

IN THE HIGH COURT OF TRIPURA
AGARTALA

RSA No. 10 of 2008

[Re Makhanbala Chakraborty, since deceased, through LRs]

1(a) Smt. Ratna Chakraborty,
daughter of late Gyanendra Chandra Chakraborty

1(b) Smt. Swapna Chakraborty (Bose),
wife of Sri Mrinal Kanti Bose

Both are residents of Chittaranjan Road,
Shibnagar, P.O. Agartala College, P.S.
East Agartala, District – West Tripura.

2. Sri Samir Chakraborty
son of late Gyanendra Chandra Chakraborty, resident of Shibnagar, P.S. East Agartala

3(a) Smt. Ruma Chakraborty,
wife of late Parimal Chakraborty,
resident of Chittaranjan Road,
Shibnagar, P.O. Agartala College, P.S.
East Agartala, District – West Tripura.

3(b) Smt. Raisona Chakraborty,
wife of Sri Ratan Chakraborty, resident
of Chhanban, Udaipur, P.O & P.S. R.K.
Pur, District – Gomati, Tripura.

4. Sri Krishna Chakraborty,
son of late Gyanendra Chandra Chakraborty, resident of Chittaranjan Road, Shibnagar, P.S. East Agartala

..... Appellants

- V e r s u s -

1. Sri Pranab Kanti Basu,

2. Sri Mrinal Kanti Bose,
son of late Jyotish Chandra Bose,
resident of Chittaranjan Road, Shibnagar,
P.S. East Agartala

- 3. Sri Kali Kinkar Chakraborty,**
son of late Gyanendra Chandra
Chakraborty, Bhati Abhoynagar, P.S.
East Agartala, District – West Tripura.

..... **Respondents**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellants : Mr. D.K. Biswas, Advocate.

For the respondent : Mr. B. Das, Sr. Advocate.
Nos.1 & 2. Mr. T.K. Dey, Advocate.

For the respondent No.3 : None.

Date of hearing : 06.06.2014

Date of delivery
of Judgment & Order : **26.09.2014**

Whether fit for reporting :

Yes	No
√	

JUDGMENT & ORDER

Against the concurrent finding of fact that the entire suit land is under adverse possession of the plaintiffs, the respondent Nos.1 and 2 herein, beyond the period of prescription, this appeal filed under Section 100 of the C.P.C. has questioned the legality of the judgment and decree dated 21.01.2008 delivered in Title Appeal No.20 of 2003 by the Additional District Judge, West Tripura, Agartala, Court No.4 which affirmed the judgment and decree dated 05.06.2003 delivered in Title Suit No.74 of 2002 by the Civil Judge, Jr. Division, Court No.1, Agartala, West Tripura.

[2] While admitting the appeal on 05.12.2008 the following substantial question of law was formulated:

Whether the court below can decide lis ignoring the evidence on record such as the registered sale deed, which was exhibited and marked as Exh.F?

[3] In the midst of hearing and as agreed by the counsel for the parties, the substantial question of law has been reframed by the order dated 06.06.2014 as under:

(i) Whether the trial court by declaring the title on adverse possession, has acted illegally?

(ii) Whether the findings on adverse possession are based on perverse appreciation of the evidence as on record?

[4] The respondents instituted a suit for declaration of title by adverse possession, confirmation of possession and perpetual injunction in respect of the suit land described in Schedule-A and Schedule-B of the plaint comprised in Mouza-Agartala town sheet No.19, Khatian No.6043, C.S. Plot Nos.16488 & 16489. In the plaint, the respondents have stated that the defendants, the appellants herein, had been illegally possessing the land comprised in Dag No.16484, owned by the predecessors in interest of the plaintiffs. Subsequently in the record of right, the possession of the said plot has been shown in the name of the defendants in exchange of Dag No.16489 described in the Schedule-B of the plaint. Similarly the said land described in the Schedule-B comprised in C.S. Plot No.16489 has

been shown in the possession of the plaintiffs in exchange of Dag No.16484. It has been asserted categorically that the plaintiffs were in the illegal possession of the suit land from the year 1953 continuously, adversely and openly. The defendants and their predecessor in interests initially tried to evict the plaintiffs from the suit land even by applying force and sometime illegally changing the record of rights. When the defendants realised that they would not succeed to dispose the plaintiffs from the suit land, they relented. The predecessor of interests of the plaintiffs got possession of suit land in the year 1953 on the day of execution of the title deed from his predecessor, namely Asrab Ali and four others. Prior to that, the suit land was in the illegal possession of the said vendors. In the finally published Khatian No.6043 the name of the defendants were shown as the rayat but the father of the plaintiffs had been shown in illegal possession since 1362 B.S. corresponding to 1955 though it should have been 1953. The plaintiffs have pleaded that the possession of the suit land is adequate, in continuity, in well publicity and in extent. The possession of the plaintiffs over the suit land being overt without attempt of concealment and hostile denying the title of the true owner, they are entitled to get the declaration and the consequential reliefs.

[5] The defendants, the appellants herein, contested the suit by filing the written statement jointly. The defendant No.4

however, as it is evident from the records, did not file any written statement. In the written statement the said defendants asserted that 'adverse possession' is a concept linked with the defence in a suit. There cannot be any decree declaring title by adverse possession to the plaintiffs. They denied that they had ever attempted a bid to dispossess the plaintiffs as stated. They have admitted that the homestead land was purchased by the plaintiffs in the year 1953. The plaintiffs being the in-law through daughter of the defendant No.1 were permitted to use the plot No.16489 as the passage for egress and ingress from their homestead land. Thus, the plaintiffs are the permissive possessors of the B- Schedule land since long. They denied the possession of the plaintiffs over the land described in the Schedule-A land which is wholly a water tank or its bank. With oblique motive, the plaintiffs filed the suit. The story of illegal possession over the suit land from the year 1953 is mischievous and there was no exchange of plots as claimed. The trial court based on the pleadings framed the following issues:

(i) Is the suit maintainable in law?

(ii) Have the plaintiffs right, title, interest and possession over the suit land?

(iii) Are the plaintiffs entitled to the decree as prayed for?

(iv) To what other reliefs the parties are entitled?

[6] The plaintiffs adduced 4(four) witnesses namely, Pranab Kanti Basu (PW-1), Mrinal Kanti Bose (PW-2), Hirendra Kr. Datta (PW-3) and Samir Pal (PW-4). PWs -1 and 4 since were not produced for cross-examination, their examination-in-chiefs had been discarded at the instance of the plaintiffs.

To rebut the evidence of the plaintiffs, the defendants adduced 3(three) witnesses, namely, Samir Chakraborty (DW-1), Chittaranjan Dasgupta (DW-2), Parimal Chakraborty (DW-3). Samir Chakraborty and Parimal Chakraborty are the defendants No.3 and 4 respectively whereas Pranab Kanti Basu and Mrinal Kanti Bose are the plaintiffs No.1 and 2 respectively.

The plaintiffs admitted in the evidence the registered sale deed executed by Asrab Ali and others in favour of their predecessor of interest, Jyotish Ch. Bose (Exbt.1), the registered sale deed executed by Induprabha Dasgupta (Exbt.2), the Khatian No.6045 (Exbt.3), the Khatian No.6044 (Exbt.4), the Khatian No.6043 (Exbt.5), the certified map of the suit land (Exbt.6) and the Khatian No.6043 at the attestation stage (Exbt.7).

The defendants admitted in the evidence, the sale deed executed by Jhanu Miah (Exbt.A), the land revenue receipt dated 07.11.1950 (Exbt.B), the certified copy of the report submitted by a police officer, namely, P. Roy in connection with

the case No.25/1953 dated 07.05.1953 (Exbt.C), the certified copy of the order dated 30.05.1973 passed in T.S. No.06 of 1971 (Exbt.D), the decree prepared in connection with T.S. 06 of 1971 (Exbt.E), the registered sale deed dated 27.04.1984 (Exbt.F), the Khatian No.6043 (Exbt.G), the letter dated 10.10.1984 addressed to the Sub-Divisional Officer, Agartala by the defendant No.3, (Exbt.H), the Khatian No.6039 (Exbt.I). The plaintiffs have also proved that a collusive entry had been made in the Khatian No.6043 by changing the entry from 'illegal' to 'permissive' possessor. The trial court has recorded that maintainability of the suit has not been challenged by the defendants on any other grounds except as to the cause of action for filing the suit. As regards the title suit being T.S. No.06 of 1971 the trial court has observed that the plaintiffs or their predecessor in interests was not made party in that suit and as such, any order or decree of that suit cannot be of any avail to the defendants. On analysis of the evidence so placed by the parties, the trial court has observed that:

"The plaintiff succeed to establish their case partly as discussed above by producing evidence and materials and in such a circumstances our Apex Court already observed in the judgment reported in AIR 1981 SC 22(35) that there is no scope for adverse presumption against the person who failed to appear in the court where admission of parties and other materials on record amply proves the point in issue. So I find no merit in the submission made by the Ld. counsel for the defendants.

So, the circumstances certainly goes to support the fact of possession of the plaintiffs

over both the suit C.S. plots since very inception in the year 1953 till now and as such I find no scope to believe the statements, made by the witnesses of the defendants that the defendants are in possession of the suit C.S. Plot No.16488."

It has been further observed that:

"the plaintiffs have been possessing the suit land described under Schedule-A of the plaint since 1953 i.e. the period of their predecessor-in-interest adversely against the defendants and their predecessor-in-interest openly, publicly and in extent which is adequate in continuity in view of the Provisions of the Article-65 read with Section 27 of the Limitation Act and thereby perfected their title over the same by adverse possession."

Thus, it has been declared and ordered that:

"The title of the plaintiffs over the suit land described under schedule-A of the plaint is hereby declared. The prayer for declaring their title over the suit land described under schedule-B stands rejected. The possession of the plaintiffs over the suit land described under schedule-A of the plaint is also confirmed. The defendants are restrained permanently from interfering with the possession of the plaintiffs over the same. At the same time the defendants are also restrained from disturbing the possession of the defendants over the suit land described under schedule-B of the plaint unless the plaintiffs evicted therefrom following the process of law."

[7] Being aggrieved by the said judgment, the defendants filed an appeal under Section 96 of the C.P.C. in the court of the District Judge, West Tripura, Agartala being Title Appeal No.20 of 2003 which was heard by the Additional District Judge, West Tripura, Agartala, Court No.4 and disposed of by the

judgment dated 21.01.2008, which is under challenge in this appeal.

[8] The first appellate court while passing the judgment of affirmation has observed that:

"On careful scrutiny of the case record it appears to me that the appellants have come before this court that two copies of Record of rights upto the stage of attestation and draft publication. The respondents have been possessing those two documents(Ext."7" and Ext."G") asserting that the Appellants in connivance of the survey settlement staff have managed to have the aforesaid two documents.

On hearing the learned counsel of both sides and also after perusing the case records meticulously and carefully I am of the view that the Appellants have failed to convince the Court basing on which they have managed to change the status of the Respondents from forcible occupier to permissive possessor.

I also cannot make out how the Survey Settlement Authority can change the entries in the finally published record of rights without having the direction from the competent authority and or without hearing the Respondents."

[Emphasis added]

In sequel it has been also observed that:

"It is hard to believe that there was/is any scope except the Appellate/Revisional Authority can change the status of a party abruptly if the party approaches him. The Appellants did not produce any documents in support of their claim which could lead the Court to echo their voice that the Collector has changed the status of the Respondents as Appellate or Revisional Authority."

On returning such finding, the appeal was dismissed.

[9] Having confronted with the concurrent findings of fact, Mr. D.K. Biswas, learned counsel appearing for the appellants has primarily focused on the aspect of whether the courts below were within their jurisdiction while declaring the title on adverse possession of the plaintiffs. Mr. Biswas, learned counsel has relied on a decision of the apex court in **Gurudwara Sahib vs. Gram Panchayat Village Sirthala and Anr.**, reported in **(2014) 1 SCC 669**, where a two Judges' Bench of the apex court has held that:

There cannot be any quarrel to this extent the judgments of the courts below are correct and without any blemish. Even if the Plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings filed against the Appellant and Appellant is arrayed as Defendant that it can use this adverse possession as a shield/defence.

[Emphasis added]

[10] Mr. B. Das, learned senior counsel appearing for the respondents No.1 and 2 has contented that by way of repeal of the Limitation Act, 1908 Article 65 in the Schedule to the Limitation Act, 1963 has recorded a significant change so far the prescription of limitation for the suit for recovery by the true owner from the squatter. He has further submitted that Section 27 of the Limitation Act, 1963 has to be read with the Article 65. Section 27 reads as under:

"27. Extinguishment of right to property : 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.

Thus, when the right to the property of the true owner extinguishes it becomes the right of the possessor who has been in possession over the land adversely and openly. He has submitted that it is a little puzzling why in **Gurudwara Sahib** it has been held that a declaration of ownership of land on the basis of adverse possession cannot be sought by a plaintiff but it can be used as a shield to defend such possession. In many judgments of the apex court, it has been established that squatter acquires exactly the title on extinguishment by his adverse possession. To buttress his contention, he has placed reliance on **Balkrishan vs. Satyaprakash and Ors.**, reported in **(2001) 2 SCC 498**, where the apex court in paragraphs 3 & 8 held as under:

"3. After considering the evidence placed before it the trial court found that the appellant had been in continuous possession of the suit land and perfected his title by adverse possession. Accordingly, the suit of the plaintiff was decreed by the trial court. Against the judgment and decree of the trial court, respondent Nos.1 to 4 filed appeal (Civil Appeal No.97-A/1990) before the IIInd Additional District Judge, Guna. On 30 July, 1991, the First Appellate Court dismissed the appeal. The said respondents filed Civil Second Appeal No.161 of 1991 in the High Court of Madhya Pradesh (Bench at Gwalior), which was allowed, setting aside the judgment and decree of the First Appellate Court, by the impugned judgment and decree.

8. In the instant case, the trial court on appreciating the evidence produced by the

parties recorded the following among other findings:

(i) Accordingly it is decided that since 23.12.1966 negating the title of actual Bhumiswami, the plaintiff has been in continuous, uninterrupted and open possession of the suit land;

(ii) As a result the plaintiff had acquired the rights of Bhumiswami on the basis of the adverse possession of the suit land."

[Emphasis added]

The apex court allowed the appeal on setting aside the judgment of the High Court and restoring the judgment and decree of the first appellate court confirming the judgment and decree of the trial court.

[11] Mr. Das, learned senior counsel has also relied on **P.T. Munichikkanna Reddy and Ors. Vs. Revamma and Ors.**, reported in **(2007) 6 SCC 59**, wherein it has been held that:

"6.Efficacy of adverse possession law in most jurisdictions depends 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. (See *American Jurisprudence*, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the intention to dispossess can not be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim."

[Emphasis added]

[12] Finally, Mr. Das, learned senior counsel has contended that upon a conjoint reading of Sections 21, 23, 28, 32, 34, 35, 52, 68 and 71 to 77 of the Registration Act, 1908, it would emerge that the Registrar/ Sub-Registrar cannot refuse to register a conveyance entered into by a squatter, since the Registrar does not have the authority to question the title of the transferor. There does not seem to be any ruling of the Supreme Court on this point, but the High Courts seem to be unanimous on this issue. Reference has been made to ***Bihar Deed Writers Association vs. State of Bihar, AIR 1989 Pat 144(DB) (para 3); Hari Singh vs. Sub-Registrar, (1998) 120 PLR 787 (DB) (paras 8 to 11), K. Eshaque vs. Sub-Registrar, AIR 2002 Ker 128 (paras 7 to 9); Gopal vs. District Collector, Bhandara, (2003) 3 Mah LJ 883 (para 11); Yadla Ramesh Naidu vs. Sub-Registrar, (2009) 1 ALD 337 (paras 22 to 25); Ashwini Ashok Khirsagar vs. State of Maharashtra, (2010) 3 AIR Bom R (NOC 318) 90 (paras 4 to 8); Deep Apartment CHS Lts. Vs. State of Maharashtra,***

(2012) 6 Bom LR 3782; (paras 6 to 9); Gurjeet Singh Madaan vs. Sub-Registrar, CS (OS) 340/2013, decided on 26-09-2013 (Delhi High Court, paras 23 to 25). Mr. Das, learned senior counsel appearing for the respondents No.1 and 2 has contended that if the statute as interpreted by the apex court clearly confers title on the squatter and such title is transferable by the registered conveyances. The declaration of title in favour of the squatter would not only remove all uncertainties as to the title to such land but also would bring the resolution of the dispute to its end. When the right to property is extinguished on adverse possession why the squatter should wait to be sued by a person whose right has been so extinguished or lost?

[13] For appreciating the rival contentions, reference may be made to Article 65 of the Schedule of the Limitation Act, 1963 which reads as under:

<u>Description of suit</u>	<u>Period of limitation</u>	<u>Time from which period begins to run</u>
65. For possession of immovable property or any interest therein based on title. Explanation : For the purposes of this article- (a) where the suit is by a remainderman, a reversioner (other than a landlord) or a devisee, the possession of the defendant shall be deemed to become adverse only when the estate of the remainderman, reversioner or devisee, as the case may be, falls into	Twelve years	When the possession of the defendant becomes adverse to the plaintiff.

possession;

(b) where the suit is by a Hindu or Muslim entitled to the possession of immovable property on the death of a Hindu or Muslim female, the possession of the defendant shall be deemed to become adverse only when the female dies;

(c) where the suit is by a purchaser at a sale in execution of a decree when the judgment-debtor was out of possession at the date of the sale, the purchaser shall be deemed to be a representative of the judgment-debtor who was out of possession.

[14] There cannot be any amount of equivocality that when the possession becomes adverse if the true owner does not sue the adverse possessor for recovery of the possession of the immovable property or interest based on title, his right to property extinguishes after 12 years. Similarly, by operation of Article 112 such right extinguishes after 30 years when the possession becomes adverse for the State. This doctrine of right on adverse possession favours the settlers against the absentee owner. In one decision being **Albert J. Lawrence Vs. Town of Concord : 439 Mass. 416**, the Supreme Judicial Court reversed the decision of the superior and appeal courts in the U.K and affirmed the ancient doctrine. In **Lawrence vs. Concord**, it has been held that adverse possession as a doctrine assumes that the adverse possessor may be acting with hope and even the intent to conceal that he has no valid interest in the property

because his use is open to the World to see and he appears to be acting as though he were a true owner, the inner workings of his mind are irrelevant. So long as a man is in possession of the land claiming title, however, wrongly and with whatever degree of knowledge that he has no right, so long the real owner is out of possession in a constructive as well as an actual sense. ***"It is of the nature of the statute of limitations when applied to civil actions, in effect, to mature a wrong into a right, by cutting off the remedy."***

In India we have witnessed the legislative change as regards the continuous possession. In Article 144 of the Limitation Act, 1908 it was mere continuous possession for 12 years that used to covert the right of the true owner extinguished but in Article 65 of the Limitation Act it is not mere continuous possession for 12 years that extinguishes the right of the true owner to recover but it is the continuous, open and adverse possession that extinguish the right of the true owner. Mere being in the continuous possession under Article 65 read with Section 27 of the Limitation Act, 1963 would not limit the right of the true owner to recover his immovable property based on the title. There cannot be any other interpretation that if the adverse possession is proved beyond the period of limitation as stated, the right of the true owner over the immovable property be extinguished.

[15] Is possession is fact or a right? This question must be taken to mean, by possession and right, what the law means by those words and not something else which Philosophers or Moralists may mean by them. For the courts we have nothing to do either, except in a legal sense. If these had always steadily in mind the question would hardly have been asked. A legal right is nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right, and this right as the same whether his claim is founded in the righteousness or in equity. Just so far as possession is protected, it is a such a source of legal rights as ownership is when it secures the same protection.

Every right is a consequence attached by the law to one or more facts which the law defines, and wherever the law gives anyone special rights not shared by the body of the people, it does so on the ground that certain special facts, not true of the rest of the World, are true of him. When a group of facts thus singled out by the law exists in the case of a given person, he is said to be entitled to the corresponding rights, meaning thereby, that the law helps him to constrain his neighbours, or some of them, in a way in which it would not, if all the facts in question were not true of him. Hence, any word which denote

such a group of facts connotes the right attached to it by way of legal consequences and any word which denotes the right attached to a group of facts connotes the group of facts in like manner.

Oliver Wendell Holmes, Jr. in his lecture on **The Common Law** has pointed out certain features of possessions:

"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 analyzed 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 consequence, property always, and contract with more uncertainty and oscillation, denote the consequence and connote the facts. When we say that a man owns a thing, we affirm directly that he has the benefit of the consequences attached to a certain group of facts, and, by implication, that the facts are true of him. The important thing to grasp is, that each of these legal compounds, possession, property, and contract, is to be analyzed into fact and right, antecedent and consequent, in like manner as every other. It is wholly immaterial that one element is accented by one word, and the other by the other two. We are not studying etymology, but law. There are always two things to be asked: first, what are the facts which make up the group in question; and then, what are the consequences attached by the law to that group. The former generally offers the only difficulties.

Hence, it is almost tautologous to say that the protection which the law attaches by way of consequence to possession, is as truly a right in a legal sense as those consequences which are attached to adverse holding for the period of prescription."

[Emphasis added]

[16] What **Oliver Wendell Holmes, Jr.** has observed in his lecture on **The Common Law** finds its reverberation in **Kshitish Chandra Bose vs. Commissioner of Ranchi**, reported in **(1981) 2 SCC 103**, where a three Judges' Bench of the apex court has observed as under:

"10. Lastly, the High Court thought that as the land in question consisted of a portion of the tank or a land appurtenant thereto, adverse possession could not be proved. This view also seems to be wrong. If a person asserts a hostile title even to a tank which as claimed by the municipality, belonged to it and despite the hostile assertion of title no steps were taken by the owner, (namely, the municipality in this case), to evict the trespasser, his title by prescription would be complete after thirty years."

[Emphasis added]

[17] In **Balkrishan**, the apex court has approvingly extracted the principle laid down in **S.M. Karim Vs. Mst. Bibi Sakina**, reported in **AIR 1964 SC 1254**. For reference para-7 of **Balkrishan** is extracted:

"7. The law with regard to perfecting title by adverse possession is well settled. A person claiming title by adverse possession has to prove three "neck" - nec vi, nec clam and nec precario. In other words, he must show that his possession is adequate in continuity in publicity and in extent. In *S.M. Karim Vs. Mst. Bibi Sakina* speaking for this Court Hidayatullah, J. (as he then was) observed thus:

"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."

[18] In **Secretary of State for India in Council vs. Debendra Lal Khan**, reported in **AIR 1934 PC 23**, the Privy Council had the occasion to consider the effect of legislation which was in force at that time that if the plaintiff can establish that those from or through whom he derived right, for 60 years been in possession adverse to the crown, whether any right of the crown thereto is extinguished and whether the plaintiff has succeeded in his claim of title based in adverse possession.

"As to what constitutes adverse possession, a subject which formed the topic of some discussion in the case, their Lordships adopt the language of Lord Robertson in delivering the judgment of the Board in *Radhamoni Debi v. Collector of Khulna (1)* (at p.140 of 27 I.A),, where his Lordship said that 'the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor.'

The classical requirement is that the possession should be *nec vc nec clam nec precario*. Mr. Dunne for the Crown appeared to desiderate that the adverse possession should be shown to have been brought to the knowledge of the Crown, but in their Lordships' opinion there is no authority for this requirement. It is sufficient that the possession be overt and without any attempt at concealment, so that the person against whom time is running ought, if he exercises due vigilance, to be aware of what is happening. If the rights of the Crown have been openly usurped it cannot be heard to plead that the fact was not brought to its notice. The Limitation Act is indulgent to the Crown in one respect only, namely in requiring a much longer period of adverse possession than in the case of a subject; otherwise there is no discrimination in the statute between the Crown and the subject as regards the requisites of adverse possession. It may be added that it is not necessary in

order to establish adverse possession that the proof of acts of possession should cover every moment of the requisite period. Though the possession,

" be not proven to have continued every quarter, month or year, yet ordinary possession will be sufficient ad victeem causae, albeit it be proponed in the terms of a continual possession, *quia probatis extremis praeesumuntur media*, if the distance be not great" : *Stair's Institutions of the Law of Scotland*, 4., 40. 20.

" The fact of possession may be continuous though the several acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescription : *Millar on Prescription*, p. 36."

The Privy Council after distinguishing the nature of possession has held that the Crown's right was extinguished creating title of the plaintiff on adverse possession.

[19] In **P. Lakshmi Reddy Vs. L. Lakshmi Reddy**, reported in **AIR 1957 SC 314**, it has been held by the apex court that the statute of limitation does not attach to the claim, 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 the plaintiff could first have maintained his action to a successful result. It definitely implies that if the adverse possession expires the period of limitation, a plaintiff can bring an action based on such extinguishment to assert his right and in that event he might succeed in the suit.

[20] In **T. Anjanappa and Ors. vs. Somalingappa and Anr.** reported in **(2006) 7 SCC 570**, this aspect again fell for consideration of the apex court and it has been observed as under:

"19. In Halsbury's Laws of England, 1953 Edition, Volume-I it has been stated as follows:

At the determination of the statutory period limited to any person for making an entry or bringing an action, the right or title of such person to the land, rent or advowson, for the recovery of which such entry or action might have been made or brought within such period is extinguished and such title cannot afterwards be reviewed either by re-entry or by subsequent acknowledgement. The operation of the statute is merely negative, it extinguished the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of the others to eject him.

20. It is well recognized proposition in law that mere possession however long does not necessarily means 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 so 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."

[Emphasis added]

[21] In **Des Raj and Ors. vs. Bhagat Ram (Dead) By LRs. and Ors.**, reported in **(2007) 9 SCC 641**, a two Judges' Bench of the apex court has held in contrast to what has been held in **Gurduwara Sahib** as under:

19. Only because the parties did not use the terminology which they should have, ipso facto, would not mean that the ingredients for satisfying the requirements of statute are absent. There cannot be any doubt whatsoever that having regard to the changes brought about by Articles 64 and 65 of the Limitation Act, 1963 vis-a-vis Articles 142 and 144 of the Limitation Act, 1908, the onus to prove adverse possession would be on the person who raises such a plea. It is also furthermore not in dispute that the possession of a co-sharer is presumed to be possession of the other co-sharers unless contrary is proved.

20. A plea of adverse possession or a plea of ouster would indisputably be governed by Articles 64 and 65 of the Limitation Act.

21. In a case of this nature, where long and continuous possession of the plaintiff-respondent stands admitted, the only question which arose for consideration by the courts below was as to whether the plaintiff had been in possession of the properties in hostile declaration of his title vis-a-vis his co-owners and they were in know thereof.

22. Mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi. But the intention on the part of the plaintiff to possess the properties in suit exclusively and not for and on behalf of other co-owners also is evident from the fact that the defendants - appellants themselves had earlier filed two suits. Such suits were filed for partition. In those suits the defendants - appellants claimed themselves to be co-owners of the plaintiff. A bare perusal of the judgments of the courts below clearly demonstrates that the plaintiff had even therein asserted hostile title claiming ownership in himself. The claim of hostile title by the plaintiff over the suit land, therefore, was, thus, known to the appellants. They

allowed the first suit to be dismissed in the year 1977. Another suit was filed in the year 1978 which again was dismissed in the year 1984. It may be true, as has been contended on behalf of the appellants before the courts below, that a co-owner can bring about successive suits for partition as the cause of action therefore would be continuous one. But, it is equally well-settled that pendency of a suit does not stop running of 'limitation'. The very fact that the defendants despite the purported entry made in the revenue settlement record of rights in the year 1953 allowed the plaintiffs to possess the same exclusively and had not succeeded in their attempt to possess the properties in Village Samleu and/or otherwise enjoy the usufruct thereof, clearly go to show that even prior to institution of the said suit the plaintiff-respondent has been in hostile possession thereof.

23. Express denial of title was made by the plaintiff-respondent in the said suit in his written statements. The courts, therefore, in the suits filed by the defendants - appellants, were required to determine the issue as to whether the plaintiff-respondent had successfully ousted the defendants - appellants so as to claim title himself by ouster of his co-owners.

24. In any event the plaintiff made his hostile declaration claiming title for the property at least in his written statement in the suit filed in the year 1968. Thus, at least from 1968 onwards, the plaintiff continued to exclusively possess the suit land with knowledge of the defendants -appellants.

25. The parties went to trial fully knowing their respective cases. The fact that they had been co-owners was not an issue. The parties proceeded to adduce evidences in support of their respective cases. Defendants - Appellants, keeping in view of the fact that they have unsuccessfully been filing suit for partition, were also not prejudiced by reason of purported wrong framing of issue. They knew that their plea for joint possession had been denied. They were, therefore, not misled. They were not prevented from adducing evidence in support of their plea.

26. Article 65 of the Limitation Act, 1963, therefore, would in a case of this nature have its role to play, if not from 1953, but at least from 1968. If that be so, the finding of the

High Court that the respondent perfected his title by adverse possession and ouster cannot be said to be vitiated in law.

27. Mr. Das has relied upon a decision of this Court in *Saroop Singh v. Banto* : (2005) 8 SCC 330, in which one of us was a member. There is no dispute in regard to the proposition of law laid down therein that it was for the plaintiff to prove acquisition of title by adverse possession.

28. We are also not oblivious of a recent decision of this Court in *Govindammal v. R. Perumal Chettiar* : (2006) 11 SCC 600 wherein it was held:

...In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case....

29. Yet again in *T. Anjanappa and Ors. v. Somalingappa* , it was held:

'12. 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 rights but denies them. 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 denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced 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 the owner's right excluded him from the enjoyment of his property.'

30. In this case, however, a finding of fact has been arrived at by all the three courts. They have analysed the evidences on record. They

have taken into consideration the correct legal position operating in the field as also conduct of the parties. They, in our opinion, applied the correct principles of law as regards 'burden of proof.'

31. We, having regard to the peculiar fact obtaining in the case, are of the opinion that the plaintiff- respondent had established that he acquired title by ousting the defendants - appellants by declaring hostile title in himself which was to the knowledge of his co-sharers.

32. We, therefore, find no infirmity in the impugned judgment. The appeal is dismissed. In the facts and circumstances of the case, there shall, however, be no order as to costs."

[Emphasis added]

[22] What has distinctly appeared is that in **Balkrishna**, a two Judges' Bench of the apex court has held that the plaintiff had acquired rights of bhumiswami (the owner) on the basis of the adverse possession of the suit land.

In **Kshitish Chandra Bose**, a three Judges of the apex court has held that if a person asserts a hostile title even to a tank which, as claimed by the municipality, belonged to it and despite the hostile assertion of title no steps were taken by the owner to evict the trespasser, his title by prescription would be complete after thirty years.

In **Des Raj and Ors**, a two Judges Bench of the apex court again held that having regard to the peculiar fact obtaining the case, the apex court was of the opinion that the plaintiff-respondent had established that he acquired title by ousting the defendants-appellants by declaring hostile title in

himself which was to the knowledge of the co-sharers. Such, declaration of title on adverse possession has got the approval of the apex court in that case.

None of those precedents are considered in **Gurduwara Sahib** for holding that even if the plaintiff is found to be adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. The conflict between the decisions of **Balkrishna, Kshitish Chandra Bose, Des Raj and Ors.** in one side and **Gurduwara Sahib** on the other, has taken the centre stage in the controversy in this appeal. Even though the maintainability of a declaratory suit for title on adverse possession at the instance of the plaintiff has not been expressly considered by the apex court except in **Gurduwara Sahib**, but when the apex court observes that no infirmity is found in the decree declaring title on adverse possession of the plaintiff it is to be invariably inferred that it approves such declaration.

[23] In **Balkrishna**, the apex court has declared that the plaintiff had acquired the rights of the owner on the basis of adverse possession over the suit land. Even in **Kshitish Chandra Bose**, the law has been positively stated that "*title by prescription would be complete after 30 years.*" In **Des Raj and Ors.**, the title has been affirmed on adverse possession in

favour of the 'the plaintiff-respondent'. Adverse possession can never be used as the sword but as the shield is no doubt a moral convention but it was never tested on the touchstone of law. What **Oliver Wendell Holmes, Jr.** has observed is of considerable significance that it is almost tautologous to say that the protection which the law attaches by way of consequence to possession is as truly as a right in a legal sense as those consequences which are attached to the adverse holding for the period of prescription. Section 27 of the Limitation Act categorically provides that if within a period prescribed by law of limitation any person fails to institute suit for recovery of possession of any property '*his right to such property shall be extinguished*'. Such possession known as the adverse possession is not a mere fact, it creates a definite right in favour of the squatter on extinguishment of the right of the true owner. When the law recognises that right the said right has to be considered as the right attached to it by way of legal consequences. Whether a person who had acquired such right should wait for infinite periods to be sued by a person whose interest in the property has been extinguished or the right as matured by way of adverse possession should be acknowledged as has been acknowledged in respect of registering a conveyance executed by a squatter, inasmuch as the Registrar does not have the right to question the title of

the transferor cannot be held to be left in the lurch for stair decisions as referred. This aspect may require further dilation. But in view of the decision rendered by the three Judges' Bench in **Kshitish Chandra Bose**, this Court would go by the decision of the larger Bench that 'the title by prescription would be complete' after the expiry of the period of limitation from the day when the possession becomes adverse. If the title by prescription becomes complete after expiry of the period of limitation there is no embargo for the civil court to declare such right. Apart that it would bury the uncertainty as to the title and nip the complex disputes at the bud.

[24] Equity and righteousness are the core of the justice. If any law stands contrary to those principles it is only expected that the legislature would bring about the necessary change in the law, if they are of the opinion that such change is required in the changed circumstances. The apex court in **Hemaji Waghaji Jat vs. Bhikhabhai Khengarbhai Harijan and Ors.**, reported in **2008 AIR SCW 6996** has been persuaded to observed that:

"34..... the law of adverse possession which ousts an owner on basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in

contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner.

35. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loose its possession only because of his inaction in taking back the possession within limitation.

36. In our considered view, there is an urgent need of fresh look regarding the law on adverse possession. We recommend the Union of India to seriously consider and make suitable changes in the law of adverse possession. A copy of this judgment be sent to the Secretary, Ministry of Law and Justice, Department of Legal Affairs, Government of India for taking appropriate steps in accordance with law.”

[25] Having held so, this Court does not find any material ground to interfere with the impugned judgment and decree which are based on the findings on adverse possession, being concurrent in nature and not suffered from any infirmity and as consequence thereof, this appeal stands dismissed.

Draw the decree accordingly.

Thereafter, send down the LCRs.

JUDGE

Sujay