

(1996) 02 AP CK 0034

In the Andhra Pradesh High Court

Case No : Second Appeal No. 540 of 1988

Smt. Ahalya Bai

APPELLANT

Vs

Gangapur Shankaraiah and Others

RESPONDENT

Date of Decision : 19-02-1996

Acts Referred:

Evidence Act, 1872 — Section 110, 47, 67, 68
Limitation Act, 1963 — Article 65, 27
Registration Act, 1908 — Section 35
Specific Relief Act, 1963 — Section 34, 35

Citation : (1996) 4 ALT 922 : (1997) 3 CivCC 330

Hon'ble Judges : B.K. Somasekhara, J

Bench : Single Bench

Advocate : R. Subhash Reddy, for the Appellant; Nagabhushana Rao, for Y. Sivaramasastri, Y. Venkat Sastri and Y.N. Lohita, for the Respondent

Judgement

B.K. Somasekhara, J.—The appellant-defendant No. 1 in O.S.No. 13 of 1982 on the file of the learned District Munsif at Asifabad and appellant No. 1 in A.S. No. 14 of 1985 on the file of the learned Subordinate Judge, Asifabad, who lost her defence against the respondent-plaintiff in the said suit, has come up with this appeal. Respondents 2 to 4 are the defendants 2 to 4 in the suit.

2. The first respondent filed the suit for declaration that he is the owner of the suit land bearing S. No. 195 measuring Acs.7-11 cents and S.No. 198 measuring Acs.3-16 cents situated in Navagaon village described in the plaint schedule and the suit sketch map and for permanent injunction to restrain the defendants from interfering with his alleged possession and enjoyment of the suit land. He claimed to have perfected his title to the suit land by adverse possession for having been in possession for more than 12 years, alleged that D1 has been out of possession during such a period and "her name normally shown as pattedar," alleged her interference with his possession at the instigation of others, alleged that she was threatening him to evict from the suit land and he also alleged that she tried to take forcibly possession from him on 10-6-1982 and therefore he

had to file the suit for the said reliefs.

3. The first defendant denied the case of the plaintiff as above. She continues to be the owner of the suit land after the death of her husband, she was getting the land cultivated through the tenants till she permitted the plaintiff to cultivate the suit land on lease for seven years, he handed over possession to her after seven years and she cultivated the same thereafter, the plaintiff has no merit in the suit and that it may be dismissed with costs. The other defendants appeared to have not resisted the suit, but they supported the appellant- defendant No. 1.

4. The following issues were settled on the basis of the pleadings:

- "1. Whether the plaintiff is entitled for declaration of ownership of the suit land;
2. Whether the defendants have leased out the suit land to the plaintiff for a period of six years through a lease deed dated 11-5-1975;
3. Whether the plaintiff is entitled for permanent injunction as prayed for; and
4. To what relief?"

In the trial afforded to the parties, both ocular and documentary evidence was produced. The plaintiff examined himself as P.W.I and two witnesses as per P.Ws.2 and 3 and got marked Exs. A-1 to A-27 by way of documentary evidence. Defendant No. 1 examined herself as D.W.I and examined five witnesses as per D.Ws.2 to 6 respectively and got marked 11 documents as per Exs.B-1 to B-11 respectively. The learned Advocates for both sides advanced arguments in support of their respective contentions. Based on that, the learned District Munsif held issue Nos. 1 and 3 in favour of the plaintiff and issue No. 2 against the first defendant and accepted the case of the plaintiff and decreed the suit. On appeal, the learned Subordinate Judge agreed with the findings of the learned District Munsif and confirmed the judgment and decree and thereby dismissed the appeal with costs.

5. Mr. R. Subhash Reddy, learned Counsel for the appellant, on the basis of the grounds of appeal, has raised the following contentions challenging the judgment and decree of the Courts below:

1. The finding that the plaintiff has been in possession of the suit land continuously for a period of 20 years prior to suit is against the evidence in the case.
2. The legal inference based on the evidence in the case that the plaintiff perfected his title by adverse possession is wrong as the conduct of the plaintiff in conceding to the title of the 1st defendant as pattedar to the suit land is inconsistent with his plea of title by adverse possession.
3. The basis of the suit itself is defective as the plaintiff has come out with a case of perfecting title by adverse possession without giving necessary particulars and sufficient plea in the plaint and without leading sufficient evidence in regard to

the same.

4. The learned Judges of the Courts below have totally ignored the facts and circumstances of the case showing that the plaintiff had any animus in regard to the alleged adverse possession as all along he knew that the first defendant is the pattedar and he did not choose to assert it throughout particularly when he had an opportunity to do when he filed the declarations before the Land Reforms Tribunal and when he filed the declarations omitting to mention that he is in possession of the suit land having perfected the title by adverse possession.

5. The learned Judges of the Courts below are in error in disbelieving the case of the first defendant that the suit land was leased out to the plaintiff under the lease deed Ex.B-1 and that although the proof of the same is accepted by accepting the report of the Hand-Writing Expert C.W.I, the finding to the contrary is opposed to the evidence.

6. The Courts below erred in law in ignoring the fundamentals about the manner and mode of proof of plea of adverse possession by a party setting up against the real owner.

7. The Courts below committed serious error of law in giving a declaration of the title of the plaintiff to the suit land merely on the basis of alleged proof of possession for a long time without examining whether it was a fit case to exercise the discretion to give such a declaration while dealing with the matter in equity Court.

8. The Judgments and decrees of the Courts below suffer from serious infirmities on both law and facts and are liable to be set aside.

6. Mr. Nagabhushana Rao, learned Advocate appearing for Respondent No. 1 on behalf of Mr. Y.N. Lohita while trying to repel the contentions of Mr. Subhash Reddy has specifically contended that the findings and the decision of the Courts below are totally justified in view of the clear evidence in the case about the continuous possession of the plaintiff, the open and hostile conduct of the plaintiff as against the first defendant in enjoying the suit land for a long time, the perfection of title by adverse possession of the plaintiff to the suit land with sufficient evidence and the failure of the first defendant to prove the lease of the suit land in favour of the plaintiff in view of the doubtful evidence both from Ex.B-1 and the testimony of the first defendant and her witnesses. The suit was actually maintainable in the manner initiated, most of the findings given by the learned Judges were purely questions of fact which do not warrant interference by this Court in the second appeal although forming ingredients of the plea of adverse possession perfected by adverse title, the reasons reasonably given by the learned trial Judge and the appellate Judge are based upon the material on record and discretionary relief as claimed by the plaintiff, having been exercised properly by the Courts below based on material with adequate reasons, this Court cannot interfere with the same unless for strong reasons which are not available and the judgments and the decrees of the Courts below deserve to be

confirmed.

7. Mr. Nagabhushana Rao, learned Advocate has raised one more contention as a pure question of law that the first defendant failed to institute a suit for possession of the suit land within 12 years atleast from the date of the suit of the plaintiff specifically denying her title and setting up his perfection of the title by adverse possession and this is sufficient to dismiss the appeal as her remedy is totally barred by virtue of Section 27 and Article 65 of the Limitation Act. For this Mr. Subhash Reddy replies with contention that such a question is alien to the suit and no finding can be given in regard to the same as it is for the plaintiff to prove that he is entitled to get such reliefs and no finding against the first defendant can be given to bar her remedies if any in future in accordance with law.

8. Therefore, the points for determination in this appeal are dear in view of the rival contentions stated above although they need not be framed physically.

9. Admittedly the first defendant is the pattedar of the suit land. Her husband was the original owner. After his death, she succeeded to her husband's right and title to the suit land. It is not the case of the plaintiff that he had any independent title to the suit land till even when he is said to have entered into possession of the suit land when it was lying fallow. This is a simple and pure case of acquisition of title by adverse possession having been in possession for over 12 years and extending upto 20 years prior to the suit thereby extinguishing the title of the first defendant to the suit land. Both the Courts below have found that the plaintiff has been in possession of the suit land for over 12 years extending upto 20 years prior to the date of suit and that he was cultivating the same. They have also found that the first defendant was not in possession of the suit land for the said period and the case of the first defendant that the suit land was let out to the plaintiff for a period of seven years, that he handed over possession to the first defendant and she cultivated it thereafter, are found to be not established. As rightly pointed out by Mr. Nagabhushan Rao, these questions are pure facts and the findings on such questions are pure findings on facts on issue and therefore, this Court may not be justified in interfering with the same. In fact, the learned Judges have given adequate reasons as to how those facts are clearly established.

10. The name of the plaintiff is found in cultivator's column of the pahanies Exs. A-1 to A-15 except in Ex. A-3 for the year 1969-70. He has also paid cist to the suit land under receipts Exs.A-16 to A-27. D.W.2 the patwari of the village has confirmed that the plaintiff has paid the cist as per Exs.A-16 to A-27 and that he has been in possession of the suit land for over 20 years. The entry of the name of the first defendant only in one pahani Ex. A-3 has been found to be doubtful and even D.W.2 is not able to explain the same. The learned Judges have found that one Gangaram, Sarpanch of Navagoan village is the neighbour of the first defendant and it is felt that he must be responsible for creating such a document before the Village Officer like D.W.2. The ocular testimony of the witnesses

P.Ws.2 and 3 who are the holders of the neighbouring lands to the suit land are found to be corroborating the testimony of the, plaintiff regarding his possession of the suit land for such a period. The testimony of the defendant's witnesses in this regard is found to be not reliable. This Court finds no reason to disagree with the reasoning of the learned Judges of the Courts below as they are based upon the clear materials as stated above.

11. Regarding the lease of the suit land to the plaintiff, the testimony of the first defendant-appellant is sought to be supported by the document Ex.B-1 lease deed and the testimony of her witnesses, D.W.3 the scribe and D.W.4 a local person and D.W.5 the fourth defendant to speak to the possession of the first defendant after the plaintiff was said to have handed over the possessor of the suit land on the expiry of the seven year period of the lease. The plaintiff not only denied Ex.B-1, but also the signature thereon. It was subjected to the opinion of the hand-writing expert C.W.I. He, on examining the disputed signature on Ex.B-2 with the admitted signatures A & B of the plaintiff, came to the conclusion that both are signed by the same person. In other words, he gave a positive opinion that the disputed signature D corresponds to the standard signatures "A" "B" "C. The plaintiff denied the signature. The learned Subordinate Judge accepting such a report proving the signature of the plaintiff on Ex.B-1, still held that the plaintiff has not executed Ex.B-1. Both the Courts below have dealt with the question of lease set up by the first defendant both on an assessment of Ex.B-1 and the oral evidence in the case. They have given adequate reasons as to why they are rejecting such a theory. They have held that although the signature on Ex.B-1 is proved to be that of the plaintiff, the execution of the document is not actually proved. That appears to be the correct legal position. Sections 47 and 67 of the Evidence Act deal with proof of signature and hand-writing of person alleged to have signed or written on a document produced. Section 68 of the said Act deals with the proof of execution of document required by law to be attested. Ex.B-1 lease deed is not required by law to be attested. However, the proof of execution contemplated therein applied equally to the proof of execution of any document in the normal rule of evidence. The proof of execution of a document in law has a definite parameter. "Executed" means completed. "Execution" is, when applied to a document, the last act or series of acts, which completes it. It might be defined as formal completion. Thus, execution of deeds is the signing, sealing and delivering of them in the presence of witnesses..... Execution consists in signing a document written out and read over and understood and does not consist of merely signing a name upon a blank sheet of paper. To be executed, a document must be in existence; where there is no document in existence, there can be no execution. "Execution" does not mean merely signing. It should be accompanied by the intention to give effect and operation to the instrument signed. The ordinary meaning of executing a document is fairly clear that it is signing a document as a consenting party thereto (P. 673 Sarkar on Evidence - 13th Edition). The man whose name has been put to the document as evidencing his assent thereto is

the executant for the purposes of Section 35 of the Registration Act. Therefore, where only signature was proved on Ex.B-1 through the evidence of the handwriting expert CW.1 as rightly held by the learned Judges, it meant execution of the document. The other evidence regarding the execution has failed to satisfy the conscience of the Court. The evidence of the first defendant and her witnesses regarding Ex.B-1 is found to be contradictory and doubtful. The writings in the document are found to be in different pens although the expressions of the witnesses showed that same pen was used. More than all, rightly or wrongly the first defendant herself stated that Ex.B-1 came into existence after she received the suit summons and having been advised by somebody that it was better to have such a document to support her case. These materials naturally influenced the learned Judges of the Courts below judiciously to reject the theory of lease of the suit land to the plaintiff. The handing over of possession by the plaintiff to the first defendant is also found to be doubtful because the entries in the pahanies did not support it except the doubtful entry in one of the documents. The conduct of the plaintiff in entering into Ex.B-1 when he was pursuing the suit with such a plea so vigorously as against the first defendant and as a whole, the materials on record, did not satisfy the Court regarding the proof of the lease set up by Ex.B-1. This Court thus confirms such findings of fact having no reason to differ on the same. It may be necessary to point out at this stage only that the first defendant was not cultivating the suit land at any time and she was getting it cultivated through others called tenants. To that extent, the case of the plaintiff has to be judged while determining the other questions.

12. The Courts below have with unstinted expressions have declared that the plaintiff has perfected his title to the suit land by adverse possession having been in possession continuously for over 12 years extending upto 20 years prior to the date of suit. However, the learned Subordinate Judge has tried to improve it by saying that such a possession is open to the knowledge of the first defendant and her close persons including D3 who examined himself as D. W .4. Therefore, the law in relation to the adverse possession has been positively held in favour of the plaintiff. Before probing into such a question and the correctness of the decision of the Courts below having been presented with controversial arguments in this regard, this Court feels it necessary to record the fundamentals about the law of adverse possession, the proof and the consequences of a person being in possession of the property belonging to the other person in such circumstances.

13. The law of adverse possession is well known and appears to be simple, but more often than not applied to the facts of the case wrongly or at least incorrectly. As rightly proposed by Mr. Subhash Reddy, learned advocate for the appellant, the learned Judges of the Courts below appear to have been terribly impressed with the long possession of the plaintiff regarding suit land. In whatever manner the ingredients of adverse possession are explained, it has three popular expressions or principles found in the maxim "nec vi, nec clam and nec precario". In P. Lakshmi Reddy Vs. L. Lakshmi Reddy, it means that such a

possession should be peaceful, open and continuous. The possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. (Pages 1470 and 1471 Vol. II, 9m Edition of U.N. Mitra's Law of Limitation). The true implication of the concept is that adverse possession is essentially a hostile possession, possession in denial of the title of the true owner. It includes possession held by a defendant in practical contravention of the plaintiff's rights while the plaintiff is standing by. It has been variously described: (a) it is possession of another's land with intent to hold and claim it as his own; it must commence in wrong and must be maintained against right; (b) it is possession with animus to hold the property in the possessor's own right and against the right of the rightful owner; (c) it is possession hostile and exclusive; (d) it is an invasion of the title; (e) it is wrongful entry into possession. (Page 1466 and 1467 of Mitra's supra). It has been consistently held that the possession for any length of time of a property belonging to one person by another person would not by itself constitute an adverse possession. Therefore, it has been held that "where there is no denial of the owner's title the possession of the defendant is not adverse to the owner. Possession of one person consistent and reconcilable with the title of another cannot be adverse to the latter. Possession by one who had admitted the title of the owner is to be deemed to be on behalf of the owner and not adversely to him. (Page 1467 of Mitra's supra). The conduct of the plaintiff who has been found to be in possession of the suit land for over 12 years and to the extent of 20 years has to be judged to know his animus in regard to the same. In other words, the conduct has to be judged whether he positively had the animus to hold the possession of the suit land by himself adverse to the title of the first defendant and declared it to the world including the first defendant to make it hostile. He ought to have done it when he had an opportunity. These expressions have a serious bearing in law. Because the law presumes that possession follows title and such a benefit is available to the first defendant. In other words, during the continuance of the title in favour of a person if any other person holds possession, the presumption appears that it should be for and on behalf of the owner. It is true that such a concept may not be within the meaning of Section 110 of the Evidence Act, but has been brought within the implications of Article 65 of the Limitation Act. But still the two concepts are not conflicting with each other. It has a bearing on the question of the degree of burden of proof. A person knowing the title or ownership of a person in regard to the land over which he sets up adverse possession, ought to know that he must set up adverse right in regard to possession, so that he will be declaring his animus or intention to be in adverse possession conflicting with the title of the real owner. Then only the true meaning of adverse possession can be brought out to complete the concept of adverse possession, because the consequences are very serious. It extinguishes the right of the real owner and creates a right in the trespasser. The Courts should be too slow and cautious in examining the plea of adverse possession "on as it is bound to destroy the title and right of the real owner. The plaintiff no doubt entered into possession and continued, to be in possession of the suit land for a

long time. The first defendant has had knowledge of it. Her not being in actual possession would not suppress her strength. So far as she is concerned, whether the plaintiff or anybody else, it was only on her behalf as she could not have cultivated the suit land physically at any time. In other words, to her mind or animus, the plaintiff's possession was not adverse or hostile. Therefore, it was for the plaintiff to clearly demonstrate that he was acting hostile in his possession to the first defendant. Admittedly, he had a clear and best opportunity to snatch when he had to make a declaration before the Land Reforms Tribunal under the relevant provisions of the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act. Exs.B-5 and B-6 are such statements admittedly filed by the plaintiff and his brother. Ex.B-7 is the statement of the plaintiff before the Additional Revenue Divisional Officer, Land Reforms. Ex.B-8 is the order of the Land Reforms Tribunal dated 4-1-1977 on the declarations filed by the plaintiff. The learned Subordinate Judge has found that the plaintiff has failed to include the suit land in his declaration before the Land Reforms Tribunal nor the Tribunal has passed any order treating the land as in possession of the plaintiff for the purpose of the Act. Ex.B-5 is dated 10-4-1975. The date of the suit is 17-6-1982. In other words, the plaintiff did not assert or adversely act against the interests of the first defendant by setting his own right to the suit land by adverse possession. The declaration of the plaintiff as per Ex.B-5 and his statement as per Ex.B-7 and the order of the Tribunal as per Ex.B-8 being part of the public records, would amount to public act to the notice of the public about the animus of the plaintiff relating to the suit land. He never showed any animus in the year 1975 that he was having hostile intent or animus against the first defendant in holding the possession of the suit land adverse to her interest. This cuts at the root of one of the main ingredients of adverse possession set up by the plaintiff in a suit seeking declaration of title. The learned Judges of the Courts below have totally failed to examine this important legal position and have obviously committed a very serious error of law more than leaving infirmity regarding the substantial questions of law, for it has been the settled law that the hostile character of the possession is judged by the animus of the persons setting up of adverse possession.

14. Mr. Subhash Reddy, learned Advocate is right in contending that it was necessary for the plaintiff to establish as to when his adverse possession commenced. The part of the law of adverse possession in this regard appears to be that 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 his possession was known to the other party, (d) how long his possession had continued, and (e) whether his possession was open and undisturbed. (P.1473, U.N. Mitra's Law of Adverse possession, Vol II supra) Although the ingredients (b) and (d) are satisfied in this case, the other ingredients are not satisfied. However, in his testimony, the plaintiff has stated that he occupied the land in the year 1962. That may not totally cure the defect in the plea as that would be a material fact which ought to be pleaded in the

plaint as a serious question of title by adverse possession was required to be considered in the case. (P. 1473 in U.N. Mitra's supra).

15. Mr. Nagabhushana Rao, learned Advocate has presented a very interesting and serious question that having due regard to the implications of Section 22 (sic. 27) of the Limitation Act, notwithstanding Article 65 of the said Act, the plaintiff having been in possession for over 12 years of statutory period as a part of adverse possession, admittedly the first defendant having not filed a suit for possession within 12 years from the date when the possession became adverse atleast from the date of serving of the summons or before filing the written statement and the statutory period of 12 years having been expired from that date, the right, title and interest of the first defendant over the suit land has totally come to an end by extinction. Mr. Reddy contends that such a rule may not be open for consideration muchless applied to the facts of this case. The Court is not determining whether the title of the first defendant has to come an end by applying Article 65 of the Limitation Act or Section 27 of the said Act, but it is examining the title of the plaintiff to give a declaration or not in the suit as the basis of the suit is title. The question is not whether the plaintiff has acquired title by adverse possession or otherwise, but the question is whether he has got the title at all as the relief claimed is one u/s 34 of the Specific Relief Act, however subject to the powers u/s 9 of the Code of Civil Procedure. Mr. Nagabhushana Rao may not be totally wrong in postulating such a principle of law. But that may not be open to him in the suit. His second limb of argument requires to be commenced first and the first limb may be considered later. Insofar as the implication of Section 27 of the Act is concerned, the learned Advocate is correct. Because at the determination of the period hereby limited under the Act to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. In the opinion of this Court, Section 27 and Article 65 or any other relevant Article for the purpose of extending the relief should be read together and an isolated reading of Section 27 may not give real and full meaning as it prescribes the period of limitation regulated in the relevant schedule of the Act, viz., (For possession of immovable property or any interest therein based on title, the period of limitation is 12 years from the time when the possession of the defendant becomes adverse to the plaintiff.) and declares that if any suit is not filed within such prescribed period, the right of such a person to the property shall be extinguished. But here is a case where we are concerned with finding out whether the plaintiff has title to the suit land or a right to the suit land to examine whether any relief can be granted for declaration and permanent injunction in accordance with Sections 34 and 35 of the Specific Relief Act. Therein we have to only examine whether the suit is within the period of limitation for such reliefs and the Court will not examine whether the right of the first defendant is within the period of limitation and whether it has extinguished. The probe into such a matter appears to be a converse and inverse process. It cannot be varied unless an occasion arises. It is fundamental that the very institution of the suit arrests the period of adverse

possession of the defendant. A decree in favour of the plaintiff would relate back to the date of the suit and the plaintiff will be entitled to possession irrespective of the time spent in the suit and execution proceedings. (Page 728, Volume 1 of Mitra's supra). Therefore, just because the plaintiff filed the suit denying the title of the first defendant and setting up his own title and adverse possession, that will not support the period of limitation of the first defendant to suffer a decree in the present suit. As to what will happen to her right prior to the present suit will be a matter for decision in any other suit or proceeding if instituted by the first defendant and the Court will consider and decide the matter.

16. Now coming to the first limb of the argument of Mr. Nagabhushan Rao, the law appears to be not very much in his favour. Although Section 27 of the Act has a legal bearing in jurisprudence about the creation of right in one person and the extinction of right in other person, it is subject to the prescribed limitations in the schedule of the Act when a proceeding is initiated by a person to establish his right. The failure of the first defendant to file a suit to get the possession of the suit land within the statutory period of limitation under Article 65 of the Limitation Act or any other Article may not by itself create a right in favour of the plaintiff in a case like this wherein he has to establish his own right or title to the suit property. Mr. Nagabhushan Rao has depended upon the latest pronouncement of the Supreme Court in Parsinni (Dead) by Lrs. and Others Vs. Sukhi and Others, to support his contention that having satisfied all the requirements of adverse possession as has been held in the ruling, there is no escape for the first defendant to suffer the decree as has been rendered by the Courts below. The situation has no doubt supported the learned Advocate in regard to the requirements of adverse possession to be established regarding the facts which are almost similar to the present case except that such a plea was being considered in the light of the plea of adverse possession in the case and not in the light of the effect of Section 27 of the Limitation Act. The matter on hand requires more elaboration in regard to such a postulation which has sincerely been set up by Mr. Nagabhushan Rao which in the opinion of this Court if rightly examined may not be available to the plaintiff in this case. In the opinion of this Court, strictly speaking, there may not be any case wherein the title can be set up or declared based on merely adverse possession. It will be strictly a suit to establish the title by perfecting it by adverse possession, which is not correct expression in law. This Court has an occasion to deal with the question in detail in Yarlagadda Venkakka Choudary (dead) and Another Vs. Daggubati Lakshminarayana (dead) and Others, . Therein the distinction between the doctrines of adverse possession" and "prescription" has been dealt with. Nothing more than repetition may be useful in the context. To read thus:

"The legal and lucid distinction between the doctrines of "adverse possession" and "prescription" appears to be well established. "Adverse possession" means:

The enjoyment of land, or such estate as lies in grant, under such circumstances as indicate that such enjoyment has been commenced and continued under an

assertion or colour of right on the part of the possessor.....

The statute of limitation is the source of title by adverse possession.....

The adverse possession must be actual, continued, visible, notorious, distinct and hostile.

(Pages 152 and 153 of Bouvier's Law Dictionary Vol. I, 3rd Revision 1914)

"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 title.

Possession is not held to be adverse if it can be referred to a lawful title. The person setting up adverse possession may have been holding under the rightful owner's title viz., trustees, guardians, bailiffs or agents. Such persons cannot set up adverse possession."

(Pages 50 and 51 of T.M. Mukherjee's Law Lexicon 1971 1 Edn 50)

"Prescription"

Prescription may be defined as the effect of lapse of time in creating and destroying rights; it is the operation of time as a vestitive fact. It is of two kinds viz., (1) positive or acquisitive prescription and (2) negative or extinctive prescription. The former is the creation of a right, the latter is the destruction of one, by the lapse of time. An example of the former is the acquisition of a right of way by the de facto use of it for twenty years.... Lapse of time therefore, has two opposite effects. In positive prescription it is a title of right, but in negative prescription it is a divestitive fact. Whether it shall operate in the one way or in the other depends on whether it is or is not accompanied by possession. Positive prescription is the investitive operation of lapse of time with possession, while negative prescription is the divestitive operation of lapse of time without possession. Long possession creates rights, and long want of possession destroys them. If a person possesses an easement for twenty years without owning it, he begins at the end of that period to own as well as to possess it. Conversely, if a person owns land for twelve years without possessing it, he ceases on the termination of that period either to own or to possess it. In both forms of prescription, fact and right, possession and ownership, tend to coincidence. Ex facto oritur jus. If the root of fact is destroyed, the right growing out of it withers and dies in course of time. If the fact is present, the right in the fullness of time proceed from it."

(Page 435 of Salmond on Jurisprudence, 12th Edn. by P.J. Fitzgerald.)

Therefore, some times it is said that adverse possession is a converse of right and prescribes vis-a-vis is also stated to be true. Judged in the light of the settled principles of law stated above, this is a clear case of title by prescriptive right whereby the plaintiff is said to have acquired the title of the suit property

by enjoying it over the statutory period and whereby the right and title of the first defendant in the suit land is stated to have become extinct. To conclude, the law in that context may not embrace a suit merely based on adverse possession or to call it a title by adverse possession. Such a defence is open to the first defendant by virtue of Article 65 of the Limitation Act to set up against the owner seeking the relief of possession based on title against a person in adverse possession. But law is thus distinguishable and distinct. Thus both on such a legal concept and the facts and circumstances of this case, this was not a fit case to accept the title of the plaintiff having been established, as pleaded by him. The findings of the learned Judges of the Courts below do not stand to the legal test as stated supra.

17. Now the question is whether such a declaration of title to the plaintiff could have been granted or can be granted even assuming that he had established such a plea. The region of the relief lies u/s 34 of the Specific Relief Act. Patently, the relief of declaration of title is a specific relief under the said provision which is being dealt with by the Equity Court. Section 34 of the Specific Relief Act is so clear that any person entitled to any legal character or to any right as to any property, may institute a suit against any person denying or interested to deny. So far as the right of a party to such a suit, there is no bar; but when such a thing occurs, it is for the Court to decide whether to grant such a relief or not. The expressions in the provision "the Court may in its discretion make therein a declaration that he is so entitled.". It has been consistently held uptill date that such a relief to be granted or rejected would be entirely within the discretion of the Court. To mean that it cannot be automatic. The Court will decide in its discretion whether such a relief can be granted or not. For justifiable reasons, the Court may withhold such a discretion. However, it may be hastened to add that such a discretion should be exercised in accordance with the established principles of law and should not be arbitrary or capricious. Therefore, the question is whether the plaintiff is entitled to get such a declaration of title based on such a case of long possession if not adverse possession. At the very inception, the position is that of a trespasser. It was also not asserted at any point of time. The plaintiff has the knowledge throughout that the first defendant is the pattedar and a widow having got the property from her husband. As rightly pointed out by Mr. Subhash Reddy, although his (plaintiff's) signature on Ex.B-1 is established to be his, he has made bold to deny it wherein he could have, by accepting the signature, would have challenged the genuineness of the document, as has been found by the Courts consistently. In effect, the learned Advocate states that the plaintiff has not come to the Court with dean hands. Not to draw the inference, but logical conclusion as above, this Court by judging the circumstances as a whole, feels that it is not a case wherein the relief of declaration can be granted to the plaintiff under the circumstances.

18. Now the question is whether the plaintiff is entitled to the relief of permanent injunction having established that he has been in possession of the suit land for a long time to the knowledge of the first defendant. The finding is clear and the

conduct of the first defendant is so clear that she has never questioned the conduct of the plaintiff in either being in possession of the suit land or his cultivating it for such a long time. Her theory of lease and she coming into possession subsequently is found to be not established. She has never chosen to dispossess the plaintiff in accordance with law. She has suffered and is suffering his possession for the best reasons known to her. Therefore, strictly speaking, the possession of the plaintiff may not be unlawful as such to throw him out except in accordance with law. He has basis to be in possession although not sufficient to get the relief of declaration of title. The law appears to be that ordinarily limitation extinguishes the remedy and does not extinguish the right itself. Section 27 postulates an exception to the principle that the expiry of the period prescribed for the commencement of an action results in barring the remedy though not in extinguishment of the right or title. (Page 726, Vol. I of Mitra's supra). In other words, in view of the true implication of Section 27, although there may be a bar for the remedy for the plaintiff if ultimately decided in the proper proceedings that itself may not extinguish the right or title for the purpose of a remedy to be granted in a case like this. Such question should be kept open to be agitated by the parties in proper proceedings, if any, initiated.

19. The learned Judges of the Courts below have not gone into the details of intricacies of law as stated above and have lent themselves to the wrong conclusions in decreeing the suit for declaration of title as prayed for. To that extent, the judgment and decree deserve to be set aside. However the relief of permanent injunction granted by the learned District Munsif and confirmed by the Subordinate Judge deserves to be confirmed.

20. For the reasons afforded above, the appeal is partly allowed. The judgments and decrees of the Courts below are set aside with regard to the relief of declaration of title of the plaintiff to the suit land, but confirmed with regard to the relief of permanent injunction. In the peculiar circumstances of the case, the parties shall bear their respective costs throughout.