shop until he knows of their presence there: See e.g., *R.* v. *Moore*; *Bridges* v. *Hawkesworth.*

(iv) The owner of a house, who may well have been in possession of the house for the purpose of taking action against a trespasser, may not be in possession of a chattel found on the premises if he has never physically occupied the house: *Hannah* v. *Peel.*

(v) The owner and possessor of land may not be in possession of chattels on his land even though he owns those chattels—another person, not on the land, may be in possession of them: *Ancona* v. *Rogers*; *Wrightson* v. *McArthur & Hutchisons.*

(vi) The finder of a lost chattel obtains possession of it, and hence title to it as against those who have no claim to it prior to his: *Armory* v. *Delamirie.*

(vii) A finder of a chattel who finds in the course of his employment does not obtain possession of it—his master does; *Willey* v. *Synan.*

(viii) As between two or more persons who are in apparent physical control and enjoyment of the use of chattels, the owner of the chattels is in possession of them: *Ramsay* v. *Margrett*; *French* v. *Gething.*

(ix) As between two or more persons apparently in physical control and enjoyment of the use of land (which is owned by one of them) and of chattels upon that land, where ownership of the chattels is in doubt, the owner of the land is in possession of the chattels and hence is presumptively the owner of them: *Re Cohen.*

(x) To acquire possession of a thing it is necessary to exercise such physical control over the thing as the thing is capable of, and to evince an intention to exclude others: *The Tubantia*; *Young* v. *Hichens.*[1]

(xi) But possession may be acquired of a thing, by transfer from another in possession, without any change in the physical control of the thing concerned: *Ramsay* v. *Margrett*; *French* v. *Gething.*[2]

This list could be extended almost indefinitely.

[1] And cf. *Pierson* v. *Post* (1805), 3 Caines 175, (Supreme Ct. of New York); *Littledale* v. *Scaith* (1788), 1 Taunt. 243 n.; 127 E.R. 826; *Hogarth* v. *Jackson* (1827), M. & M. 58, 173 E.R. 1080; *Hamps* v. *Darby*, [1948] 2 K.B. 311.

[2] Cf. *In re Stoneham*, [1919] 1 Ch. 149; *In re Ridgway* (1885), 15 Q.B.D. 447; *Cochrane* v. *Moore* (1890), 25 Q.B.D. 57.

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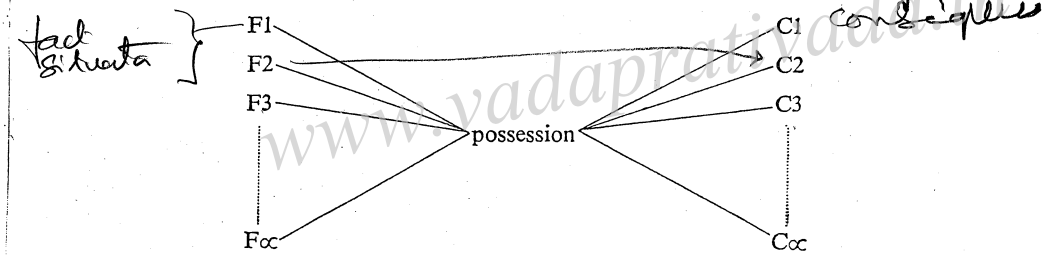
§ 125. Analysis of Possession

It should be obvious that the concept of possession in the law is not a simple concept which can be satisfactorily described in terms of facts grouped into essential and differentiating criteria for the purposes of definition—at least not when the law is seen as a process for regulating relations between persons and for resolving disputes between them. Holmes saw one important aspect of the complicating factors concerned when he said: 'The word "possession" denotes such a group of facts. Hence, when we say of a man that he has possession, we affirm directly that all the facts of a certain group are true of him, and we convey indirectly or by implication that the law will give him the advantage of the situation. Contract, or property, or any other substantive notion of the law, may be analysed in the same way, and should be treated in the same order. The only difference is, that, while possession denotes the facts and connotes the consequences, property always, and contract with more uncertainty and oscillation, denote the consequence and connote the facts.'[1] But he produced, none the less, an over-simplification which having shed some light, obscured further investigation. Thus one might describe 'possession' as a word which serves as a useful symbol to refer to the link between diverse conditions of fact and equally diverse consequences in the law—as Ross does with the concept of ownership[2]. A diagrammatic illustration can be given as follows:



(Where F = conditioning fact and C = legal consequences)

Then possession merely stands for the systematic connection that F1 as well as F2 – – – Fα entail some or all of the legal consequences C1 – – – Cα. As a technique of presentation this is expressed then

[1] *The Common Law*, 214–15.
[2] A. Ross, *On Law and Justice*, 171.

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by stating in one series of rules the facts that 'create possession', and in another series the legal consequences that 'possession' entails.[1]

Some jurists, frustrated in the search for a conceptualized[2] group of facts which would take account of F1 – – – F∝, which Holmes had assumed to exist, turned to look for some unifying similarity in the legal consequences to be discovered in C. – – – C∝. If it were possible to generalize the totality of legal consequences and find perhaps the 'essence' of the notion of possession in that generalization, then such a search might succeed in satisfying the ordering mind of the jurist. But even this is not possible, for the systematic connection between F1 – – – F∝ is not with the totality of C1 – – – C∝, but with some number of C's less than that totality. That is, there is not merely a diversity of F's defying the search for an essence, there is a diversity of C's also and the question is open at both ends. Thus the remedies that are said to be open to possessors are sometimes open to persons who are not in possession—e.g., the gratuitous bailor at will, the servant who has mere custody of her master's mackintosh.

Further, the systematic connection is circular in nature, because although the legal consequences are said to flow from the establishment of the conditioning facts, the characterization of the conditioning facts as constituting possession or not may well vary with the legal consequences. That is sufficiently established by comparing the trends of the larceny cases summarized above, the finding cases, the cases which go to the establishment of title, and the landlord and tenant cases, one with another. Again a man may be held to be in possession for one purpose where, for another, he would not be held to be in possession although the facts proved were unchanged. Consider, for example, the situation of the defendant in *Moors* v. *Burke* (*supra*) if he had been, on the facts shown, suing, for trespass to chattels, someone who had damaged the goods in his locker, or the position of the defendant in *Wrightson* v. *McArthur & Hutchisons* (*supra*) if that company had been proceeding against a person for trespass to the goods which had been contained in the locked room.

Some insight is gained by such a presentation as Ross outlines, but it does not go far enough. As Kocourek[3] demonstrates, the F's are conceptual in nature, and, lying behind them again, are extra-legal facts—the raw facts seen from outside the legal system as it were, which give rise to relations which must be regulated by the legal system.

[1] To adapt Ross's statement from ownership to possession.
[2] To use Ross's word.
[3] *Jural Relations*, ch. xx.

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It is often said that: 'Possession is a fact to which the law attaches certain consequences'.[1] In the light of the preceding discussion it can be seen that such an assertion presented in the form of definition leads to confusion, for it invites definition of an Aristotelian kind by identifying the 'fact' by reference to essence and differentia, and the search for those is a fruitless one. At the same time, in priority of history and of logic, the fact comes before the law. A typical set of facts which called for rules of law to regulate relations arising out of those facts, provided the core notion around which the various uses of the word 'possession' in rules of law tend to group themselves. Thus, when a *res* which has never been in the physical control of any person is first 'taken' into physical control by some person for himself[2] in circumstances where resistance can be expected if others attempt to interfere with that physical control, we see something which in the ordinary use of English would be called 'possession' of the thing—and possession has been created. When, however, in a legal system rules are provided to protect such a possessor in his possession, very quickly something more is added than the mere attachment of legal consequences to the 'fact' of possession. Legal relations, rights, duties, powers, immunities, &c., are established between the possessor and all other persons.

When legal relations are established, in general they continue and are supported by the system which established them unless and until some change occurs in the facts or the law which is thought sufficient to disturb them. It is not surprising, therefore, to find that the facts which will be held to create possession for the first time[3] need not be shown to continue for possession to be held to continue—for once established it is the *right to possession* which becomes important so far as legal relations are concerned. If I leave my car unlocked outside my host's house while I dine, I am not in physical control of it nor can I be expected to resist interference with it, yet I do not lose possession of it in the eyes of the law (my legal relations are not changed with respect to my possession of it) even if I have left it upon my host's land. So the change of facts which will be held to bring about loss of possession is not the mere discontinuance of the facts which created possession in the first place. Loss of possession involves a change in pre-existing legal relations with respect to a thing and

[1] As in the second edition of this work at 453.
[2] As with the wolves and the mutton mentioned at p. 504 (*supra*).
[3] See, e.g., *Littledale* v. *Scaith* (1788), 1 Taunt. 243 n., 127 E.R. 826; *Hogarth* v. *Jackson* (1827), M. & M. 58, 173 E.R. 1080; *Pierson* v. *Post* (1805), 3 Caines 175.

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raises different questions from the creation of possession of a thing with respect to which there have been no pre-existing legal relations.[1]

Similarly the transfer of possession from one person to another may be effected by changing the legal relations of persons with respect to the thing, by means permitted by the legal system, without in any way changing the physical conditions affecting the thing or the persons concerned.[2]

Just as with the concept of ownership[3] then, the way out of the confusion engendered by the struggle between convenience and theory already outlined is to recognize that possession in the law always involves legal relations between persons. Where those relations are in dispute there will be various values, sometimes competing, to be considered when establishing the precise relations to be recognized or enforced by the legal system, and when fixing the tests by which the relations concerned are to be recognized. No doubt, almost always, the basic values suggested by Felix Cohen[4] will be involved: simplicity, certainty, promotion of the community's economy, economy of effort in administration, acceptability as consonant with a general sense of fairness. But the precise rules, which include possession in their expression, developed in different parts of the legal system are affected by further complicating factors, for different purposes are pursued in the development of different rules and those purposes affect the development of the rules themselves.

A mere glance at the cases and rules summarized in the preceding section reveals that the tests for recognizing possession vary in response (*inter alia*) to the pressures of different purposes being pursued in different parts of the law. Thus in the larceny cases there is the desire to see that people who take things to which they have no justifiable claim (who have the minds of thieves)[5] shall not escape retribution.[6] In cases like *Moors* v. *Burke*,[7] there is the desire to limit

[1] If, as seems obvious, possession once gained can be lost or abandoned absolutely (i.e. not to another person), then there can be a series of 'creations' of possession with respect to the one thing, but each 'creation' involves the establishment of fresh possessory relations where there were none immediately before the act of 'creation'—see *The Tubantia*, [1924] P. 78 but cf. *Johnstone & Wilmot Pty. Ltd.* v. *Kaine* (1928), 23 *Tas. L. R.* 43.

[2] See *Ramsey* v. *Margrett* (*supra*), *French* v. *Gething* (*supra*).

[3] *Supra*, § 115.

[4] *Dialogue on Private Property* (1954), IX Rutgers L.R. 357.

[5] *Hibbert* v. *McKiernan* (*supra*) per Goddard C.J.

[6] In contrast with a 'system-made pressure' of not so long ago when there was a tendency to find some technical ground to prevent very harsh punishment being inflicted for a minor transgression: see Kenny's *Outlines of Criminal Law* (17th ed.), § 221, pp. 238–9.

[7] *Supra*, p. 520, n. 5.

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the harsh application of a statutory rule which cuts across traditional notions affecting the administration of justice in the criminal law. In the landlord and tenant cases there are varying pressures from times when there is a special need to protect the interests of tenants to other times when it is felt that landlords have been too restrictively treated by the law.[1]

In the finding cases the task facing the courts is really to allocate rights to physical control and enjoyment of things where no such control existed before in the parties concerned. The real nature of the task is obscured by the search for a pre-existing 'possessory title', and the assumption that the thing must belong to one or another of the parties prohibits a solution which may in some cases be the most desirable:—an allocation of the future rights among those parties in shares.[2]

To the objective observer there is a further complicating factor. In most cases the court does not have all the facts before it, but only those facts which are known to the litigating parties and are thought by them to be relevant to their claims in the light of the legal authorities. Thus a variety of persons in different proceedings could be held to be in possession of a thing, without the actual extra-legal facts being changed at all, depending upon the nature of the litigation, and upon the information disclosed to the court about the relevant physical facts and about the legal relations affecting the persons concerned.

This can be demonstrated by supposing any number of possible sets of facts under any one of which different persons could be held to be possessors. For example, suppose A is in lawful possession of a large purse which he has in his pocket. The purse and contents are owned by B but B is not at the relevant time entitled to possession of them. B is married to C and is living with him in a flat owned by C. A, on visiting B and C one evening, because the purse is bulky and puts his clothes out of shape, hides the purse under his hat in C's cloakroom. On this information is there any doubt that in an issue as to possession, between a finder of the purse and A, A would be held to have been all the time in possession of it? As between C and a stranger who finds the purse, if information about A and B is not

[1] And further complicated by awareness of the special interests of persons in a position of near helplessness—e.g., the wives of tenants. See *Middleton* v. *Baldock*, [1950] 1 K.B. 657; *Errington* v. *Errington*, [1952] 1 K.B. 290; *Bendall* v. *McWhirter*, [1952] 2 Q.B. 466; R. E. Megarry, '*The Deserted Wife's Right to Occupy the Matrimonial Home*' (1952), 68 *L.Q.R.* 337, 379.

[2] See Kocourek, loc. cit.

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Equivalent Citation: 2013(4) ALJ 149, 2013 119 RD106

IN THE HIGH COURT OF ALLAHABAD

Second Appeal Nos. 970 to 978, 980 of 1982

Decided On: 08.02.2013

Appellants: **Uttar Pradesh Gandhi Smarak Nidhi**
Vs.
Respondent: **Aziz Mian**

Hon'ble Judges/Coram:
Sudhir Agarwal, J.

Counsels:
For Appellant/Petitioner/Plaintiff: U.S.M. Tripathi and Shambhavi Nandan

For Respondents/Defendant: Shashi Nandan and Durga Tiwari

Case Note:
Limitation - Barred by time - Article 120 of Limitation Act, 1908; Article 113 of Limitation Act, 1963 - Lower Appellate Court confirmed order of trial Court, wherein trial Court held that land was owned by State Government and Defendants had rights to possess property if their rights were matured in their title by completion of period of limitation prescribed for adverse possession - Hence, this Appeal - Whether Plaintiff/Appellant's suits filed in 1965 were barred by time under Limitation Act, 1908 or 1963 - Held, suit must be instituted when right asserted in suit was infringed or when there was clear threat to infringe that right by Defendants against whom suit was instituted - However in present case, property in dispute though belong to State was in possession of Defendants since before 1952 - Despite lease deed executed on 06th March, 1954, possession of disputed property must be with Defendants and this must have accrued right to sue to Plaintiff to get possession of disputed property at time other part of land came in their possession - Right to sue accrued to Appellant in March, 1954 itself and if that was so limitation to file suit expired in March, 1957 - Thus in 1965 when suits in question were filed same were within period of limitation unless Appellant would have been successful in proving their case that Defendants occupied land in dispute in November, 1962 but unfortunately on this aspect, Appellant failed to prove their case - Once Defendants occupy land in dispute belong to State without any authority, limitation to oust them there from commenced - Even if it was taken to be renewal of cause of action in 1954, still limitation would have expired by any stretch of imagination in 1959 or 1960 - Therefore suits were filed in 1965, i.e., after almost 11 years from date of execution of lease deed and getting possession, suits in question were hit by Article 120 of 1908 Act and Article 113 of 1963 Act - Hence suit was barred by limitation - Appeal dismissed.

Property - Adverse possession - Whether it was open to Defendants to raise plea of adverse possession while on one hand they pleaded that Plaintiff was not owner - Held, it was well settled that one who holds possession on behalf of another did not by mere denial of other's title make his possession adverse so as to give himself benefit of statute of limitation - In this context, it found that trial Court decided issue of limitation in very cursory

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manner and had no occasion to see plea of adverse possession - Lower Appellate Court had merged issue of limitation with plea of adverse possession which raises question of limitation - Thus Lower Appellate Court had completely failed to consider that for purpose of maturing rights of Defendants with regard to title on ground of adverse possession, plea of adverse possession were completely missing in plaint - Therefore question of transfer of title by way of adverse possession could not have arisen - Defendants had not at all stated that who was owner of land against whom and with intention to hold land adverse they continued with possession so as to confer their title after expiry of prescribed period - Further suits filed by Appellant were apparently barred by limitation thus suits were liable to be dismissed - Thus modifying judgment of Lower Appellate Court by reversing findings with respect to issue in regard to adverse possession - Hence Lower Appellate Court's decision in so far as it held that Defendants had matured their rights on account of adverse possession was set aside - Since issue relating to limitation in respect of suits had been decided in favour of Defendants and suits filed by Plaintiff had to be dismissed on ground of limitation - Appeals dismissed.

Ratio Decidendi

"If period of limitation expired, legal action will become time barred."

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JUDGMENT

Sudhir Agarwal, J.

1 . Heard Sri H.R. Mishra, learned Senior Advocate assisted by Sri Shambhavi Nandan, Advocate for appellants and Smt. Durga Tiwari, Advocate for respondents. All these appeals involve common substantial questions of law having arisen from a common judgment dated 23.12.1981 passed by Civil Judge, Deoria deciding Civil Appeal Nos. 43 of 1969, 44 of 1969, 45 of 1969, 46 of 1969, 47 of 1969, 48 of 1969, 49 of 1969, 51 of 1969, 53 of 1969, 62 of 1969 and 64 of 1969, hence, as agreed by learned counsels of the parties, have been heard together and are being decided by this common judgment.

2. Against the judgment impugned in these appeals Second Appeal No. 979 of 1982 has already been decided vide order dated 17.10.2012 on the basis of a compromise between the parties and, therefore, this Court is not concerned with that. This judgment shall not affect the aforesaid matter in any manner.

3 . The plaintiff appellant (hereinafter referred to as the "appellant"), U.P. Gandhi Smarak Nidhi instituted suits against defendants-respondents (hereinafter referred to as the "defendants") seeking removal of constructions raised by them on the ground that same is unauthorized and illegal. The case set up by appellant is that it is a registered body. Araji Nos. 285, area 80 decimal and 284, area 32 decimal, situated at Mauja Kasya Tapa Mainpur, Pargana Sidhwa Jobna, District Deoria is a Nazul land belong to State. The land was leased out to Gandhi Mishan Prachar Samiti (hereinafter referred to as "GMPS") vide lease deed dated 06.03.1954. After getting possession of the aforesaid land, GMPS handed it over to appellant, whereupon a building was raised on a part of the land and rest was left open. The defendants, sometimes in November, 1962 unauthorisedly occupied small segments of land raising Gumtis measuring about 20x20 Kadi. The act of defendants is wholly unauthorized, illegal. Complaint in this regard was also made to Sub-Divisional Magistrate and Collector concerned as well as State of U.P. and, thence, suits filed seeking dispossession of defendants from land in dispute.

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4. The defendants contested the matter by filing written statement. The defence taken was almost common. It was stated that appellants have no concern with the land in dispute. The defendants are occupying and in possession of land in dispute for the last 62 years and throughout the land has been in their possession. They were paying land revenue to Zamindar. The State Government did not execute any lease in favour of appellant. Even if, any such deed was executed, the same is unauthorized and illegal. The Collector or anyone else has no authority for even managing the land in question. The possession of defendants is very old and open and, therefore, their title by satisfaction of period for adverse possession has matured. The suit is untenable. There existed a Dharamshala between Kutchery and Masjid. It was being managed by Zamindar. With permission of Zamindar the defendants constructed their shops on certain part of land and are running the same. The rent paid by defendants to Zamindar used to be spent for maintenance of Dharamshala. After independence, the people belong to Congress party forcibly occupied Dharamshala and demanded rent from defendants to which they did not agree and hence the suits have been filed. Under U.P. Zamindari Abolition and Land Reforms Act, 1951 (hereinafter referred to as the "Act, 1951") the defendants have matured their rights under Sections 9 and 123 and the land has settled with them. The plaintiff in an illegal manner demolished Dharamshala and raised a new construction. Besides, on some part of land, M.L.A. of Congress has got certain quarters constructed. The suit is barred by time and also barred by principle of estoppels.

5. The Trial Court framed following issues:

1. Whether the plaintiff is the lessee of the land in suit?

2. Whether the disputed construction lie in the land in suit?

3. Whether the land in suit is Abadi land and it is settled with the defendants under Section 9 of the Act No. 1 of 1951 as the site of the defendants shop?

4. Whether the defendants in possession over the land in suit since the last 62 years with the permission of the then Zamindars? If so its effect?

5. Whether the suit is barred by time?

6. Whether the suit is barred by estoppel?

7. To what relief if any is the plaintiff entitled?

6. The Lower Appellate Court however added three more issues while deciding appeals, which are as under:

(Vernacular Matter Omitted....Ed)

Issue No. 8: Whether the defendants have complete possession having acquired full rights over the disputed land? If so, then its effects?

Issue No. 9: Are the defendants belong to Scheduled Caste and are landless agricultural labourers?

Issue No. 10: Whether the disputed land has been settled with the defendant u/s. 123 of U.P. Act 1/1951 (Act No. 1 of 1951)? (English translation by the Court).

7. The issue Nos. 1 and 2 were decided in affirmance, i.e., in favour of appellant. Issue Nos. 3, 4, 5 and 6 were decided against the defendants. Accordingly suits were

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decreed vide judgments dated 10.01.1969. The Trial Court passed order for demolition of shops in question and recovery of possession of site thereafter from defendants. It also decreed for recovery of damages for illegal use and occupation of sites in suit, from defendants.

8. The defendants preferred civil appeals which have been considered and decided by a common judgment dated 23.12.1981. The Lower Appellate Court as already said, added three issues. The issue Nos. 9 and 10 were decided against defendants-respondents. Issue No. 8 was on the question of adverse possession which has been decided against appellant. The Lower Appellate Court held that defendants have matured their rights by completion of period of limitation prescribed for adverse possession.

9. Considering issue Nos. 1 and 2, though Lower Appellate Court held that Trial Court has not erred in deciding the same, but, since issue No. 8 on adverse possession has been decided in favour of defendants, therefore, suit cannot be decreed.

10. While considering issue No. 8, the Lower Appellate Court also recorded a finding that construction said to have been raised by defendants relate back to a period prior to 1952 though the suit was filed in 1965, i.e., beyond the period of limitation. It is, however, interesting that the Lower Appellate Court did not consider the appeal on other issues, i.e., issue Nos. 3 to 6, separately as to whether decision of Trial Court is correct or not. Since the appellant has not challenged the findings on these issues except Issue No. 5, I would not endeavour to touch the Findings of Trial Court on Issue Nos. 3, 4 and 6 and teat the same final.

11. Following two substantial questions of law were framed while entertaining this appeal:

> **1.** Whether Article 112 of the Indian Limitation Act is applicable to the facts of the case as the suit was filed on behalf of the State of Uttar Pradesh?
>
> **2.** Whether the plaintiff's suit is within limitation as it became barred in 1958 and the suit was filed in 1965.

12. In my view, there are some more substantial questions of law which have arisen from the judgment impugned in this appeal, besides that the above two questions need refraining. These questions now would be:

> **1.** Whether the suits were barred by time under Limitation Act, 1908 or 1963, as the case may be?
>
> **2.** Whether requisite pleadings for deciding an issue of adverse possession were made by parties?
>
> **3.** Whether it was open to defendants to raise a plea of adverse possession while on the one hand they pleaded that plaintiff is not the owner?
>
> **4.** Whether, issue of adverse possession can be treated to be the limitation for tiling suit, i.e., inter se relation of provisions relating to transfer of title from owner to occupant on the ground of adverse possession and limitation applicable for maintainability of suit.

13. From the judgments of courts below, particularly the findings recorded by Trial Court in respect to Issue Nos. 1 and 2, which have been upheld and confirmed by Lower Appellate Court, it is beyond doubt that land in question is a Nazul land. A Nazul land means the land vested in the Government. It is owned and vested in the

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State Government. The defendants have no otherwise right either to possess the property or to hold it except, if their rights are matured in their title, by virtue of adverse possession.

14. The appellant admits that State Government leased land in question to GMPS, wherefrom possession came to appellant. They (appellant), therefore, are not the owner of land in question. It is the State Government, since a Nazul land belongs to State and the appellant possess possessory rights under the lease deed executed by Government.

15. What is a Nazul land? It has been considered by a Special Bench of this Court in Sunni Central Board of Waqfs v. Sri Gopal Singh Visharad and others, 2010 ADJ 1 (SFB)(LB) and, in the judgment delivered by myself, from page 2830, para 4430 and onwards, the Court said:

> **4430.** In the Legal Glossary 1992, fifth edition, published by the Legal Department of the Government of India at page 589, the meaning of the word "Nazul" has been given as "Rajbhoomi i.e. Government land". It is an Arabic word and it refers to a land annexed to Crown. During the British Regime, immoveable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as "Nazul property". The reason being that neither it was acquired nor purchased after making payment. In the old record, we are told when they used to be written in Urdu, this kind of land was shown as "Jaidad Munzabta".
>
> **4431.** For dealing with such property under the authority of the Lt. Governor of North Western provinces, two orders were issued in October, 1846 and October, 1848 wherein after the words "Nazul property" its english meaning was given as "Escheats to the Government". Sadar Board of Revenue on 20th May, 1845 issued a circular order in reference to Nazul land and in para 2 thereof it mentioned "The Government is the proprietor of those land and no valid title to them can be derived but from the Government." The Nazul land was also termed as confiscated estate. Under circular dated 13th July, 1859, issued by the Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each district and lay it before the Government for orders. The kingdom of Oudh was annexed by East India Company in 1856. It declared the entire land as vested in the Government and thereafter settled the land to various individuals Zamindars, Nawabs etc.
>
> **4437.**.....the law, whether Islam or Hindu Shastras, do not recognise any personal right of ownership upon immoveable property. The entire property within the suzerainty of the king belong to him, who had right to tax its subject in the form of tax or otherwise by realising share in the agricultural or other income in the immovable property. The percentage of share may differ and that may not be relevant for our purpose.
>
> **4438.** The second aspect of the matter is that since ancient time the right of ownership proceeded with possession and is recognized by the well known principle "possession follows title". The individual right of ownership therefore was well recognized in the various personal laws and the only right the king had to acquire the land in known valid means, namely by purchase or gift etc. The obligation upon the king is to protect the subject and his property from enemies and for that purpose he used to raise revenue from the subject in the form of tax and/or share from the income of the property

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etc. It is said that the King, by virtue of its authority, was not the sole owner of the entire immovable property within his suzerainty but though the immovable property was subject to his suzerainty, the individual right of the owner on the property continued to be recognized. Besides, the fact that the land could have been acquired by the king by valid means like purchase, gift etc., meaning thereby other modes of acquisition of immovable property by King existed otherwise no private owner of the land in question would have been there within his suzerainty.

4439. The learned counsel for the parties on this aspect referred to the doctrine of Escheat/bona vacantia. We find that the right of the King to take property by escheat or as bona vacantia was recognized by common law of England. Escheat property was the lord's right of re-entry on real property held by a tenant dying intestate without lawful heirs. It was an incident, of feudal tenure and based on the want of a tenant to perform the feudal services. On the tenant dying intestate without leaving any lawful heirs, his estate came to an end and the lord was in by his own right and not by way of succession or inheritance from the tenant to re-enter the real property as owner. In most of the cases the land escheated to the Crown as the lord paramount, in view of the gradual elimination of intermediate or mesne lords since 1290 AD. The Crown takes as bona vacantia goods in which no one else can claim property. In Dyke v. Walford, 5 Moore PC 434 - 496. 13 ER 557 (580) it was said "it is the right of the Crown to bona vacantia to property which has no other owner." The right of the Crown to take as bona vacantia extends to personal property of every kind. Giving a notice at this stage that the escheat of real property of an intestate dying without heirs was abolished in 1925 and the Crown cannot take its property as bona vacantia. The principle of acquisition of property by escheat i.e. right of the Government to take on property by escheat or bona vacantia for want of a rightful owner was enforced in the Indian territory during the period of East India Company by virtue of statute 16 and 17 Victoriae, C. 95, Section 27.

4440. We may recollect having gone through the history that several estates were taken over by British Company by applying the doctrine of lapse like Jhansi which was another kind of the above two principles. The above provisions had continued by virtue of Section 54 of Government of India Act, 1858, Section 20(3)(iii) of Government of India Act, 1915 and Section 174 of the Government of India Act, 1935. After the enactment of the Constitution of independent India, Article 296 now provides:

> Subject as hereinafter provided, any property in the territory of India which, if this Constitution had not come into operation, would have accrued to His Majesty or, as the case may be, to the Ruler of an Indian State by escheat or lapse, or as bona vacantia for want of a rightful owner, shall if it is property situate in a State, vest in such State, and shall, in any other case, vest in the Union.

4441. The Apex Court in Pierce Leslie and Co. Ltd. (supra) has considered the above principles in the context of sovereign India as it stands under its Constitution after independence and has observed that "in this country the Government takes by escheat immovable as well as movable property for want of an heir or successor. In this country escheat is not based on artificial rules of common law and is not an incident of feudal tenure. It is an incident of sovereignty and rests on the principle of ultimate ownership by the State of all property within its jurisdiction."

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4443. The Judicial Committee in Cook v. Sprigg, 1899 AC 572 discussing what is an act of State, observed: "The taking possession by Her Majesty, whether by cession or by any other means by which sovereignty can be acquired, was an act of State."

4444. This decision has been followed in Raja Rajinder Chand v. Mst. Sukhi and others, MANU/SC/0080/1956 : AIR 1957 SC 286.

16. The above discussion leads to inescapable conclusion that at present day Nazul land covers a larger area but to sum up one can say that in whatever manner land comes to vest in the State, it would be a "Nazul land", i.e., a Government land.

17. Now I come to the question of adverse possession and limitation and inter se relationship of two under Indian Limitation Act, 1963 (hereinafter referred to as the "LA 1963"). Here an incidental question would be the period of limitation for adverse possession in respect to "Nazul land".

18. Before attracting plea of adverse possession, the court must see whether requisite pleading is there or not, since adverse possession is a plea to usurp title over immovable property of another/others which otherwise the claimant does not possess. Its successful claim would mean that the real owner shall be denuded of his title and the same would stand conferred upon the claimant. The pleadings, thus, in this respect, have been held of utmost importance. They have to be very clear, emphatic and to the extent of covering every necessary ingredient to satisfy the claim of adverse possession. A claimant cannot take advantage of default on the part of other side but has to set up his case on his own failing which it is he, who has to suffer. Since this kind of claim has the result of defeating the very right of an otherwise rightful person, law is very strict on this aspect. It needs a thorough and minute inquiry into the claim of the person who asserts title on the basis of adverse possession.

19. In Abubakar Abdul Inamdar & Ors. v. Harun Abdul Inamdar & Ors., MANU/SC/0023/1996 : AIR 1996 SC 112 in the context of Articles 64 and 65 of Limitation Act, 1963 (hereinafter referred to as the "LA, 1963") emphasizing the importance of pleadings in para 5 of the judgment the Apex Court said:

> With regard to the plea of adverse possession,....one has to turn to the pleadings of the appellant in his written statement. There he has pleaded a duration of his having remained in exclusive possession of the house, but nowhere has he pleaded a single overt act on the basis of which it could be inferred or ascertained that from a particular point of time his possession became hostile and notorious to the complete exclusion of other heirs, and his being in possession openly and hostilely. It is true that some evidence, basically of Municipal register entries, were inducted to prove the point but no amount of proof can substitute pleadings which are the foundation of the claim of a litigating party. The High Court caught the appellant right at that point and drawing inference from the evidence produced on record, concluded that correct principles relating to the plea of adverse possession were not applied by the courts below. The finding, as it appears to us, was rightly reversed by the High Court requiring no interference at our end. (Para 5)
>
> (Emphasis added)

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20. Recently, the Apex Court has considered in detail the various authorities on the question of adverse possession in Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan & others, MANU/SC/4083/2008 : AIR 2009 SC 103 and in para 18 observec that 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 the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

21. The Court also referred to its earlier decision in D.N. 13 Venkatarayappa & Anr. v. State of Karnataka & Ors., MANU/SC/0766/1997 : 1997 (7) SCC 567 : (AIR 1997 SC 2930) observing:

> Therefore, 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 lands in question claiming right, title and interest in the lands 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.

22. In D.N. Venkatarayappa (supra), the Court emphasized the importance of pleading as also the pre-requisites of plea of adverse possession and said:

> **3.**...What requires to be pleaded and proved is that the purchaser disclaimed his title under which he came into possession, set up adverse possession with necessary animus of asserting open and hostile title to the knowledge of the true owner and the later allowed the former, without any let or hindrance, to remain in possession and enjoyment of the property adverse to the interest of the true owner until the expiry of the prescribed period. The classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario.
>
> ...ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario and the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.
>
> apart from the actual and continuous possession which are among other ingredients of adverse possession, there should be necessary animus on the part of the person who intends to perfect his title by adverse possession.
>
> A person who under the bona fide belief thinks that the property belongs to him and as such he has been in possession, such possession cannot at all be adverse possession because it lacks necessary animus for perfecting title by adverse possession.
>
> ...one of the important ingredients to claim adverse possession is that the person who claims adverse possession must have set up title hostile to the title of the true owner.
>
> ...there is not even a whisper in the evidence of the first petitioner with regard to the claim of adverse possession set up by the petitioners. It is not stated by the petitioners that they have been in continuous and uninterrupted

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possession of the lands in question.

But, the crucial facts to constitute adverse possession have not been pleaded. Admittedly, the appellant came into possession by a derivative title from the original grantee. It is seen that the original grantee has no right to alienate the land. Therefore, having come into possession under colour of title from original grantee, if the appellant intends to plead adverse possession as against the State, he must disclaim his title and plead his hostile claim to the knowledge of the State and that the State had not taken any action thereon within the prescribed period. Thereby, the appellant's possession would become adverse. No such stand was taken nor evidence has been adduced in this behalf. The counsel in fairness, despite his research, is unable to bring to our notice any such plea having been taken by the appellant.

Therefore, 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 lands in question claiming right, title and interest in the lands 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.

...person, who comes into possession under colour of title from the original grantee if he intends to claim adverse possession as against the State, must disclaim his title and plead his hostile claim to the knowledge of the State and the State had not taken any action thereon within the prescribed period.

5....in claiming adverse possession certain pleas have to be made such as when there is a derivative title as in the present case, if the appellants intend to plead adverse possession as against the State, they must disclaim their title and plead this hostile claim to the knowledge of the State and that the State had not taken any action within the prescribed period, it is only in those circumstances the appellants' possession would become adverse. There is no material to that effect in the present case. Therefore, we are of the view that there is no substance in any of the contentions advanced on behalf of the appellants.

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23. In Mahesh Chand Sharma v. Raj Kumari Sharma, MANU/SC/0231/1996 : AIR 1996 SC 869, the necessity of pleading was emphasized and the Court in para 36 said:

In this connection, we may emphasise that a person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all the facts necessary to establish his adverse possession. For all the above reasons, the plea of limitation put forward by the appellant, or by Defendant Nos. 2 to 5 as the case may be, is rejected.

24. In Prabhu Narain Singh v. Ram Niranjan & Ors., MANU/UP/0596/1982 : AIR 1983 All 223 in para 6 the Court observed:

A person claiming title to any land by adverse possession has to be very specific about the area of the land and the period over which he has been in possession.

25. In Ramzan & Ors. v. Smt. Gafooran Ors., MANU/UP/1451/2007 : AIR 2008 All 37 the Court observed:

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27. It is, therefore, explicit that unless there is specific plea and proof that adverse possessor has disclaimed his right and asserted title and possession to the knowledge of the true owner within a statutory period and the true owner has acquiesced to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription.

29. As pointed out above, where the defendants are not sure who is the true owner and question of their being in hostile possession then the question of denying title of true owner does not arise. At the most, the defendants have claimed and which is found to be correct by the trial court that they have been in possession of the disputed property since the inception of the sale deeds in their favour. They came in possession, according to their showing, as owner of the property in question. It follows that they exercised their right over the disputed property as owner and exercise of such right, by no stretch of imagination, it can be said that they claimed their title adverse to the true owner.

26. The pleading must be specific to the date when possession become adverse. In Ram Charan Das v. Naurangi Lal & Ors., MANU/PR/0003/1933 : AIR 1933 PC 75 the property of a Mutt was alienated by Mahant by executing a Mukararri (permanent lease) in favour of one Munshi Naurangi Lal. The sale deed of the land in dispute was also executed to another one and both the documents contain a stipulation that they were executed to meet expenses and necessities of Mutt. After the death of Mahant, a suit was filed by successor in office against the lessee and purchaser etc. claiming possession of property in dispute to Mutt. The defendants besides others, took the plea of adverse possession also. The question was, did possession of the concerned defendant became adverse to Mutt or Mahant representing the Mutt on the date of relevant assurance or date of death of the concerned Mahant. The trial court held latter date to be correct while the High Court took a contrary view and upheld the former date. The Privy Council held:

> In other words a mahant has power (apart from any question of necessity) to create an interest in property appertaining to the Mutt which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of mahant of the mutt, with the result that adverse possession of the particular property will only commence when the mahant who had disposed of it ceases to be mahant by death or otherwise. If this be right as it must be taken to be, where the disposition by the mahant purports to be a grant of a permanent lease, their Lordships are unable to see why the position is not the same where the disposition purports to be art absolute grant of the property nor was any logical reason suggested in argument why there should be any difference between the two cases. In each case the operation of the purported grant is effective and endures only for the period during which the mahant had power to create an interest in the property of the mutt.
>
> (Emphasis added)

27. The pleading is necessary since burden also lies on the person who claims adverse possession. In Smt. Bitola Kuer v. Sri Ram Charan & Ors., MANU/UP/0137/1978 : AIR 1978 All 555 in para 16 the Court said:

> It is well settled that title ordinarily carries with it the presumption of possession and that when the question arises is to who was in possession of land, the presumption is that the true owner was in such possession. In other word, possession follows title. The inevitable Corollary from this principle is

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that the burden lies on the person who claims to have acquired title by adverse possession to prove his case.

28. In the present case, from perusal of pleadings, it is evident that case set up by appellant was that possession of land came to the hands of GMPS in March, 1954 pursuant to lease deed dated 06.03.1954. The defendants forcibly dispossessed appellant from disputed part of land in November, 1962 and placed Gumti 20x20 kadi as per details of boundaries mentioned at the end of plaint. The plaint is dated 07.08.1965/16.08.1965 and was registered in Trial Court on 28.08.1965.

29. On the contrary the defendants in written statement dated 24.11.1965 pleaded that they are in possession for the last 62 years. An application was filed by appellant earlier also, which was rejected on 31.12.1963. The alleged dispossession of appellant in November, 1962 is incorrect inasmuch as disputed land and Gumti thereon existed since long and was also in existence in 1951 when Act No. 1 of 1951 was enacted.

30. Para 27 of written statement was amended by addition of certain statements regarding adverse possession stating that defendants are in possession of disputed property for more than 12 years. Therefore, they have matured their rights of ownership by virtue of adverse possession. No time etc. has been mentioned in respect to the date since when the defendants claimed their possession adverse to appellant.

31. In paras 20, 21 and 22 of written statement, however, the claim of appellant in respect to disputed property has been denied in its entirety stating:

(Vernicular Matter Omitted...Ed)

20. That the plaintiff has no concern at all with the plot numbers wherein construction of defendant is situated.

21. That in any case plot Nos. 284 and 285 are neither State Government's land nor Nazul land.

22. That neither Gandhi Nidhi Samiti entered into possession of disputed plot nor their name was ever entered in records. (English translation by the Court)

32. The suit was filed in 1965. The defendants claimed possession since before 1951. The existence of Gumti has been found even before 1952. Admittedly appellant was not in possession of disputed property in 1952 or earlier thereto. It was in the hand of State before it came to be occupied by defendants. The question relating to limitation has to be examined in these facts. The Court will have to see, which provision of Limitation Act apply here and also whether it would be Limitation Act, 1908 (hereinafter referred to as the "LA, 1908") or LA, 1963.

33. In the facts of the case, one out of two statutes of limitation would apply in the present case. Which one, that is also an ancillary but integrally connected issue.

34. Limitation is a procedural law though there exist certain provisions conferring substantive right upon an incumbent.

35. The nature of the statute on limitation was considered in C. Beepathuma and others v. Valasari Shankaranarayana Kadambolithaya and others, MANU/SC/0209/1963 : AIR 1965 SC 241 and it say.

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There is no doubt that the Law of Limitation is a procedural law and the provisions existing on the date of the suit apply to it.

(Emphasis added)

36. Before the British, during the period when Muslims ruled the Country (in particular Oudh), it appears that personal laws governed all matters. The Muslim law does not recognize limitation; while in Hindu personal laws, on certain aspects, in different schools, some provisions for limitation are prescribed which are not common to all the Hindus. Hindu Law recognizes both prescription and limitation while Muslim jurisprudence recognises neither of them. In some of the Smritis a period of 20 years was prescribed for acquisition of title by prescription. It appears that since agriculture was main occupation of the people, Smritis concentrated more on land and on the rights therein.

37. Thus prior to 05.05.1859 there was no common law of limitation applicable to whole of India. The Provincial Courts in each Presidency established by East India Company were governed by certain Regulations, like; Regulation III of 1793 (Bengal); Regulation II of 1802 (Madras); Regulation I of 1800 (Bombay) and the Acts particularly applicable to them like Act I of 1845; Act XIII of 1848; Act XI of 1859. The Non-Regulation Provinces i.e. Punjab and Oudh etc. were governed by Codes of their own and sometimes by Circular Orders of Judicial Commissioner. The three Supreme Courts established by Royal Charter adopted English Law of Limitation.

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38. Cause of action with respect to the statutes of Limitation as applicable in England in one of the earliest cases came to be considered in 1849 as to when it would run. Privy Council in The East India Company v. Oditchurn Paul, 1849 (Cases in the Privy Council on Appeal from the East Indies) 43 held that the Statute runs from the time of breach, for that constitutes the cause of action. With reference to the East India Company, it observed that the statute of limitation was extended to India by Indian Act No. XIV of 1840. The appeal against the Supreme Court of Judicature at Fort William in Bengal (Calcutta) was allowed by Privy Council. It also observed therein, if the matter would have been tried by Hindu law, the limitation of suits, under the Hindu law, would have been twelve years.

39. The first codified statute was Act No. XTV of 1859, enacted to amend and consolidate laws relating to limitation of suits. This Act received assent of Governor General on 5th May, 1859. It was repealed by Act No. IX of 1871, Act XV of 1877, by Act IX of 1908, i.e., LA 1908 and lastly the Courts in India are now governed by LA, 1963 after repeal of LA, 1908.

40. Act XTV of 1859 provided limitation of suits only.

41. Though Act No. XIV of 1859 was drafted in a language much more precise than the loose phraseology of earlier Regulations, but the Privy Council in The Delhi and London Bank v. Orchard, MANU/PR/0016/1877 : ILR 3 (1876) Calcutta 47 (PC) observed it as an "inartistically drawn statute".

42. Act IX of 1871 extended the scope and made provisions relating to limitation to suits, appeals and certain applications to Courts. It received assent of Governor General on 24th March, 1871. Second Schedule, First Division, Articles118, 143 and 145 provided limitation for possession of immovable property and read as under:

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	Description of suit	Period of limitation	Time when period begins to run
118	Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
143	For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
145	For possession of immovable property or any interest therein not hereby otherwise specially provided for	Twelve years	When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff.

43. Drafting of this statute received better observation from Privy Council in Maharana Futtehsangji v. Dessai Kullianraiji (1873) LR 1 IA 34 and it commented as a "more carefully drawn statute".

44. The Act gave for the first time some recognition to the doctrine of prescription by the Legislative Council of India, viz. the doctrine of extinctive prescription as to land and hereditary offices, and of positive prescription as to easements. It lived short and was replaced by Act 15 of 1877 which extended principle of extinctive prescription to movable property and the principle of positive or acquisitive prescription to profits a prendre.

45. 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.

46. Doctrine of limitation and prescription is based upon the broad considerations. The first, there is a presumption that a right not exercised for a long time is non-existent. Where a person has not been in possession of a particular property for a long time, the presumption is that he is not the owner thereof. The reason is that owners are usually possessors and possessors are usually owners. Possession being normally evidence of ownership, the longer the possession has continued the greater is its evidentiary value. The legislature it appears, therefore, thought it proper to confer upon such evidence of possession for a particular time a conclusive force. Lapse of time is recognised as creative and destructive of right instead of merely an evidence for and against their existence. The other consideration on which the doctrine of limitation and prescription may be said to be based is that title to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense. It would not be in the interest of public at large. The object of the statute of limitation is preventive and not creative but in a matter

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covered by the principle of "adverse possession" it also creates. It interposes a statutory bar after a certain period and gives a quietus to suits to enforce an existing right.

47. Act XV of 1877 received assent of Governor General on 19th July, 1877 and came into force on 1st October, 1877. Articles 120, 142 and 144 (relevant in respect to a suit for possession), Second Schedule First Division of the said Act reads as under:

	Description of suit	Period of limitation	Time when period begins to run
120	Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
142	For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discountinued the possession.	Twelve years	The date of the dispossession or discontinuance.
144	For possession of immovable property of any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

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48. There were several amendments in the above statute and ultimately it was repealed and replaced by Act 9 of 1908.

49. L.A., 1908 came into force on 1st January, 1909. It continued with the provision imposing obligation upon the Court to dismiss a suit if, while it is instituted, is already barred by limitation vide Section 23.

50. The arrangement of Articles 120, 142 and 144 in L.A., 1908 remained the same, i.e., Articles 120, 142 and 144 and is verbatim:

	Description of suit	Period of limitation	Time when period begins to run
120	Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
142	For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
144	For possession of immovable property of any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

51. The doctrine of limitation is founded on considerations of public policy and

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expediency. It does not give a right where there exist none, but to impose a bar after a certain period to the remedy for enforcing an existing right. The object is to compel litigants to be diligent for seeking remedies in Courts of law if there is any infringement of their right and to prevent and prohibit stale claims. It fixes a life span for remedy for redressal of the legal injury, if suffered, but not to continue such remedy for an immemorial length of time. Rules of limitation do not destroy the right of the parties and do not create substantive rights if none exist already. However, there is one exception i.e. Section 28 of L.A., 1908, which provides that at the determination of the period prescribed for instituting suit for possession of any property, his right to such property shall stand extinguished and the person in possession, after expiry of the such period, will stand conferred title. The law of limitation is enshrined in the maxim "interest reipublicae ut sit finis litium" (it is for the general welfare that a period be part to litigation).

52. This statute is based upon two broad principles. First, there is a presumption that a right not exercised for a long time is non-existent. Where a person has not been in possession of a particular property for a long time, the presumption is that he is not the owner thereof. The owners are usually possessors and possessors are usually owners. Possession, thus, is normally evidence of ownership. Longer the possession has continued the greater is its evidentiary value. The law therefore has deemed it expedient to confer upon such evidence of possession for a particular time, a conclusive force.

53. In Motichand v. Munshi, MANU/SC/0127/1968 : AIR 1970 SC 898, the Court noticed the maxim vigilantibus non dormientibus jura subventiunt (the law assists the vigilant not those who sleep over their rights). Though there is a general principle ubi jus ibi remedium i.e. where there is a legal right there is also a remedy, but there are certain exceptions to this general rule.

54. Mere expiry of limitation could have extinguished remedy but the principle embodied in Section 28 extinguishes the right also and thereby makes the said general principle inapplicable. Once the right of getting possession extinguished it cannot be revived by entering into possession again [See Salamat Raj v. Nur Mohamed Khan (1934) ILR 9 Lucknow 475; Ram Murti v. Puran Singh, MANU/PH/0386/1962 : AIR 1963 P&H 393; Nanhekhan v. Sanpat,AIR 1954 Hyd 45 (FB) and Bailochan Karan v. Bansat Kumari Naik, MANU/SC/0074/1999 : 1999 (2) SCC 310 : (AIR 1999 SC 876)].

55. In this matter the appellant has also attempted to bring their case to outclass the bar of limitation by pleading that the wrong is de-die in dium, hence being a continuing wrong, no obstruction of limitation is there,

56. Article 120 is completely a residuary provision and where limitation cannot be found in any other provision, only then it would be attracted. In other words Article 120, L.A., 1908 would be attracted only when Articles 142 and 144 are inapplicable.

57. Between the Articles 142 and 144 the later one is a kind of residuary provision while Article 142 applies in a specific type of case [See Sidram Lachmaya v. Mallaya Lingaya, MANU/MH/0075/1948 : AIR (36) 1949 Bom 137 (Para9); Ranchordas Vandravandas v. Parvatibai (1902) 29 IA 71 (PC)].

58. A Full Bench of this Court in Bindyachal Chand v. Ram Gharib, MANU/UP/0284/1934 : AIR 1934 All. 993 (FB) held where Article 142 is applicable, Article 144 cannot be applied. First it has to be seen whether Article 142 applies in the case or not and when it clearly becomes inapplicable only then resort can be taken to Article 144

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59. Article 142 applies where the plaintiff while in possession has been dispossessed or has discontinued his possession Where a person has been dispossessed or discontinued of his possession of the property, he can bring an action seeking restoration of possession of the immovable property within 12 years It pre-supposes the possession of such person over the immovable property before he is dispossessed or discontinued Article 144, however, applies where any other provision specifically providing for restoration of immovable property or interest therein is not available and there also though the period of limitation is 12 years but the limitation runs from the date when possession of defendants becomes adverse to the plaintiff and commonly it is said that this provision is in respect to the cases where defendant's possession is said to be adverse. Though the distinction is quite evident but in the complex nature of society and the disputes which arise, at times the courts find difficulty in maintaining distinction between the two and there appears to be some conflicting views also as to the scope of Article 142, LA, 1908 and its applicability What has been ultimately realised is that the question would basically that of pleading

60. In reference to Article 143 of Act 9 of 1871 the Privy Council in Bibi Sahodra v Rai Jang Bahadur, MANU/PR/0032/1881 : (1881) ILR 8 Cal 224 : 8 IA 210 said:

> refers to a suit for possession of immovable property, where the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, and it allows twelve years from the date of the dispossession or discontinuance. But in order to bring the case under that head of the schedule, he must show that there has been a dispossession or discontinuance.

61. The view, therefore, was that Article 143 of Act 9 of 1871 which is corresponding to Article 142 of Act 15 of 1877 and L.A., 1908 would not be attracted where pleadings distinctly show that there was no dispossession or discontinuance of possession of the plaintiff.

62. In Karan Singh v. Bakar Ali Khan (1883) ILR 5 All 1 the question of application of Article 145 of Act 9 of 1871 arose. Sir Peacock observed that a suit can be brought within 12 years from the time when the possession of the defendant or of some persons through whom he claims, became adverse to the plaintiff.

63. In both the type of cases possession by itself is of much relevance and importance. The courts took the view that by reason of his possession a person may have an interest which can be sold or devised. One has to prove first his possession before making complaint of dispossession or discontinuance of possession. He need not prove the title or the capacity in which he had the possession for the purpose of Article 142. However, after title is proved, the presumption of possession goes with it unless proved otherwise.

64. Privy Council in Sundar v. Parbati MANU/PR/0013/1889 : (1890) ILR 12 All 51 agreed with the view of this court that possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised.

65. In Mohima Chundar Mozoomdar & Ors. v. Mohesh Chundar Neogi & Ors. (1888-1889) 16 Indian Appeals 23 considering Article 142 of Act 15 of 1877, the Judicial Commissioner held that onus lies upon the plaintiffs to prove their possession prior to the time when they were dispossessed, and at sometime within twelve years before the commencement of the suit so as to save suit from limitation prescribed under Article 142.

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66. Articles 142 and 144 of Act XV of 1877 came up for consideration before the Judicial Commissioner in Nawab Muhammad Amanulla Khan v. Badan Singh & Ors. (1888-1889) 16 Indian Appeals 148. It held that Article 142 applies where the plaintiff while in possession of the immovable property earlier had been dispossessed or has discontinued the possession and in such a case to bring a suit for possession, limitation would be 12 years. However, Article 144 applies only as to adverse possession where there is no other Article which specifically provides for the same. In the aforesaid case there was a refusal on the part of the plaintiffs and their ancestors to make the engagement for payment of revenue. The Government made engagement with the villagers (defendants). It was held that this amounted to dispossession or discontinuance of possession of the plaintiff within the meaning of Article 142 of Act 15 of 1877 and this case would not be governed by residuary Article 144 as to adverse possession.

67. Explaining inter relationship of the two Articles Punjab Chief Court in Bazkhan v. Sultan Malik, 43 PR 1901 held that suit for possession of immovable property upon discontinuance of possession or dispossession is barred after 12 years under Article 142 of the Limitation Act although no adverse possession is proved. Articles 144 and 142 cannot both apply. Article 144 in terms is applicable only when no other Article is found applicable.

68. Privy Council in Dharani Kanta Lahiri v. Gabar Ali Khan MANU/PR/0103/1912 : (1913)18 IC 17 said:

> it lay upon the plaintiffs to prove not only a title as against the defendants to the possession, but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within the 12 years immediately preceding the commencement of the suit.

69. In the above case a suit was filed for ejectment of persons who were admittedly in possession of land from which they were sought to be evicted.

70. In Secretary of State v. Chelikani Rama Rao (1916) ILR 39 Mad 617 Lord Shaw on page 631 of the report observed:

> nothing is better settled than that the onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.'.....It would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.
>
> (Emphasis added)

71. In Kanhaiya Lal v. Girwar, 1929 ALJ 1106 this Court said:

> this article applies to suit in which the plaintiff claims possession of the property on the ground that while in possession he was dispossessed or his possession was discontinued by the defendant. In other words that article is restricted to cases in which the relief for possession sought by the plaintiff is based on what may be styled as possessory title.

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> possession is in itself title and good against every body except the true owner. In short, there may be cases in which a person, though not the true owner, has been in peaceful possession of property and his possession is disturbed. In such cases the person dispossessed has a right to be restored back to possession on proving the fact of his possession and his dispossession or discontinuance of his possession by the defendant within a period of 12 years prior to the institution of the suit. To such cases Art. 142 applies.

72. It thus appears that the Court followed the principles that the correct Article to apply in cases based upon the allegation of title and possession is Article 144 because if plaintiff's title is proved he is entitled to succeed unless the defendants prove that the title has been lost on account of adverse possession on the part of defendants. But the plaintiff though not able to substantiate his title, is in a position to prove his possession and dispossession by defendants within 12 years, if that be the case, Article 142 will apply and the burden will lie on the plaintiff. This was in fact misunderstood in the sense that a suit of owner who also had actual possession, if dispossessed or discontinued possession was not treated to be covered by Article 142. This is evident in Kalian v. Mohammad Nabikhan, 1933 ALJ 105. Fortunately this mistake was soon realised and the view otherwise was overruled by a Full Bench in Bindyachal Chand (MANU/UP/0284/1934 : AIR 1934 All 993) (supra) where it was held that Article 142 is not restricted to suits based on possessory title only as distinguished from suits in which plaintiff proved his proprietary tide as well. This view of the Full Bench was followed by a Full Bench of Lahore High Court in Behari Lal v. Narain Das, MANU/LA/0420/1935 : AIR 1935 Lah 475.

73. In Shyam Sunder Prasad & others v. Raj Pal Singh & Anr., MANU/SC/0540/1995 : 1995(1) SCC 311 in reference to Articles 142 and 144 of L.A., 1908 the Apex Court said:

> Under the old Limitation Act, all suits for possession whether based on title or on the ground of previous possessions were governed by Article 142 wherein the plaintiff while in possession was dispossessed or discontinued in possession. Where the case was not one of dispossession of the plaintiff or discontinuance of possession by him, Article 142 did not apply. Suits based on title alone and not on possession or discontinuance of possession were governed by Article 144 unless they were specifically provided for by some other Articles. Therefore, for application of Article 142, the suit is not only on the basis of title but also for possession.

74. Thus, the judicial consensus now binding on this Court is to the effect that Article 142 is one of me specific provision governing suits for possession of immovable property and contemplates a suit for possession when the plaintiff, while in possession has been dispossessed or has discontinued possession [See also Abbas Dhali Masabdi Karikar MANU/WB/0382/1914 : (1914) 24 IC 216 (Cal)].

75. Article 144 in the matter of an occasion for possession of immovable property or an interest therein is a residuary Article hence the allegations made in the plaint if brings the suit within Article 142, there is no justification or occasion to take the matter out of that Article and then to apply Article 144. It is only when Article 142 is not applicable and no other Article applies, based on the pleadings, then if attracted, Article 144 may be applied. Article 142 is neither subordinate nor subject to Article 144 but will have application on its own and independent. Article 144 thus is a kind of residuary Article and will have application when no other Article has application to the matter. In Bindyachal Chand (MANU/UP/0284/1934 : AIR 1934 All 993) (supra)

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Justice Mukherjee observed, if, on the allegations made in the plaint, suit falls within Article 142, there is no justification to take it out of Article 142 and attempt to bring Article 144 into picture.

76. I may notice at this stage that the view taken by the Courts that Article 142 would apply to a suit by the owner of the property as well as a person suing on the basis of possessory titles and thereby seems to favour even a trespasser, as observed in Bindyachal Chand (supra) and some other Courts that its applicability to a suit is based on possessory title constitute one of the relevant aspect resulted in possibility of helping miscreants. This view, besides other, caused in a specific and clear provision in the new statute i.e. L.A., 1963 where words "or has discontinued the possession" were omitted in column 3 and the words "based on previous possession and not on title" were inserted in column 1 in Article 64 thereof.

77. Article 142 contemplates earlier possession before dispossession or discontinuance thereof. This bring us to understand the term 'Possession'. It has a variety of meanings. It is a juristic concept distinct from title and can be independent of it. It is both physical and legal concept. The concept of possession implies "corpus possession" coupled with "animus possidendi". Actual user without animus possidendi is not a possession in law. In fact, possession is a polymorphous term having different meanings in different context. It has different shades of meaning and very elastic in its connotation. This has already been discussed above in detail.

78. The pivotal point to attract Article 142 and to run limitation is the date of "dispossession" or "discontinuation of possession". The period of limitation thus would commence, in a case governed by Article 142, from the date the plaintiff is "dispossessed" or "discontinued". The two terms ex facie do not and cannot have the same meaning.

79. The dictionary meaning of the term "dispossession" is:

(A) In "Mitra's Legal & Commercial Dictionary" 5th Edition (1990) by A.N. Sana, published by Eastern Law House Prv. Ltd., at pages232-233:

> Dispossession. The term 'dispossession' applies when a person comes in and drives out others from possession. It imports ouster; a driving out of possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against the will of the person in possession but in accordance with his wishes and active consent. The term 'discontinuance' implies a voluntary act and abandonment of possession followed by the actual possession of another. Qadir Bux v. Ramchand, MANU/UP/0046/1970 : AIR 1970 All 289.
>
> Unless the possession of a person prior to his alleged dispossession is proved, he cannot be said to have been dispossessed. Rudra Pratap v. Jagdish : MANU/BH/0030/1956 : AIR 1956 Pat 116.

(B) In "Black's Law Dictionary" Seventh Edition (1999), published by West, St. Paul, Minn., 1999, at page 485:

> dispossession Deprivation of, or eviction from, possession of property; ouster.

(C) In "The Judicial Dictionary of Words and Phrases Judicially Interpreted,

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to which has been added Statutory Definitions" by F. Stroud Second Edition Vol. 1 (1903), at page 485;

> "DISPOSSESSION." Dispossession, or Discontinuance of Possession," S.3, Real Property Limitation Act, 1833, means the ABANDONMENT of possession by one entitled to it (Rimington v. Cannon, 22 LJ CP 153; 12 CB 18), followed by actual possession by another (Smith v. Lloyd, 23 LJ Ex 194; 9 Ex 562: McDonnell v. MeKinty, 10 Ir LR 514); ignorance on the part of the rightful owner that such adverse possession has been taken making no difference (Rains v. Buxton, 49 LJ Ch 473; 14 Ch D 537; 28 WR 954).
>
> Acts of user which do not interfere, and are consistent, with the purpose to which the owner intends to devote the land, do not amount to Discontinuance of Possession by him (Leigh v. Jack, 5 Ex D 264; 49 LJ Ex 220); Dispossession "involves an animus possidendi with the intention of excluding the owner as well as other people" (per Lindley, M.R., Littledale v. Liverpool College, 69 L.J. Ch. 89, cited DISCONTINUANCE).
>
> SMALL ACTS by the rightful owner will disprove "Dispossession or Discontinuance," e.g. small repairs (Leigh v. Jack, sup), or, as regards a boundary wall, an inscription claiming it (Phillipson v. Gibbon, 40 LJ Ch 406; 6 Ch. 428).
>
> Vh, Watson, Eq. 574, 575; and for a full examination of the cases on "Dispossession" and "Discontinuance," V. 35 S.J. 715, 742, 750.

(D) In "Corpus Juris Secundum" A Complete Restatement of the Entire American Law as developed by All Reported Cases (1959), Vol. 27, published by Brooklyn, N.Y. The American Law Book Co., at pages 600-601:

> DISPOSSESSION. The act of putting out of possession, the ejectment or exclusion of a person from the realty, if not to his injury, then certainly against his interest and without his consent, ouster.
>
> The term has been held not to imply necessarily a wrongful act; and, although it has been defined as a wrong that carries with it the emotion of possession, an act whereby the wrongdoer gets the actual possession of the land or hereditament, including abatement, intrusion, disseisin, discontinuance, deforcement, it has been said that it may be by right or by wrong, that it is necessary to look at the intention in order to determine the character of the act, and that, in this respect, the word is to be distinguished from "disseisin."

(E) In "Words and Phrases" Legally Defined, Vol. 2 (1969), published by Butterworth & Co. (Publishers) Ltd., at pages 89-90:

> DISPOSSESSION [A partnership was dissolved, and the continuing partner, Hudson, agreed, in consideration of an assignment to him of the partnership property, to pay an annuity to the retiring partner. In order to carry into effect this agreement an indenture was entered into and executed between the parties; and Hudson bound himself to trustees, in the sum of Â£ 2,000, by a bond of even date conditioned to be void on payment of the annuity "or in case he should at any time after the expiration of the then existing lease, be dispossessed

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of and be compelled and obliged to leave and quit the premises without any collusion, contrivance, consent, act, or default" on his part.] "It seems that the species of dispossession in contemplation was a compulsory eviction; and they meant to provide that, if Hudson should be evicted, not through any fault of his own, he should no longer be burdened with payment of the annuity.... The expulsion intended to be provided for, was such an expulsion as would leave Hudson no benefit from the premises." Heyland v. De Mendez (1817), 3 Mer 184, per Grant, MR, at p. 189.

(F) In P. Ramanatha Aiyar's "The Law Lexicon" with Legal Maxims, Latin Terms and Words & Phrases, Second Edition (1997), published by Wadhwa and Company Law Publishers, at page 573:

Dispossession. Where the heirs of the deceased could not realise rent owing to successful intervention of another person, it must be taken that they were dispossessed. "Dispossession" impliesouster, and the essence of ouster lies in that the person ousting is in actual possession.

Dispossession implies some active element in the mind of a person in ousting or dislodging or depriving a person against his will or counsel and there must be some sort of action on his part.

The word "dispossession" in the third column of the article is dispossession by the landlord or by an authorised agent of the landlord acting within the scope of his authority.

Dispossession obviously presupposes previous possession of the person dispossessed. If a person was never in possession, he will be said to be out of possession, but he cannot be said to have ever been dispossessed.

80. Similarly the meaning of term "discontinuance" in various dictionaries is as under:

(A) In "The New Lexicon Webster's Dictionary of the English Language" (1987), published by Lexicon Publications, Inc. at page 270:

Discontinuance a discontinuing (law) the discontinuing of an action because the plaintiff has not observed the formalities needed to keep it pending.

(B) In "Mitra's Legal & Commercial Dictionary" 5th Edition (1990) by A.N. Saha, published by Eastern Law House Prv. Ltd., at page 229:

Discontinuance of Possession. Discontinuance of possession connotes abandonment of possession by the owner followed by the taking of possession by another. Hashim v. Hamidi, MANU/WB/0151/1941 : AIR 1942 Cal 180 : 46 CWN 561.

Discontinuance implies a voluntary act and abandonment of possession followed by the actual possession of another. Quadir Bux v. Ramchand, MANU/UP/0046/1970 : AIR 1970 All 289.

(C) In "Black's Law Dictionary" Seventh Edition (1999), published by West, St. Paul, Minn., 1999, at page 477:

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> discontinuance 1. The termination of a lawsuit by the plaintiff; a voluntary dismissal or nonsuit. See Dismissal; Nonsuit. 2. the termination of an estate-tail by a tenant in tail who conveys a larger estate in the land than is legally allowed.

(D) In "The Judicial Dictionary of Words and Phrases Judicially Interpreted, to which has been added Statutory Definitions" by F. Stroud Second Edition Vol. 1 (1903), at pages 540-541:

> "DISCONTINUANCE." 'Discontinuance' is an ancient word in the law (Litt. S. 592). "A discontinuance of estates in lands or tenements is properly (in legal understanding) an alienation made or suffered by tenant in taile, or by any that is seized in auteur droit, whereby the issue in taile, or the heir or successor, or those in reversion or remainder, are driven to their action, and cannot enter" (Co. Litt. 325 a).Vf, Termes de la Ley : 3 Bl.Com. 171.
>
> "Discontinuance of POSSESSION," Ss. 3, 3 & 4 W. 4, c. 27; V. Leigh v. Jack, 5 Ex D 264; 49 LJ Ex 220: Littledale v. Liverpool College, 1900, 1 Ch. 19; 69 LJ Ch 87; 81 LT 564; 48 WR 177.

(E) In "Corpus Juris Secundum" A Complete Restatement of the Entire American Law as developed by All Reported Cases(1956), Vol. 26A, published by Brooklyn, N.Y. The American Law Book Co., at pages 971-972:

> DISCONTINUANCE. The word "discontinuance" is defined generally as meaning the act of discontinuing; cessation; intermission; interruption of continuance.
>
> As defined in Dismissal and Nonsuit; 2, the word "discontinuance" means an interruption in the proceedings of a case caused by the failure of the plaintiff to continue the suit regularly as he should, and it is either voluntary or involuntary, and is similar to a dismissal, nonsuit, or nolle prosequi, but differs from a retraxit.
>
> In a particular connection, it has been held that the term connotes a voluntary, affirmative, completed act, and that it cannot mean a temporary non-occupancy of a building or a temporary cessation of a business.
>
> The term may be employed as synonymous with "abandonment."

(F). In "Words and Phrases" Permanent Edition, Vol. 12A (1954), published by St. Paul, Minn. West Publishing Co., at pages 276-277:

> DISCONTTNUANCE-A "discontinuance" of case is a gap or chasm in proceeding after suit is pending.
>
> The term "discontinuance" means voluntary withdrawal of a suit by a plaintiff.
>
> There exists no essential difference between a "discontinuance" and a "voluntary nonsuit."
>
> A criminal suit may be discontinued, "discontinuance" being a gap or chasm in prosecution after suit is pending.

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The word "discontinuance" is synonymous with "abandonment," and connotes a voluntary, affirmative, completed act.

The word "discontinuance" as it is used in the ordinance is synonymous with "abandonment". It connotes a voluntary, affirmative, completed act.

Word "discontinuance" as employed in deed of land from city to county providing in effect that property was deeded to county to be used for park purposes and that city reserved all right of reversion in event of discontinuance of property for park purposes was equivalent to abandonment.

Narrowing of street held not "discontinuance" within statute requiring written petition as basis for action by village board.

"Discontinuance," generally speaking, is failure to continue case regularly from day to day and from term to term from commencement of suit until final judgment.

The word "discontinue" as used in ordinance, providing that, if nonconforming use of premises was discontinued future use should be in conformity with ordinance, means something more than mere suspension, and did not mean temporary non occupancy of building or temporary cessation of business, but word "discontinuance" as used was synonymous with abandonment, and connoted voluntary affirmative completed act. Zoning ordinance did not destroy owner's right to continue nonconforming use of premises merely because tenant became insolvent.

(G) In P. Ramanatha Aiyar's "The Law Lexicon" with Legal Maxims, Latin Terms and Words & Phrases, Second Edition (1997), published by Wadhwa and Company Law Publishers, at page 562:

Discontinuance. Default; a discontinuance in practice is the interruption in proceedings occasioned by the failure of plaintiff to continue the suit from time to time as he ought, or failure to follow up his case: A break or chasm in a suit arising from the failures of the plaintiff to carry the proceedings forward in due course of law.

Discontinuance is either voluntary, as where plaintiff withdraws his suit or involuntary, as where in consequence of some technical omission, mispleading, or the like, the suit is regarded as out of courts, A discontinuance means no more than a declaration of plaintiff's willingness to stop the pending action; it is neither as adjudication of his cause by the proper tribunal nor an acknowledgment by him that his claim is not will founded.

(H) In "Jowitt's Dictionary of English Law" Vol. 1 Second Edition 1977, Second Impression 1990, published by London Sweet & Maxwell Limited, at pages 621 -622:

Discontinuance, an interruption or breaking off. This happened when he who had an estate tail granted a larger estate of the land than by law he was entitled to do; in which case the estate was good so far as his power extended to make it, but no further (Finch L. 190; 1 Co.

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Rep. 44).

> Formerly, in the law of real property, discontinuance was where a man wrongfully alienated certain lands or tenements and dies, whereby the person entitled to them was deprived of his right of entry and was compelled to bring an action to recover them,. The term was specially applied to alienations by husbands seised jure uxoris, by ecclesiastics seised jure ecclesiae, and by tenants in tail: thus, if a tenant in tail alienated the land and died leaving issue, the issue could not enter on the land but was compelled to bring and action (Litt. 470, 592, 614; Co. Litt. 325A; Termes de la Ley; 3 Bl.Comm.171).
>
> The principal action appropriate to discontinuance were formedon, cui in vita, and cui ante divortium. The effect of discontinuance was taken away by the Real Property Limitation Act, 1833, S. 39. See Miscontinuance; Recontinuance; Withdrawal.
>
> In the procedure of the High Court discontinuance is where the plaintiff in an action voluntarily puts an end to it, either by giving notice in writing to the defendant not later than fourteen days after service of the defence (R.S.C. Ord. 21, R. 2(1)) or later with leave of the court (R.3). The effect of discontinuance is that the plaintiff has to pay the defendant's costs (R.S.C. Ord. 62, R. 10(1)) and any subsequent action may be stayed until these costs are paid (R.S.C. Ord. 21, R. 5). A defendant may withdraw his defence at any time and may discontinue a counterclaim by notice not later than fourteen days after service of a defence to the counterclaim (R. 2(2)). A counterclaim may be discontinued later by leave of the court (R.3). He must pay the costs of the plaintiff (R.S.C. Ord. 62, R. 5). If all the parties consent the action may be withdrawn without leave of the court (R.2(4)).

81. The term "dispossession" and "discontinuance of possession" in Article 142, Act IX of 1908 came to be considered before the Calcutta High Court in Brojendra Kishore Roy Chowdhury & others v. Bharat Chandra Roy and others, MANU/WB/0147/1915 : AIR 1916 Cal 751 and the Court held:

> Dispossession implies the coming in of a person and the driving out of another from possession. Discontinuance implies the going out of the person in possession and his being followed into possession by another.

8 2 . In Basant Kumar Roy v. Secretary of State for India & others, MANU/PR/0025/1917 : AIR 1917 PC 18, the Court explained the term 'dispossession in Article 142 of Limitation Act of 1877:

> The Limitation Act, of 1877, does not define the term "dispossession", but its meaning 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 it continues until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land, is not capable of use and enjoyment",....It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on de facto use and occupation.

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83. The distinction between "dispossession" and "discontinuance" has been noticed in Gangu Bai v. Soni MANU/NA/0153/1941 : 1942, Nagpur Law Journal 99 observing that "dispossession" is not voluntary, "discontinuance" is. In dispossession, there is an element of force and adverseness while in the case of discontinuance, the person occupying may be an innocent person. For discontinuance of possession, the person in possession goes out and followed into possession by other person.

84. In Agency Company v. Short, 1888(13) AC 793 the Privy Council observed that there is discontinuance of adverse possession when possession has been abandoned. The reason for the said observation finds mention on page 798 that there is no one against whom rightful1 owner can bring his action. The adverse possession cannot commence without actual possession and this would furnish cause of action.

85. Dispossession is a question of fact. The term refers to averments in the plaint exclusively and cannot be construed as referring to averments in the plaint in the first instance and at a later stage to the finding on the evidence. The indicias of discontinuance are also similar to some extent. It implies going out of the person in possession and is being followed into possession by another. In Abdul Latif v. Nawab Khwaja Habibullah, 1969 Calcutta Law Journal 28, the Court observed that discontinuance connotes three elements i.e. actual withdrawal, with an intention to abandon, and another stepping in after the withdrawal. Same is the view taken by this Court and Kerala High Court in Qadir Bux v. Ram Chandra, MANU/UP/0046/1970 : AIR 1970 All 289 (FB) and Pappy Amma v. Prabhakaran Nair, MANU/KE/0001/1972 : AIR 1972 Ker 1 (FB).

86. In order to wriggle out of the limitation prescribed under Article 142 of the Limitation Act, it has to be shown by plaintiff that he was in possession of the disputed land, within 12 years of the suit and has been dispossessed, as observed by the Apex Court in Sukhdev Singh v. Maharaja Bahadur of Gidhaur, MANU/SC/0052/1951 : AIR 1951 SC 288.

87. In Wahid Ali & another v. Mahboob Ali Khan MANU/OU/0066/1935 : AIR 1935 Oudh 425, referring to Article 142 of Limitation Act, 1908 the Court held where the plaintiff or the Muslim community whom they represent were dispossessed from the land in question belong to the graveyard, by erection of a house thereon, and, the suit is filed after 12 years therefrom, it would be barred by Article 142 of the Limitation Act.

88. In R.H. Bhutani v. Miss Mani J. Desai, MANU/SC/0343/1968 : AIR 1968 SC 1444 the Court said that dispossession means to be out of possession, removed from the premises, ousted, ejected or excluded. It applies when a person comes in and drives out others in possession.

8 9 . In Shivagonda Subraigonda Patil v. Rudragonda Bhimagonda Patil, MANU/SC/0390/1969 : 1969 (3) SCC 211 : (AIR 1970 SC 453), the Court held tha dispossession for the purpose of this Article must be by the defendant and that must be the basis of the suit. If there is no dispossession by the defendant, this Article would have no application. The dispossession, therefore, implies taking possession without consent of the person in possession and is a wrong to the person in possession. It must result in termination of possession of the person in possession earlier.

90. Application of Articles 142 and 144 of L.A., 1908 was considered in Jamal Uddin & Anr. v. Mosque at Mashakganj & Ors., MANU/UP/0115/1973 : AIR 1973 All 328 and in para 29 the Court said:

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29. The next point that was urged by the counsel for the appellants was that the courts below committed a legal error in applying Art. 144 of the Limitation Act, 1908, to the suit and placing the burden on the defendants to prove their adverse possession for more than twelve years, while the suit on the allegations contained in the plaint clearly fell within the ambit of Art. 142 and the burden was on the plaintiffs to prove their possession within twelve years. This contention also is quite correct. It was clearly alleged by the plaintiffs that they had been dispossessed by the contesting defendants before the filing of the suit. As such, the suit would be governed by Article 142 and the residuary Article 144 will have no application. The courts below have unnecessarily imported into their discussion the requirements.....

91. The time runs from the date of dispossession or discontinuance in the case of Article 142 and from the date the defendant's possession becomes adverse vide Article 144. This in fact provides the cause of action to the plaintiff to file a suit and that is how the limitation comes into picture and begins.

92. In Ponnu Nadar and others v. Kumaru Reddiar and others, MANU/TN/0480/1935 : AIR 1935 Mad 967, the Court held that the real cause of action was the date of the order of the Magistrate and limitation started from the date of order. Article 120 of the Limitation Act, 1908 was applicable and not Section 23 of the said Act. The relevant portions of the said judgment read as follows:

What in fact appears to have given rise to the Joint Magistrate's order was a police report of an apprehended breach of the peace between the rival factions and all that the opposite party did was to adopt an attitude which gave rise to that apprehension. So far as that attitude itself is concerned, it is impossible to find in it a continuing wrong, nor do we find it easier to hold that when the Joint Magistrate passed the order with a view to prevent a breach of the peace there was a "continuing wrong" caused by the defendants' party. There is nothing to show that it was passed at their instance and even if it were, responsibility for passing it must be taken by the Court and not laid upon the party. Again, once an order was passed, the matter was taken out of the hands of the defendant party, and it lay with the Nadars themselves to establish their right by suit.

From this point of view too we are not disposed to hold that even if there was a continuing wrong the defendant party was responsible for its continuance. Where the applicability of S. 23, Limitation Act, is doubtful, the proper course must be, we think, to enforce against the plaintiffs the ordinary principles of limitation, and in the present case to apply Art. 47 would be applied to the case of an order under S. 145, Criminal P.C., time being taken to run from the date of the order. Adopting this view, the persons affected by the order of 1900 had a period of six years within which to establish their right, and we are not greatly impressed by the argument that, if the right itself may be indestructible, the remedy ought not to have been permanently lost by their failure to take action within that time. We must hold in agreement with 26 Mad. 410(1) that the suit is barred under Art. 120, Limitation Act.

93. In Annamalai Chettiar and others v. A.M.K.C.T. Muthukaruppan Chettiar & Anr., MANU/PR/0080/1930 : AIR 1931 PC 9, Privy Council held that in case of an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted for the purpose of limitation Article 120 of the Limitation Act, 1908 is applied. Relevant

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para of the judgment from page 12 reads as under:

> In their Lordships view the case falls under Art. 120, under which the time begins to run when the right to sue accrues. In a recent decision of their Lordships' Board, delivered by Sri Binod Mitter, it is stated, in reference to Art. 120.

94. In Mst. Rukhmabai v. Lala Laxminarayan & Ors., MANU/SC/0186/1959 : AIR 1960 SC 335, the Supreme Court held where there are successive invasion or denial of right, the right to sue under Article 120 accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invites or jeopardizes the said right. Para 33 of the judgment says:

> 33. The legal position may be briefly stated thus: The right to sue under Art. 120 of the Limitation Act accrues when the defendant has clearly and unequivocally threatened to infringe the right asserted by the plaintiff in the suit. Every threat by a party to such a right, however ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right.

95. In C. Mohammad Yunus v. Syed Unnissa and Ors., MANU/SC/0359/1961 : AIR 1961 SC 808, it was held that a suit for declaration of a right and an injunction restraining the defendants from interfering with the exercise of that right is governed by Article 120. Under the said Article there can be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe the right. Relevant extract of para 7 of the judgment reads as under:

> 7....The period of six years prescribed by Art. 120 has to be computed from the date when the right to sue accrues and there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right. If the trustees were willing to give a share and on the record of the case it must be assumed that they being trustees appointed under a scheme would be willing to allow the plaintiffs their legitimate rights including a share in the income if under the law they were entitled thereto, mere denial by the defendants of the rights of the plaintiffs and defendant No. 2 will not set the period of limitation running against them.

96. In Garib Das and others v. Munshi Abdul Hamid and others MANU/SC/0617/1969 : AIR 1970 SC 1035 the Court said that in a suit for recovery of possession after cancellation of sale deed in favour of the defendants on the ground that a previous valid waqf had been created, Article 142 was not applicable, the suit was to be filed within a period of six years that is to say Article 120 was applicable. Para 13 of the judgment reads as follows:

> 13. The fourth point has no substance inasmuch as Article 142 of the Limitation Act was not applicable to the facts of the case. The suit was filed in 1955 within six years after the death of Tasaduk Hussain who died only a few months after the execution of the documents relied on by the appellants.

97. In Dwijendra Narain Roy v. Joges Chandra De, MANU/WB/0151/1923 : AIR 192

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Cal 600 (page 609) the Court said:

> The substance of the matter is that time runs when the cause of action accrues, and a cause of action accrues when there is in existence a person who can sue and another who can be used..... The cause of action arises when and only when the aggrieved party has the right to apply to the proper tribunals for relief. The statute (of limitation) does not attach to the claim for which there is as yet no right of action and does not run against a right for which there is no corresponding remedy or for which judgment cannot be obtained. Consequently the true test to determine when a cause of action has accrued is to ascertain the time when plaintiff could first have maintained his action to a successful result.

98. This has been approved in P. Lakshmi Reddy v. L. Lakshmi Reddy, MANU/SC/0083/1956 : AIR 1957 SC 314.

99. In Satya Niranjan v. Ramlal, MANU/PR/0043/1924 : AIR 1925 PC 42, it was observed that the claims declaratory in their nature falling under Section 42 of the Specific Relief Act are governed by Article 120 of LA 1908.

100. In Draupadi Devi & Ors. v. Union of India & Ors. MANU/SC/0728/2004 : (2004) 11 SCC 425 : (AIR 2004 SC 4684) the Court said:

> **73.** We may notice here that under the Code of Civil Procedure, Order VII, Rule 1(e) requires a plaint to state "the facts constituting the cause of action and when it arose". The plaintiff was bound to plead in the plaint when the cause of action arose. If he did not, then irrespective of what the defendants may plead in the written statement, the court would be bound by the mandate of Section 3 of the Limitation Act, 1908 to dismiss the suit, if it found that on the plaintiff's own pleading his suit is barred by limitation. In the instant case, the plaint does not plead clearly as to when the cause of action arose. In the absence of such pleadings, the defendants pleaded nothing on the issue. However, when the facts were ascertained by evidence, it was clear that the decision of the Government of India not to recognise the suit property as private property of the Maharaja was taken some time in the year 1951, whether in March or May. Dewan Jarmanidass, the plaintiff and the Maharaja were very much aware of this decision. Yet, the suit was filed only on 11.5.1960.
>
> **74.** The Division Bench was, therefore, right in applying Article 120 of the Limitation Act, 1908 under which the period of limitation for a suit for which no specific period is provided in the Schedule was six years from the date when the right to sue accrues. The suit was, therefore, clearly barred by limitation and by virtue of Section 3 of the Limitation Act, 1908, the court was mandated to dismiss it.
>
> **75.** As rightly pointed out by the Division Bench, the learned single Judge ought to have permitted the plea to be raised on the basis of the facts which came to light. The Division Bench has correctly appreciated the plea of limitation, in the facts and circumstances of the case, and rightly came to the conclusion that the suit of the plaintiff was liable to be dismissed on the ground of limitation. We agree with the conclusion of the Division Bench on this issue.

101. In Mt. Bolo v. Mt. Koklan and others, MANU/PR/0054/1930 : AIR 1930 PC 270 right to sue for the purpose of Article 120, Limitation Act was considered and it was

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held:

> There can be no "right to sue" until there is an accrual of the right asserted in the suit and its infringement or at least clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. (Page 272)

102. In M.V.S. Manikyala v. Narashimahwami, MANU/SC/0363/1965 : AIR 1966 SC 470, the words "right to sue" under Article 120, LA 1908 was considered by the Apex Court and it was held that right to sue occurs for the purpose of the said Article. There is an accrual of the right asserted in the suit and unequivocal threat by the respondents to infringe it. Every threat by a party to such a right, however, ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right. [See: Mst. Rukhmabai v. Lala Laxminarayan (MANU/SC/0186/1959 : AIR 1960 SC 335) (supra)]. It has been helc in a catena of decisions that in a suit for declaration of title to immovable property, it is Article 120, LA 1908 and Article 113, LA 1963 which would be applicable.

103. In Mohabharat Shaha v. Abdul Hamid Khan (1904) 1 CLJ 73, it was held when a plaintiff being in possession sues for a declaration of his title to immovable property, the residuary provision would apply, i.e., Article 120.

104. In Aftab Ali v. Akbor Ali MANU/UP/0336/1929 : (1929) 121 Ind. Cas 209 (All), the Court said that Article 120 undoubtedly applies to all declaratory suits except where separate provision is made. In such a case of declaration, it is no doubt has been held by this Court in Mst. Salamat Begam v. S.K. Ikram Husain MANU/UP/0362/1933 : (1933) 145 Ind Cas 728 and Prajapati and others v. Jot Singh and others, MANU/UP/0119/1934 : AIR 1934 All 539, that where owner is in possession, he acquires a cause of action on each occasion on which his rights are denied.

105. There appears to be a consensus of opinion that Article 120 applies to all suits of a declaratory nature where no consequential relief is sought or is necessary.

106. LA 1908 was replaced by Act, 1963, came into force on 01.01.1964 vide notification dated 29.10.1963 and thereunder the corresponding relevant entries to Articles 120, 142 and 144 are 113, 64 and 65, which read as under:

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	Description of suit	Period of limitation	Time from which period beings to run
64	For possession of immovable property based on previous possession and not on title, when the plaintiff while in possession of the property has been dispossessed.	Twelve years	The date of dispossession.
65	For possession of immovable property or any interest therein based on title.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.
113	Any suit for which no period of limitation is provided elsewhere in this Schedule.	Three years	When the right to sue accrues.

107. The appellant, however, has relied on Articles 111 and 112, which read as under:

	Description of suit	Period of limitation	Time from which period beings to run
111	By or on behalf of any local authority for possession of any public street or road or any part thereof from which it has been dispossessed or of which it has discontinued the possession.	Thirty years	The date of the dispossession or discontinuance.
112	Any suit (except a suit before the Supreme Court in the exercise of its original jurisdiction) by or on behalf of the Central Government or any State Government, including the Government of the State of Jammu and Kashmir.	Thirty years	When the period of limitation would to run under this Act against a like suit by a private person.

108. In C. Natrajan v. Ashim Bai and others, MANU/SC/8018/2007 : JT 2007 (12) SC 295 : AIR 2008 SC 363, the Apex Court noticed the distinction between Articles142 and 144 of LA 1908 and Articles 64 and 65 of LA 1963 in para 15 of the judgment as under:

> 15. The law of limitation relating to the suit for possession has undergone a drastic change. In terms of Articles 142 and 144 of the Limitation Act, 1908, it was obligatory on the part of the plaintiff to aver and plead that he not only has title over the property but also has been in possession of the same for a period of more than 12 years. However, if the plaintiff has filed the suit claiming title over the suit property in terms of Articles 64 and 65 of the Limitation Act, 1963, burden would be on the defendant to prove that he has acquired title by adverse possession.

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109. I am in agreement with the argument of the learned counsel for the defendants that a suit, if is barred by limitation, it is the statutory obligation on the part of the Court to dismiss it on the said ground by virtue of Section 3 of the Act and in such matters there is no question of any sympathy, hardship etc.

110. In the matter of limitation sympathy, hardship, discretion etc. have no place. In Maqbul Ahmad v. Onkar Pratap Narain Singh, MANU/PR/0025/1935 : AIR 1935 PC 85 Lord Tomlin observed, "there is no judicial discretion to relieve the appellants from the operation of the Limitation Act in a case of hardship or any authority in the Court to dispense with its provision." This has been followed in The Firm of Eng Gim Moh v. The Chinese Merited Banking Co. Ltd. and another MANU/RA/0018/1940 : AIR 1940 Rangoon 276, by a Full Bench of Rangoon High Court. In the above judgment, the Court also disapprove the contention that continued attachment would confer a continuous cause of action.

111. Before proceeding further the Court intend to consider applicability of Articles 111 and 112 of LA 1963 in the present case.

112. So far as Article 111 is concerned, it is evidently applicable to local authority. The term "local authority" has been defined in Section 3(31) of General Clauses Act, 1897 (hereinafter referred to as the "Act 1897") and Section 4(25) of U.P. General Clauses Act, 1904 (hereinafter referred to as the "Act 1904"). The definitions in both the Acts, read as under:

> (31) "local authority" shall mean a municipal committee, district board, body of port commissioners" or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal of local fund;
>
> (25) "local authority" shall mean a municipal board or Nagarpalika, Nagar Mahapalika, Notified Area Committee, Town Area Committee, Zila Parishad, Cantonment Board, Kshetra Samiti. Gaon Sabha or any other authority constituted for the purpose of Local Self Government or village administration or legally entitled to or entrusted by the State Government with the control or management of municipal or local fund;

113. Sri H.R. Mishra, learned Senior Advocate appearing for the appellant finding it difficult, did not dispute that plaintiff is not a local authority.

114. Apparently Article 112 is also not applicable in the present case since it is not a suit filed by plaintiff on behalf of either Central Government or the State Government inasmuch as nothing has been placed on record to demonstrate before courts below that suit is being filed on behalf of State Government and plaintiff actually is acting as an agent of Government. On the contrary the averments contained in the plaint clearly show that suit was filed by appellant founded on its own right of possession derived from GMPS, to which the property in dispute was leased by State Government. Founded on its own possessory rights the suit has been filed by appellant and not on behalf of State Government. In absence of any foundation in the plaint or otherwise to demonstrate that suit was filed by appellant on behalf of State Government, Article 112 evidently would have no application to the case in hand.

115. In this case there is no declaration sought by plaintiff, therefore, Article 58 of Act, 1963 also will have no application. It is only Articles 64, 65 or 113, at the best, could have governed the matter. Article 64 apparently is applicable if the plaintiff was earlier in possession but dispossessed. The limitation would commence from the date of dispossession. It is admitted by plaintiff-appellant that lease having been executed

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in 1954, possession of land other than the disputed part got in hands of plaintiff in 1954 itself. While according to the findings of the court below, defendants were in possession since before 1952. The plaintiff was never in possession of the disputed property since it was with defendants. Even before the other part of land got in the hand of appellant, the question of dispossession does not arise. It is in these circumstances even Article 64 of Act 1963 has no application.

116. Now the next provision is Article 65. The limitation commence from the date of possession of defendants becomes adverse to plaintiff. The defendants were already in possession of disputed property when appellant came into possession of other part of land in 1954. The question of possession, therefore, becoming adverse to appellant does not arise. Article 65 is applicable when possession of immovable property or any interest thereon is based on title. In the present case, property in dispute being Nazul Land, the title vest in State Government. The claim set up by appellant, therefore, could not have founded on title. The nature of possession of appellant, at the best, could be either of a lessee or a licensee which is less than the real owner. Article 65 since is applicable where the claim for possession is based on title, apparently it is inapplicable. The discussion about the meaning of term "possession" and "title/owner". I would also like to discuss in later part of judgment but presently at this stage I have no hesitation in holding that Article 65 of LA 1963 is not attracted to determine limitation applicable to suits in question. Therefore, apparently Article 65 also has no application to the case in hand.

117. Article 65 of LA 1963 in substances is the amalgamation of Articles 47, 136, 137, 138, 140, 141 and 144 of LA 1908. All those Articles of LA 1908 related to suits for recovery of possession of immovable property. Article 65 of LA 1963 has been clothed in such a manner so as to do away with different Articles as existed in LA 1908. In Indira v. Arumugam and another, MANU/SC/0884/1998 : AIR 1999 SC 1549, the Court said, when plaintiff once make out title to the suit property, it is for the defendants to prove that title of plaintiff has been extinguished by adverse possession of defendants for over a statutory period. The burden is thus clearly on defendants to prove when their possession has become adverse and that such possession is continued for more than statutory period of 12 years. Further detailed discussion of application of Article 65, if necessary, would be looked into while discussing question relating to adverse possession. For the time being suffice it to mention that in order to hold the suit, whether barred by time, in my view. Article 65 should not non-suit appellant in the present case.

118. Now the only provision applicable for looking into the question of limitation in suits in question is the residuary Article 113. It corresponds to Article 120 of LA 1908. It is a general provision and would be applicable unless when it is clear that suit is covered by another Article. The period of limitation would commence when right to sue accrues. The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally right to sue accrues only if cause of action arises, i.e., the right to prosecute to obtain relief by legal means. The suit must be instituted when right asserted in suit is infringed or when there is a clear or unequivocal threat to infringe that right by defendants against whom a suit is instituted. That is what has been held in State of Punjab and others v. Gurdev Singh, MANU/SC/0612/1991 : AIR 1991 SC 2219.

119. In a suit for possession the knowledge of plaintiff about otherwise possession of property by defendant would construe the time from which period begins to run, i.e., right to sue accrues therefrom. In the present case as held by courts below the property in dispute though belong to State but was in possession of defendants since before 1952 and, therefore, despite lease deed executed on 06.03.1954, possession

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of disputed property must be with defendants and this must have accrued right to sue to plaintiff to get possession of disputed property at the time other part of land came in their possession. The right to sue, therefore, was available to owner of property as soon as defendants occupy disputed land and in any case to appellant, when after execution of lease deed dated 06.03.1954, appellant was handed over possession of leased land except the disputed land over which defendants were already in possession. The cause of action or right to sue, therefore, accrued to appellant in March, 1954 itself and if that is so the limitation to file suit expired in March, 1957. By no stretch of imagination it can be said that in 1965 when suits in question were filed the same were within the period of limitation unless appellant would have been successful in proving their case that defendants occupied land in dispute in November, 1962 which was their pleading in plaint for the purpose of determining limitation but unfortunately on this aspect, the appellant having failed to prove their case, hence cannot be extended any benefit thereupon.

120. The suits have been filed in 1965. These are apparently barred by time. The right to sue implies with the person serving as a substantive and exclusive right to the claim asserted by him or there is an invasion of or threat to that right. It may also be noticed that Section 9 of Limitation Act lays down when time begins to run and it would not stop running cause of action of subsequent disability or inability to institute suit. Once the defendants occupy the land in dispute belong to State without any authority, the limitation to oust them therefrom commenced. The mere fact that appellant got possession pursuant to a lease deed executed in 1954 of the part of land would not result in either renewal of cause of action or a fresh cause of action. Even if it is taken to be a renewal of cause of action or fresh cause of action in 1954, still limitation would have expired by any stretch of imagination in 1959 or 1960. In any case when in 1965 suits were filed, i.e., after almost 11 years from the date of execution of lease deed and getting possession, in my view, the suits in question are hit by Article 120 of LA 1908 and Article 113 of LA 1963 and, therefore, are barred by limitation.

121. Now I would consider the issues relating to adverse possession by looking into the concept of adverse possession, the relevant statutory provisions and also the pleading and legal requirement to find out whether the plea of adverse possession raised by defendant has been fully met by them so as to justify inference drawn by Lower Appellate Court that the defendants' right and title on property in dispute stood matured by reason of adverse possession.

122. The limitation prescribed for adverse possession is not the limitation for maintainability of suit. The former matures a right in a person on happening of certain events continued for a period prescribed in Act 1963. It is a consequence of principle of prescription. The later is the period whereafter the remedy for redressal of a grievance is lost to a person. I would elaborate both these aspects to make the two aspects beyond any possible confusion and misunderstanding.

123. To understand the concept of "adverse possession" it would be necessary to have a clear idea about the concept of "possession" and "ownership" in respect to immovable property.

124. A retrospect of ancient post, would reveal that the concept of possession in ancient laws in different civilizations was known to the mankind. A comparative study I find, in the work of "Sir Henry Sumner Maine" (in short 'Maine'). He is considered to be the founder of comparative jurisprudence of ancient laws. Much earlier in 1861 AD, comparative jurisprudence under the heading "Ancient Law" Its connection with the Early History of Society and its Relation to Modern Ideas, was written by "Sir

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Henry Sumner Maine". The edition before the Court is one published by Dorset Press in 1986 at United States of America.

125. "Sir Maine" was highly influenced by Roman Law. He observed in Chapter I under the heading "Ancient Codes":

> The most celebrated system of jurisprudence known to the world begins, as it ends, with a Code. From the commencement to the close of its history, the expositors of Roman Law consistently employed language which implied that the body of their system rested on the Twelve Decemviral Tables, and therefore on a basis of written law....
>
> The ancient Roman Code belongs to a class of which almost every civilized nation in the world can show a sample, and which, so far as the Roman and Hellenic worlds were concerned, were largely diffused over them at epochs not widely distant from one another. (Page 1)

126. In respect to the Laws in East and in particular Hindus, he observed:

> But in the East, as I have before mentioned, the ruling aristocracies tended to become religious rather than military or political, and gained, therefore, rather than lost in power; while in some instances the physical conformation of Asiatic countries had the effect of making individual communities larger and more numerous than in the West; and it is a known social law that the larger the space over which a particular set of institutions is diffused, the greater is its tenacity and vitality. From whatever cause, the codes obtained by Eastern societies were obtained, relatively, much later than by Western, and wore a very different character. The religious oligarchies of Asia, either for their own guidance, or for the relief of their memory, or for the instruction of their disciples, seem in all cases to have ultimately embodied their legal learning in a code; but the opportunity of increasing and consolidating their influence was probably too tempting to be resisted. Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections, not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed. The Hindoo code, called the Laws of Menu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindustan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, ought to be the law. It is consistent with human nature and with the special motives of their authors, that codes like that of Menu should pretend to the highest antiquity and claim to have emanated in their complete form from the Deity. Menu, according to Hindoo mythology, is an emanation from the supreme God; but the compilation which bears his name, though its exact date is not easily discovered, is in point of the relative progress of Hindoo jurisprudence, a recent production. (Page 14)

127. Further he says:

> The fate of the Hindoo law is, in fact, the measure of the value of the Roman code. Ethnology shows us that the Romans and the Hindoos sprang from the same original stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindoo jurisprudence has a substratum of forethought and sound judgment, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities. From these

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corruptions the Romans were protected by their code. It was compiled while the usage was still wholesome, and a hundred years afterwards it might have been too late. The Hindoo law has been to a great extent embodied in writing, but, ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done. (Pages 16, 17)

128. The concept of possession has been discussed by "Sir Maine" in Chapter-VIII under the heading "The Early History of Property". Referring to the natural modes of acquiring property known in Roman law he observed:

The wild animal which is snared or killed by the hunter, the soil which is added to our field by the imperceptible deposits of a river, the tree which strikes its roots into our ground, are each said by the Roman lawyers to be acquired by us naturally. (Page 203)

129. Therefore, one of the mode of possession is occupation or occupancy.

130. "Sir Maine" further says:

Occupancy is the advisedly taking possession of that which at the moment is the property of no man, with the view (adds the technical definition) of acquiring property in it for yourself. The objects which the Roman lawyers called res nullius--things which have not or have never had an owner--can only be ascertained by enumerating them. Among things which never had an owner are wild animals, fishes, wild fowl, jewels disinterred for the first time, and lands newly discovered or never before cultivated. Among things which have not an owner are moveables which have been abandoned, lands which have been deserted, and (an anomalous but most formidable item) the property of an enemy. In all these objects the full rights of dominion were acquired by the Occupant, who first took possession of them with the intention of keeping them as his own--an intention which, in certain cases, had to be manifested by specific acts. (Page203)

If the Roman law of Occupancy is to be taxed with having had pernicious influence on any part of the Modern Law of Nations, there is another chapter in it which may be said, with some reason, to have been injuriously affected. In applying to the discovery of new countries the same principles which the Romans had applied to the finding of a jewel, the Publicists forced into their service a doctrine altogether unequal to the task expected from it. Elevated into extreme importance by the discoveries of the great navigators of the 15th and 16th centuries, it raised more disputes than it solved. The greatest uncertainty was very shortly found to exist on the very two points on which certainty was most required, the extent of the territory which was acquired for his sovereign by the discoverer, and the nature of the acts which were necessary to complete the adprehensio (sic) or assumption of sovereign possession. Moreover, the principle itself, conferring as it did such enormous advantages as the consequence of a piece of good luck, was instinctively mutinied against by some of the most adventurous nations in Europe, the Dutch, the English, and the Portuguese. Our own countrymen, without expressly denying the rule of International Law, never did, in practice, admit the claim of the Spaniards to engross the whole of America, south of the Gulf of Mexico, or that of the King of France to monopolise the valleys of the Ohio and the Mississippi. From the accession of Elizabeth to the accession of Charles the Second, it cannot be said that there was at any time thorough

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peace in the American waters, and the encroachments of the New England Colonists on the territory of the French King continued for almost a century longer. Bentham was so struck with the confusion attending the application of the legal principle, that he went out of his way of eulogize the famous Bull of Pope Alexander the Sixth, dividing me undiscovered countries of the world between the Spaniards and Portuguese by a line drawn one hundred leagues West of the Azores; and, grotesque as his praises may appear at first sight, it may be doubted whether the arrangement of Pope Alexander is absurder in principle than the rule of Public Law, which gave half a continent to the monarch whose servants had fulfilled the conditions required by Roman jurisprudence for the acquisition of property in a valuable object which could be covered by the hand. (Pages 206-207)

To all who pursue the inquiries which are the subject of this volume, Occupancy is preeminently interesting on the score of the service it has been made to perform for speculative jurisprudence, in furnishing a supposed explanation of the origin of private property. It was once universally believed that the proceeding implied in Occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the allowed property of individuals. The course of thought which led to this assumption is not difficult to understand, if we seize the shade of difference which separates the ancient from the modern conception of Natural Law. The Roman lawyers had laid down that Occupancy was one of the Natural modes of acquiring property, and they undoubtedly believed that, were mankind living under the institutions of Nature, Occupancy would be one of their practices. How far they persuaded themselves that such a condition of the race had ever existed, is a point, as I have already stated, which their language leaves in much uncertainty; but they certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind. Modern jurisprudence, accepting all their dogmas without reservation, went far beyond them in the eager curiosity with which it dwelt on the supposed state of Nature. Since then it had received the position that the earth and its fruits were once res nullius, and since its peculiar view of Nature led it to assume without hesitation that the human race had actually practised the Occupancy of res nullius long before the organisation of civil societies, the inference immediately suggested itself that Occupancy was the process by which the 'no man's goods' of the primitive world became the private property of individuals in the world of history. (Pages 207-208)

131. "Maine" has quoted "Blackstone" as under:

'The earth.' he writes, 'and all things therein were the general property of mankind from the immediate gift of the Creator. Not that the communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the substance of the thing; nor could be extended to the use of it. For, by the law of nature and reason he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature to have driven him by force, but the instance that he quitted the use of

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occupation of it, another might seize it without injustice.' He then proceeds to argue that "when mankind increased in number, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. (Pages 208-209)

132. Explaining occupancy, 'Maine' observes:

> Occupancy first gave a right against the world to an exclusive but temporary enjoyment, and that afterwards this right, while it remained exclusive, became perpetual. Their object in so stating their theory was to reconcile the doctrine that in the state of Nature res nullius became property through Occupancy, with the inference which they drew from the Scriptural history that the Patriarchs did not at first permanently appropriate the soil which had been grazed over by their flocks and herds. (Pages 209-210)

133. Referring to 'Savigny', 'Sir Maine' observed:

> It is not wonderful that property began in adverse possession. It is not surprising that the first proprietor should have been the strong man armed who kept his goods in peace. But why it was that lapse of time created a sentiment of respect for his possession--which is the exact source of the universal reverence of mankind for that which has for a long period de facto existed--are questions really deserving the profoundest examination, but lying far beyond the boundary of our present inquiries. (Page 212)

> Occupancy is the advised assumption of physical possession; and the notion that an act of this description confers a title to 'res nullius', so far from being characteristic of very early societies, is in all probability the growth of a refined jurisprudence and of a settled condition of the laws. It is only when the rights of property have gained a sanction from long practical inviolability, and when the vast majority of the objects of enjoyment have been subjected to private ownership, that mere possession is allowed to invest the first possessor with dominion over commodities in which no prior proprietorship has been asserted. The sentiment in which this doctrine originated is absolutely irreconcilable with that infrequency and uncertainty of proprietary rights which distinguish the beginnings of civilisation. Its true basis seems to be, not an instinctive bias towards the institution of Property, but a presumption, arising out of the long continuance of that institution, that everything ought to have an owner. When possession is taken of a 'res nullius', that is, of an object which is not, or has never been, reduced to dominion, the possessor is permitted to become proprietor from a feeling that all valuable things are naturally the subjects of an exclusive enjoyment, and that in the given case there is no one to invest with the right of property except the Occupant. The Occupant in short, becomes the owner, because all things are presumed to be somebody's property and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing. (Pages 212-213)

134. Referring to "laws of ownership" followed in India by Hindus, 'Sir Maine' says:

> The Roman jurisprudence will not here assist in enlightening us, for it is exactly the Roman jurisprudence which, transformed by the theory of Natural Law, has bequeathed to the moderns the impression that individual ownership is the normal state of proprietary right, and that ownership in common by groups of men is only the exception to a general rules. There is,

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however, one community which will always be carefully examined by the inquirer who is in quest of any lost institution of primeval society. How far soever any such institution may have undergone change among the branch of the Indo European family which has been settled for ages in India, it will seldom be found to have entirely cast aside the shell in which it was originally reared. It happens that, among the Hindoos, we do find a form of ownership which ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the Law of Persons would lead us to entertain respecting the original condition of property. The Village Community of India is at once an organised patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights, and to the attempts of English functionaries to separate the two may be assigned some of the most formidable miscarriages of Anglo-Indian administration. The Village Community is known to be of immense antiquity. In whatever direction research has been pushed into Indian history, general or local, it has always found the Community in existence at the farthest point of its progress. A great number of intelligent and observant writers, most of whom had no theory of any sort to support concerning its nature and origin, agree in considering it the least destructible institution of a society which never willingly surrenders any one of its usages to innovation. Conquests and revolutions seem to have swept over it without disturbing or displacing it, and the most beneficent systems of Government in India have always been those which have recognised it as the basis of administration.

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The mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, Nemo in communione potest invitus detineri ('No one can be kept in co-proprietorship against his will'). But in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common. The process has been adverted to already. As soon as a son is born, he acquires a vested interest in his father's substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manager, but more generally, and in some provinces always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but the Community is more than a brotherhood of relatives and more than an association of partners. It is an organised society, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for internal Government, for police, for the administration of justice, and for the apportionment of taxes and public duties. (Pages 215-217)

135. Regarding village communities and their system of holding land, Sir Maine observed:

The process which I have described as that under which a Village Community

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is formed, may be regarded as typical. Yet it is not to be supposed that every Village Community in India drew together in so simple a manner. Although, in the North of India, the archives, as I am informed, almost invariably show that the Community was founded by a single assemblage of blood-relations, they also supply information that men of alien extraction have always, from time to time, been engrafted on it, and a mere purchaser of a share may generally, under certain conditions, be admitted to the brotherhood. In the South of the Peninsula there are often Communities which appear to have sprung not from one but from two or more families; and there are some whose composition is known to be entirely artificial; indeed, the occasional aggregation of men of different castes in the same society is fatal to the hypothesis of a common descent. Yet in all these brotherhoods either the tradition is preserved, or the assumption made, of an original common parentage. Mountstuart Elphinstone, who writes more particularly of the Southern Village Communities, observes of them (History of India, i. 126): 'the popular notion is that the Village landholders are all descended from one or more individuals who settled the village, and that the only exceptions are formed by persons who have derived their rights by purchase or otherwise from members of the original stock. The supposition is confirmed by the fact that, to this day, there are only single families of landholders in small villages and not many in large ones; but each has branched out into so many members that it is not uncommon for the whole agricultural labour to be done by the landholders, without the aid either of tenants or of labourers. The rights of the landholders are theirs collectively and, though they almost always have a more or less perfect partition of them, they never have en entire separation. A landholder, for instance, can sell or mortgage his rights; but he must first have the consent of the village, and the purchaser steps exactly into his place and takes up all his obligations. If a family becomes extinct, its share returns to the common stock. (Pages 217-219)

136. On page 223 he further says:

In India, not only is there no indivisibility of the common fund, but separate proprietorship in parts of it may be indefinitely prolonged and may branch out into any number of derivative ownerships, the de facto partition of the stock being, however, checked by inveterate usage, and by the rule against the admission of strangers without the consent of the brotherhood.

137. The Hindu Dharam-shastras containing legal principles are mainly in Smritis. Narada-smriti or Naradiya Dharmasastra contains the laws with regard to 'property' or and 'possession' are stated as under:

43. All transactions depend on wealth. In order to acquire it, exertion is necessary. To preserve it, to increase it, and to enjoy it: these are, successively, the three sorts of activity in regard to wealth.

44. Again, wealth is of three kinds : white, spotted, and black. Each of these (three) kinds has seven sub-division.

45. White wealth is (of the following seven sorts) : what is acquired by sacred knowledge, valour in arms, the practice of austerities, with a maiden, through (instructing) a pupil, by sacrificing, and by inheritance. The gain to be derived from exerting oneself to acquire it is of the same description.

46. Spotted wealth is (of the following seven sorts) : what is acquired by lending money at interest, tillage, commerce, in the shape of Sulka, by

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artistic performances, by servile attendance, or as a return for a benefit conferred on some one.

47. Black wealth is (of the following seven sorts) : what is acquired as a bribe, by gambling, by bearing a message, through one afflicted with pain, by forgery, by robbery, or by fraud.

48. It is in wealth that purchase, sale, gift, receipt, transactions of every kind, and enjoyment, have their source.

49. Of whatever description the property may be, with which a man performs any transaction, of the same description will the fruit be which he derives from it in the next world and in this.

50. Wealth is again declared to be of twelve sorts, according to the caste of the acquirer. Those modes of acquisition, which are common to all castes, are threefold. The others are said to be nine fold.

51. Property obtained by inheritance, gifts made from love, and what has been obtained with a wife (as her dowry), these are the three sorts of pure wealth, for all (castes) without distinction.

52. The pure wealth peculiar to a Brahman is declared to be threefold : what has been obtained as alms, by sacrificing, and through (instructing) a pupil.

53. The pure wealth peculiar to a Kshatriya is of three sorts likewise : what has been obtained in the shape of taxes, by fighting, and by means of the fines declared in lawsuits.

54. The pure wealth peculiar to a Vaisya is also declared to be threefold : (what has been acquired) by tillage, by tending cows, and by commerce.....

138. Similarly, Brihaspati Smriti deals with 'possession' as under:

2. Immovable property may be acquired in seven different ways, viz. by learning, by purchase, by mortgaging, by valour, with a wife (as her dowry), by inheritance (from an ancestor), and by succession to the property of a kinsman who has no issue.

3. In the case of property acquired by one of these seven methods, viz. inheritance from a father (or other ancestor), acquisition (in the shape of a dowry), purchase, hypothecation, succession, valour, or learned knowledge, possession coupled with a legitimate title constitutes proprietary right.

4. That possession which is hereditary, or founded on a royal order, or coupled with purchase, hypothecation or a legitimate title : possession of this kind constitutes proprietary right.

5. Immovable property obtained by a division (of the estate among co-heirs), or by purchase, or inherited from a father or other ancestor), or presented by the king, is acknowledged as one's lawful property; it is lost by forbearance in the case of adverse possession.

6. He who is holding possession (of an estate) after having merely taken it, occupying it without meeting with resistance, becomes its legitimate owner thus; and it is lost (to the owner) by such forbearance.

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7. He whose possession has been continuous from the time of occupation, and has never been interrupted for a period of thirty years, cannot be deprived of such property.

8. That property which is publicly given by co-heirs or others to a stranger who is enjoying it, cannot be recovered afterwards by him (who is its legitimate owner).

9. He who does not raise a protest when a stranger is giving away (his) landed property in his sight, cannot again recover that estate, even though he be possessed of a written title to it.

10. Possession held by three generations produces ownership for strangers, no doubt, when they are related to one another in the degree of a Sapinda; it does not stand good in the case of Sakulyas.

11. A house, field, commodity or other property having been held by another person than the owner, is not lost (to the owner) by mere force of possession, if the possessor stands to him in the relation of a friend, relative, or kinsman.

12. Such wealth as is possessed by a son-in-law, a learned Brahman, or by the king or his ministers, does not become legitimate property for them after the lapse of a very long period even.

13. Forcible means must not be resorted to by the present occupant or his son, in maintaining possession of the property of an infant, or of a learned Brahman, or of that which has been legitimately inherited from a father.

14. Nor (in maintaining possession) of cattle, a woman, a slave, or other (property). This is a legal rule.

15. If a doubt should arise in regard to a house or field, of which its occupant has not held possession uninterruptedly, he should undertake to prove (his enjoyment of it) by means of documents, (the depositions of) persons knowing him as possessor, and witnesses.

16. Those are witnesses in a contest of this kind who know the name, the boundary, the title (of acquisition), the quantity, the time, the quarter of the sky, and the reason why possession has been interrupted.

17. By such means should a question regarding occupation and possession be decided in a contest concerning landed property; but in a cause in which no (human) evidence is forthcoming, divine test should be resorted to.

18. When a village, field, or garden is referred to in one and the same grant, they are (considered to be) possessed of all of them, though possession be held of part of them only. (On the other hand) that title has no force which is not accompanied by a slight measure of possession even.

19. Not to possess landed property, not to show a document in the proper time, and not to remind witnesses (of their deposition): this is the way to lose one's property.

20. Therefore evidence should be preserved carefully; if this be done, lawsuits whether relating to immovable or to movable property are sure to succeed.

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21. Female slaves can never be acquired by possession, without a written title; nor (does possession create ownership) in the case of property belonging to a king, or to a learned Brahman, or to an idiot, or infant.

22. It is not by mere force of possession that land becomes a man's property; a legitimate title also having been proved, it is converted into property by both (possession and title), but not otherwise.

23. Should even the father, grandfather, and great grandfather of a man be alive, land having been possessed by him for thirty years, without intervention of strangers.

24. It should be considered as possession extending over one generation; possession continued for twice that period (is called possession) extending over two generations; possession continued for three times that period (is called possession) extending over three generations. (Possession continued) longer than that even, is (called) possession of long standing.

25. When the present occupant is impeached, a document or witness is (considered as) decisive. When he is no longer in existence, possession alone is decisive for his sons.

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26. When possession extending over three generations has descended to the fourth generation, it becomes legitimate possession, and a title must never be inquired for.

27. When possession undisturbed (by other) has been held by three generations (in succession), it is not necessary to produce a title; possession is decisive in that case.

28. In suits regarding immovable property, (possession) held by three generations in succession, should be considered as valid, and makes evidence in the decision of a cause.

29. He whose possession has passed through three lives, and is duly substantiated by a written title, cannot be deprived of it; such possession is equal to the gift of the Veda.

30. He whose possession has passed through three lives and has been inherited from his ancestors, cannot be deprived of it, unless a previous grant should be in existence (in which the same property has been granted to a different person by the king).

31. That possession is valid in law which is uninterrupted and of long standing; interrupted possession even is (recognised as valid), if it has been substantiated by an ancestor.

32. A witness prevails over inference; a writing prevails over witnesses; undisturbed possession which has passed through three lives prevails over both.

33. When an event (forming the subject of a plaint) has occurred long ago, and no witnesses are forthcoming, he should examine indirect witnesses, or he should administer oaths, or should try artifice.

139. Thus in brief, the concept of possession in ancient laws may be stated that Possession in Roman Law recognised two degrees of possession, one is being

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detention (or possessio naturalise) of the object/thing; and the other is possessio strictly or possessio civilise. Roman law appears to be mainly concern with developing a theory to distinguish between detention and possession from each other. Physical control of an object by sale, a bailee or an agent was considered only as detention and all other kinds of physical control were treated as possession.

140. In Muslim Law a man in possession of property although by wrongful means has obvious advantages over the possessor. The possessor is entitled to protection against the whole world except the true owner. [The Principles of Mohammedan Jurisprudence (1911)].

141. In 'Ancient Indian Law' possession was nothing but a legal contrivance based on the considerations of dharma. Use and enjoyment of property was restricted and controlled by the holy scriptures. In old Hindu Law possession was of two kinds, (a) with title; and (b) without title where possession continued for three generations. Enough importance, however, was given to title (agama) to prove possession. Katyayana said, "there can be no branches without root, and possession is the branch".

142. "Ihering" defines possession, "whenever a person looks like an owner in relation to a thing he has in his possession, unless possession is denied to him by rules of law based on convenience". Apparently this definition does not give any explicit idea on the subject. It only states that the concept of possession is an ever changing concept having different meaning for different purposes and different frames of law.

143. "Pollock" says, "In common speech a man is said to be in possession of anything of which he has the apparent control or from the use of which he has the apparent powers of excluding others". The stress laid by Pollock on possession is not on animus but on de facto control.

144. "Savigny" defines possession, "intention coupled with physical power to exclude others from the use of material object." Apparently this definition involves both the elements namely, corpus possession is and animus do mini.

145. The German Jurist 'Savigny' laid down that all property is founded on adverse possession ripened by prescription. The concept of ownership accordingly as observed by him involve three elements-Possession, Adverseness of Possession, (that is a holding not permissive or subordinate, but exclusive against the world), and Prescription, or a period of time during which the Adverse Possession has uninterruptedly continued.

146. "Holmes" opined that possession is a conception which is only less important than contract.

147. According to Salmond on "Jurisprudence", 12th Edition (1966) (First Edition published in 1902) by PJ Fitzgerald, Indian Economy Reprint 2006 published by Universal Law Publishing Co. Pvt. Ltd., Delhi (hereinafter referred to as "Salmond's Jurisprudence"). On page 51, it says that the concept of "possession" is as difficult to define as it is essential to protect. It is an abstract notion and is not purely a legal concept. It is both a legal and a non-legal or a pre-legal concept. He tried to explain the concept of possession with reference to different factual and legal concepts.

148. The first one is "possession in fact". It is a relationship between a person and a thing. The things one possesses in his hand or which one has in his control like clothes he is wearing, objects he is keeping in his pocket etc. For such things it can

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be said that he is in possession of the things in fact. To possess one would have to have a thing under his physical control. If one captures a wild animal, he gets possession of it but if the animal escapes from his control, he loses possession. It implies that things not amenable in any manner to human control cannot form the subject-matter of possession like one cannot possess sun, moon or the stars etc. Extending the above concept, "Salmond" says that one can have a thing in his control without actually holding or using it at every given moment of time like possession of a coat even if one has taken it off and put down or kept in the cupboard. Even if one falls asleep, the possession of the coat would remain with him. If one is in such a position, has to be able in the normal course of events to resume actual control when one desires, the possession in fact of the thing is there. Another factor relevant to the assessment of control is the power of excluding other people. The amount of power that is necessary varies according to the nature of the object.

149. The possession consisted of a "corpus possessionis" and "animus possidendi". The former comprised both, the power to use the thing possessed and the existence of grounds for the expectation that the possessor's use will not be interfered with. The latter consisted of an intent to appropriate to oneself the exclusive use of the thing possessed.

150. Then comes "possession in law". A man, in law, would possess only those things which in ordinary language he would be said to possess. But then the possessor can be given certain legal rights such as a right to continue in possession free from interference by others. This primary right in rem can be supported by various sanctioning rights in personam against those who violates the possessor's primary right; can be given a right for compensation for interference and a dispossession and the right to have his possession restored from the encroacher.

151. Another facet of possession is "immediate" or "mediate possession". The possession held by one through another is termed "mediate" while that acquired or retained directly or personally can be said to be "immediate or direct". There is a maxim of civil law that two persons could not be in possession of the same thing at the same time. (Plures eandem rem in solidum possidere non possunt). As a general proposition exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same time. There are, however, certain exceptions, namely, in the case of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. Two or more persons may possess the same thing in common just as they may own it in common.

152. Then comes "incorporeal possession". It is commonly called the possession of a right and is distinct from the "corporeal possession" which is a possession of the thing.

153. In "The Elementary Principles of Jurisprudence" by G.W. Keeton, II Edition (1949) published by Sir Isaac Pitman and Sons Ltd. London (First published in 1930), "possession" has been dealt in Chapter XV. It says:

> 'Possession,' says an old proverb, "is nine points of law." Put in another way, this implies that he who has conscious control of an object need only surrender his control to one who can establish a superior claim in law.

154. The essentials of possession in the first instance includes a fact to be established like any other fact. Whether it exists in a particular case or not will depend on the degree of control exercised by the person designated as possessor. If his control is such that he effectively excludes interference by others then he has

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possession. Thus the possession in order to show its existences must show "corpus possessionis" and an "animus possidendi".

155. Corpus possessionis means that there exists such physical contact of the thing by the possessor as to give rise to the reasonable assumption that other persons will not interfere with it. Existence of corpus broadly depend on (1) upon the nature of the thing itself, and the probability that others will refrain from interfering with the enjoyment of it; (2) possession of real property, i.e., when a man sets foot over the threshold of a house, or crosses the boundary line of his estate, provided that there exist no factors negativing his control, for example the continuance in occupation of one who denies his right; and (3) acquisition of physical control over the objects it encloses. Corpus, therefore, depends more upon the general expectations that others will not interfere with an individual control over a thing, then upon the physical capacity of an individual to exclude others.

156. The animus possidendi is the conscious intention of an individual to exclude others from the control of an object.

157. Possession confers on the possessor all the rights of the owner except as against the owner and prior possessors. "Possession in law" has the advantage of being a root of tide.

158. There is also a concept of "constructive possession" which is depicted by a symbolic act. It has been narrated with an illustration that delivery of keys of a building may give right to constructive possession of all the contents to the transferee of the key.

159. It would also be useful to have meaning of "possession" in the context of different dictionaries.

160. In "Oxford English English-Hindi-Dictionary" published by Oxford University Press, first published in 2008, 11th Impression January, 2010, at page 920:

> possession 1. -- The state of having or owning something. 2. Something that you have or own.

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161. In "The New Lexicon Webster's Dictionary of the English Language" (1987), published by Lexicon Publications, Inc. at page 784:

> possession -- a possessing or being possessed II that which is possessed II (pl.) property II a territory under the political and economic control of another country II (law) actual enjoyment of property not founded on any title of ownership to take possession of to begin to occupy as owner II to affect so as to dominate.

162. In "Chambers Dictionary" (Deluxe Edition), first published in India in 1993, reprint 1996 by Allied Publishers Limited, New Delhi at page 1333 defines 'possess' and 'possession' as under:

> possess poz-es' vt to inhabit, occupy (obs.); to have or hold as owner, or as if owner; to have as a quality; to seize; to obtain; to attain (Spenser); to maintain; to control; to be master of; to occupy and dominate the mind of; to put in possession (with of, formerly with in); to inform, acquaint; to imbue; to impress with the notion of feeling; to prepossess (obs).
>
> possession the act, state or fact of possession or being possessed, a thing possessed; a subject foreign territory.

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163. In "Corpus Juris Secundum", A Complete Restatement of the Entire American Law as developed by All Reported Cases (1951), Vol. LXXII, published by Brooklyn, N.Y., The American Law Book Co., at pages 233-235:

> Possession expresses the closest relation of fact which can exist between a corporeal thing and the person who possesses it, implying an actual physical contact, as by sitting or standing upon a thing; denoting custody coupled with a right or interest of proprietorship; and "possession" is inclusive of "custody," although "custody" is not tantamount to "possession." In its full significance, "possession" connotes domination or supremacy of authority. It implies a right and a fact; the right to enjoy annexed to the right of property, and the fact of the real detention of thing which would be in the hands of a master or of another for him. It also implies a right to deal with property at pleasure and to exclude other persons from meddling with it. Possession involves power of control and intent to control, and all the definitions contained in recognized law dictionaries indicate that the element of custody and control is involved in the term "possession."
>
> The word "possession" is also defined as meaning the thing possessed; that which anyone occupies, owns, or controls; and in this sense, as applied to the thing possessed, the word is frequently employed in the plural, denoting property in the aggregate; wealth; and it may include real estate where such is the intention, although this is not the technical signification.
>
> It is also defined as meaning dominion; as, foreign possessions; and, while in this sense the term is not a word of art descriptive of a recognised geographical or Governmental entity, it is employed in a number of federal statutes to describe the area to which various congressional statutes apply.
>
> "Possession" in the sense of ownership, and as a degree of title, and as indicating the holding or retaining of property in one's power or control, is treated in Property.

164. In "Black's Law Dictionary" Seventh Edition (1999), published by West Group, St. Paul, Minn., 1999,atpage 1183:

> possession. 1. The fact of having or holding property in one's power; the exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. (usu. pi.) Something that a person owns or controls;

165. In Black's Law Dictionary (supra) the following categories of possession have also been referred and explained:

> actual possession. Physical occupancy or control over property.
>
> adverse possession. A method of acquiring title to real property by possession for a statutory period under certain conditions, esp. a non-permissive use of the land with a claim of right when that use is continuous, exclusive, hostile, open, and notorious.
>
> constructive adverse possession. Adverse possession in which the claim arises from the claimant's payment of taxes under colour of right rather than by actual possession of the land.

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bona fide possession. Possession of property by a person who in good faith does not know that the property's ownership is disputed.

civil possession. Civil law. Possession existing by virtue of a person's intent to own a property even though the person no longer occupies or has physical control of it.

constructive possession. Control or dominion over a property without actual possession or custody of it. Also termed effective possession; possessio fictitia.

corporal possession. Possession of a material object, such as a farm or a coin. Also termed natural possession; possissio corporis.

derivative possession. Lawful possession by one (such as a tenant) who does not hold title.

direct possession. Something that a person owns or controls.

effective possession. See constructive possession.

exclusive possession. The exercise of exclusive dominion over property, including the use and benefit of the property.

hostile possession. Possession asserted against the claims of all others, including the record owner. See Adverse Possession.

immediate possession. Possession that is acquired or retained directly or personally--Also termed direct possession.

incorporeal possession. Possession of something other than a material object, such as an easement over a neighbour's land, or the access of light to the windows of a house -- Also termed possessio juris; quasi possession.

indirect possession. See mediate possession.

mediate possession. Possession of a thing through someone else, such as an agent. Also termed indirect possession.

naked possession. The mere possession of something, esp. real estate without any apparent right or colourable title to it.

natural possession. Civil law. The exercise of physical detention or control over a thing, as by occupying a building or cultivating farmland.

notorious possession. Possession or control that is evident to others; possession of property that, because it is generally known by people in the area where the property is located, gives rise to a presumption that the actual owner has notice of it -- Also termed open possession; open and notorious possession.

peaceable possession. Possession (as of real property) not disturbed by another's hostile or legal attempts to recover possession.

pedal possession. Actual possession, as by living on the land or by improving it.

possession in fact. Actual possession that may or may not be recognized by

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law. -- Also termed possessio naturalis.

possession in law. 1. Possession that is recognized by the law either because it is a specific type of possession in fact or because the law or some special reason attributes the advantages and results of possession to someone who does not in fact possess. 2. See constructive possession. -- Also termed possessio civilis.

possession of a right. The de facto relation of continuing exercise and enjoyment of a right as oppose to the de jure relation of ownership. Also termed possession juris.

precarious possession. Civil law. Possession of property by someone other than the owner on behalf of or with permission of the owner.

quasi possession. See incorporeal possession.

scrambling possession. Possession that is uncertain because it is in dispute.

166. In "Words and Phrases" Permanent Edition, Vol. 33 (1971), published by St. Paul, Minn. West Publishing Co., at pages 91-92:

'Possession' as used in statute is not synonymous with physical bodily presence of adverse claimant; continuous bodily presence is not required, but rather question is one of fact which must be determined from circumstances of each case.

"Possession" is a common term used in every day conversation that has not acquired any artful meaning.

"Possession", in any sense of term, must imply, first, some actual power over the object possessed, and, secondly, some amount of will to avail oneself of that power.

"Possession" is one of the most vague of all vague terms, and shifts its meaning according to the subject-matter to which it is applied, varying very much in its sense, as it is introduced either into civil or into criminal proceedings.

Possession is that condition of fact under which one can exercise his power over a corporeal thing to the exclusion of all others.

To constitute possession, there must be such appropriation of the land to the individual as will apprise the community in its vicinity that the land is in his exclusive use and enjoyment, and notice of possession to be sufficient must be of the open and visible character, which from its nature will apprise the world that the land is occupied, and who the occupant is.

167. In "Jowitt's Dictionary of English Law" Vol. 2 Second Edition-1977, Second Impression-1990, published by London Sweet & Maxwell Limited, at pages 1387-1389:

Possession, the visible possibility of exercising physical control over a thing, coupled with the intention of doing so. either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by

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intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for, if the thing shows no signs of being under the control of anyone, it is not possessed; hence, if a piece of land is deserted and left without fences or other signs of occupation, it is not in the possession of anyone, and the possession is said to be vacant. The question whether possession of land is vacant is of importance in actions for recovering possession.

Possession is actual, where a person enters into lands or tenements conveyed to him; apparent, which is a species of presumptive title, as where land descended to the heir of an abator, intruder, or disseisor, who died seised; in law, when lands had descended to a man and he had not actually entered into them, or naked, that is, mere possession, without colour of right.

.....

Possession may connote different kinds of control according to the nature of the thing or right over which it is being exercised. A man may possess an estate of land; if he leases it he will be in possession of the rents and profits and the reversion, but not of the land which is in the lessee who may bring an action of trespass against the lessor.....

The adage, possession is nine parts of the law, means that the person in possession can only be ousted by one whose title is better than his; every claimant must succeed by the strength of his own title and not by the weakness of his antagonist's.

Possession does not necessarily imply use or enjoyment.

Possession gives rise to peculiar rights and consequences. The principle is that a possessor has a presumptive title, that is to say, is presumed to be absolute owner until the contrary is shown, and is protected by law in his possession against all who cannot show a better title to the possession than he has.

With reference to its origin, possession is either with or without right.

Rightful possession is where a person has the right to the possession of (that is, the right to possess) property, and is in the possession of it with the intention of exercising his right. This kind of possession necessarily varies with the nature of the right from which it arises; a person may be in possession of a thing by virtue of his right of ownership, or as lessee, bailee, etc.; or his possession may be merely permissive, as in the case of a licensee; or it may be a possession coupled with an interest, as in the case of an auctioneer (Woolfe v. Home (1867) 2 QBD 358). So the right may be absolute, that is, good against all persons; or relative, that is, good against all with certain exceptions; thus a carrier or borrower of goods has a right to their possession against all the world except the owner.

In jurisprudence, the possession of a lessee, bailee, licensee, etc., is sometimes called derivative possession, while in English Law the possessory interest of such a person, considered with reference to his rights against third persons who interfere with his possession, is usually called a special or qualified property, meaning a limited right of ownership.

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Possession without right is called wrongful or adverse, according to the rights of the owner or those of the possessor are considered. Wrongful possession is where a person takes possession of property to which he is not entitled, so that the possession and the right of possession are in one person, and the right to possession in another. Where an owner is wrongfully dispossessed, he has a right of action to recover his property, or, if he has an opportunity, he can exercise the remedy of reception in the case of goods, or of entry in the case of land.

168. In "Legal Thesaurus" Regular Edition William C. Burton (1981), published by Macmillan Publishing Co., Inc. New York., at page 391:

POSSESSION (Ownership), noun

authority, custody, demesne, domination, dominion, exclusive right, lordship, occupancy, possessio, proprietorship right, right of retention, seisin, supremacy, tenancy, title<;>

169. In "Mitra's Legal & Commercial Dictionary" 5th Edition (1990) by A.N. Saha, published by Eastern Law House Pvt. Ltd., at pages 558-559:

Possession, the visible possibility of exercising physical control over a thing, coupled with the intention of doing so, either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for, if the thing shows no signs of being under the control of anyone, it is not possessed.

.....

There are two varieties of possession (a) real or actual possession, and (b) constructive or symbolical possession.

The meaning of possession depends on the context in which it is used. English law has never worked out a completely logical and exhaustive definition of possession. Towers & Co. Ltd. v. Gray (1961) 2 All ER 68 : (1961) 2 QB 351.

Possession need not be physical possession, but can be constructive, having power and control over the gun. Gunwantlal v. State MANU/SC/0130/1972 : AIR 1972 SC 1756.

170. In P. Ramanatha Aiyar's "The Law Lexicon" with Legal Maxims, Latin Terms and Words & Phrases, Second Edition 1997, published by Wadhwa and Company, Law Publishers, at pages 1481-1483:

1. Physical control, whether actual or in the eye of law, over property; the condition of holding atone's disposal (S. 66, T.P. Act); 2. the area in one's possession (S. 37, Indian Evidence Act).

Possession is a detention or enjoyment of a thing which a man holds or exercise by himself or by another, who keeps or exercise it in his name.

Possession is said to be in two ways either actual possession or possession

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in law.

"Actual Possession," is, when a man entered into lands or tenements to him descended, or otherwise.

Possession in Law, is when lands of tenements are descended to a man, and he hath not as yet really, actually, and in deed entered into them: And it is called possession in law because that in the eye and consideration of the law, he is deemed to be in possession, inasmuch as he is liable to every man's action that will sue concerning the same lands or tenements.

The term has been defined as follows: Simply the owning or having a thing in one's power; the present right and power to control a thing; the detention and control of the manual or ideal custody of anything which may be the subject of property, for one's use of enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises it in one's place and name; the detention or enjoyment of a thing which a man holds or exercise by himself or by another who keeps or exercises it in his name; the act of possession, a having and holding or retaining of property in one's power or control; the sole control of the property or of some physical attachment to it; that condition of fact under which one can exercise his power over a corporeal thing at his pleasure, to the exclusion of all other persons. MANU/UP/0113/1937 : 171 IC 159 : 1937 ALJ 951 : 1937 ALR 913 : 1937 AWR 823 : AIR 1937 All 735; 12 Bom. LR 316 : 5 IC 457; 6 Bom LR 887 : 16 CPLR 13; 4 NLR 78 : 8 CriLJ 18.

There can be no possession without intention or consciousness or will. Norendranath Masumdar v. The State, MANU/WB/0027/1951 : AIR 1951 Cal 140. (S.19(f) Arms Act, 1878).

Possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power or control. Gunwantlal v. The State of M.P., MANU/SC/0130/1972 : AIR 1972 SC 1756, 1759.

Possession is a polymorphous term which may have different meanings in different contents. The possession of a fire-arm must have the element of consciousness or knowledge of that possession and when there is no actual physical possession a control or dominion over it, there is no possession.

The word "possession" naturally signifies lawful possession. The possession of a trespasser could not be a possession of a tenant so as to attract Section 14(1). Bhagat Ram v. Smt. Ulawati Galib, MANU/HP/0031/1972 : AIR 1972 HP 125,130.

The word 'possessed' means the state of owning or having in one's hand or power but even this broad meaning will not apply in the case of a share or a woman when there has been no partition by metes and bounds. Modi Nathubai Motilal v. Chhotubhai Manibhai Besai, MANU/GJ/0046/1962 : AIR 1962 Guj 68, 77.

Obtaining a symbolic possession is in law equivalent to obtain actual physical possession and has the effect of terminating the legal possession of the person bound by the decree and order. Umrao Singh v. Union of India, MANU/DE/0213/1974 : AIR 1975 Del 188, 191.

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The word 'possession' implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. In Re, Pachiripalli Satyanarayanan, MANU/TN/0254/1953 : AIR 1953 Mad 534.

Where an estate or interest in realty is spoken of as being "in possession", that does not, primarily, mean the actual occupation of the property; but means, the present right thereto or to the enjoyment thereof.

The word "possession" in S. 28 of the Limitation Act XV of 1877, embraces both actual possession and possession in law (1902) 6 CWN 601.

The word "possession" in C.P. Code, includes constructive possession, such as possession by a tenant (1901) ILR 25 B 478 (491).

Possession in Specific Relief Act (I of 1877), S. 9 does not include joint possession, but refers to exclusive possession (1914) 23 Ind Cas 618 (619).

The word "possession" means the legal right to possession. Health v. Drown (1972) 2 All ER 561, 573(HL).

171. There is a distinction between the terms "possession", "occupation" and "control". The distinction between "possession" and "occupation" was considered in Seth Narainbhai Ichharam Kurmi and another v. Narbada Prasad Sheosahai Pande and others, MANU/NA/0125/1941 : AIR 1941 Nag 357, and the Court held:

Bare occupation and possession are two different things. The concept of possession, at any rate as it is understood in legal terminology, is a complex one which need not include actual occupation. It comprises rather the right to possess, and the right and ability to exclude others from possession and control coupled with a mental element, namely, the animus possidendi, that is to say, knowledge of these rights and the desire and intention of exercising them if need be. The adverse possession of which the law speaks does not necessarily denote actual physical ouster from occupation but an ouster from all those rights which constitute possession in law. It is true that physical occupation is ordinarily the best and the most conclusive proof of possession in this sense but the two are not the same. It is also true that there must always be physical ouster from these rights but that does not necessarily import physical ouster from occupation especially when this is of just a small room or two in a house and when this occupation is shared with others. The nature of the ouster and the quantum necessary naturally varies in each case.

172. The distinction between "possession", "occupation" or "control" was also considered in Sumatibai Wasudeo Bachuwar v. Emperor, MANU/MH/0008/1943 : AIR 1944 Bom 125 and the Court held:

Some documents containing prejudicial reports were found in a box in the house occupied by the applicant and her husband. When the house was raided by the police, the husband was out and the applicant (wife) produced the keys with one of which the box could be opened. In addition to pre judicial reports, there were some letters in the box addressed to the applicant. Held, (1) that, prima facie, the box containing the documents would be in the possession of the husband and the mere fact that in his absence he had left the keys with the applicant (wife) would not make her in joint possession with himself; nor did the fact that there were letters in the

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box addressed to the wife mean that she was in joint possession of all the contents of the box; (2) that the wife was in the circumstances in possession of the box within the meaning of R. 39(1) of the Defence of India Rules; (3) that occupation in R. 39(2) of the Defence of India Rules meant legal occupation, and the applicant could not be held to be in occupation or control of the house so as to render her guilty under R. 39 of the Defence of India Rules.

173. In "Mitra's Law of Possession and Ownership of Property" reprint 2010 published by Sodhi Publication, Allahabad, certain kinds of possession in the light of Courts' verdict have been provided as under:

Continuous possession. -- The meaning of the word "continue" means to keep existing or happening without stopping and the word "continuous" describes something that continues without stopping. In a case where the plaintiff was in possession for a period of five years at a time on the basis of a lease, the moment the period of lease expired, the Court held in Kartik Mandal v. State of Bihar, MANU/BH/0439/2008 : AIR 2009 Pat 33, that he was bound to restore before the possession of the settler and cannot claim to be in continuous possession.

Effective possession. -- Where the plaintiff did not get the possession of the land as to control it as per his desire means that he is not having effective possession of the land as held in Alkapuri Co-operative Housing Society Ltd. v. Jayantibhai Naginbhai, MANU/SC/0049/2009 : AIR 2009 SC 1948.

De jure possession. -- A possession deemed in law though actually it is in possession of another is de jure possession as held in Kottakkal Co-operative Urban Bank v. Balakrishna, MANU/KE/0049/2008 : AIR 2008 Ker 179.

Exclusive possession. -- In Nirmal Kanta (Smt.) v. Ashok Kumar, MANU/SC/7383/2008 : 2008 (7) SCC 722 : (AIR 2008 SC 1768), the respondent No. 2 was accommodated by respondent No. 1 to assist him in his cloth business by helping customers to assess the amount of cloth required for their particular purposes. The said activity did not give respondent No. 2 exclusive possession for that part of the shop room from where he was operating and where his sewing machine had been affixed. This view taken by the Court below was upheld by the Apex Court.

Hostile possession. -- A possession against the real owner within his knowledge constitute hostile possession. Where a person is not sure who is the true owner, the question of his being in hostile possession does not arise and it would also not result in assuming that he was denying title of true owner. This is what was held by this Court in Ramzan v. Smt. Gafooran (MANU/UP/1451/2007 : AIR 2008 All 37) (supra). When a person claims possession over a property showing himself to be the owner, the question of showing hostile possession would not arise. Similarly, in Gopendra Goswami v. Haradhan Das, MANU/GH/0399/2008 : AIR 2009 Gau 41, it was held that mere possession over a land cannot be treated hostile to the title of the real owner unless it is shown that the real owner has the knowledge and thereupon the possession of the stranger continued.

Physical possession. -- It is the actual possession over the land.(See: Dhara Singh v. Fateh Singh, MANU/RH/0246/2009 : AIR 2009 Raj 132).

Wrongful possession. -- Possession contrary to law is the wrongful

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possession.

174. Possession can also be classified as under:

(a) De facto possession, (b) De jure possession, (c) Symbolic possession, (d) Joint possession, (e) Concurrent possession. Besides, some more categories are forcible possession, independent possession, lawful possession, permissive possession and settled possession.

175. Possession, therefore, has two aspects. By itself it is a limited title which is good against all except a true owner. It is also prima facie evidence of ownership. In Hari Khandu v. Dhondi Nanth, (1906) 8 Bom LR 96, Sir Lawrence Jenkins, C.J. observed that possession has twofold value, it is evidence of ownership and is itself the foundation of a right to possession. The possession, therefore, is not only a physical condition which is protected by ownership but a right itself.

176. In Supdt. & Remembrancer of Legal Affairs, West Bengal v. Anil Kumar Bhunja & Ors., MANU/SC/0266/1979 : AIR 1980 SC 52 the possession was described by the Court in paras 13, 14 and 15 as under:

13. "Possession" is a polymorphous term which may have different meanings in different contexts. It is impossible to work out a completely logical and precise definition of "possession" uniformly applicable to all situations in the contexts of all statutes. Dias & Hughes in their book on Jurisprudence say that if a topic ever suffered from too much theorizing it is that of "possession". Much of this difficulty and confusion is (as pointed out in Salmond's Jurisprudence, 12th Edition, 1966) caused by the fact that possession is not purely a legal concept. "Possession", implies a right and a fact; the right to enjoy annexed to the right of property and the fact of the real intention. It involves power of control and intent to control. (See Dias and Hughes, ibid)

14. According to Pollock & Wright "when a person is in such a relation to a thing that, so far as regards the thing, he can assume, exercise or resume manual control of it at pleasure, and so far as regards other persons, the thing is under the protection of his personal presence, or in or on a house or land occupied by him or in any receptacle belonging to him and under his control, he is in physical possession of the thing.

15. While recognising that "possession" is not a purely legal concept but also a matter of fact; Salmond (12th Edition, page 52) describes "possession, in fact", as a relationship between a person and a thing. According to the learned author the test for determining "whether a person is in possession of anything is whether he is in general control of it.

177. Here the title and ownership is with the State of U.P. The appellant at the best has lessee's rights of possession. It is thus a derivative possession, short of title or ownership.

178. The defendants on the contrary claimed hostile possession on essential feature of the concept of adverse possession. A person other than owner, if continued to have possession of immoveable property for a period as prescribed in a Statute providing limitation, openly, without any interruption and interference from the owner, though he has knowledge of such possession, would crystallise in ownership after the expiry of the prescribed period or limitation, if the real owner has not taken any action for re-entry and he shall be denuded of his title to the property in law.

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'Permissible possession' shall not mature a title since it cannot be treated to be an 'adverse possession'. Such possession, for however length of time be continued, shall not either be converted into adverse possession or a tide. It is only the hostile possession which is one of the condition for adverse possession.

179. Ordinarily an owner of property is presumed to be in possession and such presumption is in his favour where there is nothing to be contrary. But where a plaintiff himself admits that he has been dispossessed by the defendant and no longer in proprietary possession of the property in suit at the time of institution of the suit, the Court shall not start with the presumption in his favour that the possession of the property was with him. Mere adverse entry in revenue papers is not relevant for proof of adverse possession. Possession is prima facie evidence of title and has to be pleaded specifically with all its necessary ingredients namely, hostile, open, actual and continuous.

180. In Gunga Gobind Mundul v. Collector of the 24 pergunnahs (1866-67) 11 Moore's IA 345 it was observed by the Privy Council that continuous possession for more than twelve years not only bars the remedy, but practically extinguishes the title of the true owner in favour of the possessor. This was followed by a Division Bench of Calcutta High Court in Gossain Das Chunder v. Issur Chunder Nath, MANU/WB/0062/1877 : 1877 LR 3 (Cal) 224.

181. In Gossain Das Chunder (supra) the High Court held that 12 years continuous possession of land by wrong doer not only bars the remedy also extinguishes the title of the rightful owner. It confers a good title upon the wrong doer.

182. In Bhupendra Narayan Sinha v. Rajeswar Prosad Bhakat & Ors., MANU/PR/0042/1931 : AIR 1931 PC 162 the Privy Council held where a persor without any colour of right wrongfully takes possession as a trespasser of a property of another, any title which he may require by adverse possession will be strictly limited to what he has actually so possessed. That was an interesting case of dispute of ownership in respect to subsoil. It was held that there can be separate ownership of different strata of subsoil, at all events where minerals are involved. If a grant of surface right was given by the owner and the licensee is given possession to carry out the said right, by quarrying stones etc. possession of subsoil in the eyes of law remain with the owner though it is only a constructive possession but in the absence of anything to show that with the knowledge of the owner the licensee held possession of subsoil and minerals therein and continued with that possession for statutory period of limitation to continue its ownership such plea of adverse possession in respect to subsoil cannot be accepted.

183. In Basant Kumar Roy v. Secretary of State for India (MANU/PR/0025/1917 : AIR 1917 PC 18) (supra), it was held:

> An exclusive adverse possession for a sufficient period may be made out, in spite of occasional acts done by the former owner on the ground for a specific purpose from time to time. Conversely; acts which prima facie are acts of dispossession may under particular circumstances fall short of evidencing any kind of ouster. They may be susceptible of another explanation, bear some other characters or have some other object....If, as their Lordships think, no dispossession occurred, except possibly within twelve years before the commencement of this suit, Article 144 is the Article applicable, and not Article 142.

184. In Board Nageshwar Bux Roy v. Bengal Coal Co., MANU/PR/0070/1930 : AIR 1931 PC 186 the observation in respect to adverse possession similar to what has

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been noted above were made and the said judgment was followed in Bhupendra Narayan Sinha (MANU/PR/0042/1931 : AIR 1931 PC 162) (supra).

185. The law in respect to adverse possession, therefore, is now well settled. It should be nec vi nec clam nec precario. (Secretary of State for India v. Debendra Lal Khan, MANU/PR/0072/1933 : AIR 1934 PC 23, page 25). This decision has beer referred and followed by the Apex Court in P. Lakshmi Reddy (MANU/SC/0083/1956 : AIR 1957 SC 314) (supra) (para 4). The Court further says that the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. [Radhamoni Debi v. Collector of Khulna MANU/PR/0007/1900 : (1900), 27 Ind App 136 at p 140 (PC)]. The case before the Apex Court in P. Lakshmi Reddy (supra) was that of co-heirs where the plea of adverse possession was set up. In this regard it was held:

> But it is well settled in order, to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of the joint title. The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus of his own part in derogation of the other co-heir title. It is settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

186. In Thakur Kishan Singh v. Arvind Kumar, MANU/SC/0015/1995 : AIR 1995 SC 73 the Court said:

> A possession of a co-owner or of a licensee or of an agent or a permissive possession to become adverse must be established by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of real owner. Mere possession for howsoever length of time does not result in converting the permissive possession into adverse possession.

187. In Sheo Raj Chamar & another v. Mudeer Khan & others, MANU/UP/0224/1934 : AIR 1934 All 868, it was held:

> If, indeed it did, the defendants have acquired a right by sheer adverse possession held and maintained for more than 12 years. The adverse possession to be effective need not be for the full proprietary right.

188. In Saroop Singh v. Banto and others, MANU/SC/1146/2005 : 2005(8) SCC 330 : (AIR 2005 SC 4407) the Court held in para 30:

> 30. Animus possidendi is one of the ingredients of adverse possession. Unless the person possessing the land has a requisite animus the period for prescription does not commence.....

189. In T. Anjanappa and others v. Somalingappa and another, MANU/SC/8429/2006 : 2006 (7) SCC 570 : (2006 AIR SCW 4368) the preconditions for taking plea of adverse possession has been summarised as under:

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It is well-recognised proposition in law that mere possession however long does not necessarily mean that it is adverse to the true owner. Adverse possession really means the hostile possession which is expressly or impliedly in denial of title of the true owner and in order to constitute adverse possession the possession proved must be adequate in continuity, in publicity and in extent to as to show that it is adverse to the true owner. The classical requirements of acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.

190. In P.T. Munichikkanna Reddy & Ors. v. Revamma & Ors., MANU/SC/7325/2007 : AIR 2007 SC 1753 it was held:

It is important to appreciate the question of intention as it would have appeared to the paper-owner. The issue is that intention of the adverse user gets communicated to the paper-owner of the property. This is where the law gives importance to hostility and openness as pertinent qualities of manner of possession. It follows that the possession of the adverse possessor must be hostile enough to give rise to a reasonable notice and opportunity to the paper-owner.

191. In the above case the Apex Court discussed the law in detail and observed:

Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. (Para 5)

Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the Court expires through effluxion of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time, but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (Para 6)

Therefore, to assess a claim of adverse possession, two pronged enquiry is required:

1. Application of limitation provision thereby jurisprudentially "wilful 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

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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 (Para 9)

192. In para 12 of the judgment, referring to its earlier decision in T. Anjanappa (MANU/SC/8429/2006 : 2006 AIR SCW 4368) (supra), the Court held that if the defendants are not sure who is the true owner, the question of their being in hostile possession and the question of denying title of the true owner do not arise. It also referred on this aspect its earlier decision in Des Raj and others v. Bhagat Ram (Dead) by LRs. and others, MANU/SC/7153/2007 : 2007(3) SCALE 371 : (AIR 200 SC (Supp) 512 : (AIR 20007 SC 204) and Govindammal v. R. Perumal Chettiar and others MANU/SC/8567/2006 : JT 2006 (1) SC 121.

193. In Annakili v. A. Vedanayagam and others, MANU/SC/8027/2007 : AIR 2008 SC 346 the Court pointed out that a claim of adverse possession has two elements (i) the possession of the defendant becomes adverse to the plaintiff; and (ii) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi is held to be a requisite ingredient of adverse possession well known in law. The Court held:

> It is now a well settled principle of law that mere possession of the land would not ripen into possessor 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 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 do not ripen into a title.

194. In Vishwanath Bapurao Sabale v. Shalinibai Nagappa Sabale and others, MANU/SC/0442/2009 : JT 2009 (5) SC 395 : (AIR 2009 SC (supp) 1525) the Cour said:

> ....for claiming title by adverse possession, it was necessary for the plaintiff to plead and prove animus possidendi.
>
> A peaceful, open and continuous possession being the ingredients of the principle of adverse possession as contained in the maxim nec vi, nec clam, nec precario, long possession by itself would not be sufficient to prove adverse possession.

195. The title of property can vest in idols also by adverse possession as held in Ananda Chandra Chakrabarti v. Broja Lal Singha and others, MANU/WB/0418/1922 : AIR 1923 Cal 142 wherein reliance was also placed on Balwant v. Puran MANU/PR/0006/1883 : (1883) 10 Ind App 90; Ramprakash v. Ananda Das, MANU/PR/0001/1916 : 43 Cal (1916) 707; Vidya v. Balusami MANU/PR/0062/1921 : (1921) 48 IA 302; Khaw Sim v. Chuah Hooi MANU/PR/0115/1921 : (1922) 49 IA 37; Damodar Das v. Lakhandas MANU/PR/0026/1910 : (1910) 37 IA 147 : 1910 (37) ILR (Cal) 885.

196. In Dasami Sahu v. Param Shameshwar Uma Bhairabeshwar Bam Lingshar and Chitranjan Mukerji MANU/UP/0235/1929 : (1929) ALJR 473, Hon'ble Sulaiman, J. o this Court held that there can be adverse possession, not only as against the idols but over the idols themselves. That adverse possession can be acquired against idols in respect of property dedicated in their favour and for the said purpose, reliance was placed on Maharaja Jagadindra Nath Roy Bahadur v. Rani Hemanta Kumari Debi

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MANU/PR/0014/1904 : (1904) 1 ALJR 585; Rao Bahadur Man Singh v. Maharan Nawlakhbati MANU/PR/0126/1925 : (1926) 24 ALJR 251 and Damodar Das v. Lakhar Das (Supra). It further held:

> In our opinion the same principle applies whether the adverse possession is exercised by a total stranger or by the donor himself. So long as such decision is exercised to the ouster and knowledge of Chittaranjan's mother, who alone can hold the property on behalf of the idols, it would mature into title after the lapse of the prescribed period.

197. In Secretary of State v. Debendra Lal Khan (MANU/PR/0072/1933 : AIR 1934 PC 23) (supra) it was held that the period of possession of a series of independent trespassers cannot be added together and utilized by the last possessor to make up the statutory total period of adverse possession. This was followed in Wahid Ali & another v. Mahboob Ali Khan (MANU/OU/0066/1935 : AIR 1935 Oudh 425) (supra).

198. In (Sm.) Bibhabati Devi v. Ramendra Narayan Roy & others, MANU/PR/0032/1946 : AIR 1947 pc 19 it was observed that in order to claim a right of ownership applying the principle of adverse possession it is a condition precedent that the possession must be adverse to a living person. Herein the appellant was possessing the property under a mosque after the death of the defendant, it was held that the possession cannot be said to be adverse.

199. In Chhote Khan & others v. Mal Khan & others, MANU/SC/0128/1954 : AIR 1954 SC 575, the Court observed that no question of adverse possession arises where the possession is held under an arrangement between the co-sharers.

200. The Court in P. Lakshmi Reddy (MANU/SC/0083/1956 : AIR 1957 SC 314) (supra) quoted with approval Mitra's Tagore Law Lectures on Limitation and Prescription (6th Edition) Vol. I, Lecture VI, at page 159, quoting from Angell on Limitation:

> An adverse holding is an actual and exclusive appropriation of land commenced and continued under a claim of right, either under an openly avowed claim, or under a constructive claim (arising from the acts and circumstances attending the appropriation), to hold the land against him (sic) who was in possession. (Angell, sections 390 and 398). It is the intention to claim adversely accompanied by such an invasion of the rights of the opposite party as gives him a cause of action which constitutes adverse possession.

201. It further held:

> Consonant with this principle the commencement of adverse possession, in favour of a person, implies that that person is in actual possession, at the time, with a notorious hostile claim of exclusive title, to repel which, the true owner would then be in a position to maintain an action. It would follow that whatever may be the animus or intention of a person wanting to acquire title by adverse possession his adverse possession cannot commence until site animus.

202. In Karbalai Begum v. Mohd. Sayeed MANU/SC/0363/1980 : (1980) 4 SCC 396 : (AIR 1981 SC 77) in the context of a cosharer, it was held:

> ...It is well settled that mere non-participation in the rent and profits of the land of a cosharer does not amount to an ouster so as to give title by

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adverse possession to the other cosharer in possession.

203. In Annasaheb Bapusaheb Patil v. Balwant MANU/SC/0172/1995 : (1995) 2 SCC 543 : (AIR 1995 SC 895) the Court, in para 15, said:

> 15. Where possession can be referred to a lawful title, it will not be considered to be adverse. The reason being that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another, does not by mere denial of that other's title make his possession adverse so as to give himself the benefit of the statute of limitation. Therefore, a person who enters into possession having a lawful title, cannot divest another of that title by pretending that he had no title at all.

204. In Vidya Devi v. Prem Prakash MANU/SC/0345/1995 : (1995) 4 SCC 496 : (AIR 1995 SC 1789) the Court in paras 27 and 28 held:

> **27.**..it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in P. Lakshmi Reddy case (MANU/SC/0083/1956 : AIR 1957 SC 314) which has since been followed in Mohd. Zainulabudeen v. Sayed Ahmed Mohideen (MANU/SC/0785/1989 : AIR 1990 SC 507).
>
> **28.** 'Ouster' does not mean actual driving out of the cosharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.

205. In making above observations, the Court also relied on its earlier decisions in P. Lakshmi Reddy (MANU/SC/0083/1956 : AIR 1957 SC 314) (supra) and Mohd. Zainulabudeen v. Sayed Ahmad Mohideen MANU/SC/0322/1989 : (1990) 1 SCC 345 : (AIR 1990 SC 507).

206. In Roop Singh v. Ram Singh MANU/SC/0204/2000 : (2000) 3 SCC 708 : (AIR 2000 SC 1485) it was held that if the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession. The Court relied on its earlier decisions in Thakur Kishan Singh (MANU/SC/0015/1995 : AIR 1995 SC 73) (supra).

207. In Darshan Singh v. Gujjar Singh MANU/SC/0007/2002 : (2002) 2 SCC 62 : (AIR 2002 SC 606) in paras 7 and 9, the Court held:

> ...It is well settled that if a cosharer is in possession of the entire property, his possession cannot be deemed to be adverse for other, cosharers unless there has been an ouster of other cosharers.

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9. In our view, the correct legal position is that possession of a property belonging to several cosharers by one cosharer shall be deemed that he possesses the property on behalf of the other cosharers unless there has been a clear ouster by denying the title of other cosharers and mutation in the revenue records in the name of one cosharer would not amount to ouster unless there is a clear declaration that title of the other cosharers was denied.

208. In order to defeat title of a plaintiff on the ground of adverse possession it is obligatory on the part of the respondent to specifically plead and prove as to since when their possession came adverse. If it was permissive or obtained pursuant to some sort of arrangement, the plea of adverse possession would fail. In Md. Mohammad Ali v. Jagadish Kalita & Ors. MANU/SC/0785/2003 : (2004) 1 SCC 271 with reference to a case dealing with such an issue amongst cosharers it was observed that "Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a cosharer does not amount to ouster so as to give title by prescription.

209. It was also observed in para 21 that for the purpose of proving adverse possession/ouster, the defendant must also prove animus possidendi.

210. In Amarendra Pratap Singh v. Tej Bahadur Prajapati and others, MANU/SC/0955/2003 : AIR 2004 SC 3782 : (2004) 10 SCC 65 considering as to wha is adverse possession, the Court in para 22 observed:

> What is adverse possession? Every possession is not, in law, adverse possession. Under Article 65 of the Limitation Act, 1963, a suit for possession of immovable property or any interest therein based on title can be instituted within a period of 12 years calculated from the date when the possession of the defendant becomes adverse to the plaintiff. By virtue of Section 27 of the Limitation Act, at the determination of the period limited by the Act to any person for instituting a suit for possession of any property, his right to such property stands extinguished. The process of acquisition of title by adverse possession springs into action essentially by default or inaction of the owner. 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 tide 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. It is that extinguished tide of the real owner which comes to vest in the wrongdoer. The law does not intend to confer any premium on the wrong doing of a person in wrongful possession; it pronounces the penalty of extinction of title on the person who though entitled to assert his right and remove the wrong doer and reenter into possession, has defaulted and remained inactive for a period of 12 years, which the law considers reasonable for attracting the said penalty. Inaction for a period of 12 years is treated by the Doctrine of Adverse Possession as evidence of the loss of desire on the part of the rightful owner to assert his ownership and reclaim possession.

211. However, the Court further observed that if property, by virtue of some statutory provisions or otherwise, is alienable, the plea of adverse possession may not be available and held:

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23. The nature of the property, the nature of title vesting in the rightful owner, the kind of possession which the adverse possessor is exercising, are all relevant factors which enter into consideration for attracting applicability of the Doctrine of Adverse Possession. The right in the property ought to be one which is alienable and is capable of being acquired by the competitor. Adverse possession operates on an alienable right. The right stands alienated by operation of law, for it was capable of being alienated voluntarily and is sought to be recognized by doctrine of adverse possession as having been alienated involuntarily, by default and inaction on the part of the rightful claimant, who knows actually or constructively of the wrongful acts of the competitor and yet sits idle. Such inaction or default in taking care of one's own rights over property is also capable of being called a manner of 'dealing' with one's property which results in extinguishing one's title in property and vesting the same in the wrong doer in possession of property and thus amounts to 'transfer of immovable property' in the wider sense assignable in the context of social welfare legislation enacted with the object of protecting a weaker section.

212. In L.N. Aswathama & another v. V.P. Prakash, MANU/SC/1222/2009 : JT 2009 (9) 527 : (2009 AIR SCW 5439) the Court, in paras 17 and 18 said:

17. The legal position is no doubt well settled. To establish a claim of title by prescription, that is adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence.

18....When a person is in possession asserting to be the owner, even if he fails to establish his title, his possession would still be adverse to the true owner. Therefore, the two pleas put forth by the defendant in this case are not inconsistent pleas but alternative pleas available on the same facts. Therefore, the contention of the plaintiffs that the plea of adverse possession is not available to defendant is rejected.

213. Further, in para 25 the Court said:

25. When defendant claimed title and that was proved to be false or fabricated, then the burden is heavy upon him to prove actual, exclusive, open, uninterrupted possession for 12 years. In this case we have already held that he did not make out such possession for 12 years prior to the suit.

214. Where a plea of adverse possession is taken, the pleadings are of utmost importance and anything, if found missing in pleadings, it may be fatal to such plea of adverse possession. Since mere long possession cannot satisfy the requirement of adverse possession, the person claiming it must prove as to how and when the adverse possession commenced and whether fact of adverse possession was known to real owner. (R.N. Dawar v. Ganga Saran Dhama, MANU/DE/0003/1993 : AIR 1993 Del 19). In Parwatabai v. Sona Bai, (MANU/SC/0104/1997 : 1997 (1) SCC 531 : AIR 1997 SC 381), it was stressed upon by the Apex Court that to establish the claim of

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adverse possession, one has to establish the exact date from which adverse possession started. The claim based on adverse possession has to be proved affirmatively by cogent evidence and presumptions and probabilities cannot be substituted for evidence. The plea of adverse possession is not always a legal plea. It is always based on facts which must be asserted, pleaded and proved. A person pleading adverse possession has no equities in his favour since he is trying to defeat the right of the true owner and, therefore, he has to specifically plead with sufficient clarity when his possession became adverse and the nature of such possession. [See Mahesh Chand Sharma (MANU/SC/0231/1996 : AIR 1996 SC 869) (supra)].

215. In Parsinnin v. Sukhi MANU/SC/0575/1993 : (1993) 4 SCC 375 : (1993 AIR SCW 3606), it said that burden of prove lies on the party who claims adverse possession. He has to plead and prove that his possession is nec vi, nec clam, nec precario i.e., peaceful, open and continuous.

216. Article 144 L.A. 1908 shows that where a suit for possession is filed, it is the defendant to whom the plea of adverse possession is available and it is he who has to take necessary pleadings. A suit by a plaintiff based on adverse possession is not contemplated by Article 144 inasmuch the suit contemplated therein is for restoration of possession and where a person is already in possession, though adverse possession, the question of filing a suit for possession would not arise. If the chain of possession or continued possession ceased or interrupted, particularly at the time of filing of the suit, the adverse possession extinguishes and the earlier long possession, may be of more than the statutory period, would not give any advantage if the possession has been lost at the time of filing of the suit.

217. Besides, alternative plea may be permissible, but mutually destructive pleas are not permissible. The defendants may raise inconsistent pleas so long as they are not mutually destructive as held in Biswanath Agarwalla v. Sabitri Bera & others, MANU/SC/1452/2009 : JT 2009 (10) SC 538 : (2009 AIR SCW 7425).

218. In Gautam Samp v. Leela Jetly & others MANU/SC/7401/2008 : (2008) 7 SCC 85 : (AIR 2009 SC (supp) 363), the Court said that a defendant is entitled to take an alternative plea but such alternative pleas, however, cannot be mutually destructive of each other.

219. In Ejas Ali Qidwai & Ors. v. Special Manager, Court of Wards, Balrampur Estate & Ors., MANU/PR/0014/1934 : AIR 1935 pc 53 certain interesting questions cropped up which also attracted certain consequences flowing from annexation of province of Oudh in 1857 by the British Government. It appears that one Asghar Ali and his cousin Muzaffar Ali granted a mortgage by conditional sale of the entire estate of Ambhapur (commonly known as the Taluka of Gandara) and certain villages to the then Maharaja of Balrampur. The mortgaged property situated in District Bahraich, which was in the Province of Oudh. The mortgagee brought an action to enforce his right, got a decree in his favour and ultimately possession of the property in 1922. The sons of Asghar Ali thereafter brought an action in civil Court for recovery of their share of the mortgaged property on the ground that it was the absolute property of their father and on his death devolved on all the persons who were his heirs under the Mahomedan Law. They challenged Iqbal Ali's right to mortgage the whole of estate and impeached the mortgaged transaction on various grounds. The claim was resisted on the ground that succession to the estate was governed by the rule of primogeniture according to which the whole of the estate descended first to Asghar Ah and after his death to his eldest son Iqbal Ali. The defence having been upheld the claim was negatived by the trial Court as well as the court of appeal. Before the Privy Council the only question raised was whether the succession to the property was

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regulated by the rule of primogeniture or by Mahomedan Law.

220. The Privy Council while considering the above question observed that the Province of Oudh was annexed by the East India Company in 1856 but in 1857 during the first war of independence by native Indians much of its part was declared independent. Soon after it was conquered by the British Government and it got re-occupation of the entire province of Oudh. Thereafter in March 1858 the British Government issued a proclamation confiscating, with certain exceptions "the proprietary right in the soil of the Province" and reserved to itself the power to dispose of that right in such manner as to it may seem fit. On 10th October 1859 the British Government (the then Government of India) declared that every talukdar with whom a summary settlement has been made since the re-occupation of the Province has thereby acquired a permanent, hereditary and transferable proprietary right, namely in the taluka for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluka. Pursuant to that declaration, Wazir Ali with whom a summary settlement of Taluka has already been made was granted a Sanad which conferred upon him full proprietary right, title and possession of the estate or Ambhapur. In the said grant, there contained a stipulation that in the event of dying intestate or anyone of his successor dies intestate, the estate shall descend to the nearest male heir according to rule of primogeniture. Subsequently, in order to avoid any further doubt in the matter, Oudh Estates Act I of 1869 was enacted wherein Wazir Ali was shown as a Talukdar whose estate according to the custom of the family on or before 13.2.1856 ordinarily devolved upon a single heir. However, having noticed this state of affairs, the Privy Council further observed that this rule was not followed after the death of Wazir Ali and the Taluka was mutated in favour of his cousin Nawazish Ali. He was recorded as owner of Taluka. Thereafter in 1892 Samsam Ali entered the joint possession with Nawazish Ali and after death of Nawazish Ali, Samsam Ali was recorded as the sole owner. The system of devolution of the property was explained being in accordance with the usage of the family and when the name of Asghar Ali was recorded, he also made a similar declaration. Faced with the situation the appellant sought to explain the possession of Nawazish Ali as adverse possession but the same was discarded by the Privy Council observing:

> The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed.

221. It appears that the defendants initially sought to maintain their claim of continued ownership, possession and disruption against the Government authorities but later on the plea of adverse possession against the plaintiff has been taken which makes the stand of the defendants inherently inconsistent and mutually destructive. The defendants ought to have elected one or the other case and could not have taken a plea which is not an alternative but mutually destructive.

222. In Nagubai Ammal and others v. B. Shama Rao and others, MANU/SC/0089/1956 : AIR 1956 SC 593 the Court considered the doctrine of election and observed:

> **18.** An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way

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of estoppel.

.....

Reliance was placed on the well-known observations of Baron Park in Slatterie v. Pooley, (1840) 6 M & W 664 (669) (C) that "what a party himself admits to be true may reasonably be presumed to be so", and on the decision in (1907) 34 Ind App 27 (B), where this statement of the law was adopted. No exception can be taken to this proposition. But before it can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, such as will be conclusive unless explained.

The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Banks, L.J.:

> Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act.

The observations of Scrutton, L.J. on which the appellants rely are as follows:

> A plaintiff is not permitted to 'approbate and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election namely, that no party can accept and reject the same instrument: Ker v. Wauchope (1819) 1 Bligh 1 (21) (E): Douglas Menzies v. Umphelby, 1908 AC 224 (232) (F). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction.

It is clear from the above observations that the maxim that a person cannot 'approbate and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in Halsbury's Laws of England, Volume XIII, page 454, para 512:

> On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it. (para 23)

223. The Doctrine of election was described by Jarman on Wills, 6th Edn. Page 532 as under:

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> The doctrine of election may be thus stated. That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument conforming to all its provisions and renouncing every right inconsistent with it. If therefore a testator has affected to dispose of property which is not his own, and has given a benefit to the person to whom that property belongs, the devisee or legatees accepting the benefit so given to him must make good the testator's attempted disposition, but if, on the contrary, he chose to enforce his proprietary rights against the testator's disposition, equity will sequester the property given to him, for the purpose of making satisfaction out of it to the person whom he has disappointed by the assertion of those rights.

224. This has been followed in several cases noticed and followed by a Division Bench of Madras High Court in Ammalu Achi v. Ponnammal Achi & others, MANU/TN/0169/1918 : AIR 1919 Mad 464. The above judgment, however, shows that the doctrine of election as followed therein was that of applicable in England based on English decision since Sections 35 of Transfer of Property Act, 1882 and 172 of Succession Act, 1865 were found by the Court as enunciating the doctrine of election as enforced in England but those sections were not applicable to Hindus in India.

225. In R.N. Gosain v. Yashpal Dhir, MANU/SC/0078/1993 : 1992 (4) SCC 683 : (AIR 1993 SC 352), the Court said:

> 10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See: Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd. (1921) KB 608, 612 (CA), Scrutton, LJ]. According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside. (para 1508).

226. In National Insurance Co. Ltd. v. Mastan and another, MANU/SC/2367/2005 : 2006 (2) SCC 641: (AIR 2006 SC 577) the Court said:

> 23. The 'doctrine of election' is a branch of 'rule of estoppel', in terms whereof a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had. The doctrine of election postulates that when two remedies are available for the same relief the aggrieved party has the option to elect either of them but not both. Although there are certain exceptions to the same rule but the same has no application in the instant case.

227. The question of effect of gap in continuous possession came to be considered in Devi Singh v. Board of Revenue for Rajasthan and others, MANU/SC/0567/1994 : (1994) 1 SCC 215 and in para 5 the Court held as under:

> The salutary principle of appreciation of evidence in possessory matters is that when a state of affairs is shown to have existed for a long course of time but a gap therein puts to doubt its continuity prudence requires to lean in favour of the continuity of things especially when some plausible explanation of the gap is forthcoming.

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228. In Raja Rajgan Maharaja Jagatjit Singh v. Raja Partab Bahadur Singh, MANU/PR/0029/1942 : AIR 1942 PC 47 it was held that the defendant-appellant has to establish that the title to the land in suit held by the owner under the First Settlement of 1865 had been extinguished under Section 28 of the Limitation Act due to the adverse possession of the defendant-appellant or his predecessors for the appropriate statutory period of limitation and completed prior to the possession taken under attachment by Tehsildar who thereafter held it for the true owner. It also says:

> It is well established that adverse possession against an existing title must be actual and cannot be constructive.

229. In Md. Mohammad Ali v. Jagdish Kalita (supra) also the change brought in 1963 under Article 65 qua the earlier Act of 1908 was pointed out and the Court observed:

> By reason of the Limitation Act, 1963 the legal position as was obtaining under the old Act underwent a change. In a suit governed by Article 65 of the 1963 Limitation Act, the plaintiff will succeed if he proves his title and it would no longer be necessary for him to prove, unlike in a suit governed by Articles 142 and 144 of the Limitation Act, 1908, that he was in possession within 12 years preceding the filing of the suit. On the contrary, it would be for the defendant so to prove if he wants to defeat the plaintiffs claim to establish his title by adverse possession.

230. Mahadeo Prasad Singh and others v. Karia Bharthi, MANU/PR/0011/1934 : AIR 1935 PC 44 is a judgment which deals with the issue of commencement of limitation under Article 144 of Limitation Act 1908. It was held therein that a person in actual possession of Math is entitled to maintain a suit for recovery of property pertaining to Math not for his own benefit but for the benefit of Math. On the matter of limitation the Court held:

> It is common ground that the article of the Indian Limitation Act of 1908 applicable to the claim is Article 144, which prescribes a period of 12 years from the date when me possession of the appellants became adverse to the math. Their case is that in 1904, when Rajbans settled his dispute with the plaintiff, he ceased to be the mahant of Kanchanpur and repudiated the title of the math of the village of Saktni as well as to the other villages which he got in pursuance of the compromise. On that date, it is contended, he began to hold the property adversely to the institution, and the action, which was brought after the expiry of 12 years from that date, was barred by time.

231. To the same effect is the view taken in Gopal Datt v. Babu Ram, MANU/UP/0229/1936 : AIR 1936 All 653.

232. From the above discussion what boils down is that the concept of adverse possession contemplates a hostile possession, i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's right and in fact deny the same. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. In order to determine whether the act of a person constitutes adverse possession is 'animus in doing that act' and it is most crucial factor. Adverse possession commences in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of owner's right excluded him from the enjoyment of his property. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's

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title. Possession is not held to be adverse if it can be referred to a lawful title. The persons setting up adverse possession may have been holding under the rightful owner's title, i.e., trustees, guardians, bailiffs or agents, such person cannot set up adverse possession. Burden is on the defendant to prove affirmatively.

233. An occupation of reality is inconsistent with the right of the true owner. Where a person possesses property in a manner in which he is not entitled to possess it, and without anything to show that he possesses it otherwise than an owner, i.e., with the intention of excluding all persons from it, including the rightful owner, he is in adverse possession of it. Where possession could be referred to a lawful title it shall not be considered to be adverse. The reason is that a person whose possession can be referred to a lawful title will not be permitted to show that his possession was hostile to another's title. One who holds possession on behalf of another does not by mere denial of other's title make his possession adverse so as to give himself the benefit of the statute of limitation. A person who enters into possession having a lawful title cannot divest another of that title by pretending that he had no title at all.

234. Adverse possession is of two kinds. (A) Adverse from the beginning or (B) that become so subsequently. If a mere trespasser takes possession of A's property, and retains it against him, his possession is adverse ab initio. But if A grants a lease of land to B, or B obtains possession of the land as A's bailiff, or guardian, or trustee, his possession can only become adverse by some change in his position. Adverse possession not only entitles the adverse possessor, like every other possessor, to be protected in his possession against all who cannot show a better title, but also, if the adverse possessor remains in possession for a certain period of time produces the effect either of barring the right of the true owner, and thus converting the possessor into the owner, or of depriving the true owner of his right of action to recover his property although the true owner is ignorant of the adverse possessor being in occupation.

235. In Hari Chand v. Daulat Ram, MANU/SC/0385/1986 : AIR 1987 SC 94 the Cour held if the encroachment was not new one but the structure was in existence prior to acquiring title over the property the decree on the basis of adverse possession cannot be granted in favour of the plaintiff. Paras 10 and 11 of the judgment read as under:

> **10.** On a consideration of these evidences it is quite clear that the disputed kachha wall and the khaprail over it is not a new construction, but existed for over 28 years and the defendant has been living therein as has been deposed to by Ramji Lal vendor of the plaintiff who admitted in his evidence that the land in dispute and the adjoining kachha walls had been affected by salt and the chhappar over the portion shown in red was tiled roof constructed about 28 years back. This is also supported by the evidence of the defendant, D.W. 1, that the wall in dispute was in existence when the partition was effected i.e., 28 years before. On a consideration of these evidences the Trial Court rightly held that the defendant had not trespassed over the land in question nor he had constructed a new wall or khaprail. The trial court also considered the report 57C by the court Amin and held that the wall in question was not a recent construction but it appeared 25-30 years old in its present condition as (is) evident from the said report. The suit was therefore dismissed. The lower appellate court merely considered the partition deed and map Exts. 3/1 and 3/2 respectively and held that the disputed property fell to the share of the plaintiff's vendor and the correctness of the partition map was not challenged in the written statement. The court of appeal below also referred to Amin's map 47A which showed the encroached portion in red colour as falling within the share of plaintiff's vendor, and held that the defendant

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encroached on this portion of land marked in red colour, without at all considering the clear evidence of the defendant himself that the wall and the khaprail in question existed for the last 28 years and the defendant has been living there all along. P.W. 1 Ramji Lal himself also admitted that the wall existed for about 28 years as stated by the defendant and the kachha walls and the khaprail has been effected by salt. The lower appellate court though held that P.W. 1 Ramji Lal admitted in cross-examination that towards the north of the land in dispute was the khaprail covered room of Daulat Ram in which Daulat Ram lived, but this does not mean that the wall in dispute exists for the last any certain number of years, although it can be said that it is not a recent construction. Without considering the deposition of defendant No. 1 as well as the report of the Amin 57 C the IInd Addl. Civil Judge, Agra wrongly held that the defendant failed to prove that the wall in dispute and the khaprail existed for the last more than 12 years before the suit. The Civil Judge further held on surmises as "may be that the wall and khaprail have not been raised in May, 1961 as is the plaintiff's case, but they are recent constructions." This decision of the court of appeal below is wholly incorrect being contrary to the evidences on record.

11. On a consideration of all the evidences on record it is clearly established that the alleged encroachment by construction of kuchha wall and khaprail over it are not a recent construction as alleged to have been made in May 1961. On the other hand, it is crystal clear from the evidences of Ramji Lal P.W. 1 and Daulat Ram D.W. 1 that the disputed wall with khaprail existed there in the disputed site for a long time, that is 28 years before and the wall and the khaprail have been affected by salt as deposed to by these two witnesses. Moreover the court Amin's report 57C also shows the said walls and khaprail to be 25-30 years old in its present condition. The High Court has clearly come to the finding that though the partition deed was executed by the parties yet there was no partition by metes and bounds. Moreover there is no whisper in the plaint about the partition of the property in question between the co-sharers by metes and bounds nor there is any averment that the suit property fell to the share of plaintiff's vendor Ramji Lal and Ramji Lal was ever in possession of the disputed property since the date of partition till the date of sale to the plaintiff. The plaintiff has singularly failed to prove his case as pleaded in the plaint.

236. In Maharaja Sir Kesho Prasad Singh Bahadur v. Bahuria Mt. Bhagjogna Kuer and others, MANU/PR/0029/1937 : AIR 1937 pc 69 the Hon'ble Privy Council has helc that mere receipt of rent by persons claiming adversely is not sufficient to warrant finding of adverse possession. The possession of persons or their predecessors-in-title claiming by adverse possession must have "all the qualities of adequacy, continuity and exclusiveness" necessary to displace the title of the persons against whom they claim. Relevant extracts from page 78 of the said judgment reads as follows:

the mere fact that many years after the sale the Gangbarar maliks or persons depriving title from them are obtaining rent for the land is in itself very significant. Even in a locality exposed to dilution by the action of the river this circumstance alone might be given considerable weight. But without sufficient proof to cover the intervening years it was most reasonably held by the learned Subordinate Judge to be insufficient. The circumstance that the Maharaja was not in possession or in receipt of rent is, it need hardly be said, insufficient under Art. 144 to warrant a finding of adverse possession on behalf of the respondents or their predecessors-in-title. Their Lordships

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are of opinion that on the materials produced it cannot be contended that the learned Subordinate Judge was obliged in law to find that the possession of the principal respondents had "all the qualities of adequacy, continuity and exclusiveness" (per Lord Shaw 126 CWN 666 (1922) at p. 673) necessary to displace the title of the Maharaja, and they think that no reason in law exists why his finding of fact in this respect should not be final.

237. In Ramzan and others v. Smt. Gafooran (MANU/UP/1451/2007 : AIR 2008 All 37) (supra) the Hon'ble Allahabad High Court has held that unless there is specific plea and proof that adverse possession has disclaimed his right and asserted title and possession to the knowledge of the true owner within the statutory period and the true owner has acquiesced to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription. Where the adverse possessor was not sure as to who was the true owner and question of his being in hostile possession, then the question of denying title of true owner does not arise. Relevant paras 27, 29 and 30 of the said judgment read as follows:

> **27.** It is, therefore, explicit that unless there is specific plea and proof that adverse possessor has disclaimed his right and asserted title and possession to the knowledge of the true owner within a statutory period and the true owner has acquiesced to it, the adverse possessor cannot succeed to have it established that he has perfected his right by prescription.
>
> **29.** As pointed out above, where the defendants are not sure who is the true owner and question of their being in hostile possession then the question of denying title of true owner does not arise. At the most, the defendants have claimed and which is found to be correct by the trial Court that they have been in possession of the disputed property since the inception of the sale deeds in their favour. They came in possession, according to their showing, as owner of the property in question. It follows that they exercised their right over the disputed property as owner and exercise of such right, by no stretch of imagination, it can be said that they claimed their title adverse to the true owner.
>
> **30.** Viewed as above, on the facts of the present case, the possession of the contesting defendants is not of the variety and degree which is required for adverse possession to materialise.

238. In Qadir Bux v. Ram Chandra (MANU/UP/0046/1970 : AIR 1970 All 289) (supra) the Hon'ble Allahabad High Court has held that the term "dispossession" applies when a person comes in and drives out others from the possession. It implies ouster; a driven out of possession against the will of the person in actual possession. The term "discontinuance" implies a voluntary act and openness of possession followed by the actual possession of another. It implies that a person discontinuing as owner of the land and left it to be dispossessed by any one who has not to come in. Relevant para 30 of the said judgment reads as follows:

> 30. The main point for consideration is whether in such circumstances it can be said that the plaintiff had been dispossessed or had discontinued his possession within the meaning of Article 142 of the First Schedule to the Indian Limitation Act. The term "dispossession" applies when a person comes in and drives out others from the possession. It imports ouster a driving out of possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against

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the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" implies a voluntary act and abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession, but this cannot be assumed. It must be either admitted or proved. So strong in fact is the position of the rightful owner that even when he has been dispossessed by a trespasser and that trespasser abandons possession either voluntarily or by vis major for howsoever short a time before he has actually perfected his title by twelve years' adverse possession the possession of the true owner is deemed to have revived and he gets a fresh starting point of limitation -vide Gurbinder Singh v. Lal Singh, MANU/SC/0256/1965 : AIR 1965 SC 1553. Wrongful possession cannot be assumed against the true owner when according to the facts disclosed by him he himself had voluntarily handed over possession and was not deprived of it by the other side.

239. In Gurbinder Singh and another v. Lal Singh and another, MANU/SC/0256/1965 : AIR 1965 SC 1553 the Hon'ble Supreme Court held that in order that Article142 is attracted the plaintiff must initially be found in possession of the property and should have been dispossessed by the defendant or someone through whom the defendants claim or alternatively the plaintiff should have discontinued possession. It has also been held that in a suit to which Article 144 attracted the burden is on the party who claims adverse possession to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of an independent trespasser. Relevant paras 6, 8 and 10 of the said judgment read as follows:

6. In order that Art. 142 is attracted the plaintiff must initially have been in possession of the property and should have been dispossessed by the defendant or someone through whom the defendants claim or alternatively the plaintiff should have discontinued possession. It is no one's case that Lal Singh ever was in possession of the property. It is true that Pratap Singh was in possession of part of the property which particular part we do not know- by reason of a transfer thereof in his favour by Bakshi Singh. In the present suit both Lal Singh and Pratap Singh assert their claim to property by success on in accordance with the rules contained in the dastur-ul-amal whereas the possession of Pratap Singh for some time was under a different title altogether. So far as the present suit is concerned it must, therefore, be said that the plaintiffs-respondents were never in possession as heirs of Raj Kaur and consequently Art. 142 would not be attracted to their suit.

8. Mr. Tarachand Brijmohanlal, however, advanced an interesting argument to the effect that if persons entitled to immediate possession of land are somehow kept out of possession may be by different trespassers for a period of 12 years or over, their suit will be barred by time. He points out that as from the death of Raj Kaur her daughters, through one of whom the respondents claim, were kept out of possession by trespassers and that from the date of Raj Kaur's death right up to the date of the respondents' suit, that is, for a period of nearly 20 years trespassers were in possession of Mahan Kaur's, and after her death, the respondents' share in the land, their suit must therefore be regarded as barred by time. In other words the learned counsel wants to tack on the adverse possession of Bakshi Singh and Pratap

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Singh to the adverse possession of the Raja and those who claim through him. In support of the contention reliance is placed by learned counsel on the decision in Ramayya v. Kotamma, MANU/TN/0166/1921 : ILR 45 Mad 370 : (AIR 1922 Mad 59). In order to appreciate what was decided in that case a brief resume of the facts of that case is necessary. Mallabattudu, the last male holder of the properties to which the suit related, died in the year 1889 leaving two daughters Ramamma and Govindamma. The former died in 1914. The latter surrendered her estate to her two sons. The plaintiff who was a transferee from the sons of Govindamma instituted a suit for recovery of possession of Mallabattudu's property against Punnayya, the son of Ramamma to whom Mallabattudu had made an oral gift of his properties two years before his death. Punnayya was minor at the date of gift and his eider brother Subbarayudu was managing the property on his behalf. Punnayya, however, died in 1894 while still a minor and thereafter his brothers Subbarayudu and two others were in possession of the property. It would seem that the other brothers died and Subbarayudu was the last surviving member of Punnayya's family. Upon Subbarayudu's death the properties were sold by his daughters to the third defendant. The plaintiffs-appellants suit failed on the ground of limitation. It was argued on his behalf in the second appeal before the High Court that as the gift to Punnayya was oral it was invalid, that consequently Punnayya was in possession as trespasser, that on Punnayya's death his heir would be his mother, that as Subbarayudu continued in possession Subbarayudu's possession was also that of a trespasser, that as neither Subbarayudu nor Punnayya completed possession for 12 years they could not tack on one to the other and that the plaintiff claiming through the nearest reversioner is not barred. The contention for the respondents was that there was no break in possession so as to retest the properties in the original owners, that Punnayya and Subbarayudu cannot be treated as successive trespassers and that in any event the real owner having been out of possession for over 12 years the suit was barred by limitation. The High Court following the decision of Mookerjee J. in Mohendra Nath v. Shamsunnessa, 21 Cal LJ 157 at p. 164 : (AIR 1915 Cal 629 at p 633), held that time begins to ran against the last full owner if he himself was dispossessed and the operation of the law of limitation would not be arrested by the fact that on his death he was succeeded by his widow, daughter or mother, as the cause of action cannot be prolonged by the mere transfer of title. It may be mentioned that as Mallabattudu had given up possession to Punnayya under an invalid gift Art. 142 of the Limitation Act was clearly attracted. The sons of Govindamma from whom the appellant had purchased the suit properties claimed through Mallabattudu and since time began to run against him from 1887 when he discontinued possession it did not cease to ran by the mere fact of his death. In a suit to which that Article applies the plaintiff has to prove his possession within 12 years of his suit. Therefore, so long as the total period of the plaintiff's exclusion from possession is, at the date of the plaintiff's suit, for a period of 12 years or over, the fact that this exclusion was by different trespassers will not help the plaintiff provided there was a continuity in the period of exclusion. That decision is not applicable to the facts of the case before us. This is a suit to which Art. 144 is attracted and the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of independent trespassers.

10. This view has not been departed from in any case. At any rate none was

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brought to our notice where it has not been followed. Apart from that what we are concerned with is the language used by the legislature in the third column of Art.144. The starting point of limitation there stated is the date when the possession of the defendant becomes adverse to the plaintiff. The word "defendant" is defined in S. 2(4) of the Limitation Act thus:

> 'defendant' includes any person from or through whom a defendant derives his liability to be sued.

No doubt, this is an inclusive definition but the gist of it is the existence of a jural relationship between different persons. There can be no jural relationship between two independent trespassers. Therefore, where a defendant in possession of property is sued by a person who has title to it but is out of possession what he has to show in defence is that he or anyone through whom he claims has been in possession for more than the statutory period. An independent trespasser not being such a person the defendant is not entitled to tack on the previous possession of that person to his own possession. In our opinion, therefore, the respondents' suit is within time and has been rightly decreed by the courts below. We dismiss this appeal with costs.

(emphasis added)

240. In S.M. Karim v. Mst. Bibi Sakina, MANU/SC/0236/1964 : AIR 1964 SC 125⁴ the Hon'ble Apex Court has held that the alternative claim must be clearly made and proved, adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point on limitation against the party affected can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "a possible title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and prayer clause is not a substitute for a plea. Relevant paras 3 to 5 of the said judgment read as follows:

> **3.** In this appeal, it has been stressed by the appellant that the findings clearly establish the benami nature of the transaction of 1914. This is, perhaps, true but the appellant cannot avail himself of it. The appellant's claim based upon the benami nature of the transaction cannot stand because S. 66 of the Code of Civil Procedure bars it. That section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words were, no suit shall be maintained against a certified purchaser and the change was made to protect not only the certified purchaser but any person claiming title under a purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone claiming through him. In the present case, the appellant as plaintiff was hit by the section and the defendants were protected by it.
>
> **4.** It is contended that the case falls within the second sub-section under which a suit is possible at the instance of a third person who wishes to proceed against the property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner. Reliance is placed upon the transfer by Syed Aulad Ali in favour of the appellant which is described as a claim by the transferee against the real owner. The words of the second sub-section refer

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to the claim of creditors and not to the claims of transferees. The latter are dealt with in first sub-section, and if the meaning sought to be placed on the second sub-section by the appellant were to be accepted, the entire policy of the law would be defeated by the real purchaser making a transfer to another and the first sub-section would become almost a dead letter. In our opinion, such a construction cannot be accepted and the plaintiff's suit must be held to be barred under S. 66 of the Code.

5. As an alternative, it was contended before us that the title of Hakir Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The plea of adverse possession is raised here. Reliance is placed before us on Sukan v. Krishanand, ILR 32 Pat 353 and Sri Bhagwan Singh and others v. Ram Basi Kuer and others, MANU/BH/0054/1957 : AIR 1957 Pat 157 to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakir Alam Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakir Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered, because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in Bishun Dayal v. Kesho Prasad, MANU/PR/0042/1940 : AIR 1940 PC 202 the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea.

241. In B. Leelavathi v. Honnamma and another, MANU/SC/0365/2005 : (2005) 11 SCC 115 the Hon'ble Supreme Court has held that the adverse possession is a question of fact which has to be specifically pleaded and proved and in the absence of any plea of adverse possession, framing of an issue and adducing evidence it would not be held that the plaintiffs had perfected towards the title by way of adverse possession. Para 11 of the judgment read as follows:

11. Plea of adverse possession had been taken vaguely in the plaint. No categorical stand on this point was taken in the plaint. No issue had been framed and seemingly the same was not insisted upon by the plaintiff-respondent. Adverse possession is a question of fact which has to be

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specifically pleaded and proved. No evidence was adduced by the plaintiff-respondent with regard to adverse possession. Honnamma, the plaintiff in her own statement did not say that she is in adverse possession of the suit property. We fail to understand as to how the High Court, in the absence of any plea of adverse possession, framing of an issue and evidence led on the point, could hold that the plaintiff-respondent had perfected her title by way of adverse possession.

242. In Dharamarajan & Ors. v. Valliammal & Ors., MANU/SC/8194/2007 : 2008 (2) SCC 741 : (AIR 2008 SC 850) the Hon'ble Supreme Court has held that in a claim of adverse possession openness and adverse nature of the possession has to be proved against the owner of the property in question. Relevant para 11 of the said judgment reads as follows:

11. In our opinion none of these questions could be said to be either question of law or a substantial question of law arising out of the pleadings of the parties. The first referred question of law could not and did not arise for the simple reason that the plea of adverse possession has been rightly found against the plaintiff. Karupayee Ammal's possession, even if presumed to be in a valid possession in law, could not be said to be adverse possession as throughout it was the case of the appellant Dharmarajan that it was a permissive possession and that she was permitted to stay on the land belonging to the members of the Iyer family. Secondly it has nowhere come as to against whom was her possession adverse. Was it adverse against the Government or against the Iyer family? In order to substantiate the plea of adverse possession, the possession has to be open and adverse to the owner of the property in question. The evidence did not show this openness and adverse nature because it is not even certain as to against whom the adverse possession was pleaded on the part of Karupayee Ammal. Further even the legal relationship of Doraiswamy and Karupayee Ammal is not pleaded or proved. All that is pleaded is that after Karupayee Ammal's demise Doraiswamy as her foster son continued in the thatched shed allegedly constructed by Karupayee Ammal. There was no question of the tacking of possession as there is ample evidence on record to suggest that Doraiswamy also was in the service of Iyer family and that he was permitted to stay after Karupayee Ammal. Further his legal heirship was also not decisively proved. We do not, therefore, see as to how the first substantial question of law came to be framed. This is apart from the fact that ultimately High Court has not granted the relief to the respondents on the basis of the finding of this question. On the other hand the High Court has gone into entirely different consideration based on reappreciation of evidence. The second and third questions are not the questions of law at all. They are regarding appreciation of evidence. The fourth question is regarding the admissibility of Exhibit A8. In our opinion there is no question of admissibility as the High Court has found that Exhibit A8 was not admissible in evidence since the Tehsildar who had issued that certificate was not examined. Therefore, there will be no question of admissibility since the document itself was not proved. Again the finding of the High Court goes against the respondent herein. Even the fifth question was a clear cut question of fact and was, therefore, impermissible in the Second Appeal.

243. In A.S. Vidyasagar v. S. Karunanandam : 1995 Supp (4) SCC 570 the Hon'ble Supreme Court has held that permissive possession is not adverse possession and can be terminated at any time by the rightful owner. Relevant para 5 of the judgment reads as follows:

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5. Adverse possession is sought to be established on the supposition that Kanthimathi got possession of the premises as a licensee and on her death in 1948, the appellant who was 4 years of age, must be presumed to have become a trespasser. And if he had remained in trespass for 12 years, the title stood perfected and in any case, a suit to recovery of possession would by then be time barred. We are unable to appreciate this line of reasoning for it appears to us that there is no occasion to term the possession of Kanthimathi as that of a licensee. The possession was permissive in her hands and remained permissive in the hands of the appellant on his birth, as well as in the hands of his father living then with Kanthimathi. There was no occasion for any such licence to have been terminated. For the view we are taking there was no licence at all. Permissible possession of the appellant could rightfully be terminated at any moment by the rightful owners. The present contesting respondents thus had a right to institute the suit for possession against the appellant. No oral evidence has been referred to us which would go to support the plea of openness, hostility and notoriety which would go to establish adverse possession. On the contrary, the Municipal Tax receipts, Exts. B39 and 40, even though suggestedly reflecting payment made by the appellant, were in the name of Kuppuswami, the rightful owner. This negates the assertion that at any stage did the appellant assert a hostile title. Even by examining the evidence, at our end, we come to the same view as that of the High Court. The plea of adverse possession thus also fails. As a result fails this appeal. Accordingly, we dismiss the appeal, but without any order as to costs.

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244. In Goswami Shri Mahalaxmi Vahuji v. Shah Ranchhoddas Kalidas, MANU/SC/0466/1969 : AIR 1970 SC 2025 the Hon'ble Supreme Court held that a party cannot be allowed to set up a case wholly inconsistent with that pleaded in its written statement. Relevant para 8 of the said judgment reads as follows:

8. We may now proceed to examine the material on record for finding out 'the true character of the suit properties viz. whether they are properties of a public trust arising from their dedication of those properties in favour of the deity Shree Gokulnathji or whether the deity as well as the suit properties are the private properties of Goswami Maharaj. In her written statement as noticed, earlier, the 1st defendant took up the specific plea that the idol of Shree Gokulnathji is the private property of the Maharaj the Vallabh Cult does not permit any dedication in favour of an idol and in fact there was no dedication in favour of that idol. She emphatically denied that the suit properties were the properties of the deity Gokulnathji but in this Court evidently because of the enormity of evidence adduced by the plaintiffs, a totally new plea was taken namely that several items of the suit properties had been dedicated to Gokulnathji but the deity being the family deity of the Maharaj, the resulting trust is only a private trust. In other words the plea taken in the written statement is that the suit properties were the private properties of the Maharaj and that there was no trust, private or public. But the case argued before this Court is a wholly different one viz., the suit properties were partly the properties of a private trust and partly the private properties of the Maharaj. The 1st defendant cannot be permitted to take up a case which is wholly inconsistent with that pleaded. This belated attempt to bypass the evidence adduced appears to be more a manor than a genuine explanation of the documentary evidence adduced. It is amply proved that ever since Mathuranathji took over the management of the shrine, two sets of account books have been maintained, one relating to the income and expenses of the shrine and the other relating to that of the Maharaj. These

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account books and other documents show that presents and gifts used to be made to the deity as well as to the Maharaj. The two were quite separate and distinct. Maharaj himself has been making gifts to the deity. He has been, at times utilising the funds belonging to the deity and thereafter reimbursing the same. The account books which have been produced clearly go to show that the deity and the Maharaj were treated as two different and distinct legal entities. The evidence afforded by the account books is telltale. In the trial Court it was contended on behalf of the 1st defendant that none of the account books produced relate exclusively to the affairs of the temple. They all record the transactions of the Maharaj, whether pertaining to his personal dealings or dealings in connection with the deity. This is an obviously untenable contention. That contention was given up in the High Court. In the High Court it was urged that two sets of account books were kept, one relating to the income and expenditure of the deity and the other of the Maharaj so that the Maharaj could easily find out his financial commitments relating to the affairs of the deity. But in this Court Mr. Narasaraju, learned Counsel for the appellant realising the untenability of the contention advanced in the Courts below presented for our consideration a totally new case and that is that Gokulnathji undoubtedly is a legal personality; in the past the properties had been dedicated in favour of that deity; those properties are the properties of a private trust of which the Maharaj was the trustee. On the basis of this newly evolved theory he wanted to explain away the effect of the evidence afforded by the account books and the documents. We are unable to accept this new plea. It runs counter to the case pleaded in the written statement. This is not a purely legal contention. The 1st defendant must have known whether there was any dedication in favour of Shri Gokulnathji and whether any portion of the suit properties were the properties of a private trust. She and her adviser's must have known at all relevant times the true nature of the accounts maintained. Mr. Narasaraju is not right in his contention that the plea taken by him in this Court is a purely legal plea. It essentially relates to questions of fact. Hence we informed Mr. Narasaraju that we will not entertain the plea in question.

245. In the matter of plea of adverse possession, mutually inconsistent or mutually destructive pleas must not be taken in the plaint. Whenever the plea of adverse possession is raised, it pre supposes that owner is someone else and the person taking the plea of adverse possession is not the actual owner but has perfected his tide by prescription since the real owner failed to initiate any proceeding for restoring the possession within the prescribed period under the statute.

246. In P. Periasami v. P. Periathambi & Ors., MANU/SC/0821/1995 : 1995 (6) SCC 523 it was said:

> Whenever the plea of adverse possession is projected, inherent in the plea is that someone else was the owner of the property.

247. In Mohan Lal v. Mirza Abdul Gaffar MANU/SC/1039/1996 : (1996) 1 SCC 639 : (AIR 1996 SC 910), the Court said:

> As regards the first plea, it is inconsistent with the second plea. 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 his title by prescription

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nec vi, nec clam, nec precario.

248. In Karnataka Board of Wakf v. Government of India & others MANU/SC/0377/2004 : (2004) 10 SCC 779, the Court held that whenever the plea of adverse possession is projected, inherent therein is that someone else is the owner of the property. In para 12 it said:

> The pleas on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced.

249. The decision in Mohal Lal (supra) has also been followed in Karnataka Board of Wakf (supra) and in para 13, the Court said:

> As we have already found, the respondent obtained title under the provisions of the Ancient Monuments Act. The element of the respondent's possession of the suit property to the exclusion of the appellant with the animus to possess it is not specifically pleaded and proved. So are the aspects of earlier title of the appellant or the point of time of disposition. Consequently, the alternative plea of adverse possession by the respondent is unsustainable.

250. It would be useful to refer certain observations of a single Judge of this Court in Abdul Halim Khan v. Raja Saadat Ali Khan and others, MANU/OU/0021/1927 : AIR 1928 Oudh 155, which, in my view, squarely applies to the facts and pleadings of this case and I am in respectful agreement therewith:

> One of the general principles governing the law of limitation is that a person can only be considered to be barred, if he has a right to enter and does not exercise that right within the period fixed by the Limitation Act. The maxim of law is contra non valente agree nulla currit praescriptio (prescription does not run against a party who is unable to act);vide Broom's Legal Maxims,9th edn.,p.576. Accordingly possession cannot become adverse against a person as long as he is not entitled to claim immediate possession. Ex facie it must follow that a person who is not in existence cannot be considered to be in a position to claim whether immediate or otherwise. It is evident that in the eyes of the law the plaintiff did not come into existence as long as he was not adopted. His adoption took place on 27th July 1914. He must be deemed to have come into existence only then. It was, therefore, obviously not possible for him to claim possession of the property before that date, and if he was not in a position to claim it at all, having not been then in existence, it would be absurd to say that another person was in possession adversely to him. One might fairly ask:
>
> > "Adverse against whom?" It certainly cannot be adverse against the plaintiff, who was not then in existence. It may have been adverse against any other person, but we are not concerned with such person unless the plaintiff can be shown to have derived his title from such person. (page 189-190)

251. Recently, in Vishwanath Bapurao Sabale (supra), the Apex Court in respect to a claim of title based on the pleading of adverse possession said as under:

> for claiming title by adverse possession, it was necessary for the plaintiff to plead and prove animus possidendi. A peaceful, open and continuous possession being the ingredients of the principle of adverse possession as contained in the maxim nec vi, nec clam, nec precario, long possession by itself would not be sufficient to prove adverse possession.

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252. What should have been pleaded and what a person claiming adverse possession has to show has been laid down by the Apex Court categorically in Karnataka Board of Wakf (supra):

> 11. 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 true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.....Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. 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.

253. Earlier also, a three Judges Bench of Apex Court in Parsinni & another v. Sukhi (MANU/SC/0575/1993 : 1993 SCW 3606) (supra) laid down the following three requisites for satisfying the claim based on adverse possession:

> 5. The appellants claimed adverse possession. The burden undoubtedly lies on them to plead and prove that they remained in possession in their own right adverse to the respondents.....Possession is prima facie evidence of title. Party claiming adverse possession must prove that his possession mast be "nec vi nec clam, nec precario" i.e. peaceful, open and continuous. The possession must be adequate, in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

254. In Maharaja Sir Kesho Prasad Singh Bahadur (supra), it was held that in order to obtain a favourable finding of adverse possession, one must have to satisfy all the qualities of adequacy, continuity and exclusiveness. Reliance was placed on Kuthali Moothavur v. P. Kunharankutty, MANU/PR/0032/1921 : AIR 1922 PC 181.

255. In the context of above law on the aspect of adverse possession, I find that the Trial Court decided the issue of limitation in a very cursory manner and had no occasion to see the plea of adverse possession. Lower Appellate Court has merged the issue of limitation with the plea of adverse possession and has not discussed issue No. 5, at all, which raises the question of limitation. Besides other defects in Lower Appellate Court's order, i.e., non dealing issues separately the basic premise in respect to issue of limitation I find erroneous.

256. The Lower Appellate Court, however, has completely failed to consider that for the purpose of maturing rights of defendants with regard to title on the ground of

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adverse possession, the basic pleadings satisfying conditions precedents before asserting a plea of adverse possession are completely missing in the plaint. Therefore, the question of transfer of title by way of adverse possession could not have arisen. The defendants have not at all stated that who was the owner of land against whom and with the intention to hold the land adverse they continued with possession so as to confer their title after expiry of period prescribed in Sections 25 and 27. The plea of adverse possession cannot be decided on mere assumptions, unless and until statutory requirement is satisfied in all respect.

257. Para 21 of written statement shows the stand taken by defendants that State Government did not own the land. It is nowhere stated in the entire written statement as to against whom the defendants occupied disputed accommodation so as to complete their right of adverse possession by prescription after expiry of period prescribed in statute. It is not the case of defendants that possession was adverse either from beginning or it became so subsequently. As already said, the animus in the act of possessing land in dispute hostile against true owner is completely missing and absent. Adverse possession, as already said, commences with wrong and is claimed against right. The actual, conclusive, open and uninterrupted hostile possession with intention to possess disputed land hostile against real owner are all the relevant pleadings which are missing in this case. Long and continuous possession by itself does not constitute "adverse possession" as referred to in Md. Mohammad Ah v. Jagadish Kalita (supra). Every possession is not in law adverse possession. All the ingredients constituting and satisfying requirement of adverse possession are conspicuously missing and absent not only in pleadings but virtually there is no material on record whereupon the finding of Lower Appellate Court that the defendants have matured their rights by virtue of adverse possession, can be sustained. Requisite ingredients of adverse possession, well known in law, i.e., animus possidendi is completely absent not only in the pleadings but even in evidence. I have no hesitation in observing that Lower Appellate Court has based its inference in deciding Issue No. 8 in favour of defendants on no evidence and the findings are totally perverse and against well established law on the subject of adverse possession.

258. In view thereof, while I find it difficult to uphold the findings of Lower Appellate Court in respect of issue No. 8 to the extent that title of defendants on the basis of adverse possession matured at the time when suits were filed and aforesaid finding, therefore, deserved to be reversed and set aside but I find that suits filed by appellant were apparently barred by limitation, therefore, the ultimate conclusion that the suits were liable to be dismissed, stand.

259. Modifying the judgment of Lower Appellate Court by reversing the findings with respect to issue No. 8, i.e., in regard to adverse possession, the judgment of Lower Appellate Court, to the extent the original suits filed by plaintiff have been dismissed, stand confirmed. In other words, the Lower Appellate Court's decision in so far as it has held that defendants have matured their rights on account of adverse possession, deciding Issue No. 8 in their favour, is hereby set aside. However, since the issue relating to limitation in respect of suits has been decided in favour of defendants, the suits filed by plaintiff have to be dismissed on the ground of limitation.

260. Subject to above directions and observations, all the appeals are dismissed. The parties shall bear their own costs.

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13

IN THE HIGH COURT OF ALLAHABAD

First Appeal No. 98 of 1998

Decided On: 16.11.2016

Appellants: **Railway Electrification and Ors.**
Vs.
Respondent: **Malti Devi and Ors.**

Hon'ble Judges/Coram:
Sudhir Agarwal and Virendra Kumar-II, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: A.K. Gaur, N.C. Tripathi, S.K. Mishra, Barun Pratap Singh, Lalji Sinha and Govind Saran

For Respondents/Defendant: A.V. Chandra, Anshuman Midha, B.P. Singh, Chandra Kumar Rai, Faujdar Rai, V. Chandra, Sanjay Singh, Anshuman Vidhu Chandra, R.N. Sharma, Rajeshwari, V.K. Shukla and V.P. Singh

JUDGMENT

Sudhir Agarwal and Virendra Kumar-II, JJ.

1. This is a defendants appeal under Section 96 of Code of Civil Procedure (hereinafter referred to as 'C.P.C.') arising from judgment and decree dated 22.10.1997 and 11.11.1997, respectively, passed by Sri N.A. Siddiqui, 1st Additional Civil Judge, Senior Division) Allahabad (hereinafter referred to as 'Court below/Trial Court'). It has decreed Original Suit No. 25 of 1988, allowing it partly and declaring that disputed property is owned by plaintiff-respondents. Plaintiff-respondent, Chhedi Lal (since deceased and substituted by-legal representatives) filed Original Suit No. 25 of 1988 in the Court of Civil Judge, (S.D.) Allahabad.

2. Plaint case set up by him is that Abdul Raheem and Smt. Rahiman Bibi were Zamindars of village Sarai Mauja Urf Kydganj Uparhar. Smt. Rahiman Bibi executed a registered lease deed dated 25.5.1948 in favour of predecessor in interest of plaintiff, in respect to five agricultural plots measuring 5 Bigha 9 Biswas. Remaining land was given in possession of plaintiff by Sri Abdul Raheem. Both co-owners/Zamindars i.e. Smt. Rahiman Bibi and Abdul Raheem executed a deed of Khairat (gift deed) on 24.4.1949 in favour of Chhedi Lal (original plaintiff) in respect of all plots, mentioned at the bottom of plaint, over which plaintiff was given possession on 24.5.1948. Description of plots given at the bottom of plaint, refers to plots situated in Mauza Kydganj, Uparhar, Mauza Sarai Mauj, Pargana and Tehsil Chail, District Allahabad, bearing plots numbers and area as under:

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Sl. No.	Plot No.	Area
1.	78	16 biswa
2.	79	18 biswa
3.	80	1 bigha, 4 biswa
4.	81/1	10 biswa
5.	82/2	8 biswa
6.	83	1 bigha, 5 biswa
7.	84/2	10 biswa
8.	126	1 bigha 5 biswa, 10 dhur
9.	127	16 biswa
10.	128/2	1 bigha, 2 biswa
11.	130	5 biswa, 10 dhur
12.	131	5 biswa, 8 dhur
13.	133/2	2 biswa
14.	134/1	3 biswa, 12 dhur
15.	135/1	13 biswa
16.	136/1	16 biswa
		Total = 11 Bigha

3. It also mentioned, about pacca construction thereon including seven kotharies and two huts.

4. Legal Representatives of original plaintiff Chhedi Lal are continuing in possession of entire land as owner after his death. Possession is continuing since 24.5.1948. Disputed land was not acquired by Collector as enquired by plaintiff from Collector's office. For acquisition of land, State Government issued a notification dated 26.11.1949 under Section 4 Land Acquisition Act, 1894 (hereinafter referred to as 'Act 1894') and a declaration dated 21.2.1950 was published under Section 6 of said Act. In the aforesaid notifications description of disputed land was wrongly mentioned showing same of village as "Sarai Mauja" whereas, actually it is village "Sarai Mauja Urf Kydganj Uparhar". The land was proposed to be acquired for O.T. Railway Company, though it was not in existence at that time. State Government proposed to acquire land illegally. There was no urgency for dispensing with enquiry under Section 5-A, still urgency clause under Section 17(4) was invoked. No notice under Section 9 was served upon plaintiff. Sub-Divisional Magistrate, Chail, Allahabad instituted a suit on 1.5.1984 for removal of some material from disputed land but subsequently it was withdrawn on 28.10.1985. Thereafter, plaintiffs filed Writ Petition No. 17726 of 1985 in which interim order was passed against defendant-appellants who preferred an appeal in Supreme Court which was decided on 10.2.1987, observing that plaintiff may avail remedy of declaration of title. The land never vested in State. Notification under Sections 4 and 6 of Act 1894 are void, inoperative and liable to be ignored. Disputed land was agricultural and arable. Crops entries were showing in Revenue record. Collector had not acquired land for defendant-1. Defendant-2 was added under order of Court though it had no right, title or interest in the disputed land. Cause of action to file suit in question arose on 10.2.1987 when Supreme Court observed that plaintiff-respondent may avail remedy of seeking declaration in appropriate forum. The only relief sought in the plaint is a declaration that plaintiff is owner of property in suit. Reliefs sought in the plaint is reproduced as under:

"(a) It be declared that the plaintiff is the owner of the property in suit.

(b) Any other relief which the Hon'ble Court deems fit and proper in favour of the plaintiff.

(c) Cost of the suit be awarded."

5. Subsequently, plaintiff-respondents got plaint amended on 27.3.1989 and relief 'd' was added which reads as under:

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"(d) That the defendant No. 2 be ordered to remove the structures raised by it or its sub-ordinate officials of various departments under defendant No. 2, on a portion of land in suit during pendency of the suit within a time fixing by the Court."

6 . Defendants 1 and 2 contested suit by filing written statement. Assertions of plaintiff regarding possession of disputed land and ownership rights are denied. In substance they have pleaded that in 1949, O.T. Railway requested State Government to acquire a compact land of 5.62 acres near Allahabad City (N.E. Railway Station) in Sarai Mauja. Thereupon, acquisition proceedings were initiated by Government and it acquired 5.62 acres of land following procedure under Act 1894. Major portion of land acquired by State of U.P. belong to late Rahiman Bibi and late Abdul Raheem. There used to be garden of guavas on this piece of land and plaintiff used to take contracts on annual basis. He was Contractor for the said purpose, since 4-5 years before when land was acquired by State Government for construction of staff quarters by Railway. This fact is noticed in the judgment dated 2.3.1956 delivered by District Judge, Allahabad in Suit No. 6 of 1952 (Abdul Raheem v. State of U.P.). The acquired land was handed over to defendant Railway on 29.3.1950. Plaintiff had also given an undertaking on 8.11.1950 in writing that he had no objection in withdrawing his claim upon the land in question and will not raise any objection in future. Suit land is in possession of N.E. Railway since 1950. Railway constructed Railway Station in 1957 which functioned up to 9.9.1983. Railway lines which laid upto the side still exist at the spot. Some part of siding was removed by Railway Electrification Organization (hereinafter referred to as 'R.E.O.') for the purpose of construction of residential houses in April, 1985. Possession of some part of disputed land was delivered by North Eastern Railway (hereinafter referred to as 'N.E.R.') to 'R.E.O.'. It is also stated that O.T. Railway was in existence upto 9.4.1952 and the assertions in the plaint that it was not in existence when acquisition notification under Section 4 was issued on 26.11.1949, is incorrect.

7. In para-35 of the written statement (Paper No. 13A), it is answered.

"That the defendant is in possession of a compact area of 5.62 acres of land which was acquired by State Government of U.P. after following the Land Acquisition proceedings in Land Acquisition Act, and possession was handed over to Railway on 29.3.1950. Revenue authorities prepared a survey map showing clear demarcation of the land acquired thereon. A copy of the survey map duly certified by the Tehsildar, Allahabad giving full details and plot Nos. of the land so acquired in total 5.62 acres was also handed over to the railway to substantiate the railway land. The railway acquisition electrification is constructing the buildings for staff quarters over the suit land at the cost of more than one crore rupees and more than 60 to 70 percent work have been completed on the acquired land of 5.62 acres which are in their possession, occupation and is in use since 29.3.50. In addition to this construction, the N.E. Railway has also constructed 6 units Type I and 4 Units Type II Quarters for their staff and 1 Unit Type III quarter is under construction even at present. Further the N.E. Railway have also licensed the land for erecting temporary shops as early as in 1978 on 61 plots alongwith G.T. Road these shops are still functioning. The acquired land measuring 5.62 acres was fenced by masonry boundary walls, barbed wire pole fencing and posts. In premises, the comp, act area of 5.62 acres was acquired without leaving any land in between. In fact it was also not possible to leave even a single inch of land in between the compact area. Thus the suit land so acquired is fully in physical possession, use and occupation of the defendant and plaintiff has no possession over it. The said land is in village Sarai Mauz

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Urf Kydganj in the city of Allahabad, U.P."

8. Union of India (defendant 2) though has filed a separate written statement but reiterated the stand taken by defendant Railway.

9. State of U.P. (defendant 3) in its written statement has pleaded that disputed land was acquired long back in 1949 and after such a long time, entire record is not available. Possession of acquired land was handed over to Railways on 29.3.1950.

10. Railway authorities prepared a survey map showing demarcation of land acquired by it. A copy of survey map including report of Tehsildar Allahabad giving details of plots number of acquired land having total area as 5.62 acres which was also handed over to Railway. Railway Electrification Department constructed building of staff quarters over suit land at the cost of more than one crore and work more than 60 to 70% had already been completed on acquired land which was in their possession since 29.3.1950.

11. Trial Court formulated 15 issues as under:

1. क्या वादी वादग्रस्त सम्पत्ति का स्वामी है?
1. Whether plaintiff is owner of disputed property?
2. क्या वादी वादग्रस्त सम्पत्ति पर अध्यासन में है?
2. Whether plaintiff is in possession of disputed property?
3. क्या वादी को वाद संस्थित करने का अधिकार नहीं है?
3. Whether plaintiff has no right to file the suit?
4. क्या वाद पोषणीय नहीं है?
4. Whether suit is not maintainable?
5. क्या वाद काल बाधित है?
5. Whether suit is barred by time?
6. क्या वाद में असंयोजन का दोष है?
6. Whether suit is bad for non-joinder of parties?
7. क्या व्यवहार प्रक्रिया संहिता की धारा 80 से वाद बाधित है?
7. Whether suit is barred by Section 80 of Civil Procedure Code?
8. क्या विनिर्दिष्ट अनुतोष अधिनियम की धारा 34 से वाद बाधित है?
8. Whether suit is barred by Section 34 of Specific Relief Act?
9. क्या व्यवहार प्रक्रिया संहिता के आदेश 7 नियम 11 से वाद दूषित है? यदि हां तो उसका प्रभाव ?
9. Whether suit is bad in view of order 7 Rule 11 C.P.C.? If so, its effect?
10. क्या वाद विबन्ध के सिद्धान्त से बाधित है?
10. Whether suit is barred by Principle of estoppel?
11. क्या वाद न्यून मूल्यांकित है और प्रदत्त न्यायशुल्क अपर्याप्त है?
11. Whether suit is under valued and Court fee paid is insufficient?
12. क्या व्यवहार प्रक्रिया संहिता की धारा 11 से वाद बाधित है?
12. Whether suit is barred by Section 11 of Civil Procedure Code? If so, its effect?
13. क्या वाद में कुसंयोजन का दोष है? यदि हां तो उसका प्रभाव?
13. Whether suit is bad for mis-joinder of parties? If so, its effect?
14. अनुतोष, यदि कोई जिसका वादी अधिकारी है?
14. Relief, if any to which plaintiff is entitled?
15. क्या विवादित निर्माण प्रतिवादी संख्या 2 ने दौरान मुकदमा स्थापित किया है जैसा कि वाद पत्र के प्रस्तर 17 में कहा गया है, यदि हां तो उसे ध्वस्त करा पाने के वादी अधिकारी है? इसका प्रभाव?
15. Whether defendant-2 has made disputed construction during pendency of suit as erred in para 17 of plaint? If so, whether plaintiff is entitled to get the same demolished? Its effect?

(English Translation by Court)

12. Issue 11 relates to Court fees and was taken as a preliminary issue. It was answered in favour of plaintiff-respondent vide order dated 24.12.1988.

13. Issues 1, 2 and 3 were taken together. Trial Court relied on registered lease deed dated 25.5.1948 (Exhibit-1), deed of Khairat (gift deed) dated 24.4.1949 (Exhibit-2) and held that pursuant to document dated 24.4.1949, plaintiff became owner. Since he was already in possession, he became owner in possession of disputed land. Trial

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Court also relied upon stand taken by State of U.P. in memo of possession dated 29.3.1950, that number of plots were not disclosed. There was no evidence that disputed land was actually acquired by State. It answered Issues 1, 2 and 3 in affirmative holding that plaintiff-respondents are owner of disputed land though it is in possession of defendants-appellants hence plaintiff-respondents are entitled to institute suit in question.

14. Issue 4 was answered in negative. Issue 5 relating to limitation was also answered in favour of plaintiff-respondents relying on Supreme Court's order dated 10.2.1987 holding that cause of action to institute suit had arisen thereon.

15. In respect of Issue 6, Court held that there was no irregularity of non-joinder of any necessary party and there was no deficiency in suit for want of notice under Section 80 C.P.C. Issue 7 was also answered in favour of plaintiff-respondents. Issue 8 is, "whether suit is barred under Section 34 of Specific Relief Act, 1963" (hereinafter referred to as 'Act 1963'), Court below while answering Issue 8 held that since Supreme Court in its order dated 10.2.1987 has observed only with regard to declaration of title, hence suit could have been filed for that purpose alone and Section 34 of Act 1963 is not attracted.

16. Issues 10, 12, 13 and 15 were also answered in negative. Ultimately Court decreed suit partly by making a declaration that plaintiff-respondents are owner of disputed property.

17. Sri A.K. Gaur, Learned Senior Counsel appearing for appellant contended that disputed land was acquired under Act 1894 and possession of land was taken by State. Hence, it vested in it without any encumbrances. No Civil Suit was maintainable against acquisition notifications. Moreover, there is no challenge to acquisition notification. Title of land had already vested in State, after acquisition. He further contended that admittedly possession of disputed land was held by defendant-appellant since 1950 and, in that view of the matter suit for mere declaration was not maintainable and barred by Section 34 of Act, 1963. Trial Court erred in law in answering this question by relying on the order of Supreme Court dated 10.2.1087. He also contended that land had vested in State of U.P. in 1950 itself, when after taking possession, it was handed over to appellant Railways. Plaintiff admittedly filed writ petition after more than 35 years and suit in question even thereafter, hence, it was hopelessly barred by Limitation. Once expired, limitation cannot revive in any manner.

18. Learned Counsel for plaintiff-respondents on the contrary submitted that plaintiff's land was never acquired since numbers of plots were not mentioned in acquisition notification. Defendant-appellant was not in possession. Plaintiff-respondents were in possession continuously, therefore, suit was rightly instituted only for declaration. Section 34 of Act, 1963 has no application and suit was not barred on account thereof. Further it is argued that appellant Railway raised some illegal constructions on some part of land but that will not confer any title upon it, and in any case, Court below has decreed suit by making declaration of ownership of disputed land in favour of plaintiff, which finding is based on evidence, hence no interference is made.

19. We find, from rival submissions, following points for determination, for adjudication of this appeal.

(1) Whether disputed land was acquired by notifications dated 26.11.1949 and 21.2.1950 and possession was taken vide memo of possession dated 29.3.1950 or possession continued with plaintiff-respondents?

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(2) Whether Original Suit No. 25 of 1988 filed by plaintiff-respondent for declaration of title was barred by Section 34 of Act, 1963 for not seeking any relief for delivery of possession?

(3) Whether aforesaid suit is barred by limitation?

(4) Whether suit was not maintainable since acquisition notifications were challenged and pleaded illegal in the aforesaid suit?

(5) Whether suit suffered the vice of non-impleadment of necessary parties as defendants?

20. Before proceeding to discuss the aforesaid points; we find it appropriate to place certain more facts as are evident from perusal of record, to keep facts in a chronological order, and put record straight.

21. Trial Court initially framed Issues 1 to 14 on 25.8.1988 and additional Issue 15 on 23.8.1989. Presiding Officer again on 26.2.1996 framed eight issues, which are reproduced below:

1. Whether the plaintiff is the owner and in possession of the property in dispute?

2. Whether the land in dispute has been acquired by the State Government and the plaintiff has no right to institute the present suit?

3. Whether the suit is bad for non-joinder of the heirs of Late Abdul Raheem and Rahiman Bibi?

4. Whether the suit is bad for want of notice under Section 80 of the Code of Civil Procedure?

5. Whether the suit is barred by the provisions of acquiescence and estoppel?

6. Whether the suit is barred by time?

7. Whether the suit as framed is not maintainable?

8. To what relief, if any, is the plaintiff entitled?

22. Trial Court recorded statements of PW-1 original plaintiff-Chhedilal, PW-2 Shiv Bahadur Shrivastava, PW-3 Shriram Pathak and PW-4 Gulabchand S/o. Chhedi Lal in support of plaint case.

23. Statements of DW-1 Shri R.G. Sharma, DW-2 Shri Bhagwan Dass Mishra, employees of Railway Department and DW-3 Mathura Singh, Clerk Land Acquisition Office (Collectorate), Allahabad were recorded on behalf of defendants-appellants.

24. Despite the fact that issues were reframed on 26.2.1996, Trial Court in the impugned judgment has considered and answered 15 issues framed earlier and has ignored reframed issues which were reduced to eight on 26.2.1996. There is substantial difference in the reframed issues and issues which have been answered by Trial Court. What prevailed upon Court below not to address on subsequently framed issues on 26.2.1996 and revert back to earlier 15 issues framed in 1988-89 is not clear from record that while deciding the suit, as to why Court below did not address itself and not proceeded to decide 8 issues framed afresh on 26.2.1996 and,

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instead, proceeded to decide 15 issues framed earlier. As we have already said, there is a marked distinction in respect of some of relevant issues which have material bearing in the matter. We propose to discuss this aspect at a later stage.

25. We now proceed to place some more fact straight as are evident from record which could not be disputed by learned Counsel for the parties during course of arguments.

26. A Notification No. 4246-R-23-3L-A-39 dated 26.11.1849 was issued under Section 4(1) of the Act 1894. In this notification details of land acquired were given as area measuring 5.62 acre, situated at Sarai Mauja, Pargana Chail, District Allahabad. This land was proposed to be acquired for construction of Staff Quarters of Railway Department. Another notification No. 4246 (3 R)/23-3-R-49 dated 21.2.1950 was issued under Section 6(1) of Act 1894. It is mentioned in this notification that map of land is available in the office of Collector, Allahabad and provisions of Section 17(1) of Act 1894 were also invoked.

27. Sajra of Mauja Sarai Mauja urf Kydganj, Tehsil Chail, District Allahabad prepared in the year 1913, is available on record. Khasra Nos. 78, 79, 80, 81/2, 82/1, 83/3, 84/1, 84/2, 136, 121, 122/1, 128/2, 129, 130, 131, 133 and 134 are shown in the Sajra by red ink and mentioned as Railway land. It is mentioned that Tehsildar Chail, Allahabad on 24.9.1986 had attested photocopy of map/Sajra. The above-mentioned Khasra numbers have been shown as land of Railway Department.

28. Possession of land acquired for appellant/Railway Department was handed over on 29.3.1950 which was situated in village Sarai Mauja, Kydganj, Pargana Chail, District Allahabad. Area of acquired land measuring 5.62 acre has been mentioned in Notification No. 1852/II-notification No. 4246 dated 21.2.1950.

29. Mr. Abdul Raheem and Smt. Rahiman Bibi instituted Reference No. 6 of 1952, under Section 18 of Act 1894. This reference was decided by Court of District Judge, Allahabad vide judgment dated 20.3.1956. The disputed Khasra numbers above-mentioned 78, 79, 81/2, 82/2, 83/2, 126, 127, 128/2 of area, measuring 4 Bigha, 11 Biswa were registered in revenue record in favour of Smt. Rahiman Bibi and a portion of plot No. 80, 83/1, 128/1, 129, 130 and portion of 131 was registered in the name of Mr. Abdul Raheem, which were acquired vide notification dated 26.11.1949, issued under Section 4 of Act 1894. Claim of Mr. Abdul Raheem was dismissed with costs to the State, while that of Smt. Rahiman Bibi represented by Zahid Ali and Hidayat Ali was also dismissed with costs to Mr. Abdul Raheem. She being entitled only half share of compensation for trees and well.

30. It was found by Reference Court in the judgment dated 2.3.1956 that compensation had been awarded separately to Mr. Abdul Raheem and Smt. Rahiman Bibi by Land Acquisition Officer for the plots acquired by State, respectively, belonging to them. But so far as the trees and well are concerned, a joint award was made. It was also found "that the above-mentioned Khasra numbers were situated in Sarai Mauja also known as Kydganj of City Allahabad and these were acquired by State Government for the purposes of Railway Department. District Judge has noticed stand of the Abdul Raheem and Rahiman Bibi that Chhedi Lal used to take Theka for 5-6 years when the land was acquired for Railway and has found that Chhedi Lal was not adduced as witness and the said fact was not proved. Findings recorded by District Judge in the judgment dated 2.3.1956 read as under :

> "According to Bhirgu, Chhedi Khatik used to take theka and that he had been taking that 'theka' for five or six years, when the land was acquired for the Railway. According to this witness, Chhedi Khatik used to pay Rs. 150/- to

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Smt. Rahiman Bibi and another sum of Rs. 150/- to Abdul Raheem.

Mohd. Ameer also says that the land used to be let out to one and the same person and the last 'theka' was given to "Chhedi Khatik" ***but although he admits that Chhedi Khatik was alive, he was not produced as a witness. This witness has a house in the vicinity of the land and according to him both Smt. Rahiman Bibi and Abdul Raheem used to collect at his house to let-out the land jointly and that it was there that the Thekedar used to pay the dues to them in equal shares.***

Abdul Raheem naturally supports his case in his statement on oath.

The fact that Chhedi Khatik has not been produced goes against Abdul Raheem as his statement-would have definitely shows that even ***though the land had been actually partitioned, the trees and well used to be considered by both the parties as belonging to jointly to them.***

The burden as I have already pointed out lay on Smt. Rahiman Bibi's legal representatives after once the Land Acquisition Officer had awarded the compensation jointly so far as the trees and the well were concerned. The oral evidence is not very satisfactory on either side. I have now to examine whether the documentary evidence produced by the parties leads us to any definite conclusion.

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As regards the trees, the only documentary evidence on record that was pointed out to me is contained in document exhibits B-4 that is the Phantbandi. In that document has bee shown a grove of guavas in plot No. 81/2. This entry does not necessarily mean that there were no trees standing on the plots allotted to Abdul Raheem, for the reasons that the Phantbandi of the share of Abdul Raheem has not been filed and if it had been filed it would have indicated if any tree stood in his share also.

As to the well we have document ***exhibit 'B1' (the extract front the Khasara relating to the year 1358-F) in which a mark has been shown against plot No. 8112 about the existence of a well***. We have also an extract from the Khasara for the year 1334-F on the record (exhibit A-l). In that Khasara a mark of the well has been given against both plots Nos. 81 and 83. This entry relates to a period much earlier than the acquisition proceedings were under taken and the only inference possible from the document is that the well lies in both the plots. A portion of plot No. 83 (i.e. 83/1) has been allotted to Abdul Raheem also. It cannot be therefore said from this document that the well belonged exclusively to Smt. Rahiman Bibi. The Khasara relating to the year 1358-F (exhibit B-1) no doubt indicates that a well stands in plot No. 81/2 but it was not inconsistent with the entry in the Khasra relating to the year 1334-F (exhibit A-1) for it is just possible that the well might have been indicated in both these plots namely 81/2 and 83/1 in 1358-F. In case extract for the year 1358-F had been filed regarding plot No. 83/1 also. ***Moreover, the extract for the year 1358-F relates to the year 1950-51, the period when acquisition proceedings were going on and even if exhibit B-1 is construed as indicating that the well exclusively fell in the plot No. 8112 the extract 1334 is more dependable than the extract for 1358-F***. For want of better evidence, therefore, and also on account of fact that the burden lay on Smt. Rahiman Bibi's legal representative to establish that the trees and the well exclusively belonged to her. I hold that Abdul Raheem and

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Smt. Rahiman Bibi were both the owners of the well and the trees in dispute jointly."

(Emphasis added)

31. Chhedi Lal instituted Suit No. 112-16-114 of 1984-85 and 1985-86 under Section 59 of U.P. Tenancy Act, 1939 and 209 of U.P.Z.A. & L.R. Act 1950 (hereinafter referred to as 'U.P. Act, 1950') in the Court of Sub-Divisional Magistrate, Chail, Allahabad seeking a declaration that the land described at the bottom of application/suit plaint is owned by him and he is in possession, hence possession of the same be delivered to him. Details of land given at the bottom of the plaint is as under:

"आराजी नं0 78 रकबा 16 बिस्वा, 10 धूर व 71 रकबा 17 बिस्वा व 80 रकबा 1 बीघा 4 बिस्वा 8111 रकबा 10 बिस्वा 10 धूर, 8212 रकबा 8 बिस्वा, 84 रकबा 1 बीघा 5 बिस्वा, 8411 रकबा 2 बिस्वा, 2211 रकबा 10 बिस्वा, 12612 रकबा 5 बिस्वा, 127 रकबा बिस्वा 10 धूर पर 131 रकबा 5 बिस्वा 15 धूर, 13511 रकबा 13 बिस्वा व 136 11 रकबा 16 बिस्वा कुल गाटा 13 रकबा 10 बीघा 18 बिस्वा"।

32. It was pleaded therein that land-in dispute was acquired in 1954 for public purpose of Kumbh Mela and possession was taken by defendant 5-6 i.e. N.E.R. from plaintiff and thereafter in the Revenue record also entry was made by Lekhpal in the name of defendants 5-6.

33. The above Revenue suit was contested by defendants 5-6 by filing written statement "dated 25.6.1984 in which they pleaded that disputed land belong to Abdul Raheem and Rahiman Bibi etc. was acquired in 1950 by Railway after paying compensation to the owners and plaintiff Chhedi Lal is neither owner in possession nor otherwise has any concerned with the said land.

34. Thereafter, plaintiff Chhedi Lal moved an application dated 4.10.1985 seeking permission to withdraw suit with liberty to file a fresh one. Said permission was granted by Additional Sub-Divisional Magistrate, Chail vide order dated 28.10.1985 which reads as under:

"The plaintiff moved an application on 4.10.1985 to withdraw his suit with permission to file a fresh. He has stated in this application that he filed the suit under wrong advice which may create complication in future. The defendant is not attending the case for the several dates and have no objection was filed. The permission is granted on payment of cost Rs. 25/- to Status".

35. The case set up by the appellant further is that after acquisition, Railway siding was developed and land was used for storing ballast. It was surrounded by constructing walls and barbed wire. N.E.R. also constructed three blocks of Railway Quarters on the western side of the land. In 1978 onwards, N.E.R. gave license to certain persons for constructing commercial shops on main G.T. Road on northern side of acquired land and 56 such commercial shops were in existence. Chhedi Lal was thekedar of guava garden as was also noticed in the judgment dated 2.3.1956 of District Judge, Allahabad. He had constructed a kachcha hut. He gave in writing to Railway Authorities on 8.11.1950 that he would remove his hut from the side and will not interfere in any way with peaceful possession and use of acquired land by Railway. In 1985 N.E.R. transferred a portion of acquired land comprising 3.5 acres to R.E.O. for construction of Railway Quarters for their officers. When R.E.O. Started construction Chhedi Lal filed Writ Petition No. 17726 of 1985 in this Court claiming that he is owner of the said land relied on unregistered gift deed in khairatnama

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dated 22.4.1949 executed by Abdul Raheem and Smt. Rahiman Bibi. This Court passed order dated 16.11.1985 which was modified on 8.7.1986 restraining Railway from making any construction there against. Railway preferred appeal before Supreme Court and vide judgment dated 10.2.1987, Court permitted Railway to take over possession of land and utilize the same for their purpose. Court also observed that a writ petition cannot be a proper proceeding in respect of the aforesaid land in dispute where seriously disputed questions of facts have to be investigated. The order dated 10.2.1987 passed by Court reads as under:

> "Special Leave granted.
>
> We have heard learned Counsel for the parties. Title to the property is in serious dispute and has to be investigated and determined on the basis of evidence led by the parties. Such a decision cannot properly be taken in a proceeding under Article 226 of the Constitution.
>
> When we pointed out this position, and were about to direct dismissal of the Writ Petition, learned Counsel for the respondents prayed that the writ petition may be permitted to be withdrawn and the respondent should have the right to institute appropriate civil proceedings for establishing his title. That in our opinion is the right course to adopt. The Railway authorities should be free to take over the property and utilise the same for their purpose. 'The respondents would be entitled to any interim relief.
>
> In case the respondent No. 1 succeeds to establish his title, the appellants before us have undertaken to compensate the respondent No. 1 amicably for the property in dispute and failing a amicable settlement, they have further undertaken to take action under the Land Acquisition Act for acquisition of the property.
>
> The appeal is allowed subject to what we have said above. The order of the High Court is vacated and the writ petition before the High Court is dismissed as withdrawn.
>
> There shall be a direction that in case the suit as contemplated above is instituted, the same shall be disposed of within one year of its institution.
>
> Keeping in view the history of the litigation, we direct that the respondent No. 1 shall be paid a consolidated sum of Rs. 5,000/- (Rupees five thousand only) by the appellants by way of costs within two months from today."

36. Chhedi Lal, original plaintiff, also filed Writ Petition No. 24289 of 1987 alleging that Railway Authorities are trying to demolish his construction though in this regard Collector passed an order dated 11.8.1987 in his favour. The said writ petition was disposed of on 23.12.1987 with following order:

> "Heard the learned Counsel for the petitioner. We think that petitioner should approach the Collector and apprise him of the situation that despite his order dated 11.8.1987 noted on Annexure 13 attached with the writ petition, the railway authorities and others are demolishing the construction of the petitioner without demarcating the land acquired on the spot. We have no doubt if the petitioner approaches the Collector, he will see that the construction of the petitioner shall not be demolished unless the land has been demarcated on the spot.
>
> With this observation this writ petition is disposed of."

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37. Chhedi Lal thereafter filed Original Suit No. 25 of 1988 which was decided on 1.11.1989 declaring him owner of the said land and directing Railway to pay compensation to Chhedi Lal. Railway filed First Appeal No. 801 of 1989 against judgment dated 1.11.1989. This Court vide order dated 9.1.1990 granted interim order.

38. During pendency of aforesaid litigation, Chhedi Lal raised certain unauthorised constructions on the acquired land and then filed Writ Petition No. 593 of 1988 in Supreme Court impleading N.E.R., R.E.O., Collector Allahabad, Land Acquisition Officer, Allahabad and State of U.P. as respondents in the Supreme Court seeking compensation of land acquired by defendant-appellants. However, Court found that there was a dispute relating to identification of property and therefore, defendant-appellants were granted liberty to approach District Judge, Allahabad for appointment of a Commissioner to demarcate actual acquired area and submit report to Supreme Court. The order passed by Supreme Court on 13.3.1990 reads as under:

> ***"Counsel for the petitioner*** does not dispute that in terms of the previous direction of this Court, the original Petitioner was-and now his legal representatives-***are entitled only to compensation for the land which formed the subject-matters of the acquisition. There is no dispute that the area acquired is 5.62 acres***. The Railways are entitled to carry out their own construction on the acquired property and the petitioners are restrained from interfering in any manner with the activities for the Railways. The present Writ Petition, however, seeks to maintain that the respondents are interfering with the possession of the petitioner's properties which are not the subject-matter of acquisition. ***Since there is dispute between the parties which is mainly relating to the identification of the property we give liberty to the respondents to apply to the District Judge of Allahabad to appoint a Competent Commissioner to demarcate the actual acquired area and make a report to this Court*** within two months hence clearly containing the property. The cost of the Commissioner shall be borne by the respondents."
>
> (Emphasis added)

39. Thereupon defendant-appellants filed Misc. Petition No. 342 of 1990 before District Judge, Allahabad who passed order appointing one S.P. Goel as Advocate Commissioner, vide order dated 4.4.1990. The order passed by District Judge, Allahabad reads as under:

> "Heard Counsel for the North Eastern Railway and perused the order of the Supreme Court.
>
> Sri S.P. Goal, a Senior Advocate of this Judgeship has given his consent for appointment as Survey Commissioner to carry out the orders of the Supreme Court. He is an experienced and competent Survey Commissioner.
>
> Sri S.P. Goal is accordingly appointed Survey Commissioner to demarcate at the spot 5.62 acres of land acquired by N.E. Railways, to prepare a site plan of the land so demarcated on scale and submit his report direct to the Hon'ble Supreme Court by 3.5.1990. Fee Rs. 4,00/- plus expenses for the present which would be borne by N.E. Railways.
>
> The Commissioner shall be given Annexures 1 to 11 filed with the application. The copy of the application and the copy of the order of the Hon'ble Supreme Court shall be supplied by the applicant N.E. Railways to

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the Survey Commissioner. The N.E. Railways shall also supply to the Survey Commissioner any other paper or document which he may require. The Survey Commissioner shall start his work after informing the heirs of Chhedi Lal of his visit to the spot for demarcation and as far as possible would carry out the demarcation in the presence of the representative of the heirs of deceased Lal."

40. On application, moved by Gulab Chandra another order was passed by District Judge, Allahabad on 21.4.1990 which reads as under:

"In Writ Petition No. 593 of 1988, Chhedi Lal (since deceased) through legal representatives v. The North Eastern Railway & others, it was noted by the Supreme Court in its order dated 13.3.1990 while disposing of interlocutory applications that "there is no dispute that the area acquired is 5.62 acres. The Railways are entitled to carry out their own constructions on the acquired property" and restrained the petitioners from interfering in any manner with the activities of the Railway. The Hon'ble Supreme Court also directed that "since there is dispute between the parties which is mainly relating to the identification of the property we give liberty to the respondents to apply to the District Judge of Allahabad to appoint a competent Commissioner to demarcate the actual acquired area and make a report to this Court within two months hence clearly containing the property". In view of this direction a Survey Commissioner was appointed to carry out the directions of the Hon'ble Supreme Court.

Gulab Chand one of the legal heirs of Chhedi Lal has moved the application stating that the plots number, their area and the name of the village where those plots are situate have not been given and in the absence of these particulars the Commissioner would carry out survey according to the wishes of the Railway advocate which would cause him prejudice. It is also stated in this application that Chhedi Lal had filed a Suit No. 25 of 1988 against the Railway Administration which was decided by XII Additional District Judge, Allahabad on 1.11.1989 holding that the acquisition proceedings are invalid because the name of the village, the plot numbers and the area given were wrong. The appeal against this judgment is pending in the Hon'ble High Court. The prayer made is that suitable directions be given to the Survey Commissioner in this respect.

I have heard the Counsel for the applicant. The Counsel for the Railways did not come to plead his point of view.

Some notification regarding acquisition of land must have been made before 5.62 acres of land was acquired by the Railways. The respondents before the Supreme Court would make that notification available to the Survey Commissioner ***who would demarcate the land on the basis of that notification. In case it is impossible for him to demarcate land on the basis of that notification then he will submit detailed report in the matter.***

Copy of this order be sent to the Survey Commissioner."

(Emphasis added)

41. Advocate Commissioner submitted report on 3.5.1990 after making spot inspection on 22.4.1990. Relevant extract of the said report reads as under:

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"I asked the parties about the boundaries of the land which is claimed by them. The O.P. gave the boundary in writing on the spot, duly signed by the Counsel of the party which is annexed with the report. Similarly, the applicant's Counsel also gave the boundaries of the land acquired for Railway through the land acquisition authority. By giving the boundaries by the parties, there left no dispute about the identification of the land. Both the parties admitted that to the south of the said land lies the old boundary wall of Crosthwaite Girls Inter College, Allahabad and this boundary wall was found existing on the spot. This boundary wall is very old and hence there remains no doubt about the location of the land which is claimed by the parties. The land claimed by the parties, is to the north of this boundary wall. It is also admitted that the land starts from the gate of the Crosthwaite Girls Inter College Allahabad. The gate of Crosthwaite Girls Inter College stands on the north-western corner of the College Compound. I had with me 1913 A.D. settlement village map of village sarai Mauz, Allahabad in which plot Nos. 85, 86, 87, 88, 89, 121, 125, 124 and other numbers are recorded in the name of Association Ala School Talim Nisba, which runs the said Institute. The Lekhpal also confirmed this fact by seeing the map and khasra of the village. This leads to irresistible conclusion that plot Nos. 84, 78, 79, 80, 81, 82, 83, 127, 131, 130, 133, 134, 135, 129, 136 lie to the north of boundary wall of Crosthwaite Girls Inter College and to the north of plot Nos. 78, 79, 80, 81, 82 G.T. Road is existing on the spot and throughout the length Railway's shops are in existence on G.T. Road. To the east of plot No. 126, 134, 133, 136, 137 the Kydganj Road is in existence. The Kydganj Road has taken a turn towards west in circular shape as shown in the plan annexed with the report. As per 1320 fasli map the Kydganj road had a turning towards west through plot No. 137 but on the spot at present there was no such road in existence, as Kydganj Road having taken a turn towards west in circular shape at point F J and joins G.T. Road at point H.M. It seems to be a later change on the spot and a piece of land is left between the old Road and the new one which is shown in the map with letters J K L M N. The defendants submitted a plan duly signed which is similar to the plan prepared by me. The situation of all the plots as per 1320 fasli map is also shown which proves situation of the plots.

The applicant has also supplied me with a copy of plot No. 1852II(ii), showing proposal for acquisition of land in which the land to be acquired is written of Mauza Sarai and in the acquisition notification also the word 'Sarai' is written. There is some mistake in mentioning the name of the village in the notification for the acquisition. There is only one Crosthwaite Girls College at Allahabad and this girls college is situated at village Sarai Mauz, Tahsil Chail, Allahabad city. The land claimed by the parties is situated in village Sarai Mauz, Allahabad. The admitted boundaries also prove the situation of land in Sarai Mauz.

The portion of the land 5.62 acre which was proposed to be acquired, is demarcated with red colour in acquisition plan No. 1852 II (ii) of the year 1949, and the same is signed by the then Land Acquisition Officer. In this map towards south boundary wall of Crosthwaite Girls Inter College is shown and to the north G.T. Road is shown and to the east, Kydganj Road is shown. The possession of memo (copy of which is available on record) also shows that possession to the railway authorities was delivered on the basis of plan No. 1852 II (ii). The revenue authorities also issued a map (vide copy of village map 1913 A.D.) over which the acquired portion is shown with red colour and the said portion is carved out over plots mentioned in village map

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of 1320 fasli = 1913 A.D. From the facts mentioned above, proposed plan for acquisition, possession memo, Revenue records, old Railway Lines, existence of lever and huge constructions made by Railway on the land, leads to a conclusion that property bounded by the words AVCRSTUVIAI is the same land which was notified and acquired for railway.

I started locating the whole area as claimed by the heirs of Chhedi Lal, which is shown with letters A V C R D E F J K L M N I A and the measurements area clearly shown in the annexed map. The Railway authorities claimed their land shown which letters AVCRSTUV M I A. It was not possible to demarcate the eastern portion of the land as Nirankari Ashram and other buildings were existing and hence it was carved out on the plan which is shown by dotted lines and words R S T U V. From point C P O G H the land was available on the spot and to the east of H G there was Kydganj Road and to the east of G O P C there was abadi on the spot and to the west of H G O P C there were several constructions, of the Railway as shown in the annexed plan. On the western side upto I B, north eastern railways constructions were existing and to the east of I B constructions of railway electrification were in existence which is shown in the plan annexed with the report. There were few temporary constructions made by the opposite parties towards eastern side of the land which are shown in green colour in the plan. There was plantation of guava and other plants to the west of O P C, which is shown in the map. There were few temporary Jhuggies to the south of Railway leased out shops which are also shown in green colour. The constructions made by the opposite parties are shown by green colour at their respective places in the plan annexed with the report. The area of AVCRSTUVHIA is 5.62 acres as according to measurements of the area pointed out to have been acquired by the Railway. But at present only 4.84 acres is available on the spot which is shown in the plan with letters A V C P O S H I A. The Railway authorities claim possession over it. However, on the spot, I found that the portion shown in green colour in the plan, are in possession of opposite parties.

The plaintiff also pointed out the existence of Railway lines over plot and found the Railway lines existing over the plots which are shown in the plan with black colour. Existence of a well was also pointed out to me on the spot, which is shown in the map.

The only dispute is about the name of the village. This dispute too is resolved by the facts stated in the report.

The clear position of the spot with relevant measurements and situations is shown in the map which is part of report."

42. Thereafter, Gulab Chandra plaintiff-respondent No. 2 filed an objection dated 4.5.1990 before District Judge, Allahabad requesting for setting aside the said report and direct for a fresh survey. District Judge forwarded objection and Commissioner's report to Supreme Court for its consideration.

43. Supreme Court confirmed Commissioner's report. Writ Petition No. 593 of 1988 was finally disposed of vide order dated 19.11.1990 observing that this Court, in pending appeal, may take into consideration, report of Commissioner. Order dated 19.11.1990 reads as under :

"We have heard Counsel for the parties. The appeal filed by the Union of India before the Allahabad High Court be disposed of within six months from now as agreed to by Counsel before us. ***On the basis of the decree to be***

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made in the Allahabad High Court the question as to whether the construction is beyond the acquired area or is a part of the acquired area has to be determined. In deciding the matter the High Court may take into consideration the report made by the Commissioner in terms of the Court's order.

The writ petition is disposed of."

(Emphasis added)

44. When First Appeal No. 801 of 1989 came up for hearing, this Court vide judgment dated 4.1.1995 allowed the same and judgment and decree of Trial Court was set aside and the matter was remanded. Order of this Court reads as under:

"Defendants are appellants against a decree declaring title of plaintiff (deceased) in respect of 5 acres 62 decimals of land in Allahabad town.

During the pendency of this appeal an application for amendment of the plaint was filed and it was directed mat the same shall be considered at the time of hearing. Since the result of the appeal would depend upon the question of amendment of the plaint, we heard Sri Ravi Kant learned Counsel for the plaintiff/respondent and Mr. J Nagar learned Counsel for appellants on this aspect first.

When defendant raised structures on the disputed land suit was filed for declaration the plaintiff is the owner of the area in dispute later prayer was made for directing defendants to remove the structures. ***Defendants took the plea that on acquisition of the land, possession has been given to them and plaintiff has no right title and interest on the land in question***. Objection was also taken to maintainability of the suit on the ground of absence of notice under Section 80 C.P.C. Suit having been decreed present appeal has been filed.

Ownership of the land in dispute was subject-matter of various litigations initiated by plaintiff last of which is a writ petition in the Supreme Court. The same has been disposed off directing this appeal to be disposed of.

One of the objection of the defendants is that notice under Section 80 C.P.C. was mandatory and there being no averment in the plaint that no such notice has been served the plaint is liable to be rejected under order 7 rule 11 C.P.C. Despite such plea in the written statement ***no evidence was adduced by the plaintiff to prove that the notice under Section 80 C.P.C. has been served***. In view of the settled law relating to precondition of service of the notice under Section 80 C.P.C. in a suit of this nature rightly the ***plaintiff has been advised to amend the plaint by incorporating that the notice has been served as asserted.*** There shall be grave injustice to the plaintiff as he will not be able to prove his case and on technical ground the suit may be dismissed. What would be the effect of serving of notice in prior suit has also gone into if is served that such notice has been served. Although serious objection was raised by appellant to the introduction of this new facts we are inclined to hold that appellant should not succeed on technicality if the same is proved. But it cannot be ignored that applicant has been involved in litigation for a long time and would have to face further litigation if this amendment is allowed the decree has to be set aside and suit has to be remitted back. This can be mitigated so that state exchequer shall not suffer.

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When plaintiff claims that acquisition of land is not valid in law he should be permitted to challenge the same by adding Collector as array for which Collector has been sought to be made party by amendment of the plaint, necessary facts are required to be incorporated in the plaint ***challenging the acquisition.***

Therefore, we are satisfied that end of justice would be best served in the present case if the application of amendment is allowed subject to payment of cost of Rs. 20,000/- (Rupees twenty thousand .only) to the appellant defendants in the Trial Court. On amount being deposited within three months from today, Trial Court shall allow the amendment of the plaint and impleadment of the Collector.

Once the plaint is amended it goes without saving that defendant shall get an opportunity to file Addl. Written statement and newly added party shall also get a chance to file written statement therefore the suit shall be heard and all parties shall be given a full liberty to adduce further evidence. The evidence already on record shall be taken into consideration after availability of opportunity to newly added party to challenge the same. In result the appeal is allowed, and judgment and decree of the Trial Court are set aside. Suit is remitted back to the Trial Court for fresh trial which shall be subject to the condition of payment of Rs. 20,000/- (Twenty thousand rupees only) as cost to the applicant as already indicated above. There shall be no order as to costs in the appeal".

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(Emphasis added)

45. After remand, State of UP and REO filed their written statements i.e. paper No. 130A and 160A.

46. Thereafter, Trial Court reframed all the issues vide order dated 26.2.1996 and confining the same only to 8 in number. It also recorded statements of Gulab Chand as PW 4 (Paper No. 156A), R.G. Sharma as DW 1 (paper No. 176A) and thereafter decided suit vide judgment dated 20.10.1997 and passed decree dated 11.11.1997, which is under consideration in this appeal.

47. The Advocate Commissioner's report dated 3.5.1990 was obtained for identification of the disputed land.

48. We have perused the report dated 3.5.1990. This report is based on boundaries situated on the spot. No fix point was fixed by Advocate Commissioner for making survey of the disputed Khasra numbers. He has only identified disputed Khasra numbers on the basis of Sajra of Fasli year 1320 comparing the boundaries mentioned in the Sajra map. Advocate Commissioner has mentioned in his report in paragraph No. 4 that the portion of land of area ad-measuring 5.62 acre was demarcated in the map with read colour in the acquisition plan No. 1852-11 (ii) of the year 1949 and the same was signed by the then Land Acquisition Officer. Therefore, Advocate Commissioner had not made survey by fixing fixed point of the disputed Khasra numbers and as such, they were not located on the spot at the point of time of inspection made on 22.4.1990.

49. On the other hand, burden of proof of this fact that disputed Khasra numbers were transferred to original plaintiff Chhedi Lal by Smt. Rahiman Bibi on the basis of registered Patta dated 25.5.1948 lay on plaintiff. Area ad-measuring 5 bigha, 9 biswa and lease dated 25.5.1948 included disputed Khasra numbers as claimed by plaintiff has also to be proved by plaintiff. This fact was not proved by plaintiff by adducing

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evidence. In this regard plaintiff did not apply for survey of disputed Khasra numbers, which were acquired for Railway. The disputed land claimed by plaintiff could have been located on the basis of survey of these Khasra numbers. Plaintiff Shri Chhedi Lal had pleaded in the plaint that no information/notice was received by him about the acquisition proceedings conducted by State Government while fact is that Smt. Rahiman Bibi and Abdul Raheem actually received compensation. In pith and substance, Chhedi Lal had challenged acquisition of land of area 5.62 acre land acquired for public purposes in favour of OT Railway.

50. With respect to challenge to land acquisition proceedings and notifications issued under Section 4 and 6 of Act 1894, now law is well-settled that no civil suit is maintainable. Learned Counsel for the parties fairly admitted that this issue has been answered in Laxmi Chand and others v. Gram Panchayat, Kararia and others, MANU/SC/0128/1996 : AIR 1996 SC 523, wherein Court in para 3 of judgment has said:

> "3. It would thus be clear that the scheme of the Act is complete in itself and thereby the ***jurisdiction of the Civil Court to take cognizance of the case arising under the Act, by necessary implication, stood barred. The Civil Court thereby is devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act.*** The only right an aggrieved person has is to approach the constitutional Courts, viz., the High Court and the Supreme Court under their plenary power under Articles 226 and 136 respectively with self-imposed restrictions on their exercise of extraordinary power. Barring thereof, there is no power to the Civil Court."
>
> (emphasis added)

51. Therefore, suit for challenging land acquisition proceedings at the instance of plaintiff respondent was not maintainable at all.

52. Moreover, even otherwise, it was not permissible for plaintiff-respondent for the reason that owners of land after acquisition notifications, filed applications under Section 18 of Act 1894 which was decided by District Judge vide judgment dated 2.3.1956. It was not a case pleaded by Sri Abdul Raheem and Smt. Rahiman Bibi, owners of disputed land from whom plaintiff claims to have derived his title, that disputed land had already been transferred to plaintiff-respondent Chhedi Lal and they had no further interest in the said land. This fact is relevant to show that claim set up by plaintiff-respondent on the basis of alleged gift deed dated 24.4.1949, was apparently suspicious and when it was challenged to be fictitious and forged by defendant-appellant, we find no reason to treat the said document as a valid document to confer and prove title of plaintiff-respondent in respect of disputed property. Trial Court has treated the said document, valid, so as to confer title upon plaintiff-respondent only on the ground that it is a document of 20 years and more old and therefore, presumption has to be drawn in its favour and no further proof is required by virtue of Section 90 of Evidence Act, 1872 (hereinafter referred to as 'Act 1872') as amended in State of. U.P. This approach on the part of Court below is clearly erroneous and illegal.

53. Presumption under Section 90 of Act 1872 in respect of thirty years old document (20 years as per U.P. Amendment) coming from proper custody relates to the signature, execution and attestation of document i.e. to its genuineness but it does not give rise to presumption of correctness of every statement contained in it. The contents of document are true or it had been acted upon, have to be proved like any other fact. This is what has been said in Union of India v. Ibrahim Uddin and

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Another, MANU/SC/0561/2012 : 2012 (8) SCC 148. Defendant-appellants specifically pleaded that document dated 24.4.1949, so-called Khairatnama (gift deed), relied by plaintiff-respondents, is a forged and fictitious document inasmuch as after acquisition of land, compensation was received by original owners namely Smt. Rahiman Bibi and Abdul Raheem and in the application filed under Section 18 of Act 1894 before District Judge in 1952, no averment was made by them that disputed land was already gifted to any other person or plaintiff-respondent and they have no title thereon. Plaintiff-respondent, therefore, was bound to prove correctness of the contents of document dated 24.4.1949 when same was challenged by defendant-appellants. In absence of any such proof, Trial Court in our view, clearly erred in law by accepting its contents as self-proved so as to confer title upon plaintiff-respondent, without there being any iota of evidence led by plaintiff-respondents in this regard. We therefore, find no hesitation in observing that respondent (original plaintiff, Chhedi Lal) was unable to prove this fact that zamindars Mr. Abdul Raheem and Smt Rahiman Bibi executed Khairatnama/gift deed in his favour after one year of the execution of lease deed.

54. We have also perused statements of PW-1 Shri Chhedi Lal and his son PW-4 Gulab Chandra. Both these witnesses have stated that in 1944, disputed land relating to Khasra numbers mentioned in the plaint was leased out by Mr. Abdul Raheem and Smt. Rahiman Bibi to plaintiff Chhedi Lal for cultivating it. Lease deed was executed on 25.5.1948. Hence, nature of disputed land was "agricultural land". Therefore, plaintiff ought to have sought relief on the basis of lease deed dated 25.5.1948 and alleged Khairatnama, regarding his right, title and interest from Revenue Court.

55. Both these witnesses have accepted that Chhedi Lal had instituted a Suit No. 6/14 of 1984 (Chhedi Lal v. State of U.P. and others) under Section 209 and 259 of U.P. Act, 1950 in which Sri Abdul Raheem and Smt. Rahiman Bibi were arrayed as defendants 3 and 4; OT Railway through General Manager, Eastern Railway, Gorakhpur and Divisional Manager Engineering Varanasi Rail were arrayed as defendants 5 and 6. A perusal of plaint of suit No. 6/14 of 1984, reveals that disputed land of Khasra numbers mentioned in the plaint of present case, were also mentioned as disputed property in that suit. It was also pleaded that defendants 5 and 6 were not having any title and interest on the disputed Khasra numbers. It was alleged that defendants 5 and 6 with conspiracy of Lekhpal got acquisition of these Khasra registered numbers in Revenue records. In paragraph No. 6 of plaint of Revenue suit, it is mentioned that defendants 5 and 6 acquired land of these Khasra numbers in 1954 for Kumbh Mela, in public interest, and possession was handed over to them (defendants 5 and 6) by plaintiff Chhedi Lal. Revenue suit was instituted by Chhedi Lal for obtaining possession over disputed Khasra numbers. PW-1 and PW-4 have accepted this fact that Revenue suit was later on withdrawn by Chhedi Lal and writ petition was filed before this Court. An interim order was granted by this Court. There against appellant-Railway Department went in Supreme Court. Therefore, PW-1 and PW-4 have accepted this fact that above-mentioned disputed Khasra numbers were acquired in favour of appellant and according to their own admission possession was taken in 1954. They were well aware of acquisition of disputed land at least in 1954.

56. Khatauni of 1391 Fasli (non-Z.A.) relating to disputed Khasra numbers situated at Sarai Mauja urf Kydganj Uparhar, Tehsil Chayal, Allahabad is available on record. These disputed Khasra numbers are registered alongwith Khasra numbers 133/2, 134/1, 135/1 and 136/1 in Revenue record Khatauni in favour of OT Railway.

57. PW-1 and PW-4 in their cross-examination have accepted that appellant-Railway Department had constructed quarters on disputed land. Plaintiff, Chhedi Lal, also

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accepted that Smt. Rahiman Bibi and Mr. Abdul Raheem had expired. He had also stated that house No. 176, GT Road, was purchased by him for consideration of Rs. 800/-, but no sale deed was executed by seller. PW-1 and PW-4 have also accepted during cross examination, when appellant-Railway Department constructed quarters on disputed land, suit was instituted before Revenue Court, which was withdrawn and these proceedings were conducted by Chhedi Lal before Revenue Court. PW-1 Chhedi Lal could not disclose name of husband of Smt. Rahiman Bibi. He could not specify names of witnesses in presence of whom Khairatnama was executed in his favour by Smt. Rahiman Bibi in 1949. He had no knowledge whether Mr. Abdul Raheem was alive or not.

58. Chhedi Lal (PW-1) has accepted that he applied in Nagar Mahapalika for registration of disputed property in his favour only two year prior to the institution of suit in question. Between 1949 and two years before institution of suit, he had not moved any such application. PW-4, his son Gulab Chandra, during his cross examination accepted that Railway Department has allotted land to shopkeepers and these shops are mentioned in map 66 Ga, which were constructed by shopkeepers. By mark 3, Railway quarters were mentioned in this map. He has also stated that in 1983 he came to know that disputed Khasra numbers were registered in favour of defendant-appellant and he tried to get this entry deleted in the 1983. An application was moved before S.D.M. Chayal for registration of their name regarding disputed Khasra numbers. When no action was taken for two years then Revenue suit was withdrawn and proceedings were conducted before this Court. Likewise, he (PW-4) has accepted on page No. 4 of his statement that near Patari of Municipal Corporation, near G.T. Road on the southern side of Patari, 56 shops were constructed in 1982 and Railway Department had allotted land to these shops, situated on disputed land.

59. PW-1 and PW-4 have tried to prove that on 20.11.1987, appellant-Railway Department with help of police administration had constructed quarters on the disputed land. PW-4 has said that Nanku was witness of lease deed and Sukh Ram and Ram Nath were witnesses of Khairatnama/gift deed, but these witnesses were not examined on behalf of plaintiff to prove his right, title and interest over disputed Khasra numbers. PW-4 on page 11 of his statement has accepted that till 1988, he could not know that disputed Khasra numbers were registered in the name of appellant. He has stated in his cross-examination that in 1983, he inspected records about acquisition of disputed property through his Counsel but he (Counsel) did not inform about acquisition of disputed land by State Government. He has skipped answer to suggestion of appellant/defendant that process of acquisition had already started at the point of time, when alleged Khairatnama was executed as claimed by them.

60. On the basis of appreciation of evidence of PW-1 and PW-4, it reveals that they were unable to prove alleged lease deed and Khairatnama executed by Abdul Raheem and Rahiman Bibi in favour of original plaintiff, Chhedilal. Moreover, acquisition of land by State Government for Railway was also in the knowledge of plaintiff Chhedi Lal at least in 1954 but no action was taken. Railway department/appellant had constructed railway quarters and allotted land for shops constructed on disputed property, which was acquired by State Government for it.

61. Trial Court has examined PW-2 Shiv Bahadur Srivastava, who had stated that he surveyed land ad-measuring 10.5 Bighas on the basis of map, Paper No. 66/3. It discloses existence of house on disputed land. He has clarified in cross-examination that this map was a scaled map but was not prepared after doing survey of above mentioned khasra numbers, on the basis of sajra by fixing fixed point for this

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purpose. He has also accepted in cross-examination that he has shown construction of seven quarters, one workshop and one overhead tank, existed on the disputed land, which was constructed by Railway.

62. PW-3 Ram Pathik has stated that Rahiman Bibi and Abdul Rahim, Zamindars provided disputed land to Chhedilal 1944 and afterwards executed Khairatnama in his favour. But in his cross-examination, he has said that he met Abdul Rahim 1957. He has disclosed this fact that Rahiman Bibi was resident of his locality. Her house situated at a distance of two furlong and he knew Smt. Rahiman Bibi, because his relative Fazal obtained land on lease from her. He is not the witness of lease deed dated 25.5.1948, because he has not signed this lease deed. During his cross-examination, he has stated that Railway constructed house and shops on 20.11.1987 with the help of police personnel, forcefully.

63. Thus on the basis of statements of PW-1 to PW-4, it is also revealed that plaintiff-Chhedilal was not in possession of disputed property on the date of institution of suit. He had sought relief for demolition of houses, shops and workshops existed on dispute property, but did not claim relief of possession of disputed land. Witnesses No. 1 and 4 have also accepted that they had instituted a suit No. 6/14 of 1984, which was withdrawn by plaintiff. Therefore, it is evident that land was acquired in 1950 (according to admission of PW-1 it was acquired in 1954 and possession was also taken by Railway) but first litigation at the instance of plaintiff came into light in 1984. This Suit apparently was barred by limitation, whether for the purpose of mere declaration or even for delivery of possession.

64. In the present case PW-1 having admitted that possession was taken by Railway in 1954, though as per the case set up by appellants, possession was taken in 1950, but in both the contingencies, fact remained admitted that possession was not with plaintiff-respondent from 1950 or in any case from 1954, hence suit for declaration without seeking any relief for delivery of possession, filed in 1984 or thereafter was apparently barred by limitation and suit for mere declaration was barred by Section 34 of Specific Relief Act 1963 (hereinafter referred to as "S.R. Act, 1963").

65. In this respect, we may also refer to some further evidence adduced on behalf of the defendant.

66. DW-1 Shri R.G. Sharma and DW-2 Shri Bhagwan Dass Mishra are employees of Railway. They have deposed regarding acquisition of land admeasuring 5.62 acres vide notification dated 26.11.1949 and 3.12.1949 issued under Sections 4 and 6 of Act, 1894. They have also proved that disputed land is situated in Sarai Mauz Urf Kydganj Allahabad under jurisdiction of Tahsildar Chaiyal. These witnesses have also proved that on the basis of paper No. 28-C, document of possession and Revenue map (Paper No. 29-C) possession of disputed land of khasra numbers mentioned in the plaint was handed over in 1950 to Railway. DW-2 has stated that Rahiman Bibi and Abdul Raheem had instituted a Reference under Section 18 of Act, 1894. This reference was decided by District Judge, Allahabad vide judgment dated 2.3.1956 (Paper No. 33-C/33). He has also proved that O.T. Railway got possession of disputed property, which merged in 1952 in North Eastern Railway. He has also clarified that compensation was granted to plaintiff-Chhedilal regarding his Kachcha hut and he had not complained to Railway for such compensation. DW-1 has proved fact that the map (Paper No. 86-C/44) was prepared in his presence and Railway allotted disputed land to shopkeepers in 1978. This land was allotted to 56 shopkeepers. Boundary was constructed in 1959, according to DW-2. DW-1 and DW-2 have stated that further construction over disputed land was made in 1966-1967.

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67. DW-1 and 2 have deposed that plaintiff-Chhedilal got interim stay from High Court, but Supreme Court set-aside that stay order. Then work of construction was started by Railway. DW-1 has adduced evidence on the basis of record of office of Land Acquisition Officer and Railway and file relating to acquisition of disputed khasra number maintained by North Eastern Railway, Gorakhpur.

68. DW-3 Mathura Singh adduced his evidence on the basis of original file of acquisition proceedings maintained by concerned department and proved that land mentioned in sajra plan was published under Section 4 on 26.11.1949 and publication No. 26/1 & 26/2, (photocopy of this notification) was proved on the basis of original file. He has proved that land ad-measuring 5.62 acres was acquired by State Government for Railway. Likewise, notification under Section 6 of Act, 1894 was issued on 21.2.1950. Possession of disputed khasra numbers was handed over to Railway on 29.3.1950 as-deposed by DW-3.

69. During cross-examination, he has proved signature of Madho Singh of O.T. Railway, who had signed possession letter (Paper No. 28-Gaa) whereby possession of disputed khasra numbers were given to Railway.

70. All these facts noticed above unquestionably show that suit in question was barred by limitation, which had expired long back. Once limitation expires, there is no question of its revival by any act of the plaintiff himself.

71. Period of limitation for filing a suit for declaration is three years vide Article 58, Part-III of the Schedule of Limitation Act, 1963 (hereinafter referred to as 'L.A. 1963') if we consider applicability of L.A., 1963 as in force on the date of filing of suit in question. If we go by provisions of limitation as applicable on the date of accrual of cause of action, in our view it would be Article 120 of Limitation Act, 1908 (hereafter as referred to as 'L.A. 1908') for declaration and for possession, it is Article 142 or 144, as the case may be.

72. Court below strangely ignored provisions of L.A. 1908 or L.A. 1963 on the ground that since Supreme Court had disposed of appeal, permitting parties to avail remedy under common law, therefore, for the purpose of limitation of suit, it will commence therefrom. This approach on the part of Court below is clearly erroneous and illegal. Statutory period of limitation is governed by statute. Once it has already expired or lapsed, it cannot be restored or revived even by Court. Right to avail remedy lost under law, on account of a statutory provision of limitation, cannot be undone or made alive even by Court. Even otherwise, Court while permitting parties to avail remedy in common law has not said anything about limitation. Therefore, it had to be considered in the light of law as it is/was.

73. We may remind ourselves that principles relating to limitation though merely procedural but when are provided by statute must has to be applied as stated in the Statute and not on the whims of anyone.

74. We may have a retrospect of matter relating to limitation on this aspect for the benefit of Courts so that provisions of limitation may not be dealt in such a casual manner.

75. The nature of the statute on limitation was considered in C. Beepathuma C. Beepathumma And Ors. v. V.S. Kadambolithaya And others, MANU/SC/0209/1963 : AIR 1965 SC 241. Court says "There is no doubt that the Law of Limitation is a procedural law and the provisions existing on the date of the suit apply to it."

76. Before British, during the period when Muslims ruled Country, it appears that

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personal laws governed all matters. Muslim law does not recognize limitation; while in Hindu personal laws, on certain aspects, in different schools, some provisions for limitation are prescribed which are not common to all Hindus. Hindu Law recognizes both prescription and limitation while Muslim jurisprudence recognizes neither of them. In some of the Smritis a period of 20 years was prescribed for acquisition of title by prescription. It appears that since agriculture was the main occupation of people, Smritis concentrated more on land and on the rights therein.

77. Thus prior to 5.5.1859 there was no common law of limitation applicable to whole of India. Provincial Courts in each Presidency, established by East India Company, were governed by certain Regulations, like; Regulation III of 1793 (Bengal); Regulation II of 1802 (Madras); Regulation I of 1800 (Bombay) and Acts particularly applicable to them like Act I of 1845; Act XIII of 1848; Act XI of 1859. Non-Regulation Provinces i.e. Punjab and Oudh etc. were governed by Codes of their own and sometimes by Circular Orders of Judicial Commissioners. Three Supreme Courts established by Royal Charter adopted English law of limitation.

78. Cause of action with respect to the statutes of Limitation as applicable in England in one of the earliest cases came to be considered in 1849 as to when it would run. Privy Council in The East India Company v. Oditchurn Paul, 1849 (Cases in the Privy Council on Appeal from the East Indies) 43, held that Statute runs from the time of breach, for that constitutes cause of action. With reference to East India Company, it observed that statute of limitation was extended to India by Indian Act No. XIV of 1840. Appeal against Supreme Court of Judicature at Fort William in Bengal (Calcutta) was allowed by Privy Council. It also observed therein, if the matter would have been tried by Hindu law, limitation of suits, under Hindu law, would have been twelve years.

79. The first codified statute was Act No. XIV of 1859, enacted to amend and consolidate laws relating to limitation of suits. This Act received assent of Governor General on 5.5.1859. It was repealed by Act No. IX of 1871, Act XV of 1877 and thereafter by Act IX of 1908 (i.e. L.A. 1908). Presently, even L.A. 1908 has been repealed and Courts in India are now governed by L.A. 1963.

80. Act XIV of 1859 provided limitation of suits only. Section I, Clauses 12 and 16, said : "12. To suits for the recovery of immovable property or of any interest in immovable property to which no other provision of this Act applies-the period of twelve years from the time the cause of action arose."

> "16. To all suits for which no other limitation is hereby expressly provided-the period of six years from the time the case of action arose."

81. Sections XI, XII, XV and XVI of the Act XIV of 1859 read as under:

> "XI. If, at the time when the right to bring an action first accrues, the person to whom the right accrues is under a legal disability, the action may be brought by such person or his representative within the same time after the disability shall have ceased as would otherwise have been allowed from the time when the cause of action accrued, unless such time shall exceed the period of three years, in which case the suit shall be commenced within three years from the time when the disability ceased; but, if, at the time when the cause of action accrues to any person, he is not under a legal disability, no time shall be allowed on account of any subsequent disability of such person or of the legal disability of any person claiming through him."

> "XII. The following persons shall be deemed to be under legal disability

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within the meaning of the last preceding Section-married women in cases to be decided by English law, minors, idiots, and lunatics."

"XV. If any person shall, without his consent, have been dispossessed of any immovable property otherwise than by due course of law, such person, or any person claiming through him, shall, in a suit brought to recover possession of such property, be entitled to recover possession thereof notwithstanding any other title that may be set up in such a suit, provided that the suit be commenced within six months from the time of such dispossession. But nothing in this Section shall bar the person from whom such possession shall have been so recovered, or any other person, instituting a suit to establish his title to such property and to recover possession thereof within the period limited by this Act."

"XVIII. All suits that may be now pending, or that shall be instituted within the period of two years from the date of the passing of this Act, shall be tried and determined as if this act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted after the expiration of the said period shall be governed by this Act and no other law of limitation, any Statute, Act, or Regulation now in force notwithstanding."

82. Section I of Act XIV of 1859 says that no suit shall be maintained in any Court of Judicature within any part of the British territories in India in which this Act shall be in force, unless the same is instituted within the period of limitation hereinafter made applicable to a suit of that nature, any Law or Regulation to the contrary notwithstanding. Territory upon which said Act was made operative, was provided in Section XXIV as under :

"XXIV. This Act shall take effect throughout the Presidencies of Bengal, Madras, and Bombay, including the Presidency Towns and the Straits Settlements; but shall not take effect in any Non-Regulation Province or place until the same shall be extended thereto by public notification by the Governor-General in Council or by the Local Government to which such Province or place is subordinate. Whenever this Act shall be extended to any Non-Regulation Province or place by the Governor-General in Council or by the Local Government to which such Province or place is subordinate, all suits which, within such Province or place, shall be pending at the date of such notification, or shall be instituted within the period of two years from the date thereof, shall be tried and determined as if this Act had not been passed; but all suits to which the provisions of this Act are applicable that shall be instituted within such Province or place after the expiration of the said period, shall be governed by this Act and by no other law of limitation, any Statute, Act, or. Regulation now in force notwithstanding."

83. Though Act No. XIV of 1859 was drafted in a language much more precise than the loose phraseology of earlier Regulations, but Privy Council in The Delhi and London Bank v. Orchard, I.L.R. 3 (1876) Calcutta 47 (PC) observed that it as an "inartistically drawn statute".

84. Act DC of 1871 extended the scope and made provisions relating to limitation to suits, appeals and certain applications to Courts. It received assent of Governor General on 24.3.1871. Second Schedule, First Division, Articles118, 143 and 145 provided limitation for possession of immovable property and read as under:

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Description of suit	Period of limitation	Time when period begins to run
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant, or of some person through whom he claims, became adverse to the plaintiff.

85. Some of the features of Act DC of 1871 are:

(a) Section-3 defines term 'minor means a person who has not completed his age of eighteen years;

(b) Section-7 deals with legal disability, Section 9 provides continuous running of time, Sections 23 and 24 deals with continued cause of action or renewal of cause of action and 29 for the first time provides for extinction of rights of a person in respect to any land or hereditary office and read as under :

> "7. If a person entitled to sue be, at the time the right to sue accrued, a minor, or insane, or an idiot, he may institute the suit within the same period after the disability has ceased, or (when he is at the time of the accrual affected by two disabilities) after both disabilities have ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed. When this disability continues upto his death, his representative in interest may institute the suit within the same period after the death as would otherwise have been allowed from the time prescribed therefor in the third column of the same schedule.
>
> Nothing in this Section shall be deemed to extend, for more than three years from the cessation of the disabilities or the death of the person affected thereby, the period within which the suit must be brought."
>
> "9. When once time has begun to run, no subsequent disability or inability to sue stops it : Provided that where letters of administration to the stage of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues."
>
> "23. In the case of a suit for the breach of a contract, where there are successive breaches, a fresh right to sue arises, and a fresh period of limitation begins to run, upon every fresh breach; and where the breach is a continuing breach, a fresh right to sue arises, and a fresh period of limitation begins to run, at every moment of the time during which the breach continues.

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Nothing in the former part of this Section applies to suits for the breach of contracts for the payment of money by instalments, where, on default made in payment of one instalment, the whole becomes due."

"24. In the case of a continuing nuisance a fresh right to sue arises, and a fresh period of limitation begins to run at every moment of the time during which the nuisance continues."

"29. At the determination of the period hereby limited to any person for instituting a suit for possession of any land or hereditary office, his right to such land or office shall be extinguished."

86. Drafting of this statute received better observations from Privy Council in Maharana Futtehsangji v. Dessai Kullianraiji, (1873) LR IIA 34 and it commented as a "more carefully drawn statute".

87. The Act gave for the first time some recognition to the "doctrine of prescription" viz. doctrine of extinctive prescription as to land and hereditary offices, and of positive prescription as to easements. It lived short and replaced by Act 15 of 1877 which extended principle of extinctive prescription to movable property and principle of positive or acquisitive prescription to profits a prendre.

88. Law of Prescription prescribes period at the expiry of which not only 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 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.

89. Doctrine of limitation and prescription is based upon two broad considerations. First, there is a presumption that a right not exercised for a long time is non-existent. Where a person has not been in possession of a particular property for a long time, presumption is that he is not owner thereof. The reason is that owners are usually possessors and possessors are usually owners. Possession being normally evidence of ownership, the longer the possession has continued greater is its evidentiary value. Legislature, it appears, therefore, thought it proper to confer upon such evidence of possession for a particular time, a conclusive force. Lapse of time is recognised as creative and destructive of right instead of merely an evidence for and against their existence. The other consideration on which doctrine of limitation and prescription may be said to be based is that title to property and matters of right in general should not be in a state of constant uncertainty, doubt and suspense. It would not be in the interest of public at large. The object of statute of limitation is preventive and not creative but in a matter covered by principle of adverse possession, it also creates. It interposes a statutory bar after a certain period and gives a quietus to suits to enforce an existing right.

90. Act XV of 1877 received assent of Governor General on 19.7.1877 and came into force on 1.10.1877. Articles 120, 142 and 144, Second Schedule-First Division of the said Act read as under:

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Description of suit	Period of limitation	Time when period begins to run
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
For possession of immovable property, when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

91. Section 2 of Act XV of 1877 makes it clear that right to sue, if already barred, shall not revive by said enactment. It reads as follows:

> "2. All reference to the Indian Limitation Act, 1871, shall be read as if made to this Act; and ***nothing herein or in that Act contained shall be deemed to affect any title acquired, or to revive any right to sue barred, under that Act***, or under any enactment, thereby repealed; and nothing herein contained shall be deemed to affect the Indian Contract Act, Section 25."
>
> (Emphasis added)

92. Section 4 makes it obligatory for Courts to dismiss a suit if presented after expiry of period of limitation. Section 7 deals with the legal disability which is virtually pari materia with earlier provisions of 1871 Act though slightly worded differently and says:

> "7. If a person entitled to institute a suit or make an application be, at the time from which the period of limitation is to be reckoned. A minor, or insane, or an idiot, he may institute the suit or make the application within the same period, after the disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the second schedule hereto annexed.
>
> When he is, at the time from which the period of limitation is to be reckoned, affected by two such disabilities, or when, before his disability has ceased, he is affected by another disability, he may institute the suit or make the application within the same period after both disabilities have ceased, as would otherwise have been allowed from the time so prescribed.
>
> When his disability continues up to his death, his legal representative may institute the suit or make the application within the same period after the death as would otherwise have been allowed from the time so prescribed. When such representative is at the date of the death affected by any such disability, the rules contained in the first two paragraphs of this Section shall apply. Nothing in this Section applies to suits to enforce rights of pre-emption, or shall be deemed to extend, for more than three years from the cessation of the disability or the death of the person affected thereby, the period within which any suit must be instituted or application made."

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93. Section 9 talks of continuous running of time, Section 23 deals with continuing breach of contract and Section 28 talks of extension of right to property and say:

> "9. When once time has begun to run, no subsequent disability or inability to sue stops it:
>
> Provided that, where letters of administration to the estate of a creditor have been granted to his debtor, the running of the time prescribed for a suit to recover the debt shall be suspended while the administration continues."

> "23. In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

> "28. At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished."

94. There were several amendments in the above statute and ultimately it was repealed and replaced by Act 9 of 1908.

95. L.A. 1908 came into force on 1.1.1909. It continued with the provision imposing obligation upon Courts to dismiss a suit, while instituted, is already barred by limitation vide Section 23.

96. The arrangement of above Articles 120, 142 and 144 in L.A. 1908 remained the same, i.e., Articles 120, 142 and 144 and are verbatim:

Description of suit	Period of limitation	Time when period begins to run
Suit for which no period of limitation is provided elsewhere in this schedule.	Six years	When the right to sue accrues.
For possession of immovable property when the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession.	Twelve years	The date of the dispossession or discontinuance.
For possession of immovable property or any interest therein not hereby otherwise specially provided for.	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

97. The doctrine of limitation is founded on consideration of public policy and expediency. It does not give a right where there exist none, but to impose a bar after a certain period to the remedy for enforcing an existing right. The object is to compel litigants to be diligent for seeking remedies in Courts of law if there is any infringement of their rights and to prevent and prohibit stale claims. It fixes a life span for remedy for redressal of legal injury, if suffered, but not to continue such remedy for an immemorial length of time. Rules of limitation do not destroy right of

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the parties and do not create substantive rights if none exist already. However, there is one exception i.e. Section 28 of L.A. 1908, which provides that at the determination of period prescribed for instituting suit for possession of any property, his right to such property shall stand extinguished and the person in possession, after expiry of such period, will stand conferred title. The law of limitation is enshrined in the maxim "interest rei publicae ut sit finis litium" (it is for the general welfare that a period be part to litigation).

98. In Motichand v. Munshi, MANU/SC/0127/1968 : AIR 1970 SC 898, Court noticed the maxim vigilantibus non dormientibus jura subventiunt (the law assists the vigilant not those who sleep over their rights). Though there is a general principle ubi jus ibi remedium i.e. where there is a legal right there is also a remedy, but there are certain exceptions to this general rule.

99. Mere expiry of limitation could have extinguished remedy but principle embodied in Section 28 extinguishes right also and thereby makes the said general principle inapplicable. Once right of getting possession extinguished it cannot be revived by entering into possession again [See Salamat Raj v. Nur Mohamed Khan, (1934) ILR 9 Lucknow 475; Ram Murti v. Puran Singh, MANU/PH/0386/1962 : AIR 1963 Punjab 393; Nanhekhan v. Sanpat, AIR 1954 Hyd 45 (FB) and Bailochan Karan v. Bansat Kumari Naik, MANU/SC/0074/1999 : 1999 (2) SCC 310].

100. Learned Counsel for the plaintiff-respondent, however, sought to argue that the norm de die in diem is a continuous norm, hence there was no obstruction on account of limitation nor so since right to property is a constitutional right. Upto 42nd amendment of the Constitution it was a part of fundamental right and thereafter it has become constitutional right under Article 300-A. Hence, no person could have been deprived of right to property except under the provisions in accordance with law. In the present case plaintiff-respondent has been deprived of property illegally and therefore, it is a constitutional right which cannot be denied to him on the ground of procedural law of limitation. The submission is thoroughly misconceived and ignores the basic concept of law of limitation as it takes away remedy though person concerned may continue with the right. According to own admission of plaintiff, PW-1, possession was taken by defendants in 1954 after acquisition of land. It is evident that not only title was lost but even possession was lost. Therefore, whether a cause of action with regard to declaration would attract limitation prescribed under Article 120 or for possession would attract limitation under Article 142 or 144 of Schedule of L.A. 1908 and in either of the case, suit became barred by limitation by all means by 1966.

101. Article 120 is a residuary provision where limitation cannot be found in any other provision, only then it would be attracted. We can say safely that Article 120 L.A. 1908 would be attracted only when Articles 142 and 144 are inapplicable.

102. Between Articles 142 and 144, the later one is a kind of residuary provision while Article 142 applies in a specific type of case [See Sidram Lachmaya v. Mallaya Lingaya, MANU/MH/0075/1948 : AIR (36) 1949 Bom. 137 (Para 9); Ranchordas Vandravandas v. Parvatibai, 29 I.A. 71 (P.C.)].

103. A Full Bench of this Court in Bindyachal Chand v. Ram Gharib, MANU/UP/0284/1934 : AIR 1934 Alld. 993 (FB), held where Article 142 is applicable, Article 144 cannot be applied. First it has to be seen whether Article 142 applies in the case or not and when it clearly becomes inapplicable only then resort can be taken to Article 144.

104. Article 142 applies where plaintiff while in possession, has been dispossessed

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or has discontinued his possession. Where a persons has been dispossessed or discontinued of his possession of the property, he can bring an action seeking restoration of possession of immovable property within 12 years. It pre-supposes possession of such person over immovable property before he is dispossessed or discontinued. Article 144, however, applies where any other provision specifically providing for restoration of immovable property or interest therein is not available and there also, period of limitation is 12 years but limitation runs from the date when possession of defendants becomes adverse to plaintiff. Commonly it is said that this provision is in respect to the cases where defendant's possession is said to be adverse. Though distinction is quite evident but in the complex nature of society and the disputes which arise, at times Courts find difficulty in maintaining distinction between the two and there appears to be some conflicting views also as to the scope of Article 142 L.A. 1908 and its applicability. What has been ultimately realised is that the question would basically that of pleading.

105. In reference to Articles 143 of Act 9 of 1871, Privy Council in Bibi Sahodra v. Rai Jang Bahadur, (1881) 8 Cl. 224 : 8 I.A. 210, said:

> "refers to a suit for possession of immovable property, where the plaintiff, while in possession of the property, has been dispossessed or has discontinued the possession, and it allows twelve years from the date of the dispossession or discontinuance. But in order to bring the case under that head of the schedule, he must show that there has been a dispossession or discontinuance."

106. The view, therefore, was that Article 143 of Act 9 of 1871 which is corresponding to Article 142 of Act 15 of 1877 and L.A. 1908 would not be attracted where pleadings distinctly show that there was no dispossession or discontinuance of possession of plaintiff.

107. In Karan Singh v. Bakar AM Khan, (1882) 5 All 1, the question of application of Article 145 of Act 9 of 1871 (this corresponds to Article 144 of the statute with which we are concerned) arose. Sir Peacock observed that a suit can be brought within 12 years from the time when possession of the defendant or of some persons through whom he claims, became adverse to plaintiff.

108. In both the type of cases what we find is that possession by itself is of much relevance and importance. Courts took the view that by reason of his possession a person may have an interest which can be sold or devised. One has to prove first his possession before making complaint of dispossession or discontinuance of possession. He need not prove title or the capacity in which he had the possession for the purpose of Article 142. However, after title is proved, presumption of possession goes with it unless proved otherwise.

109. Privy Council in Sundar v. Parbati, MANU/PR/0013/1889 : (1889) 12 All 51, agreed with the view of this Court that possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised.

110. In Mohima Chundar Mozoomdar & Ors. v. Mohesh Chundar Neogi & Ors., 16 Indian Appeals (1888-1889) 23, considering Article 142 of Act 15 of 1877, Judicial Commissioner held that onus lies upon the plaintiffs to prove their possession prior to the time when they were dispossessed, and at sometime within twelve years before the commencement of suit so as to save suit from limitation prescribed under Article 142.

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111. Articles 142 and 144 of Act. XV of 1877 came up for consideration before Judicial Commissioner in Nawab Muhammad Amanulla Khan v. Badan Singh & Ors., 16 Indian Appeals (1888-1889) 148, It held that Article 142 applies, where plaintiff while in possession of immovable property earlier had been dispossessed or has discontinued possession and in such a case to bring a suit for possession, limitation would be 12 years. However, Article 144 applies only as to adverse possession where there is no other Article which specifically provides for the same. In the aforesaid case there was a refusal on the part of the plaintiffs and their ancestors to make the engagement for payment of revenue. The Government made engagement with villagers (defendants). It was held that this amounted to dispossession or discontinuance of possession of plaintiff within the meaning of Article 142 of Act 15 of 1877 and this case would not be governed by residuary Article 144 as to adverse possession.

112. Explaining inter relationship of two Articles, Punjab Chief Court in Bazkhan v. Sultan Malik, 43 P.R. 1901, held that suit for possession of immoveable property upon discontinuance of possession or dispossession is barred after 12 years under Article 142 of Limitation Act although no adverse possession is proved. Articles 144 and 142 cannot both apply. Article 144 in terms is applicable only when no other Article is found applicable.

113. Privy Council in Dharani Kanta Lahiri v. Gabar Ali Khan, MANU/PR/0103/1912 : (1913) 18 I.C. 17, said:

> "it lay upon the plaintiffs to prove not only a title as against the defendants to the possession, ***but to prove that the plaintiffs had been dispossessed or had discontinued to be in possession of the lands within the 12 years immediately preceding the commencement of the suit."***
>
> (Emphasis added)

114. In the above case a suit was filed for ejectment of persons who were admittedly in possession of lands from which they were sought to be evicted.

115. In Secretary of State v. Chelikani Rama Rao, (1916) 39 Mad. 617, Lord Shaw on page 631 of the report observed:

> "nothing is better settled than that the ***onus of establishing title to property by reason of possession for a certain requisite period lies upon the person asserting such possession***. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, 'I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfill all the legal conditions. .....It would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession."
>
> (Emphasis added)

116. In Kanhaiya Lal v. Girwar, 1929 ALJ 1106, this Court said:

> "this article applies to suit in which the plaintiff claims possession of the property on the ground that while in possession he was dispossessed or his possession was discontinued by the defendant. In other words that article is restricted to cases in which the relief for possession sought by the plaintiff is

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based on what may be styled as possessory title."

"possession is in itself title and good against everybody except the true owner. In short, there may be cases in which a person, though not the true owner, has been in peaceful possession of property and his possession is disturbed. In such cases the person dispossessed has a right to be restored back to possession on proving the fact of his possession ***and his dispossession or discontinuance of his possession by the defendant within a period of 12 years prior to the institution of the suit***. To such cases Art. 142 applies."

(emphasis added)

117. It thus appear that Court followed the principles that correct article to apply in cases based upon the allegation of title and possession is Article 144 because if plaintiff's title is proved he is entitled to succeed unless the defendants proves that the title has been lost on account of adverse possession on the part of defendants. But plaintiff though not able to substantiate his title, is in a position to prove his possession and dispossession by defendants within 12 years, if that be the case, Article 142 will apply and burden will lie on plaintiff. This was in fact misunderstood in the sense that a suit of owner who also had actual possession, if dispossessed or discontinued possession was not treated to be covered by Article 142. This is evident in Kalian v. Mohammad Nabikhan, 1933 ALJ 105. Fortunately this mistake was soon realised and the view otherwise was overruled by a Full Bench in Bindyachal Chand v. Ram Gharib (supra) where it was held that Article 142 is not restricted to suits based on possessory title only as distinguished from suits in which plaintiff proved his proprietary title as well. This view of the Full Bench of this Court was followed by a Full Bench of Lahore High Court in Behari Lal v. Narain Das, MANU/LA/0420/1935 : 1935 Lah. 475.

118. In Shyam Sunder Prasad & Others v. Raj Pal Singh & Anr., MANU/SC/0540/1995 : 1995 (1) SCC 311, in reference to Article142 and 144 of L.A. 1908, Court said:

"Under the old Limitation Act, all suits for possession whether based on title or on the ground of previous possessions were governed by Article 142 wherein the plaintiff while in possession was dispossessed or discontinued in possession. Where the case was not one of dispossession of the plaintiff or discontinuance of possession by him, Article 142 did not apply. Suits based on title alone and not on possession or discontinuance of possession were governed by Article 144 unless they were specifically provided for by some other articles. Therefore, for application of Article 142, the suit is not only on the basis of title but also for possession."

119. Thus, judicial consensus now binding on this Court is to the effect that Article 142 is one of the specific provision governing suits for possession of immoveable property and contemplates a suit for possession when the plaintiff, while in possession has been dispossessed or has discontinued possession [See also Abbas Dhali Masabdi Karikar, (1914) 24 I.C. 216 (Cal.)].

120. Article 144 in the matter of an occasion for possession of immoveable property or an interest therein is a residuary Article. Hence allegations made in the plaint, if brings the suit within Article 142, there is no justification or occasion to take the matter out of that Article and then to apply Article 144. It is only when Article 142 is not applicable and no other article apply, based on the pleadings, then if attracted, Article 144 may be applied. Article 142 is neither subordinate nor subject to Article

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144 but will have application on its own and independent. Article 144 thus is a kind of residuary article and will have application when no other article has application to the matter.

121. In C. Natrajan v. Ashim Bai & Anr., MANU/SC/8018/2007 : AIR 2008 SC 363, the Apex Court noticed the distinction between Article 142 and 144 of LA 1908 and Article 64 and 65 of LA 1963 in para 15 of the judgment as under:

> "15. The law of limitation relating to the suit for possession has undergone a drastic change. ***In terms of Articles 142 and 144 of the Limitation Act, 1908, it was obligatory on the part of the plaintiff to aver and plead that he not only has title over the property but also has been in possession of the same for a period of more than 12 years***. However, if the plaintiff has filed the suit claiming title over the suit property in terms of Articles 64 and 65 of the Limitation Act, 1963, burden would be on the defendant to prove that he has acquired title by adverse possession."
>
> (Emphasis added)

What is Dispossession

122. Article 142 contemplates earlier possession before dispossession or discontinuance thereof. This bring us to understand the term 'Possession'. It has a variety of meanings. It is a juristic concept distinct from title and can be independent of it. It is both physical and legal concept. The concept of possession implies "corpus possession" coupled with "animus possidendi". Actual user without animus possidendi is not a possession in law. In fact, possession is a polymorphous term having different meanings in different context. It has different shades of meaning and very elastic in its connotation.

123. The pivotal point to attract Article 142 and to run limitation is the date of "dispossession" or "discontinuation of possession". The period of limitation thus would commence, in a case governed by Article 142, from the date plaintiff is "dispossessed" or "discontinued". The two terms ex facie do not and cannot have the same meaning.

124. The dictionary meaning of the term "dispossession" is: (A) In "Mitra's Legal & Commercial Dictionary" 5th Edition (1990) by A.N. Saha, published by Eastern Law House Prv. Ltd., at pages 232-233:

> "Dispossession. The term 'dispossession' applies when a person comes in and drives out others from possession. ***It imports ouster; a driving out of possession against the will of the person in actual possession.*** This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against the will of the person in possession but in accordance with his wishes and active consent. The term 'discontinuance' implies a voluntary act and abandonment of possession followed by the actual possession of another. *Qadir Bux v. Ramchand*, MANU/UP/0046/1970 : AIR 1970 All 289.
>
> *Unless the possession of a person prior to his alleged dispossession is proved, he cannot be said to have been dispossessed. Rudra Pratap v. Jagdish*, MANU/BH/0030/1956 : AIR 1956 Pat 116."
>
> (B) In "Black's Law Dictionary" Seventh Edition (1999), published by West, St. Paul, Minn., 1999, at page 485 : "dispossession

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Deprivation of, or eviction from, possession of property; ouster."

(C) In "The Judicial Dictionary of Words and Phrases Judicially Interpreted, to which has been added Statutory Definitions" by F. Stroud Second Edition Vol. 1 (1903), at page 485:

"DISPOSSESSION.-"Dispossession, or Discontinuance of Possession," s. 3, Real Property Limitation Act, 1833, means the ABANDONMENT of possession by one entitled to it *(Rimington v. Cannon*, 22 L.J.C.P. 153; 12C. B. 18), followed by actual possession by another (Smith v. Lloyd, 23 L.J. Ex. 194; 9 Ex. 562 : *McDonnell v. MeKinty*, 10 Ir.L.R. 514)-; ignorance on the part of the rightful owner that such adverse possession has been taken making no difference *(Rains v. Buxton*, 49 L.J. Ch. 473; 14 Ch. D. 537; 28 W.R. 954).

Acts of user which do not interfere, and are consistent, with the purpose to which the owner intends to devote the land, do not amount to Discontinuance of Possession by him *(Leigh v. Jack, 5 Ex. D.264; 49 L.J. Ex. 220) ;* ***Dispossession "involves an animus possidendi with the intention of excluding the owner as well as other people"*** *(per Lindley, M.R., Littledale v. Liverpool College*, 69 L.J. Ch. 89, cited DISCONTINUANCE). SMALL ACTS by the rightful owner will disprove "Dispossession or Discontinuance,"-e.g. small repairs (Leigh v. Jack, sup), or, as regards a boundary wall, an inscription claiming it *(Phillipson v. Gibbon*, 40 L.J. Ch. 406; 6 Ch. 428).

Vh, Watson, Eq. 574, 575; and for a full examination of the cases on "Dispossession" and "Discontinuance," V. 35 S.J. 715, 742, 750."

(D) In "Corpus Juris Secundum" A Complete Restatement of the Entire American Law as developed by All Reported Cases (1959), Vol. 27, published by Brooklyn, N.Y. The American Law Book Co., at pages 600-601:

"DISPOSSESSION.-The act of putting out of possession, ***the ejectment or exclusion of a person from the realty***, if not to his injury, then certainly against his interest and without his consent, ouster.

The term has been held not to imply necessarily a wrongful act; and, although it has been defined as a wrong that carries with it the amotion of possession, an act whereby the wrongdoer gets the actual possession of the land or hereditament, including abatement, intrusion, disseisin, discontinuance, deforcement, it has been said that it may be by right or by wrong, that it is necessary to look at the intention in order to determine the character of the act, and that, in this respect, the word is to be distinguished from "disseisin."

(E) In "Words and Phrases" Legally Defined, Vol. 2 (1969), published by Butterworth & Co. (Publishers) Ltd., at pages 89-90:

"DISPOSSESSION [A partnership was dissolved, and the continuing partner, Hudson, agreed, in consideration of an assignment to him of the partnership property, to pay an annuity to the retiring partner. In order to carry into effect this agreement an indenture was entered into and executed between the parties; and Hudson bound himself to trustees, in the sum of AÂ£ 2,000, by a bond of even date conditioned to be void on payment of the annuity "or in case he should at any time after the expiration of the then existing lease, be dispossessed of and be compelled and obliged to leave and quit the

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premises without any collusion, contrivance, consent, act, or default" on his part.] ***"It seems that the species of dispossession in contemplation was a compulsory eviction; and they meant to provide that, if Hudson should be evicted, not through any fault of his own, he should no longer be burthened with payment of the annuity....*** The expulsion intended to be provided for, was such an expulsion as would leave Hudson no benefit from the premises." Heyland v. De Mendez, (1817), 3 Mer. 184, per Grant, M.R., at p. 189."

(F) In P Ramanatha Aiyar's "The Law Lexicon" with Legal Maxims, Latin Terms and Words & Phrases, Second Edition 1997), published by Wadhwa and Company Law Publishers, at page 573:

"**Dispossession.**-Where the heirs of the deceased could not realise rent owing to successful intervention of another person, it must be taken that they were dispossessed. ***"Dispossession" implies ouster, and the essence of ouster lies in that the person ousting is in actual possession.***

Dispossession implies some active element in the mind of a person in ousting or dislodging or depriving a person against his will or Counsel and there must be some sort of action on his part.

The word "dispossession" in the third column of the article is dispossession by the landlord or by an authorised agent of the landlord acting within the scope of his authority.

Dispossession obviously presupposes previous possession of the person dispossessed. If a person was never in possession, he will be said to be out of possession, but he cannot be said to have ever been dispossessed."

(Emphasis added)

125. Similarly meaning of term "discontinuance" in various dictionaries is as under:

(A) In "The New Lexicon Webster's Dictionary of the English Language" (1987), published by Lexicon Publications, Inc. at page 270:

> "Dis-con-tin-u-ance-a discontinuing (law) the discontinuing of an action because the plaintiff has not observed the formalities needed to keep it pending"

(B) In "Mitra's Legal & Commercial Dictionary" 5th Edition (1990) by A.N. Saha, published by Eastern Law House Prv. Ltd., at pages 229:

> "Discontinuance of Possession. ***Discontinuance of possession connotes abandonment of possession by the owner followed by the taking of possession by another***. *Hashim v. Hamidi*, MANU/WB/0151/1941 : AIR 1942 Cal 180 : 46 CWN 561.
>
> Discontinuance implies a voluntary act and abandonment of possession followed by the actual possession of another. Quadir Bux v. Ramchand, MANU/UP/0046/1970 : AIR 1970 All 289."

(C) In "Black's Law Dictionary" Seventh Edition (1999), published by West, St. Paul, Minn., 1999, at page 477:

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"discontinuance 1. The termination of a lawsuit by the plaintiff; ***a voluntary dismissal*** or nonsuit. See Dismissal; Nonsuit.

2. the termination of an estate-tail by a tenant in tail who conveys a larger estate in the land than is legally allowed."

(D) In "The Judicial Dictionary of Words and Phrases Judicially Interpreted, to which has been added Statutory Definitions" by F. Stroud Second Edition Vol. 1 (1903), at page 540-541:

"DISCONTINUANCE.-" 'Discontinuance' is an ancient word in the law" (Litt. s. 592). "A discontinuance of estates in lands or tenements is properly (in legally understanding) ***an alienation made or suffered by tenant in taile, or by any that is seized in auter droit, whereby the issue in taile, or the heir or successor, or those in reversion or remainder, are driven to their action***, and cannot enter" (Co. Litt. 325 a). Vf, Termes de la Ley : 3 B1. Com. 171.

(E) In "Corpus Juris Secundum" A Complete Restatement of the Entire American Law as developed by All Reported Cases (1956), Vol. 26A, published by Brooklyn, N.Y. The American Law Book Co., at pages 971-972:

"DISCONTINUANCE.-The word "discontinuance" is defined generally as meaning the act of discontinuing; cessation; intermission; ***interruption of continuance***.

As defined in Dismissal and Nonsuit; 2, the word "discontinuance" means an interruption in the proceedings of a case caused by the failure of the plaintiff to continue the suit regularly as he should, and it ***is either voluntary or involuntary, and is similar to a dismissal, nonsuit or nolle prosequi, but differs from a retraxit.***

In a ***particular connection, it has been held that the term connotes a voluntary***, affirmative, completed act, and that it cannot mean a temporary nonoccupancy of a building or a temporary cessation of a business.

The term may be employed as synonymous with "abandonment."

(F) In "Words and Phrases" Permanent Edition, Vol. 12A (1954), published by St. Paul, Minn. West Publishing Co., at pages 276-277:

"DISCONTINUANCE-A "discontinuance" of case is a gap or chasm in proceeding after suit is pending.

The term "discontinuance" means ***voluntary withdrawal of a*** suit by a plaintiff. There exists no essential difference between a "discontinuance" and a "voluntary nonsuit." A criminal suit may be discontinued, "discontinuance" being a gap or chasm in prosecution after suit is pending. ***The word "discontinuance" is synonymous with "abandonment," and connotes a voluntary, affirmative, completed act.*** The word "discontinuance" as it is used in the ordinance is synonymous with "abandonment". It connotes a voluntary, affirmative, completed act. Word "discontinuance" as

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employed in deed of land from city to county providing in effect that property was deeded to county to be used for park purposes and that city reserved all right of reversion in event of discontinuance of property for park purposes was equivalent to abandonment. Narrowing of street held not "discontinuance" within statute requiring written petition as basis for action by village board. "Discontinuance," generally speaking, is failure to continue case regularly from day to day and from term to term from commencement of suit until final judgment. The word "discontinue" as used in ordinance, providing that, if nonconforming use of premises was discontinued future use should be in conformity with ordinance, means something more than mere suspension, and did not mean temporary nonoccupancy of building or temporary cessation of business, but word "discontinuance" as used was synonymous with abandonment , and connoted voluntary affirmative completed act. Zoning ordinance did not destroy owner's right to continue nonconforming use of premises merely because tenant became insolvent."

(G) In P Ramanatha Aiyar's "The Law Lexicon" with Legal Maxims, Latin Terms and Words & Phrases, Second Edition 1997), published by Wadhwa and Company Law Publishers, at page 562:

"Discontinuance. Default; a discontinuance in practice is the interruption in proceedings occasioned by the failure of plaintiff to continue the suit from time to time as he ought, or failure to follow up his case: A break or chasm in a suit arising from the failures of the plaintiff to carry the proceedings forward in due course of law.

Discontinuance is either voluntary, as where plaintiff withdraws his suit or involuntary, as where in consequence of some technical omission, mispleading, or the like, the suit is regarded as out of Courts, A discontinuance means no more than a declaration of plaintiff's willingness to stop the pending action; it is neither as adjudication of his cause by the proper Tribunal nor an acknowledgement by him that his claim is not will founded."

(H) In "Jowitt's Dictionary of English Law" Vol. 1 Second Edition-1977, Second Impression-1990, published by London Sweet & Maxwell Limited, at pages 621-622:

"Discontinuance, an interruption or breaking off. This happened when he who had an estate tail granted a larger estate of the land than by law he was entitled to do; in which case the estate was good so far as his power extended to make it, but no further (Finch L. 190;1 Co. Rep. 44).

Formerly, ***in the law of real property, discontinuance was where a man wrongfully alienated certain lands or tenements and dies, whereby the person entitled to them was deprived of his right of entry and was compelled to bring an action to recover them***. The term was specially applied to alienations by husbands seised jure uxoris, by exxlesiastics seised jure ecclesiae, and by tenants in tail : thus, if a tenant in tail alienated the land and died leaving issue, the issue could not enter

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on the land but was compelled to bring and action (Litt. 470, 592, 614; Co. Litt. 325A; Termes de la Ley; 3 Bl. Comm. 171).

The principal action appropriate to discontinuance were formed on, cui in vita, and cui ante divortium. The effect of discontinuance was taken away by the Real Property Limitation Act, 1833, Section 39. See Miscontinuance; Recontinuance; Withdrawal.

In the procedure of the High Court discontinuance is where the plaintiff in an action voluntarily puts an end to it, either by giving notice in writing to the defendant not later than fourteen days after service of the defence (R.S.C. Order 21, Rule 2(1)) or later with leave of the Court (Rule 3). The effect of discontinuance is that the plaintiff has to pay the defendant's costs (R.S.C. Order 62, Rule 10(1)) and any subsequent action may be stayed until these costs are paid (R.S.C. Order 21, Rule 5). A defendant may withdraw his defence at any time and may discontinue a counterclaim by notice not later than fourteen days after service of a defence to the counterclaim (r. 2(2)). A counterclaim may be discontinued later by leave of the Court (r. 3). He must pay the costs of the plaintiff (R.S.C. Ord. 62, r. 5). If all the parties consent the action may be withdrawn without leave of the Court (r. 2(4)).

(emphasis added)

126. The term "dispossession" and "discontinuance of possession" in Article 142, Act IX of 1908 came to be considered before Calcutta High Court in Brojendra Kishore Roy Chowdhury & others v. Bharat Chandra Roy and others, AIR 1916 Cal. 751, and Court held:

"Dispossession implies the coming 'in of a person and the driving out of another from possession. ***Discontinuance implies the going out of the person in possession and his being followed into possession by another."***

(Emphasis added)

127. In Basant Kumar Roy v. Secretary of State for India & others, AIR 1917 PC 18, Court explained the term 'dispossession' in Article 142 of Limitation act of 1877:

"The Limitation Act, of 1877, does not define the term "dispossession", but its meaning 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 it continues until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land, is not capable of use and enjoyment",.... It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on de facto use and occupation."

128. The distinction between "dispossession" and "discontinuance" has been noticed in Gangu Bai v. Soni, MANU/NA/0153/1941 : 1942 Nagpur Law Journal 99, observing that "dispossession" is not voluntary, "discontinuance" is. In dispossession, there is an element of force and adverseness while in the case of discontinuance, the person occupying may be an innocent person. For discontinuance of possession, the person in possession goes out and followed into possession by other person.

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129. In Agency Company v. Short, 1888 (13) AC 793, Privy Council observed that there is discontinuance of adverse possession when possession has been abandoned. The reason for the said observation find mention on page 798 that there is no one against whom rightful owner can bring his action. The adverse possession cannot commence without actual possession and this would furnish cause of action.

130. Dispossession is a question of fact. The term refers to averments in the plaint exclusively and cannot be construed as referring to averments in the plaint in the first instance and at a later stage to the finding on the evidence. The indicias of discontinuance are also similar to some extent. It implies going out of the person in possession and is being followed into possession by another. In Abdul Latif v. Nawab Khwaja Habibullah, 1969 Calcutta Law Journal 28, Court observed that discontinuance connotes three elements i.e. actual withdrawal, with an intention to abandon, and another stepping in after the withdrawal. Same is the view taken by this Court and Kerala High Court in Qadir Bux v. Ram Chandra, MANU/UP/0046/1970 : AIR 1970 Alld. 289 (FB) and Pappy Amma v. Nair, AIR 1972 Kerala 1 (FB) 2226. In order to wriggle out of the limitation prescribed under Article 142 of Limitation Act, it has to be shown by plaintiff that he was in possession of disputed land, within 12 years of the suit and has been dispossessed, as observed Apex Court in Sukhdev Singh v. Maharaja Bahadur of Gidhaur, MANU/SC/0052/1951 : AIR 1951 SC 288.

131. In Wahid Ali & another v. Mahboob Ali Khan, MANU/OU/0066/1935 : AIR 1935 Oudh 425, referring to Article 142 of Limitation Act, 1908, Court held where the plaintiff or the Muslim community whom they represent were dispossessed from the land in question belonging to the graveyard by erection of a house thereon, and suit is filed after 12 years therefrom, it would be barred by Article 142 of the Limitation Act.

132. In R.H. Bhutani v. Miss Mani J. Desai, MANU/SC/0343/1968 : AIR 1968 SC 1444, Court said that dispossession means to be out of possession, removed from the premises, ousted, ejected or excluded. It applies when a person comes in and drives out others in possession.

133. In Shivagonda Subraigonda Patil v. Rudragonda Bhimagonda Patil, MANU/SC/0390/1969 : 1969 (3) SCC 211, Court held that dispossession for the purpose of this Article must be by the defendant and that must be the basis of the suit. If there is no dispossession by the defendant, this Article would have no application. The dispossession, therefore, implies taking possession without consent of the person in possession and is a wrong to the person in possession. It must result in termination of possession of the person in possession earlier.

134. Application of Article 142 and 144 of L.A. 1908 was considered in Jamal Uddin & Anr. v. Mosque at Mashakganj & Ors., MANU/UP/0115/1973 : AIR 1973 Allahabad 328 and in para 29, Court said:

> "29. The next point that was urged by the Counsel for the appellants was that the Courts below committed a legal error in applying Art. 144 of the Limitation Act, 1908, to the suit and placing the burden on the defendants, to prove their adverse possession for more than twelve years, while the suit on the allegations contained in the plaint clearly fell within the ambit of Art. 142 and the burden was on the plaintiffs to prove their possession within twelve years. This contention also is quite correct. It was clearly alleged by the plaintiffs that they had been dispossessed by the contesting defendants before the filing of the suit. As such, the suit would be governed by Article 142 and the residuary Article 144 will have no application. The Courts below

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have unnecessarily imported into their discussion the requirements of adverse possession and wrongly placed the burden on the defendant to prove those requirements. Now the Trial Court has approached the evidence produced by the parties would be evident from the following observation contained in its judgment."

135. In the present case, lack of clarity or nondisclosure of correct facts on the part of the plaintiff-respondents is writ large from the fact that in the plaint it is averred that plaintiff-respondent got possession of property in dispute on 24.5.1948 pursuant to lease deed of same date and subsequently got title also in view of khairatnama/gift deed dated 24.4.1949 and possession continued with them when 1983-84, Railway authorities tried to raise some constructions and dispossess plaintiff-respondents. Not only in oral deposition it was admitted that possession was already taken as a result of acquisition by defendants in 1954, but a similar admission also we find in earlier plaint of suit, filed by plaintiff before Revenue Court in 1984, which was subsequently got dismissed as withdrawn. Aforesaid plaint is admissible in evidence for the purpose of showing admission on the part of plaintiff with regard to state of affairs vis a vis disputed land. In that view of the matter, it is clear that since atleast from 1954 onwards plaintiff-respondents did not have possession over disputed land and still suit was filed without any relief for delivery of possession. In any case even suit for declaration was apparently barred by limitation.

136. It is then argued that the period spent on other legal remedies has to be excluded and reliance is placed on Section 14 of L.A. 1963, which reads as under:

"14. Exclusion of time of proceeding bona fide in Court without jurisdiction.- (1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecution with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a Court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a Court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the Court under rule 1 of that Order where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the Court or other cause of a like nature.

Explanation.-For the purposes of this Section,-

(a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;

(b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

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(c) misjoinder of parties or of cause of action shall be deemed to be a cause of a like nature with a like nature with defect of jurisdiction."

137. The said provision does not help plaintiff-respondents for the reason that limitation had already expired long back. Section 14 could have helped plaintiff-respondents if limitation would have continued and during that period plaintiff-respondents would have availed some other legal remedies but that is not so in the present case. Limitation had expired between 1955 and 1970, if we look into the facts from whatever angle, whether as set up by plaintiff-respondents or defendant-appellants. That being so, question of exclusion of any period by applying Section 14 when such other remedies were availed by plaintiff-respondents in 1984 onwards, would be of no avail.

138. Further on the basis of appreciation of evidence of both the parties, it reveals that the disputed khasra numbers claimed by plaintiff-Chhedilal were acquired for the appellants-railway department and possession was handed over on 25.3.1950. Plaintiffs-respondents had not claimed their right, title and interest on the basis of alleged Khairatnama and lease deed executed by Rahiman Bibi and Abdul Rahim but has also challenged acquisition proceedings. Moreover, plaintiff-Chhedilal instituted Revenue Suit No. 6/14 of 1984 before Court of S.D.M., which was withdrawn by him. He consciously withdrawn the suit and filed proceeding before this Court and Supreme Court. Therefore, Trial Court while dealing with issue 5 which was framed regarding suit being barred by time (period of limitation), recorded erroneous finding that after direction of Supreme Court for deciding ownership of disputed khasra numbers, cause of action arose to the plaintiffs for filing suit. This finding that cause of action arose after decision dated 10.2.1987 in SLP No. 12524 of 1986, North Eastern Railway another v. Chhedilal and another, is mis-conceived.

139. Moreover, according to provisions of order 2 rule 2 CPC, original plaintiff-Chhedilal should have sought relief of possession also, but he sought relief only for declaration of his right, title and interest regarding disputed khasra numbers and mandatory injunction for demolition of construction raised by appellants without claiming relief of possession. Therefore, it would be deemed that he had waived this relief for possession. Order 2 Rule 2 CPC is reproduced as follows:

> **2.** Suit to include the whole claim.-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.
>
> (2) Relinquishment of part of claim.-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.
>
> (3) Omission to sue for one of several reliefs.-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.
>
> Explanation.-For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

140. Delhi High Court in Regular First Appeal No. 370/1999, Ashok K. Khurana v. M/s. Steelman Industries & another, decided on 3.3.2000 considered Sections 3 and 5 of L.A., 1963 and observed:

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"19. Regarding the other point as to whether an application for condensation of delay in filing the suit was maintainable, we would like to observe that there is no provision in the Limitation Act, 1963 (for short the Act) for condensation of delay in filing the suits. Section 3 of the Act provides:

> **3 .** Bar of limitation.-(1) Subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed although limitation has not been set up as a defense.
>
> (2) For the purposes of this Act.
>
> (a) a suit is instituted-
>
> (i) .....
>
> (ii) .....
>
> (iii) .....
>
> (b) any claim by way of a set off, or a counter claim, shall be treated as a separate suit and shall be deemed to have been instituted-
>
> (i) .....
>
> (ii) .....
>
> (c) an application by notice of motion in a High Court is made when the application is presented to the proper officer of that Court.

20. Mere reading of Section 3 of the Act shows that it is mandatory and absolute in nature. It enjoins upon the Courts to dismiss any suit instituted, appeal preferred application made, after the prescribed period of limitation, although, limitation has not been set up as a defense. Courts have no discretion or inherent powers to condone the delay if the suit is filed beyond the prescribed period of limitation. Rather a duty is cast on the Court to dismiss the suit appeal or application, if the same is barred by limitation, unless the matter is covered by Sections 4 to 24 of the Act.

21. At this stage it would also be relevant to refer to Section 5 of the Act which reads as under:

> "5. Extension of prescribed period in certain cases.-Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 may be admitted after the prescribed period of the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

22. Reading of Section 5 of the Act itself reveals that it does not apply to the suits. It applies only to the appeals or applications except an application under Order XXI of the Code of Civil Procedure, 1908. The Court cannot grant exemption from limitation even on equitable considerations or hardships. Section 5 of the Act though worded in very wide terms is not applicable to the suits, even if it is assumed that the plaintiff was really incapacitated for

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any reason, benefit of Section 5 of the Act cannot be availed."

141. Contesting the argument with respect to Section 14 of L.A. 1963, learned Counsel for appellant also argued that proceedings before Revenue Court, this Court and Supreme Court initiated by plaintiff-respondents cannot be said to be bona fide. He said that the said proceedings cannot be said to be founded on wrong legal advise. We find substance therein.

142. PW-1 & PW-4'Chhedilal and his son had accepted this fact that suit No. 6/14 of 1984 was instituted before Revenue Court/SDM which was withdrawn by plaintiff-respondent and the proceedings were conducted before this Court and Supreme Court. Therefore, plaintiff conducted these proceedings consciously. It cannot be termed that these proceedings were conducted by him on the basis of wrong advice of Counsel or these were not conducted bona fide in Revenue Court. Therefore, benefit of Section 14 of L.A., 1963 even otherwise cannot be extended to plaintiff.

143. DW-1 and DW-2 witnesses have proved that Railway constructed quarters on the land of disputed khasra numbers in 1966-67 and land was allotted to the shopkeepers in the year 1978, on which shopkeepers raised temporary constructions. 56 shops are existing on disputed khasra numbers. Possession of land of disputed khasra numbers was handed over on 29.3.1950. Therefore, even otherwise we are of the view that plaintiff was not able to prove that cause of action for suit arose after decision dated 10.2.1987 by Supreme Court and not earlier thereto.

144. We therefore, are, clearly of the view that suit in question as framed and filed was barred by limitation. Findings recorded by Court below on this aspect is clearly erroneous, hence are hereby reversed and set aside.

145. Now coming to the question of maintainability of suit under Section 34 of S.R. Act 1963, we have already made discussions hereinabove and here we propose to add that learned Counsel for plaintiff-respondents when confronted to evidence of record, showing that plaintiff-respondents lost possession of disputed land much before 1955 and, therefore, suit for mere declaration without any further relief for delivery of possession is barred by Section 34 or not, he could give no specific reply and could not support findings of Court below that suit is not barred by Section 34 for the reason that it was framed and filed in the light of the observations made by Supreme Court it its order dated 10.2.1997.

146. As a proposition of law learned Counsel for the plaintiff-respondents could not dispute, where plaintiff is claiming only declaration regarding title though not in possession of property in dispute, such were declaratory suit is barred by Section 34 of S.R. Act 1963. A similar provision pari materia to Section 34 of S.R. Act 1963 earlier existed in Section 42 of Specific Relief Act, 1877. With reference thereto, a question whether suit for mere declaration without any consequential relief for delivery of possession would be maintainable, came up for consideration in Deokuer and Another v. Sheoprasad Singh And others, MANU/SC/0275/1965 : 1966 AIR 359, and Court held that if defendant was not in physical possession and also not in a position to deliver possession to plaintiff, then suit for mere declaration by plaintiff would not be bad in absence of any relief for claiming possession. Therefore, one of exceptions whether consequential relief would not bar the suit where defendant is not in possession of property in suit which is not the case in hand. In case where possession of disputed property wholly or partly is with defendants, relief of possession is mandatory else suit would be barred. This is what has been held in Vinay Krishna v. Keshav Chandra And Another, MANU/SC/0136/1993 : AIR 1993 SC 957.

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147. The purpose of proviso to Section 34 of S.R. Act 1963 is to avoid multiplicity of proceedings and also to prevent loss of Revenue or Court fee to State Exchequer. We find from Law Reports that when Specific Relief Act, 1877 was enforced, 9th Report of Law Commission of India 1958 suggested certain amendments in proviso whereby plaintiff could seek declaratory relief without seeking any consequential relief, if he seeks permission of Court to make subsequent claim in another proceeding. However, this recommendation was not accepted and no such provision was made in S.R. Act 1963.

148. In Muni Lal v. The Oriental Fire, MANU/SC/0162/1996 : AIR 1996 SC 642 Court said that mere declaration without consequential relief does not provide needed relief in the suit, it would be for the plaintiff to seek both reliefs. Omission thereof mandates the Court to refuse grant of declaratory relief.

149. In Shakuntala Devi v. Kamla and Others, MANU/SC/0277/2005 : (2005) 5 SCC 390, the Court said

> "a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases of suit for possession based on an earlier declaratory decree is filed it is open to the defendant to establish that the declaratory decree on which suit is based is not a lawful decree."

150. In Venkataraja & Ors. v. Vidyane Doureradjaperumal, MANU/SC/0354/2013 : 2013 (4) SC J.T. 505. Court said, if only a declaration is sought and possession of property was with the defendants but no relief for possession is prayed for, when an objection was taken by defendant at the earliest i.e. in written statement, but plaintiff did not make any attempt to amend the plaint before the Trial Court at any stage, then such a suit would be barred by Section 34 proviso, of S.R. Act 1963.

151. In Union of India v. Ibrahim Uddin (supra), Court has considered scope of Section 34 of S.R. Act 1963. It has observed that Section 34 carves out an exception that a Court shall not make any declaration of status or right where the plaintiff being able to seek further relief than a mere declaration of title, omits to do so. It relied of its earlier judgment in Ram Saran nd another v. Smt. Ganga Devi, MANU/SC/0523/1972 : AIR 1972 SC 2685 wherein it was held that suit seeking declaration of title of ownership but where possession is not sought, is hit by the proviso of Section 34 of S.R. Act, 1963 and as such, not maintainable.

152. In view thereof, suit in question was clearly barred by Section 34 of S.R. Act, 1963 and Court below in recording findings otherwise, has clearly erred in law. The said findings are hereby set aside and we hold that suit is barred by Section 34 of S.R. Act, 1963.

153. Then comes to question, whether there was defect of non-impleadment of necessary parties, i.e. non-impleadment of Smt. Rahiman Bibi and Sri Abdul Raheem. Issue-3 framed on 26.2.1996 was very clear whether suit is bad for non-joinder of heirs of Abdul Raheem and Rahiman Bibi, the reason being that the claim set up by plaintiff-respondents on the basis of alleged khairatnama (gift deed) was disputed by defendants alleging that document was forged and fictitious and land continued to be owned by Abdul Raheem and Rahiman Bibi when it was acquired by Railway and possession was taken from the said two owners. In these facts and circumstances, correctness of contents of document dated 24.4.1949 had to be proved by plaintiff-respondents. Therefore, impleadment of authors of said document or their legal heirs was necessary. This objection was specifically raised by defendant-appellants, still plaintiff did not choose to implead them. Trial Court has misconstrued the effect and

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consequence of the provision with regard to presumption of old document and has recorded an erroneous finding, which we have already held illegal. Therefore, we have no hesitation in holding that suit in question also suffers the vice of non-impleadment of necessary parties. Otherwise findings recorded by Court below as unsustainable, hence reversed.

154. On the question of want of notice under Section 80 C.P.C. also, we are of the view that findings recorded by Court below are not correct legally or otherwise. Suit in question was filed vide plaint dated 11.1.1988, impleading Railway Electrification through Senior Civil Engineer, North Eastern Railway, Allahabad and Union of India through General Manager N.E.R., Gorakhpur as defendants 1 and 2, State of U.P. was subsequently added as defendant-3. Trial Court has answered the issue relating to Section 80 C.P.C. by referring to notice dated 21.2.1984, which was given to State of U.P., General Manager N.E.R., Gorakhpur and Gram Sabha Sarai Mauja Urf Kydganj. The aforesaid notice was given before filing Revenue suit before Sub-Divisional Magistrate in 1984 which was ultimately withdrawn by plaintiff-respondents. Before filing the suit in question in Civil Court, no notice under Section 80 C.P.C. was given. However, we refrain from non-suiting plaintiff-respondents on this ground in view of our findings on other questions as discussed above.

155. In the result we answer all the questions for determination formulated above in favour of defendant-appellants and against plaintiff-respondents. In view of our findings it is evident that judgment and decree of Court below, under appeal is unsustainable. The appeal is accordingly allowed. Judgment and decree in question, dated 22.10.1997 and 11.11.1997 respectively passed by Sri N.A. Siddiqui, 1st Additional Civil Judge, Senior Division, Allahabad in Original Suit No. 25 of 1988 are hereby set aside and original suit stands dismissed with costs throughout.

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7. As we have noticed that the High Court considered only two grounds for granting bail — one is that the respondent was in custody for more than one year and the other is that the High Court made some observation in the previous order. We may point out that the previous order referred to by the High Court only made a mention that the respondent could renew the application after framing of the charge against him. That observation is not a ground envisaged under Section 437(1)(*i*) of the Code for granting bail. We are of the definite opinion that the High Court did not approach the bail application from a legal angle.

8. We refrain from expressing any opinion on the merits of the rival contentions raised before us. We have noticed from the impugned judgments that there was no application of mind of the High Court from the angle provided in the aforesaid clause, which is sine qua non for granting bail, in the light of the specific prohibition contained in the sub-clause that such persons shall not be so released if there appears a reasonable ground for believing that he has been guilty of an offence punishable with death or imprisonment for life.

9. While setting aside the impugned judgment, we make it clear that we have not considered the case of either the appellant or the respondent relating to the entitlement of bail claimed by the respondent. We leave it to the High Court to consider this aspect afresh if any motion is made by the respondent in that behalf. In such an event the High Court will pass orders untrammelled by any observations made by the High Court in the impugned order or by us in this order. With these observations the appeal is disposed of.

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(BEFORE ASHOK BHAN AND S.H. KAPADIA, JJ.)

RAMIAH .. Appellant;

Versus

N. NARAYANA REDDY (DEAD) BY LRS. .. Respondent.

Civil Appeal No. 5864 of 1999†, decided on August 10, 2004

A. Limitation Act, 1963 — Arts. 64 and 65 — Applicability — Held, applicability of the relevant article, has to be decided on the basis of pleadings — But by suppression of material facts and skilful pleading, plaintiff cannot seek to avoid the inconvenient article — Suit filed by appellant in 1984 for possession of the property without disclosing that admittedly he was ousted from the property in 1971 — Held, Art. 64 attracted and suit, having been filed thirteen years after dispossession, was barred by limitation

† From the Judgment and Order dated 27-5-1997 of the Karnataka High Court in RFA No. 412 of 1988

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Held :

Article 64 of the Limitation Act, 1963 (Article 142 of the Limitation Act, 1908) is restricted to suits for possession on dispossession or discontinuance of possession. In order to bring a suit within the purview of that article, it must be shown that the suit is in terms as well as in substance based on the allegation of the plaintiff having been in possession and having subsequently lost the possession either by dispossession or by discontinuance. Article 65 of the Limitation Act, 1963 (Article 144 of the Limitation Act, 1908), on the other hand, is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title in which there is no allegation of prior possession and subsequent dispossession alone can fall within Article 65. The question whether the article of limitation applicable to a particular suit is Article 64 or Article 65, has to be decided by reference to pleadings. The plaintiff cannot be allowed by skilful pleading to avoid the inconvenient article. The plaintiff cannot invoke Article 65 by suppressing material facts. (Para 9)

Ram Surat Singh v. *Badri Narain Singh*, AIR 1927 All 799 (2) : 25 All LJ 802; *Mohd. Mahmud* v. *Mohd. Afaq*, AIR 1934 Oudh 21 : 11 OWN 104, *relied on*

Sanjiva Row: *Commentary on the Limitation Act*, (9th Edn., Vol. 2, p. 549), *relied on*

In this case in an earlier suit for possession filed by the respondent against the appellant, in his evidence the appellant had admitted that he was in possession of the suit property up to 1971. This admission of the appellant in that suit indicates ouster from possession of the appellant herein. In the present suit instituted by the appellant, he has glossed over this fact. On the facts of the case, Article 64 is applicable to the present suit. Therefore, the said suit was barred by limitation as it was filed after 13 years from dispossession. (Paras 9 and 6)

B. **Limitation Act, 1963 — S. 14 — Applicability — Benefit of exclusion of time taken in prosecuting another civil proceeding — Suit for possession of land filed by the respondent — Trial court partly decreeing the suit in 1971 finding that respondent was in possession of the entire land, which was inam land, though a portion thereof was regranted to appellant — Trial court granting permanent injunction restraining appellant from interfering with possession of respondent over the entire land with liberty to appellant to take steps to recover possession of the said portion of the land by following due process of law — First and second appeals having been dismissed, the judgment and decree passed by trial court in 1971 attained finality in 1982 — But appellant failing to take any steps to sue for recovery of the said portion of the land till 1984 when he filed the suit for possession — Held, appellant not entitled to benefit of S. 14 (Paras 4 and 11)**

Appeal dismissed R-P-M/ATZ/30300/C

Advocates who appeared in this case :
P.R. Ramasesh and Ms Vandana Jalan, Advocates, for the Appellant;
G.V. Chandrashekhar and P.P. Singh, Advocates, for the Respondent.

Chronological list of cases cited ***on page(s)***

1. AIR 1934 Oudh 21 : 11 OWN 104, *Mohd. Mahmud* v. *Mohd. Afaq* 545*c-d*
2. AIR 1927 All 799 (2) : 25 All LJ 802, *Ram Surat Singh* v. *Badri Narain Singh* 545*b-c*

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The Judgment of the Court was delivered by

S.H. KAPADIA, J.— Being aggrieved by the judgment and order dated 27-5-1997 passed by the High Court of Karnataka in RFA No. 412 of 1988, the original plaintiff has come to this Court by this appeal. By the impugned judgment, the High Court has dismissed the suit filed by the plaintiff.

2. The short question which arises for consideration in this appeal by special leave is whether the plaintiff has proved that he was in possession of the suit land within 12 years of the date of the suit.

3. The facts on which this appeal has arisen are as follows:

One Bayyanna was the owner of the suit land in Survey No. 19/1 admeasuring 3 acres 12 guntas. The suit land was *inam* land. Bayyanna sold the suit land to N. Narayana Reddy (since deceased), father of the respondents herein, vide registered sale deed dated 4-11-1958. N. Narayana Reddy had instituted Suit No. 357 of 1960 in the Court of Principal Second Munsif, Bangalore for recovery of possession based on title and for permanent injunction against the appellant herein on the ground that the appellant was trying to interfere with his possession.

4. The defence of the appellant herein in the above suit was that he had purchased the suit land on 27-11-1959 from B. Bayyanna and that he was in possession of the suit land. His further defence was that the suit land was *inam* land and that he was registered as *khadim* tenant by the Inam Abolition Authorities. By judgment and order dated 7-4-1971, the Principal Munsif, Bangalore partly decreed the suit filed by N. Narayana Reddy holding him to be the owner of only 1 acre 21 guntas and not of the entire land admeasuring 3 acres 12 guntas. However, he was found to be in possession of the entire 3 acres 12 guntas and, therefore, the Principal Munsif granted permanent injunction in favour of N. Narayana Reddy restraining the appellant herein from interfering with the possession of N. Narayana Reddy on the entire suit land admeasuring 3 acres 12 guntas with liberty to the appellant herein to take steps to recover possession of 1 acre 21 guntas out of the total area of 3 acres 12 guntas by following due process of law. By the aforestated judgment, the Principal Munsif, Bangalore came to the conclusion that N. Narayana Reddy was in possession of the entire area admeasuring 3 acres 12 guntas; that the entire area was *inam* lands and since an area admeasuring 1 acre 21 guntas out of total area admeasuring 3 acres 12 guntas was regranted by the Deputy Commissioner to the appellant herein, N. Narayana Reddy was not the owner of the entire area admeasuring 3 acres 12 guntas.

5. Being aggrieved by the judgment and order dated 7-4-1971, N. Narayana Reddy preferred Regular Appeal No. 45 of 1971. The first appellate court dismissed the said regular appeal vide judgment dated 13-1-1975. Thereafter, N. Narayana Reddy filed Regular Second Appeal No. 801 of 1975 in the High Court of Karnataka, which came to be dismissed on 24-11-1982. Consequently, the judgment and decree passed in Suit No. 357 of 1960 dated 7-4-1971 reached finality on 24-11-1982.

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6. On 8-5-1984, the appellant herein filed the present Suit No. 1518 of 1984 i.e. within two years from the date of the decision of the High Court dated 24-11-1982 in RSA No. 801 of 1975 filed by N. Narayana Reddy, for possession of land admeasuring 1 acre 21 guntas. The said suit was instituted in the Court of Additional City Civil Judge, Bangalore (hereinafter for the sake of brevity referred to as "the trial court"). In the said suit, it was held that the appellant herein admittedly stood ousted in 1971 and, therefore, the said suit was barred by limitation as it was filed after 13 years from dispossession. Consequently, the trial court dismissed the suit.

7. Being aggrieved, the appellant herein preferred Regular First Appeal No. 412 of 1988 under Section 96 CPC in the High Court of Karnataka. By the impugned judgment, the High Court confirmed the dismissal of the suit by the trial court by holding that the present suit has been filed much beyond 12 years. By the impugned judgment, the High Court rejected the contention advanced on behalf of the appellant that the period of limitation commenced only after the decision of the High Court of Karnataka in RSA No. 801 of 1975, filed by N. Narayana Reddy, decided on 24-11-1982. Hence, this civil appeal.

8. Mr P.R. Ramasesh, learned counsel appearing on behalf of the appellant contended that the plaintiff had instituted the suit for possession based on title and not on the basis of previous possession and, therefore, under Article 65 of the Limitation Act, 1963 the suit was well within time as the limitation of 12 years commenced from the date when the possession of the defendant became adverse to the plaintiff. He contended that Article 64 was not applicable to the facts of the present case as the suit instituted by the appellant for possession of immovable property was based on title and not on the basis of previous possession. It was further urged that the appellant was entitled to the benefit of Section 14 of the Limitation Act, 1963, as the earlier litigation instituted by N. Narayana Reddy came to an end only on 24-11-1982 when the High Court in RSA No. 801 of 1975 confirmed the decree dated 7-4-1971 passed by the Principal Munsif in Suit No. 357 of 1960.

9. We do not find any merit in the aforestated arguments. Article 64 of the Limitation Act, 1963 (Article 142 of the Limitation Act, 1908) is restricted to suits for possession on dispossession or discontinuance of possession. In order to bring a suit within the purview of that article, it must be shown that the suit is in terms as well as in substance based on the allegation of the plaintiff having been in possession and having subsequently lost the possession either by dispossession or by discontinuance. Article 65 of the Limitation Act, 1963 (Article 144 of the Limitation Act, 1908), on the other hand, is a residuary article applying to suits for possession not otherwise provided for. Suits based on the plaintiff's title in which there is no allegation of prior possession and subsequent dispossession alone can fall within Article 65. The question whether the article of limitation applicable to a particular suit is Article 64 or Article 65, has to be decided by reference to pleadings. The plaintiff cannot invoke Article 65 by suppressing material facts. In the present case, in Suit No. 357 of 1960 instituted by N. Narayana

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Reddy in the Court of Principal Munsif, Bangalore, evidence of the appellant herein was recorded. In that suit, as stated above, the appellant was the defendant. In his evidence, the appellant had admitted that he was in possession of the suit property up to 1971. This admission of the appellant in that suit indicates ouster from possession of the appellant herein. In the present suit instituted by the appellant, he has glossed over this fact. In the circumstances, both the courts below were right in coming to the conclusion that the present suit was barred by limitation. The appellant was ousted in 1971. The appellant had instituted the present suit only on 8-5-1984. Consequently, the suit has been rightly dismissed by both the courts below as barred by limitation.

10. In the case of *Ram Surat Singh* v. *Badri Narain Singh*[1] it has been held that if the suit is for possession by a plaintiff who says that while he was in possession of the property he was dispossessed, then he must show possession within 12 years under Article 142 (now Article 64) of the Limitation Act. To the same effect is the ratio of the judgment in the case of *Mohd. Mahmud* v. *Mohd. Afaq*[2]. In *Commentary on the Limitation Act* by Sanjiva Row (9th Edn., Vol. 2, p. 549) it has been stated that the question as to which of the two articles would apply to a particular case should be decided by reference to pleadings, though the plaintiff cannot be allowed by skilful pleading to avoid the inconvenient article. On facts of the case, we find that Article 64 is applicable to the present suit. Consequently, the suit has been rightly dismissed by both the courts below.

11. In the present case, on the facts of this case as stated above, Section 14 of the Limitation Act, 1963 cannot be invoked by the appellant as the appellant herein had never challenged the findings on possession recorded by the Principal Munsif vide decree dated 7-4-1971. In the present case, earlier Suit No. 357 of 1960 was filed by the said N. Narayana Reddy, which was partly decreed and, therefore, he preferred Regular Appeal No. 45 of 1971 which was dismissed by the first appellate court on 13-1-1975. Thereafter, N. Narayana Reddy filed RSA No. 801 of 1975 which was dismissed by the High Court on 24-11-1982. All throughout this period, although the appellant had the right to recover possession from N. Narayana Reddy to the extent of 1 acre 21 guntas in accordance with law, the appellant herein did not take any steps to sue for possession till 8-5-1984. Consequently, the appellant was not entitled to the benefit of Section 14 of the Limitation Act, 1963.

12. For the foregoing reasons, we do not find any merit in this civil appeal and the same is accordingly dismissed, with no order as to costs.

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1 AIR 1927 All 799 (2) : 25 All LJ 802

2 AIR 1934 Oudh 21 : 11 OWN 104

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