

**Kishundeo Rout & Ors.**

v.

**Govind Rao & Ors.**

(Special Leave Petition (Civil) No. 22070 of 2025)

08 August 2025

**[J.B. Pardiwala\* and R. Mahadevan, JJ.]**

**Issue for Consideration**

Whether the High Court rightly set aside the order passed by the First Appellate Court by which it had accepted the plea of adverse possession raised by the plaintiffs for the first time in appeal and decreed the suit.

**Headnotes<sup>†</sup>**

**Adverse possession – Plea – Not raised in pleadings, cannot be raised for the first time in appeal – Suit filed by the plaintiffs for cancellation of sale deed, dismissed by trial court – Appeal filed by the plaintiffs – First Appellate Court accepting the plea of adverse possession raised by them for the first time, allowed the appeal and decreed the suit – Second appeal filed by the defendants, allowed by High Court – Challenge to:**

**Held:** The foundation for the plea of adverse possession must be laid in the pleadings and then an issue must be framed and tried – A plea not properly raised in the pleadings or in issues at the stage of trial would not be permitted to be raised for the first time at the stage of First Appeal u/s.96, CPC – The plea of adverse possession is always based on facts which must be asserted and proved – A person who claims adverse possession must show on what date he came into possession, what was the nature of his possession, whether the factum of his possession was known to the legal claimants and how long his possession continued and whether his possession was open and undisturbed – These are all questions of fact and unless they are asserted and proved, a plea of adverse possession cannot be inferred from them – Unless the plea of adverse possession has been specifically raised in the pleadings, put in issue, and then cogent and convincing evidence is led on a multitude of points, and an opportunity to refute the case is

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made out by the plaintiff, and availed of by the defendant, the plea of adverse possession cannot be allowed to be flung as a surprise, on an unsuspecting defendant, for the first time in appeal – In the present case, if plea of adverse possession had been taken in the plaint, and if that plea had been traversed by the defendants and then proper issues framed, a heavy burden would have laid on the plaintiffs to lead evidence in support of their hostile claim and a corresponding opportunity of rebuttal would have been given by law to the defendants – The question of adverse possession cannot become the subject matter of adjudication in the absence of proper plea, issue or proof – Petition fails, dismissed. [Paras 19, 29-31]

**Pleadings – Rule of – Principle of *secundum allegata et probata* – Effect:**

**Held:** The basic rule of law of pleadings is that a party can only succeed according to what he has alleged and proved, otherwise, on the principle of *secundum allegata et probata*, a party is not allowed to succeed, where he has not set up the case which he wants to substantiate – Pleadings and proof must correspond – No party should be prejudiced by being taken by surprise by varying the case as originally set up. [Paras 24, 25]

**Adverse possession – Ordinarily, a question of fact however, in certain cases, it may be a question of law or a mixed question of law and facts – Determination of adverse possession – When can the plea of adverse possession be allowed by the Appellate Court to be taken up for the first time in appeal, stated.** [Para 27, 28]

### Case Law Cited

*Trojan and Co., Ltd. v. RM. N. N. Nagappa Chettier* [1953] 1 SCR 789 – referred to.

*Ganda Singh and Ors. v. Ram Narain Singh, ILR (1959) 1 P&H 385; Municipal Board, Etawah v. Mt. Ram Sri and Another, AIR 1931 All. 670; Krishna Churn Baisack and Others v. Protab Chunder Surma, ILR 7 Cal. 560; Ram Singh v. Deputy Commissioner of Bara Banki, ILR 17 Cal. 444; Lachhmi Sewak Sahu v. Ram Rup Sahu and Others, AIR 1944 P.C. 24; Somasundaram Chetty v. Vadivelu Pillai, ILR. 31 Mad. 531; Eshan Chunder Singh v. Shama Chunder, 11 M.I.A; Neopen Bala Debi v. Siti Kanta Banerji, 8 IC 41; Shiro Kumari Debi v. Gobind Shaw Tanti, ILR 2 Cal. 418 – referred to.*

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Plea of adverse possession; Plea of adverse possession raised/taken for the first time in appeal; Adverse possession plea not raised in pleadings; First Appellate Court accepted the plea of adverse possession; Plea of adverse possession must be laid in the pleadings; First Appeal under Section 96, CPC; Plea of adverse possession is based on facts; Adverse possession is a question of fact; Questions of fact; Question of law; Mixed question of law and facts; Principle of *secundum allegata et probata*; Pleadings; Rule of pleadings.

**Case Arising From**

EXTRAORDINARY APPELLATE JURISDICTION: Special Leave Petition (Civil) No. 22070 of 2025

From the Judgment and Order dated 28.02.2025 of the High Court of Jharkhand at Ranchi in SA No. 151 of 2022

**Appearances for Parties**

*Advs. for the Petitioners:*

Shekhar Prit Jha, Ms. Tamanna Swami, Anurag Bansal.

**Judgment / Order of the Supreme Court****Order**

**J.B. Pardiwala, J.**

1. Delay condoned.
2. This petition arises from the judgment and order passed by the High Court of Jharkhand dated 28.02.2025 in Second Appeal No. 151 of 2022 by which the Second Appeal filed by the respondents herein (original defendants) came to be allowed thereby set aside the judgment and order passed by the First Appellate Court, i.e., District Judge II, Deoghar in Civil Appeal No. 64 of 2018 preferred by the petitioners herein (original plaintiffs) against the judgment and decree passed by the Civil Judge (Sr Div) IV, Deoghar in Title Suit No. 35 of 1999 dated 18.08.2018.
3. For the sake of convenience, the petitioners shall hereinafter be referred to as the plaintiffs and the respondents herein shall hereinafter be referred to as the defendants.

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4. The plaintiffs instituted Title Suit No. 35 of 1999 in the Court of the Civil Judge, Deoghar and prayed for the following reliefs:

*"That under the above facts and circumstances the plaintiff prays for following relief for a decree declaring that the Sale deed bearing no. 256 is bogus, in operative and as such fit to be cancelled. As such fit to be cancelled, And for confirmation of possession.*

*In the event of this dispossession pending the suit then for recovery of possession.*

*(ii) for permanent injunction restraining the defendant from claiming herself as the owner of the suit property on the basis of the forged and fabricated sale deed.*

*(iii) for the cost of the suit.*

*(iv) for any other relief or reliefs which the plaintiff may be deemed entitled to."*

5. In the Title Suit referred to above the trial court framed the following issues:

*I. Is the suit, as framed, maintainable?*

*II. Is the suit barred by limitation?*

*III. Whether the suit is bad for non-joinder of the parties?*

*IV. Whether the sale deed dated 03.02.1997, vide no. 256, executed by Sudama Devi, is illegal and without valuable consideration?*

*V. Whether the sale deed dated 03.02.1997 was managed by playing fraud/misrepresentation and undue influence upon Sudama Devi?*

*VI. Whether Sudama Devi did not pass her right., title and interest in the suit property to the defendant?*

*VII. Whether the possession of suit property was not given to the defendant after the execution of alleged sale deed dated 03.02.1997?*

*VIII. Is the plaintiff entitled for reliefs as claimed?*

*X. Whether there is any cause of action for filing the suit ?*

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6. The suit ultimately came to be dismissed *vide* the judgment and decree dated 18.08.2018 while answering the issue nos. (i), (ii), (iii) and (ix), the trial court recorded the following findings:

*"9. As per above discussion, I have already found that plaintiffs have not succeeded to prove their case that sale deed no. 256 dated 03.02.1997 was managed by playing fraud, misrepresentation and due influence upon Sudama Devi and also failed to prove that the possession of suit property was not given to the defendant after execution of alleged sale deed and as such the suit filed by the plaintiffs against the defendant is not maintainable in its present form and there is no valid cause of action for the present suit. Hence, the aforesaid issues are also decided against the plaintiffs. Therefore, it is, hereby."*

7. The plaintiffs being dissatisfied with the judgment and decree passed by the trial court dismissing the suit preferred First Appeal in the court of the District Judge, Deoghar being the Civil Appeal No. 64 of 2018.

8. The First Appeal came to be allowed, and the suit instituted by the plaintiffs came to be decreed. While allowing the First Appeal, the First Appellate Court recorded the following findings:

*"7.4 During the course of argument this court has made a query to the Ld. Counsel for the respondents as to whether after dispossession his client/s came in re-possession of the suit property, to which there was no satisfactory reply. The counsel verbally submitted that his clients were temporary dispossessed for a day or two and there after they regained the possession of the suit property. What is evident from W.S is that dispossession from suit property by the plaintiff came to the knowledge of the defendants on 06.07.2000 or 07.07.2000 and the W.S was filed exactly 11 days after that, and in the said W.S there is mention of dispossession of the defendants. Further from the date of evidences of DW-1 and DW-2 it has come out that evidence of DW-1 was tendered in the court on 29.04.2011 and his cross-examination was finally completed on 30.06.2011. Further the evidence of DW-2 was tendered in the court on 06.05.2011 and she was cross-examined on 05.08.2011, 29.08.2011, 8.11.2011 and*

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*finally it was completed on 09.02.2012. Further additional evidence of DW-2 was file do 16.04.2015 and her cross-examination was completed on 05.06.2015.*

*7.5 Further from the appreciation of affidavit and corresponding crossexaminations, this court could not find out a single instance wherein the defendants have averred that they have regained their lost possession of the suit property mentioned in schedule B. Rather it is an admitted fact that defendant has lost possession of suit property on 07.07.2000.*

*7.6 what is astonishing to see is that neither a separate suit to reclaim the lost possession of suit property is filed by the defendants nor any counter claim to reclaim the lost possession is filed in their W.S. This means that the defendants have not claimed their lost possession of the suit property since 07.07.2000. Rather the information petition was filed in the court in that regard and same is exhibited by them as Exhibit-E. Further as per article 65 of the schedule in Limitation Act, 1963, the period of limitation as provided by statute for filing of suit for possession of immovable property or any interest therein based on title is 12 years, from the date when the possession of the plaintiff becomes adverse to the defendant. Further from the conjoint reading of section-3 R/w 27 of the Limitation Act, the right and remedy both are extinguished on the expiry of period of limitation as provided by the statute.*

*7.7 Since appeal is continuation of the suit, the Court while sitting under appeal can make additional issues from the material on record, in order to adjudicate the matter finally and also to avoid multiplicity of proceedings between the parties. Therefore this court is making an additional issue and adjudicating it without taking further evidence as everything is admitted in the record of the trial court. The additional issue is “whether the possession of the plaintiff became adverse to the defendants despite the facts that defendants have registered sale deed in their favour and whether such adverse possession has made the defendant herein remedy-less to oust plaintiffs from the suit property ?”*

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*7.8 Further no evidence is required to adjudicate the additional issue, because everything is available on record, Before we proceed further, it is pertinent to quote the law laid down by apex court in RAVINDER KAUR GREWAL AND OTHERS v/s MANJIT KAUR AND OTHERS AIR 2019 SC 3827. It was held that “ there is absolutely no bar for the perfection of title by way of adverse possession whether a person is suing as the plaintiff or being sued as a defendant. The statute does not define adverse possession, it is common law concept, the period of which has been prescribed statutorily under the law of limitation Art. 65 as 12 years. Law of limitation does not define the concept of adverse possession nor anywhere contains a provision that the plaintiff cannot sue based on adverse possession. It only deals with limitation to sue and extinguishment of rights. Once the right is extinguished another person acquires perspective right which cannot be defeated by reentry by the owner or subsequent acknowledgment of his rights. The adverse possession requires all the three classic requirements to coexist at the same time, namely, nec-vi i.e. adequate in continuity, nec-claim i.e. adequate in publicity and nec-precario i.e. adverse to a competitor, in denial of title and his knowledge. Visible, notorious and peaceful so that if the owner does not take care to know notorious facts, knowledge is attributed to him on the basis that for due diligence he would have known it.” the old concept of the law the adverse possession can only be used a shield and not as sword, as be overruled by the Hon’ble Court in the aforesaid Judgment. And the Appellate court while sitting under appeal has unfettered powers under section 107 R/w 96 of the CPC to appreciate the entire record on law and facts.*

*7.9 In the present case, it is an admitted fact by the defendants that they are not in possession of the suit property since 07.07.2000 and since that day the plaintiff have forceful possession against the defendant and which is within the knowledge of the defendants. Despite having title documents of the property no efforts were made by them to evict the trespassers/plaintiff and reclaim the lost*

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*possession. Even if it is presumed that the suit is dismissed against the plaintiff's and sale deed which is sought to be declared void is held valid and legal, then also it would not make any difference because the defendants have lost their right as well remedy to get evicted the plaintiffs and reclaim possession of the property, even on basis of title. Merely holding a sale deed would not do anything in their favour. Neither any separate suit is filed to reclaim the possession nor any counter claim in the present suit is alleged to reclaim the lost possession and it cannot be said that defendants were not aware of the illegal-adverse possession of the plaintiff. Therefore, plaintiffs adverse possession ripened against the defendants. To avoid multiplicity of proceedings this court is proceeding thereunder.*

*7.10 Further, in the present case: the Original plaintiff who has claimed that she did not receive even a single farthing has expired during the pendency of the suit. She did not come as plaintiff witness and except her no one would have rightly deposed and substantiated as to whether she received sale consideration or not. And had she been alive, the defendant would have got the chance to cross-examine her. In the present case, the scenario is bit different. The original plaintiff could not give her evidence and as such that could not be rebutted by defendant. Whatever evidence the plaintiff gave can only be hearsay evidence, and as such the same fall short to qualify as direct evidence. Further, the documentary evidence of defendants superseded the oral evidence advanced by plaintiffs in all respects. Therefore this court declares the sale deed of the plaintiff as valid document and also the transactions done between the parties. BE THAT IT MAY BE SO; as discussed earlier the adverse possession of the plaintiffs have already ripened against the defendants in year 2012, only w.r.t to property which is alleged to be forcefully taken by them and not against the other properties. As per settled law, such adverse possession in light of aforesaid Judgment has given rights to the original plaintiff's (through her heir) to retain such*

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*property (on which there is adverse possession) in their own name.*

*7.11 Accordingly, the suit of the plaintiff is decreed in their favor only for the suit property mentioned in schedule B of the plaint. Further for properties mentioned in Schedule A of the plaintiff, it was alleged that those properties were already sold by the plaintiff to some other persons and despite that those persons being necessary parties were not made parties to the suit by the plaintiff or by the defendants, therefore suit of the plaintiff can be decreed only with respect to schedule B property. For rest of the properties mentioned in other schedules the suit is dismissed on merits, for want of necessary parties.*

*8. There shall be no order as to costs, parties to bear their own costs. Office to call for Sherestadar report for deficit court fee, if any and then after compliance, Office to make Decree and file be consigned to records after due compliance.*

*9. Therefore, the suit is decreed in favour of the plaintiffs with respect to Schedule B property only and this court holds the plaintiffs to be the exclusive owners thereof. Accordingly, this Court sets aside the impugned Judgment dated 18.08.2018 passed by the Ld. Court below and to this extent, this Civil Appeal is Allowed.*

*10. All the pending applications, if any, are also hereby disposed off.*

*11. O/c to draw decree sheet accordingly and consign the file to records as per rules and send the original LCR along with documents to the concerned court as per rules.”*

9. Thus, the First Appellate Court accepted the plea of adverse possession put up by the plaintiffs and decreed the suit.
10. The original defendants being dissatisfied with the judgment and order passed by the First Appellate Court preferred Second Appeal in the High Court.
11. The High Court formulated two substantial questions of law for its consideration:

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*“(i) Whether the learned lower Appellate Court was justified in framing additional issue of adverse possession in an appeal filed by the plaintiffs although the plaintiffs never pleaded any case of, adverse possession in the plaint?*

*(ii) Whether the learned lower appellate court after Framing the additional issue of adverse possession could decide the case without taking further evidence in connection with the additional issue of adverse possession?”*

12. The High Court allowed the Second Appeal recording the following findings:

*“24. This Court is of the considered view that the condition precedent to seek a relief of declaration of adverse possession is perfection of title by adverse possession prior to filing of the suit and it has been held that once such right, title or interest is acquired, it can be used as a sword by the plaintiff as well as a shield by the defendant within ken of Article 65 of the Act and any person who has perfected title by way of adverse possession, can file a suit for restoration of possession in case of dispossession. There is no concept of perfection of title by adverse possession during the pendency of the suit between the parties. As held above, adverse possession cannot be decreed on a title which is not pleaded.*

*25. Upon perusal of the entire plaint and also the relief, this Court finds that there was no foundational pleading with regard to claim of title by adverse possession of the property. Rather, essentially the suit was filed seeking a declaration of the sale deed executed by the plaintiffs in favour of the defendant as bogus, inoperative and seeking a permanent injunction upon the defendant from claiming herself to be owner of the suit property. At the time of filing of the suit in the year 1999, the plaintiffs claimed to be in possession of the property. The defendant had filed a written statement stating that the defendant was dispossessed from the property since 07.07.2000, that is, during the pendency of the suit.*

*26. This Court finds that since there was no foundational pleading in connection with claim of adverse possession in*

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*the plaint or in the written statement, there was no occasion for the learned 1st appellate court to frame an issue of adverse possession. The learned 1st Appellate Court recorded that in the written statement, the defendant had stated that they were dispossessed from the property since 07.07.2000. The learned Appellate Court further recorded that in spite of the defendant having been dispossessed from the property since 07.07.2000 did not take any effort to recover the property from the plaintiffs and accordingly held that the adverse possession of the plaintiffs against the defendant ripened in the year 2012, that is during the pendency of the suit.*

27. *There are concurrent findings with regard to the legality and validity of the sale deed bearing no.256 dated 03.02.1997 executed by the original plaintiff in favour of the original defendant. However, the learned appellate court framed additional issues on the point of adverse possession of the plaintiffs and held that the adverse possession matured in favour of the plaintiffs in the year 2012 and period commenced from the year 2000 when the defendant was dispossessed.*

28. *This Court finds that framing of an issue of adverse possession by the 1st appellate court was absolutely beyond the pleadings of the parties and the appellate court was not at all justified in holding that adverse possession matured in favour of the plaintiffs in the year 2012 during the pendency of the suit which was filed in the year 1999.*

29. *This Court is of the considered view that considering the aforesaid facts and circumstances, framing of an issue of adverse possession at the first appellate stage and recording a finding that the adverse possession matured during the pendency of the suit, is ex facie perverse and is beyond the scope of the suit and beyond the pleading in the suit. This Court is of the considered view that if plea of adverse possession is to be considered and decided in favour of the plaintiff, then the foundational pleading for claiming adverse possession has to be there in the plaint itself, which is totally absent in the present case.*

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*30. In view of the aforesaid facts and circumstances, the first substantial question of law is decided in favour of the appellants and against the respondents.*

*31. In view of the findings with regard to the 1st substantial question of law, there is no question of taking any further evidence on the point of adverse possession framed for the first time by the learned 1st appellate court. Consequently, the 2nd substantial question of law is also answered against the appellants and in favour of the respondents.*

*32. Both the substantial questions of law having been answered in favour of the appellants, this appeal is allowed. Accordingly, the judgement and decree passed by the learned 1st appellate court is set aside and consequently, the judgement and decree passed by learned Trial Court is affirmed.”*

13. Thus, the High Court while allowing the Second Appeal took the view that there was no foundational pleading led by the plaintiffs in connection with the claim of adverse possession in the plaint or in the written statement and there was no occasion for the First Appellate Court to frame an issue of adverse possession.
14. The High Court also recorded a finding that the Original suit was to declare the sale deed sham and bogus, which the plaintiffs were unable to establish and accordingly, the suit was dismissed.
15. In the last, the High Court recorded a finding that as regards the legality and validity of the sale deed bearing no. 256 of 03.02.1997 executed by the original plaintiff in favour of the original defendant is concerned, the First Appellate Court concurred with the findings recorded by the trial court.
16. In such circumstances referred to above, the petitioners-original plaintiffs are here before this Court with the present petition.

**ANALYSIS:-**

17. Heard the learned counsel appearing for the petitioners.
18. We had the benefit of looking into few very old erudite judgments on the pivotal issue involved in the present litigation. One such judgment is a full Bench decision rendered by the Punjab High Court in the

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case of *Ganda Singh and Ors. v. Ram Narain Singh* reported in *ILR (1959) 1 P&H 385*.

19. It is a settled position of law that the foundation for the plea of adverse possession must be laid in the pleadings and then an issue must be framed and tried. A plea not properly raised in the pleadings or in issues at the stage of trial would not be permitted to be raised for the first time at the stage of First Appeal under Section 96 of the Code of Civil Procedure (CPC).
20. The plea of adverse possession is not always a legal plea. Indeed, it is always based on facts which must be asserted and proved. A person who claims adverse possession must show on what date he came into possession, what was the nature of his possession, whether the factum of his possession was known to the legal claimants and how long his possession continued. He must also show whether his possession was open and undisturbed. These are all questions of fact and unless they are asserted and proved, a plea of adverse possession cannot be inferred from them. Therefore, in normal cases an appellate Court will not allow the plea of adverse possession to be raised before it. There is no doubt that in some cases, the plea will be allowed for the reason that in some form or the other allegation upon which it can be raised might have been made at the time and the facts necessary to prove the plea were brought before the court and proved. Such a case is the one of which the decision is reported in *Municipal Board, Etawah v. Mt. Ram Sri and another* reported in *A.I.R. 1931 All. 670*. In that case the plaintiffs based their suit on title extending over a period of thirty years. "The plaintiffs" case was that plaintiff 1 was the owner of the land and she had on that plot four small shops fetching a rent of about Rs. 80 a month. Plaintiff 2 is her lessee. The shops were burnt down in June, 1926 and the land was laid vacant. The plaintiffs made an application to the Municipal Board for permission to build again on the land, but this permission was refused on 27th August, 1926, on the ground that the Municipal Board was the owner of the land and not the plaintiffs." The learned Judges of the Allahabad High Court held that a plea of adverse possession extending over a period of thirty years could be read into this claim and therefore although it was not specifically raised in the plaint yet it could be raised at a later stage. In other words, what they held was that the plea of adverse possession was included in the plea of title. In coming to this conclusion the learned

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Judges no doubt took notice of the fact that the plaintiffs had clearly stated that actual physical possession of the property in dispute was with them. [See: *Ganda Singh* (supra)]

21. A case of another type in which the plea of adverse possession was not allowed to be raised is *Krishna Churn Baisack and others v. Protab Chunder Surma* reported in I.L.R. 7 Cal. 560. In that case no plea of adverse possession for a period of twelve years was made in the plaint, but the plea was raised in the trial Court itself. The District Judge, however, took the view that the plaintiffs ought not be allowed to succeed on the plea of adverse possession because it had not been set out with sufficient distinctness in the plaint. With this view the learned Judges of the Calcutta High Court agreed. They based their decision on the ground that all the facts necessary for proving this plea had not been alleged before the Court. In that case the plaintiffs had not been in continued possession for a period of twelve years and they sought to tack on the previous possession of another. Therefore, it is clear that in disallowing the plea of adverse possession to be raised before them the learned Judges were actuated by the fact that fresh material would have to be brought before the Court in the form of allegations and counter-allegations before the plea of adverse possession could be held to be proved. They remanded that case for fresh decision on another issue.
22. In *Ram Singh v. Deputy Commissioner of Bara Banki* reported in I.L.R. 17 Cal. 444, the plea of adverse possession was raised for the first time in appeal before the Privy Council. Their Lordships held that since there was no allegation of adverse possession in the plaint and no issue raised as to it before the Court below they could not entertain the plea.
23. *Lachhmi Sewak Sahu v. Ram Rup Sahu and others* reported in A.I.R. 1944 P.C. 24 is another case in which the same principle was laid down. Also see *Somasundaram Chetty v. Vadivelu Pillai* reported in I.L.R. 31 Mad. 531.
24. It is important to remember that the basic rule of law of pleadings is, that a party can only succeed according to what he has alleged and proved, otherwise, on the principle of *secundum allegata et probata*, a party is not allowed to succeed, where he has not set up the case which he wants to substantiate. In the words of Lord

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Westbury in *Eshan Chunder Singh v. Shama Chunder* reported in 11 M.I.A.: —

“.....the determination in a case should be founded upon the case either to be found in the pleadings as involved in or consistent with the case thereby made..... It will introduce the greatest amount of uncertainty into judicial proceedings, if final determination of causes, is to be founded upon inferences, at variance with the case that the plaintiff has pleaded..... and is not taken to prove..... they desire to have the rule observed that the state of fact and the equities and ground of relief originally alleged and pleaded by the plaintiff, shall not be departed from.”

(emphasis supplied)

25. This rule that pleadings and proof must correspond, rests upon the principle that no party should be prejudiced by being taken by surprise by varying the case as originally Set up. In the words of Mahajan, J., in *Trojan and Co., Ltd. v. RM. N. N. Nagappa Chettier* reported in 1953 S.C.R. 789 (806). “*It is well settled that decision of a case cannot be based on grounds outside the pleadings of the parties and it is a case pleaded that has to be found.*”
26. The correct test as to when a plea of adverse possession, when not taken in the plaint, can be raised later on in appeal, was laid down by Calcutta High Court in *Nepen Bala Debi v. Siti Kanta Banerji* reported in 8 I.C. 41 in the following words:

“Where no case of acquisition of title by adverse possession is made in the plaint, nor is the question raised directly or indirectly in any of the issues, the plaintiff ought not to be allowed to succeed upon such a case. On the other hand, as pointed out by this court in the case of *Lilabati Misrain v. Bishun Chobey*, when the question reduces itself to one of law, upon facts admitted or proved beyond controversy, it is not only competent to the Court, but expedient in the interest of justice to entertain the plea of adverse possession, if such a case arises on the facts stated in the plaint and the defendant is not taken by surprise. The true test, therefore, to be applied to determine whether the

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*plea of title by adverse possession should be allowed to be urged though not explicitly raised in the plaint, is, how far the defendant is likely to be prejudiced if the point is permitted to be taken."*

(emphasis supplied)

27. Ordinarily, the question of adverse possession is one of fact, resting upon proof of numerous circumstances which go to establish the several elements, indicating adverse character of the possession. In certain cases, it may be a question of law, or, a mixed question of law and facts as, where the decision rests upon inferences to be drawn from facts which are admitted or established.
28. The determination of adverse possession depends upon sifting of facts and circumstances, indicative of adverse possession, and then, upon testing of the evidence in the light of the law applicable. The Appellate Court may allow the setting up of the plea of adverse possession for the first time in appeal provided, the facts on the record are sufficient to support it, and the opposite party is not taken by surprise, but otherwise, a declaration of title by adverse possession will not be given where the claim is not set out distinctly in the pleadings or in issues. In *Shiro Kumari Debi v. Gobind Shaw Tanti* reported in I.L.R. 2 Cal. 418, Markby J., observed at page 242, that where the question of 12 years' possession had not been properly raised either in the plaint or in the issues, and the defendant had no proper notice that such a point was going to be raised, it was not open to the lower appellate Court to declare in plaintiff's favour on the strength of the title which had not been alleged. Plaintiff's suit was dismissed.
29. In the case at hand if plea of adverse possession had been taken in the plaint, and if that plea had been traversed by the defendants and then proper issues framed, a heavy burden would have laid on the plaintiffs to lead evidence in support of their hostile claim and a corresponding opportunity of rebuttal would have been given by law to the defendants. In this case it is inconceivable that the question of adverse possession can become the subject- matter of adjudication on this record in the absence of proper plea, issue or proof.
30. The above discussion leads us to the only conclusion, and that is, that, unless the plea of adverse possession has been specifically

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raised in the pleadings, put in issue, and then cogent and convincing evidence is led on a multitude of points, and an opportunity to refute the case is made out by the plaintiff, and availed of by the defendant, the plea of adverse possession cannot be allowed to be flung as a surprise, on an unsuspecting defendant, for the first time in appeal.

31. In the result, this petition fails and is hereby dismissed.
32. Pending applications, if any, also stand disposed of.

*Result of the case:* Petition dismissed.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey