
(2013) 02 AHC CK 0080

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No"s. 6612, 6606, 6607, 6609 and 6614 of 1990

State of U.P.

APPELLANT

Vs

Ist Additional District Judge and Others

RESPONDENT

Date of Decision : 21-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 66
Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 4
Transfer of Property Act, 1882 — Section 23, 35

Citation : (2013) 5 ADJ 203 : (2013) 6 ALJ 316

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Zafaryab Jilani and Zainuddin Siddiqui, C.S.C, for the Appellant;
Kunwar Gulab Singh, Manish Chaudhary, Pankaj Srivastava and Manish Mathur,
for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—Heard Sri Zafaryab Jilani, learned Additional Advocate General assisted by Sri Zainuddin Siddiqui, Advocate for the petitioner. None has appeared for the respondent in Writ Petition No. 6612 of 1990 while in others Sri Manish and Pankaj Srivastava have appeared. Since these cases have been listed in the category of old cases, I proceed to decide the matter. Since common questions of facts and law are involved in all these writ petitions, therefore, as requested and agreed by learned counsel for the parties, the same are being decided by this common judgment. However, for the purpose of facts, writ petition No. 6612 of 1990 is being treated as leading case and pleadings are being referred therefrom.

2. The proceedings were initiated by petitioner-State for ejectment of respondent No. 3 from accommodation in question under the provisions of U.P. Public Premises (Eviction of Unauthorised Occupants) Act, 1972 (hereinafter referred to as "Act, 1972").

3. Respondent No. 3 took objection that he has perfected his rights of ownership by application of principle of adverse possession i.e. Prescription and, therefore, he cannot be evicted from premises in dispute. The said objection has been affirmed by Prescribed Authority vide order dated 18.1.1983 and application of State was rejected. The petitioner's appeal has also been rejected by 1st Additional District Judge, Lucknow vide judgment dated 10th May, 1995, hence this writ petition. The petitioner has sought a writ of certiorari for quashing both the aforesaid orders. The facts in other connected writ petitions are similar.

4. It is basically contended that respondent's own case was that he occupied land in question as a Raiyat of erstwhile owner Raja Dera. The pleadings lacked necessary facts to attract plea of adverse possession and without looking into this aspect, impugned orders have been passed, which are liable to be set aside. It is also contended that such a serious issue, involving civil rights could not have been considered and adjudicated by Prescribed Authority in summary proceedings under Act, 1972.

5. Sri Jilani, learned Additional Advocate General contended, that if Prescribed Authority found that there was a title dispute in respect to property in question, it ought to have returned application or rejected it, directing petitioner to approach civil Court but issue of title on the basis of adverse possession could not have been decided by the authorities under the proceedings in Act, 1972, which are summary in nature.

6. In my view, the two issues, need be considered in this matter are:

(i) Whether Prescribed Authority exercising its jurisdiction under Act, 1972 can enter into serious question of title?

(ii) Whether issue of title raised by respondents in the case in hand conform to the requisite pleadings and whether prerequisites in law to attract principle of adverse possession has been looked into by Courts below in passing impugned orders, declaring that title of respondent has perfected on the ground of adverse possession.

7. Before entering into discussion and adjudication on the aforesaid issues, it would be necessary to look into the facts, in brief, giving rise to the present dispute.

8. The Estate Officer (Rajya Sampati Adhikari) filed an application dated 11th September, 1980 before Prescribed Authority u/s 4 of Act, 1972 for damages and eviction of opposite party(s).

9. The land in dispute formed part of the building and land appurtenant thereto, known as Ahatha Raja Dera, Kothi Lalbagh, Lucknow (hereinafter referred to as "property"). The entire property was sold by Raja Jagdish Pratap Sahi, Dera Estate, Sultanpur vide sale deed dated 15.6.1963 to Praveen Bhawan Nirman Sahkari Samiti. At the relevant time, Raja Jagdish Pratap Sahi, Son of Raja Auadhendra Pratap Sahi was the owner of said property and he executed the

aforesaid sale deed. Subsequently, aforesaid property was purchased by Medical Department of U.P. government from Praveen Bhawan Nirman Sahkari Samiti vide sale deed dated 15.6.1965. The State Government internally transferred the property to Estate Department for management vide G.O. dated 13.10.1977. The opposite party No. 3 is said to be the tenant of Raja Dera. The property having stood transferred to State, became public property, hence his tenancy came to an end since no allotment order was issued to him. Therefore, application dated 11.9.1980 was filed before Prescribed Authority u/s 4 of Act, 1972, claiming damages and eviction of opposite party No. 3.

10. It was contested by opposite party No. 3 alleging that his forefather and now he is in possession of disputed land, measuring about 25.19 sq. m., over the last 60 years, and has matured his title by adverse possession. In his objection dated 3.10.1980, pleadings in respect to adverse possession contained in para 4, 5 and 7 read as under:

4. That the said plot of land is in occupation of applicant opposite party's father and after his death the applicant for more than 60 years, without interference from any body, either Raja Saheb or any other authority and has acquired full ownership rights by adverse possession.

5. That the applicant or anybody is not authorised to evict the applicant-opposite party.

7. That on 24.9.55 Dy. Commissioner gave notice for acquisition, and the rights of the opp. Parties-applicants were recognised and the proceedings dropped.

11. The Prescribed Authority passed order dated 18.1.1983. Referring to the claim set up by opposite party No. 3 that his ancestor and he are in possession of disputed property for the last more than sixty years, without interruption by any person, he said, since this fact could not be shown to be incorrect by applicant-State, therefore he (respondent No. 3) matured his title. According to him, the respondent No. 3 had already perfected his rights and title, before the land could be transferred by Raja Dera, the erstwhile owner to Praveen Bhawan Nirman Sahkari Samiti in 1963 and transfer of property in dispute to above Samiti was incompetent and infructuous. That being so, respondent No. 3 is not an unauthorised occupant. The land is not a "public premises". Hence he (Prescribed Authority) had no jurisdiction to try the matter. Accordingly, it (Prescribed Authority) dismissed petitioner's application.

12. The matter was taken up in appeal and Appellate Court i.e. 1st Additional District Judge, Lucknow dismissed petitioner's appeal No. 156 of 1983 vide judgment dated 10th May, 1989, confirming the view taken by Prescribed Authority.

13. Besides other, Appellate Court has also gone into the question that original sale deed was not placed before the Court, hence appellant State failed to prove ownership and occupation of property in dispute. For accepting the case set up

by respondent No. 3, Appellate Court said that he (respondent No. 3) has filed his own affidavit in support of the case, stating that his father Ram Narain was in continuous possession of property in dispute for more than 60 years within the knowledge of owner Raja Dera and constructions were made by incurring expenses of his own. It, therefore, held that occupation by respondent No. 3 is proved in respect to disputed land which was owned by Raja Jagdish Pratap Sahi. The father of respondent died on 4.8.1975 whereafter respondent No. 3 and his two brothers are continuing in possession of the disputed land. No rent was ever paid to Raja Jagdish Pratap Sahi by respondent No. 3 or his father. On the date of execution of sale deed dated 15.6.1963, ownership of disputed land was already acquired by respondent No. 3's father by adverse possession. Raja Dera having lost his title and ownership right on disputed land in 1963 itself, could not have transferred aforesaid land to anyone.

14. For the purpose of present dispute, I presume that factum about possession of land in dispute by respondent No. 3 for the last 60 years and more as correct since there is no otherwise material on record to take a different view. The bigger but substantial question, yet would be, whether this by itself would satisfy plea of "adverse possession" in the case in hand.

15. Now, I proceed to take up the two issues as formulated above.

16. Section 4 of Act, 1972 says, the Prescribed Authority, either of its own or on an application or report received on behalf of State Government or the corporate authority, i.e. a body as defined u/s 2(a) of Act, 1972, if is of the opinion that any person(s) is/are in unauthorised occupation of any public premises and he/they should be evicted, the prescribed authority shall issue a notice in writing, in the manner, as provided, calling upon all person(s) to show-cause why an order of eviction should not be made.

17. After issuing notice and receiving reply, if Prescribed Authority is satisfied that public premises is in unauthorised occupation, it shall pass an order of eviction recording reasons.

18. The provision(s) is/are *pari materia* to the provisions contained in the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as "Act, 1971") which is an Act of Parliament; and, certain similar enactments of different other States.

19. Whether substantive rights of the parties with respect to title, ownership etc. to a property claimed to be a "public premises" can be determined by Prescribed Authority under the special enactment like Act 1971, providing a summary procedure for eviction of an unauthorised occupant from public premises. A *pari materia* provision came to be considered by Apex Court in Government of Andhra Pradesh Vs. Thummala Krishna Rao and Another, . Section 6 and 7 of Andhra Pradesh Land Encroachment Act, 1905 (in short "Act 1905") was up for consideration before the Court. It held that provisions show that summary remedy for eviction can be resorted to by the Government only against persons

who are unauthorised occupant of any land, which is the property of the Government. In respect to such property, obviously, there should be no doubt, difficulty or dispute about title of Government and in such a case, Government would be free to take recourse to summary remedy of eviction u/s 6 of Act, 1905. Having said so, the Court further held:

If there is a bona fide dispute regarding the title of the Government to any property, the Government cannot take a unilateral decision in its own favour that the property belong to it and on the basis of such decision take recourse to the summary remedy provided by Section 6 for evicting the person who is in possession of the property under a bona fide claim or title in the instant case, there "unquestionably a genuine dispute between the State Government and the respondents as to whether the three plots of land were the subject-matter of acquisition proceeding taken by the then Government of Hyderabad and whether the Osmania University, for whose benefit the plots are alleged to have been acquired, had lost title to the property by operation of the law of limitation. The suit filed by University was dismissed on the ground of limitation, inter alia, since Nawab Habibuddin was found to have encroached on the property more than twelve years before the date of the suit and the University was not in possession of the property at any time within that period. Having failed in the suit, the University activated the Government to evict the Nawab and his transferees summarily, which seems to us impermissible. The respondents have a bona fide claim to litigate and they cannot be evicted save by the due process of law. The summary remedy prescribed by Section 6 is not the kind of legal process which is suited to an adjudication of complicated question of title. That procedure is, therefore, not the due process of law for evicting the respondents.

20. Having said so, the Court in paras 9 and 10 of the judgment further clarified as under:

9....What is relevant for the decision of that question is more the nature of the property on which the encroachment is alleged to have been committed and the consideration whether the claim of the occupant is bona fide. Facts which raise a bona fide dispute of title between the Government and the occupant must be adjudicated upon by the ordinary Courts of law. The Government cannot decide such questions unilaterally in its own favour and evict any person summarily on the basis of such decision. But duration of occupation is relevant in the sense that a person who is in occupation of a property openly for an appreciable length of time can be taken, prima facie, to have a bona fide claim to the property requiring an impartial adjudication according to the established procedure of law.

10....The question as to whether the title to the property came to be vested in the Government as a result of acquisition and the further question whether the Nawab encroached upon that property thereafter and perfected his title by adverse possession must be decided in a properly constituted suit. May be, that the Government may succeed in establishing its title to the property but, until that is done, the respondents cannot be evicted summarily.

21. In *Express Newspapers Pvt. Ltd. and Others Vs. Union of India (UOI) and Others*, a question arose whether a breach of contract of the lease or any statute can be properly adjudicated and decided by an authority exercising summary jurisdiction. Hon''ble R.B. Misra J while concurring with Hon''ble A.P. Sen, J opined that, question whether there was a breach of contract of lease or of any statute, can be properly decided by taking detailed evidence involving examination and cross examination of witness(es). Such import cannot be properly decided in a summary manner.

22. Besides Apex Court, there are some authorities of various High Courts also taking a similar view. A Division Bench of Patna High Court in *Bhartiya Hotel and Others Vs. Union of India(UOI) and Another*, in para 15 of the judgment, said that Estate Officer misdirected himself by saying that he can decide the question of title to the land also and this observation of Estate Officer is a patent error of law.

23. Delhi High Court (Hon''ble Vikramajit Sen, J.) (as His Lordship then was) in *Sudhir Goel v. Municipal Corporation Delhi*, AIR 2005 Del 7, has observed.

it will not be legally proper for the authorities and/or the Estate Officer to adopt a summary hearing even in those cases where facts and submissions are so very convoluted, complex and complicated.....

24. Very recently this Court has followed Apex Court's decision in *Government of Andhra Pradesh v. Thummala Krishna Rao and another*, (supra) in Writ Petition No. 65058 of 2011 (*Nand Lal v. Union of India and others*) decided on 3.4.2012 and has taken a view that a dispute of title when seriously raised, cannot be decided in summary proceedings by Prescribed Authority under Act, 1971.

25. In the present case, by means of the impugned judgment, Prescribed Authority as well as Appellate Court have virtually declared title of respondent No. 3 on the property in dispute. Such a serious issue, based on the plea of adverse possession, in my view, could not have been decided in such summary manner and, that too, in absence of proper pleadings, evidence etc.

26. How serious legal flaws, even otherwise, have crept in. Orders impugned in this writ petition, conferring title upon respondent No. 3 by taking recourse to principle of adverse possession, is another aspect which vitiate the orders impugned. I shall now demonstrate the same, discussing issue No. 2.

27. The application was filed in 1980. The respondent No. 3 claimed that he perfected his title even before 1963 when sale deed was executed by Raja Jagdish Pratap Sahi in favour of Praveen Bhawan Nirman Sahkari Samiti. The Limitation Act, 1963 (hereinafter referred to as "L.A. 1963") came into force on 1.1.1964 and therefore prior thereto Limitation Act, 1908 (hereinafter referred to as "L.A. 1908") was operating and holding the field whereunder respondent No. 3 claimed to have perfected his title on the basis of adverse possession.

28. Though the two statutes are different but provisions in respect to adverse

possession are almost *pari materia*. Even in the statutes of limitation, available prior to L.A. 1908, there was not much difference in the provisions relating to prescription and principles of law are almost same. Since a catena of authorities were/are already holding the field on the basis of adverse possession, which is a substantive right, acquired by a person on account of prescription, relevant statutory provisions contained in L.A. 1908 and L.A. 1963 as also the principles relating to pleadings, condition precedent etc., all have to be looked into at length and only then it can be seen whether the same have been considered in correct perspective in the impugned orders or not. It has consistently been held that before considering an issue on the plea of adverse possession, specific and categorical pleadings are of utmost importance. Unless there are clear pleadings, plea of adverse possession cannot and shall not, be looked into.

29. Adverse possession is a plea to usurp title over immoveable property of another/others which otherwise a claimant does not possess. Its successful claim would mean that real owner shall be denuded of his title and the same would stand conferred upon the claimant. Pleadings, thus, are of utmost importance in order to claim a right founded on adverse possession. They have to be very clear and emphatic and to the extent of covering every necessary ingredient to satisfy the claim of adverse possession. No one can take advantage of default on the part of other side but has to set up his case on his own, failing which it is he, who has to suffer. Since the claim based on adverse possession results in defeating the very right/title of an otherwise rightful person, law is very strict in this regard. It needs a thorough and minute enquiry into the claim of the person, who asserts title on the basis of adverse possession.

30. In *Abubakar Abdul Inamdar (dead) by LRs. and others Vs. Harun Abdul Inamdar and Others*, in the context of Articles 64 and 65 of L.A. 1963 emphasizing the importance of pleadings, in para 5 of the judgment, Court said:

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

(emphasis added)

31. In Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others, , the necessity of pleading was emphasized and the Court in para 36 said:

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

32. Recently, the Apex Court has considered in detail, various authorities on the question of adverse possession, in Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan and Others, and in para 18, observed, that plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

33. The Court also referred to its earlier decision in D.N. Venkatarayappa and another Vs. State of Karnataka and others, observing:

Therefore, in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the lands in question claiming right, title and interest in the lands in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession.

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

3....What requires to be pleaded and proved is that the purchaser disclaimed his title under which he came into possession, set up adverse possession with necessary animus of asserting open and hostile title to the knowledge of the true owner and the later allowed the former, without any let or hindrance, to remain in possession and enjoyment of the property adverse to the interest of the true owner until the expiry of the prescribed period. The classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario.

... ordinary classical requirement of adverse possession is that it should be nec vi, nec clam, nec precario and the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor."

apart from the actual and continuous possession which are among other

ingredients of adverse possession, there should be necessary animus on the part of the person who intends to perfect his title by adverse possession.

A person who under the bona fide belief thinks that the property belongs to him and as such he has been in possession, such possession cannot at all be adverse possession because it lacks necessary animus for perfecting title by adverse possession.

... one of the important ingredients to claim adverse possession is that the person who claims adverse possession must have set up title hostile to the title of the true owner.

... there is not even a whisper in the evidence of the first petitioner with regard to the claim of adverse possession set up by the petitioners. It is not stated by the petitioners that they have been in continuous and uninterrupted possession of the lands in question.

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

Therefore, in the absence of crucial pleadings, which constitute adverse possession and evidence to show that the petitioners have been in continuous and uninterrupted possession of the lands in question claiming right, title and interest in the lands in question hostile to the right, title and interest of the original grantees, the petitioners cannot claim that they have perfected their title by adverse possession

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

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

any of the contentions advanced on behalf of the appellants.

35. In *Prabhu Narain Singh Vs. Ram Niranjana (deceased by L.Rs.) and Others*, in para 6 the Court observed:

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

36. In *Ramzan and Others Vs. Smt. Gafooran and Others*, the Court observed:

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

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

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

In other words a mahant has power (apart from any question of necessity) to create an interest in property appertaining to the Mutt which will continue during his own life, or to put it perhaps more accurately, which will continue during his tenure of office of mahant of the mutt, with the result that adverse possession of the particular property will only commence when the mahant who had disposed of it ceases to be mahant by death or otherwise. If this be right as it must be taken to be, where the disposition by the mahant purports to be a grant of a permanent lease, their Lordships are unable to see why the position is not the

same where the disposition purports to be an absolute grant of the property nor was any logical reason suggested in argument why there should be any difference between the two cases. In each case the operation of the purported grant is effective and endures only for the period during which the mahant had power to create an interest in the property of the mutt.

(emphasis added)

38. The pleading is necessary since burden also lies on the person who claims adverse possession. In *Smt. Bitola Kuer Vs. Sri Ram Charan and Others*, in para 16 the Court said:

It is well settled that title ordinarily carries with it the presumption of possession and that when the question arises is to who was in possession of land, the presumption is that the true owner was in such possession. In other word" possession follows title. The inevitable Corollary from this principle is that the burden lies on the person who claims to have acquired title by adverse possession to prove his case.

39. Where a plea of adverse possession is taken, the pleadings are of utmost importance and anything, if found missing in pleadings, it may be fatal to such plea of adverse possession. Since mere long possession cannot satisfy the requirement of adverse possession, the person claiming it must prove as to how and when the adverse possession commenced and whether fact of adverse possession was known to real owner. (*Wg. Cdr. (Retd.) R.N. Dawar Vs. Shri Ganga Saran Dhama*,). In *Parwatabai Vs. Sonabai and others*, , it was stressed upon by the Apex Court that to establish the claim of adverse possession, one has to establish the exact date from which adverse possession started. The claim based on adverse possession has to be proved affirmatively by cogent evidence and presumptions and probabilities cannot be substituted for evidence. The plea of adverse possession is not always a legal plea. It is always based on facts which must be asserted, pleaded and proved. A person pleading adverse possession has no equities in his favour since he is trying to defeat the right of the true owner and, therefore, he has to specifically plead with sufficient clarity when his possession became adverse and the nature of such possession. [See *Mahesh Chand Sharma (supra)*].

40. In *Parsinni (Dead) by Lrs. and Others Vs. Sukhi and Others*, , it said that burden of proof lies on the party who claims adverse possession. He has to plead and prove that his possession is *nec vi, nec clam, nec precario* i.e., peaceful, open and continuous.

41. Article 144 L.A. 1908 shows, where a suit for possession is filed, it is the defendant to whom the plea of adverse possession is available and it is he who has to take necessary pleadings. A suit by a plaintiff based on adverse possession is not contemplated by Article 144 inasmuch as the suit contemplated therein is for restoration of possession and where a person is already in possession, though adverse possession, the question of filing a suit for

possession would not arise. If the chain of possession or continued possession ceased or interrupted, particularly at the time of filing of the suit, the adverse possession extinguishes and the earlier long possession, may be of more than the statutory period, would not give any advantage if the possession has been lost at the time of filing of the suit.

42. Besides, alternative plea may be permissible, but mutually destructive pleas are not permissible. The defendants may raise inconsistent pleas so long as they are not mutually destructive as held in *Biswanath Agarwalla Vs. Sabitri Bera and Others*, .

43. In *Gautam Sarup Vs. Leela Jetly and Others*, , the Court said that a defendant is entitled to take an alternative plea but such alternative pleas, however, cannot be mutually destructive of each other.

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

45. The Privy Council while considering the above question observed that the Province of Oudh was annexed by the East India Company in 1856 but in 1857 during the first war of independence by native Indians much of its part was declared independent. Soon after it was conquered by the British Government and it got reoccupation of the entire province of Oudh. Thereafter in March 1858 the British Government issued a proclamation confiscating, with certain exceptions "the proprietary right in the soil of the Province" and reserved to itself the power to dispose of that right in such manner as it may seem fit. On 10th October 1859 the British Government (the then Government of India) declared that every talukdar with whom a summary settlement has been made since the re-occupation of the Province has, thereby, acquired a permanent, hereditary

and transferable proprietary right, namely in the taluka, for which, he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluka. Pursuant to that declaration, Wazir Ali with whom a summary settlement of taluka has already been made was granted a Sanad which conferred upon him full proprietary right, title and possession of the estate or Ambhapur. In the said grant, there contained a stipulation that in the event of dying intestate or anyone of his successor dies intestate, the estate shall descend to the nearest male heir according to rule of primogeniture. Subsequently, in order to avoid any further doubt in the matter, Oudh Estates Act I of 1869 was enacted wherein Wazir Ali was shown as a Talukdar whose estate according to the custom of the family on or before 13.2.1856 ordinarily devolved upon a single heir. However, having noticed this state of affairs, the Privy Council further observed that this rule was not followed after the death of Wazir Ali and the taluka was mutated in favour of his cousin Nawazish Ali. He was recorded as owner of taluka. Thereafter in 1892 Samsam Ali entered the joint possession with Nawazish Ali and after death of Nawazish Ali, Samsam Ali was recorded as the sole owner. The system of devolution of the property was explained being in accordance with the usage of the family and when the name of Asghar Ali was recorded, he also made a similar declaration. Faced with the situation the appellant sought to explain the possession of Nawazish Ali as adverse possession but the same was discarded by the Privy Council observing:

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

46. The defendants ought to have elected one or the other case and could not have taken a plea which is not an alternative but mutually destructive.

47. In Nagubai Ammal and Others Vs. B. Shama Rao and Others, the Court considered the doctrine of election and observed:

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

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

The ground of the decision is that when on the same facts, a person has the right

to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Banks, L.J.:

Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act". The observations of Scrutton, L.J. on which the appellants rely are as follows:

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

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

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

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

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

49. This has been followed in several cases noticed and followed by a Division Bench of Madras High Court in Ammalu Achi, by her authorised Agent, G. Venkatachalam Pillai Vs. Ponnammal Achi and Others, . The above judgment, however, shows that the doctrine of election as followed therein was that of applicable in England based on English decision since Sections 35 of Transfer of Property Act, 1882 and 172 of Succession Act, 1865 were found by the Court as enunciating the doctrine of election as enforced in England but those Sections were not applicable to Hindus in India.

50. In R.N. Gosain Vs. Yashpal Dhir, , the Court said:

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

51. In National Insurance Co. Ltd. Vs. Mastan and Another, the Court said:

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

52. The question of effect of gap in continuous possession came to be considered in Devi Singh and Others Vs. Board of Revenue for Rajasthan and Others, and in para 5 the Court held as under:

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

53. In the present case, I try to find out whether aforesaid requirement of pleading is sufficient so as to justify conferment of title upon respondent No. 3 by applying doctrine of adverse possession by respondents No. 2 and 1 respectively in the impugned orders. The only pleading in the objection filed before Prescribed Authority, contained in paras 4, 5 and 7 which may have some bearing on the

adverse possession, has already been referred to hereinabove.

54. Before this Court a counter-affidavit has been filed on behalf of respondent No. 4 who has been impleaded after the death of respondent No. 3 being heir and legal representative as also occupant of the land in dispute. The respondent No. 4 is the widow of late Phool Chandra Gupta, younger brother of Munna. The case set up by respondent No. 4 is that her father in law and their father were given a plot measuring about 25 ft. wide towards main road and 50 ft. long back side of Raja Dera Kothi of Sultanpur for residing ancestors of deponent as Asami since they used to work as servant of Raja Saheb Dera. Her ancestors constructed a pucca house on the aforesaid land more than 100 years ago. Raja Sahab told that residential house of respondent No. 4's ancestors was neither transferred nor sold to anybody. The house has been given a separate municipal number by erstwhile Municipal Board, Lucknow i.e. 120/6, Lalbagh, Beldari Lane, Lucknow and new number was allotted by Nagar Nigam Lucknow is 120/6 Ga. It is then said that since ancestors and now respondent No. 4 is residing uninterruptedly for more than 100 years on the land in dispute, they have become complete owner according to law of adverse possession.

55. The above pleadings make the possession at the best as a licensee. It was not hostile but with the grace and permission of the then owner i.e. Raja Saheb. The pleading, ex facie, reject the scope of application of adverse possession.

56. The averments made in para 2 of counter-affidavit have been repeated in paras 3, 5, 6 and 9. For better understanding the relevant averments contained in different paragraphs may be reproduced as under:

2....deponent's father-in-law and their father was given a plot measuring 25" (Twenty Five Feet) wide towards main road and 50" (Fifty Feet) long back side of the Raja Dera Kothi of Sultanpur for the residing for the deponent ancestors as a Assami, because who work as a servant of RAJA SAHEB DERA and by that help and mercy the deponent's ancestors constructed his pucca house about more than 100 (hundred) years ago....the deponent and her ancestors were peacefully residing and passing their poor life without any interruption from more than 100 (hundred) years and deponent and her ancestors according to the law of adverse possession became complete owner and master of the said in the eyes of law.

3.....deponent's ancestors were the Asami (Raiat's) as servant of Raja Saheb Dera, and Raja Saheb Dera had gifted a piece of land about 25" x 50" to the deponent ancestors to reside in lieu of being servant and from His Highness mercy and help the deponent ancestors had constructed the pucca house on that piece of land of the Dera Raja Ahata Kothi Beldari Lane Lalbagh, and never tenant of the King and not in dream to pay a penny rent to Raja Saheb. Because Raja Saheb gifted the piece of land to the residence of deponent ancestors who work in Raja Saheb House and dominion, so that work could be peacefully performed by the servant.

5.....the opposite party No. 4 ancestors were Asami alias Raiet of Raja Saheb and were used work in the palace of Raja Saheb as servant, so being Raiet the Raja had gifted the land to reside the deponent ancestors more than hundred years ago and since then upto now deponent and her ancestors are coming in possession without any interruption and whatever construction was made by the deponent ancestors was done by the permission of Raja Saheb ancestor.

6.....the trial Courts have only considered the adverse possession in law and did not say about the Asami rights of the ancestors of the deponent. Because in those days Raja and Zamindars used to give land to their Asami/Raiet for their residences and livelihood for their families and the junior Engineer has wrongly and illegally has prepared the sketch map with collusion of others only to harass and cow down because deponent's ancestors had given a piece of land for residence which is 25 (Twenty Five) feed wide towards the road side and 50" (Fifty feet) long towards the back side.

9.....deponent ancestors were "Raiet/Asami" of Raja Saheb Dera, who had given by the sweet will another words orally gifted the land to the deponent ancestors who were servant to reside who used to work in his palance, and in those days every Raja and zamindar were pleased and gave the land for the residences and livelihood to their Raiet and Asami. It is specifically not considered but only the law of adverse possession is considered because opposite party No. 3/4 ancestors were possession of the piece of land more than 100 years ago with consent and mercy as well as in other word by gift of the then Raja and since then upto now without any hindrance deponent and her ancestors are living as well as coming in the peaceful possession and passing a poor life.

57. Apparently possession claimed by respondents 3 and 4 is neither adverse nor hostile nor the other necessary ingredients so as to attract principles of adverse possession have been pleaded or shown to exist.

58. Now I proceed further to see what is adverse possession, what are conditions precedents and relevant factor to sustain a plea of adverse possession maturing to the title.

59. The principle of adverse possession was recognized in ancient law also but has been codified and recognized in the written statutes since the British Rule, going back to middle of 19th century. Before the British, during the period when Muslims ruled the Country, personal laws used to govern all matters. The Muslim law generally does not recognize limitation; while in Hindu personal laws, on certain aspects, in different schools, some provisions for limitation are prescribed but not common to all the Hindus. Hindu Law recognizes both prescription and limitation while Muslim jurisprudence recognises neither of them. In some of the Smritis a period of 20 years was prescribed for acquisition of title by prescription. It appears that since agriculture was main occupation of the people, Smritis concentrated more on land and on the rights therein.

60. To understand the concept of "adverse possession" it would be necessary to

have a better idea of the concept of "possession" and "ownership" in respect to immovable property.

61. A retrospect of ancient scriptures, would reveal that the concept of possession in ancient laws in different civilizations was known to the mankind. A comparative study, I find, in the work of "Sir Henry Summer Maine" (in short "Maine"). He is considered to be the founder of comparative jurisprudence of ancient laws. Much earlier in 1861 AD, comparative jurisprudence under the heading "Ancient Law"-Its connection with the Early History of Society and its Relation to Modern Ideas, was written by "Sir Henry Sumner Maine". The edition before the Court is one published by Dorset Press in 1986 at United States of America.

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

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

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

64. "Sir Maine" further says:

Occupancy is the advisedly taking possession of that which at the moment is the property of no man, with the view (adds the technical definition) of acquiring property in it for yourself. The objects which the Roman lawyers called *res nullius*--things which have not or have never had an owner--can only be ascertained by enumerating them. Among things which never had an owner are wild animals, fishes, wild fowl, jewels disinterred for the first time, and lands newly discovered or never before cultivated. Among things which have not an owner are moveables which have been abandoned, lands which have been deserted, and (an anomalous but most formidable item) the property of an enemy. In all these objects the full rights of dominion were acquired by the Occupant, who first took possession of them with the intention of keeping them as his own--an intention which, in certain cases, had to be manifested by specific acts. (Page 203)

If the Roman law of Occupancy is to be taxed with having had pernicious influence on any part of the modern Law of Nations, there is another chapter in it which may be said, with some reason, to have been injuriously affected. In applying to the discovery of new countries the same principles which the Romans had applied to the finding of a jewel, the Publicists forced into their service a doctrine altogether unequal to the task expected from it. Elevated into extreme importance by the discoveries of the great navigators of the 15th and 16th centuries, it raised more disputes than it solved. The greatest uncertainty was

very shortly found to exist on the very two points on which certainty was most required, the extent of the territory which was acquired for his sovereign by the discoverer, and the nature of the acts which were necessary to complete the apprehension or assumption of sovereign possession. Moreover, the principle itself, conferring as it did such enormous advantages as the consequence of a piece of good luck, was instinctively mutinied against by some of the most adventurous nations in Europe, the Dutch, the English, and the Portuguese. Our own countrymen, without expressly denying the rule of International Law, never did, in practice, admit the claim of the Spaniards to engross the whole of America south of the Gulf of Mexico, or that of the King of France to monopolise the valleys of the Ohio and the Mississippi. From the accession of Elizabeth to the accession of Charles the Second, it cannot be said that there was at any time thorough peace in the American waters, and the encroachments of the New England Colonists on the territory of the French King continued for almost a century longer. Bentham was so struck with the confusion attending the application of the legal principle, that he went out of his way of eulogise the famous Bull of Pope Alexander the Sixth, dividing the undiscovered countries of the world between the Spaniards and Portuguese by a line drawn one hundred leagues West of the Azores; and, grotesque as his praises may appear at first sight, it may be doubted whether the arrangement of Pope Alexander is absurder in principle than the rule of Public Law, which gave half a continent to the monarch whose servants had fulfilled the conditions required by Roman jurisprudence for the acquisition of property in a valuable object which could be covered by the hand. (Page 206-207)

To all who pursue the inquiries which are the subject of this volume Occupancy is pre-eminently interesting on the score of the service it has been made to perform for speculative jurisprudence, in furnishing a supposed explanation of the origin of private property. It was once universally believed that the proceeding implied in Occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the allowed property of individuals. The course of thought which led to this assumption is not difficult to understand, if we seize the shade of difference which separates the ancient from the modern conception of Natural Law. The Roman lawyers had laid down that Occupancy was one of the Natural modes of acquiring property, and they undoubtedly believed that, were mankind living under the institutions of Nature, Occupancy would be one of their practices. How far they persuaded themselves that such a condition of the race had ever existed, is a point, as I have already stated, which their language leaves in much uncertainty; but they certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind. Modern jurisprudence, accepting all their dogmas without reservation, went far beyond them in the eager curiosity with which it dwelt on the supposed state of Nature. Since then it had received the position that the earth and its fruits were once *res nullius*, and since its peculiar view of Nature led it to assume

without hesitation that the human race had actually practised the Occupancy of *res nullius* long before the organisation of civil societies, the inference immediately suggested itself that Occupancy was the process by which the "no man's goods" of the primitive world became the private property of individuals in the world of history. (Page 207-208)

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

The earth, "he writes, "and all things therein were the general property of mankind from the immediate gift of the Creator Not that the communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the substance of the thing; nor could be extended to the use of it. For, by the law of nature and reason he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or to speak with greater precision, the right of possession continued for the same time only that the act of possession lasted. Thus the ground was in common, and no part was the permanent property of any man in particular; yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature to have driven him by force, but the instant that he quitted the use of occupation of it, another might seize it without injustice." He then proceeds to argue that "when mankind increased in number, it became necessary to entertain conceptions of more permanent dominion, and to appropriate to individuals not the immediate use only, but the very substance of the thing to be used. (Page 208-209)

66. Explaining occupancy, Maine observes:

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

67. Referring to "Savigny", "Sir Maine" observed:

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

Occupancy is the advised assumption of physical possession; and the notion that an act of this description confers a title to "*res nullius*", so far from being

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

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

The Roman jurisprudence will not here assist in enlightening us, for it is exactly the Roman jurisprudence which, transformed by the theory of Natural Law, has bequeathed to the moderns the impression that individual ownership is the normal state of proprietary right, and that ownership in common by groups of men is only the exception to a general rules. There is, however, one community which will always be carefully examined by the inquirer who is in quest of any lost institution of primeval society. How far so ever any such institution may have undergone change among the branch of the Indo-European family which has been settled for ages in India, it will seldom be found to have entirely cast aside the shell in which it was originally reared. It happens that, among the Hindoos, we do find a form of ownership which ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the Law of Persons would lead us to entertain respecting the original condition of property. The Village Community of India is at once an organised patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights, and to the attempts of English functionaries to separate the two may be assigned some of the most formidable miscarriages of Anglo-Indian administration. The Village Community is known to be of immense antiquity. In whatever direction research has been pushed into Indian history, general or local, it has always found the Community in existence at the farthest point of its progress. A great number of intelligent and observant writers, most of whom had no theory of any sort to support concerning its nature and origin, agree in considering it the least

destructible institution of a society which never willingly surrenders any one of its usages to innovation. Conquests and revolutions seem to have swept over it without disturbing or displacing it, and the most beneficent systems of government in India have always been those which have recognised it as the basis of administration. The mature Roman law, and modern jurisprudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains "universally in Western Europe, Nemo in communion potest invites detineri ("No one can be kept in co-proprietorship against his will"). But in India this order of ideas is reversed, and it may be said that separate proprietorship is always on its way to become proprietorship in common. The process has been adverted to already. As soon as a son is born, he acquires a vested interest in his father's substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father, and the property constantly remains undivided for several generations, though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manager, but more generally, and in some provinces always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but the Community is more than a brotherhood of relatives and more than an association of partners. It is an organised society, and besides providing for the management of the common fund, it seldom fails to provide, by a complete staff of functionaries, for internal government, for police, for the administration of justice, and for the apportionment of taxes and public duties. (Page 215-217)

69. The Hindu Dharm-shastras containing legal principles with respect to possession of property are mainly Smritis. In Narada Smriti or Naradiya Dharma-shastra, law relating to "property" and "possession", relevant with respect to principles of possession/adverse possession, is as under:

70. The Hindu Dharm-shastras containing legal principles are mainly in Smritis. Narada-smriti or Naradiya Dharma-sastra contains the laws with regard to "property" or and "possession" are stated as under:

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

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

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

threefold. The others are said to be nine fold.

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

71. Similarly, Brihaspati Smriti deals with "possession" as under:

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

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

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

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

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

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

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

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

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

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

than that even, is (called) possession of long standing.

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

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

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

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

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

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

72. Thus in brief, the concept of possession in ancient laws may be stated that Possession in Roman law recognised two degrees of possession, one is being detention (or possession naturalise) of the object/thing; and the other is possessio strictly or possessio civilise. Roman law appears to be mainly concerned with developing a theory to distinguish between detention and possession from each other. Physical control of an object by sale, a bailee or an agent was considered only as detention and all other kinds of physical control were treated as possession.

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

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

75. "Inhering" defines possession, "whenever a person looks like an owner in

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

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

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

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

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

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

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

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

82. The essentials of possession in the first instance includes a fact to be established like any other fact. Whether it exists in a particular case or not, will depend on the degree of control exercised by the person designated as possessor. If his control is such that he effectively excludes interference by others then he has possession. Thus the possession in order to show its existences must show "corpus possession is" and an "animus possidendi".

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

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

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

86. Possession can also be classified as under:

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

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

88. In *Supdt. & Remembrancer of Legal Affairs, Supdt. and Remembrancer of Legal Affairs, West Bengal Vs. Anil Kumar Bhunja and Others*, the possession was described by the Court in paras 13, 14 and 15 as under:

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

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

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

89. There is a distinction between the terms "possession", "occupation" and "control". The distinction between "possession" and "occupation" was considered in AIR 1941 357 (Nagpur) and the Court held:

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

90. The distinction between "possession", "occupation" or "control" was also considered in *Emperor Vs. Sumatibai Wasudeo Bachuwar*, and the Court held:

Some documents containing prejudicial reports were found in a box in the house occupied by the applicant and her husband. When the house was raided by the police, the husband was out and the applicant (wife) produced the keys with one of which the box could be opened. In addition to prejudicial reports, there were some letters in the box addressed to the applicant. Held, (1) that, *prima facie*, the box containing the documents would be in the possession of the husband and the mere fact that in his absence he had left the keys with the applicant (wife) would not make her in joint possession with himself; nor did the fact that there were letters in the box addressed to the wife mean that she was in joint possession of all the contents of the box; (2) that the wife was in the circumstances in possession of the box within the meaning of R. 39(1) of the

Defence of India Rules; (3) that occupation in R. 39(2) of the Defence of India Rules meant legal occupation, and the applicant could not be held to be in occupation or control of the house so as to render her guilty under R. 39 of the Defence of India Rules.

91. As discussed above, law in respect to possession and its different kinds was varying in different principles of law. It continued till almost middle of 19th century. No common or uniform period of limitation/prescription was available to confer a right and title by way of possession, if has continued for a certain length of time. The written legislation came to be made in the occupied and invaded territory by East India Company and thereafter the British Rulers. Prior to 05.05.1859 there was no common law of limitation applicable to whole of India. The Provincial Courts in each Presidency established by East India Company were governed by certain Regulations, like; Regulation III of 1793 (Bengal); Regulation II of 1802 (Madras); Regulation I of 1800 (Bombay) and the Acts particularly applicable to them like Act I of 1845; Act XIII of 1848; Act XI of 1859. The Non-Regulation Provinces i.e. Punjab and Oudh etc. were governed by Codes of their own and, sometimes by Circular Orders of Judicial Commissioner. The three Supreme Courts established by Royal Charter adopted English law of limitation.

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

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

94. Though Act No. XIV of 1859 was drafted in a language much more precise than the loose phraseology of earlier Regulations, but the Privy Council in *The Delhi and The Delhi and London Bank Limited vs. Orchard* observed it as an "inartistically drawn statute".

95. Act IX of 1871 extended the scope and made provisions relating to limitation to suits, appeals and certain applications to Courts. It received assent of

Governor General on 24th March, 1871.

96. Drafting of this statute received better observation from Privy Council in (1873) L.R. 1 I.A. 34 (Privy Council) and it commented as a "more carefully drawn statute".

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

98. The Law of Prescription prescribes the period at the expiry of which not only the judicial remedy is barred but a substantive right is acquired or extinguished. A prescription, by which a right is acquired, is called an "acquisitive prescription". A prescription by which a right is extinguished is called "extinctive prescription". The distinction between the two is not of much practical importance or substance. The extinction of right of one party is often the mode of acquiring it by another. The right extinguished is virtually transferred to the person who claims it by prescription. Prescription implies with the thing prescribed for, is the property of another, and, that it is enjoyed adversely to that other. In this respect it must be distinguished from acquisition by mere occupation as in the case of *res nullius*. The acquisition in such cases does not depend upon occupation for any particular length of time.

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

100. In *Agency Company v. Short*, 1888(13) AC 793 the Privy Council observed that there is discontinuance of adverse possession when possession has been abandoned. The reason for the said observation finds mention on page 798 that

there is no one against whom rightful owner can bring his action. The adverse possession cannot commence without actual possession and this would furnish cause of action.

101. Act XV of 1877 received assent of Governor General on 19th July, 1877 and came into force on 1st October, 1877. Articles 120, 142 and 144 (relevant in respect to a suit for possession), Second Schedule-First Division. Ultimately it was repealed and replaced by Act 9 of 1908, came into force on 1st January, 1909. It continued with the provision imposing obligation upon the Court to dismiss a suit if, while it is instituted, is already barred by limitation vide Section 23. The arrangement of Articles 120, 142 and 144 in L.A. 1908 remained the same, i.e., Articles 120, 142 and 144 and is verbatim as were in Act XV of 1877.

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

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

104. In *Tilokchand and Motichand and Others Vs. H.B. Munshi and Another*, the Court noticed the maxim *vigilantibus non dormientibus jura subveniunt* (the law assists the vigilant not those who sleep over their rights). Though there is a general principle *ubi jus ibi remedium*, i.e. where there is a legal right, there is also a remedy, but there are certain exceptions to this general rule.

105. Mere expiry of limitation could have extinguished remedy, but the principle embodied in Section 28 extinguishes the right also and thereby makes the said general principle inapplicable. Once the right of getting possession extinguished

it cannot be revived by entering into possession again [See *Salamat Raj v. Nur Mohamed Khan*, (1934) ILR 9 Lko 475; *Ram Murti and others Vs. Puran Singh and another* ; *Nanhekhan v. Sanpat*, AIR 1954 Hyd 45 (FB) and *Bailochan Karan Vs. Basant Kumari Naik and Another*,].

106. L.A. 1908 was replaced by L.A. 1963, came into force on 01.01.1964 vide notification dated 29.10.1963 and thereunder the corresponding relevant entries to Articles 120, 142 and 144 are 113, 64 and 65. The provision relating to prescription i.e. extinction of title in one person and transfer of title on expiry of a particular period of length are contained, as already discussed above, vide Section 28 of L.A. 1908 contained vide Section 27 in L.A. 1963.

107. The limitation prescribed for adverse possession is not the limitation for maintainability of suit. The former matures a right in a person on happening of certain events continued for a period prescribed in L.A. 1963. It is a consequence of principle of prescription. The later is the period whereafter the remedy for redressal of a grievance is lost to a person.

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

109. "Permissible possession" shall not mature a title since it cannot be treated to be an "adverse possession". Such possession, for howsoever length of time be continued, shall neither be converted into adverse possession nor a title. It is only the hostile possession which is one of the conditions for adverse possession.

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

111. In *Gunga Gobind Mundul v. Collector of the 24-pergunnahs* 11 Moore's, I.A., 345 it was observed by the Privy Council that continuous possession for more than twelve years not only bars the remedy, but practically extinguishes the title of the true owner in favour of the possessor. This was followed by a Division Bench of Calcutta High Court in *Gossain Dass Chunder Vs. Issur Chunder Nath*, . Therein the High Court held that 12 years continuous possession of land

by wrong doer not only bars the remedy also extinguishes the title of the rightful owner. It confers a good title upon the wrong doer.

112. In AIR 1931 162 (Privy Council) the Privy Council held where a person without any colour of right wrongfully takes possession as a trespasser of a property of another, any title which he may acquire by adverse possession will be strictly limited to what he has actually so possessed. That was an interesting case of dispute of ownership in respect to subsoil. It was held that there can be separate ownership of different strata of subsoil, in all events where minerals are involved. If a grant of surface right was given by the owner and the licensee is given possession to carry out the said right, by quarrying stones etc. possession of subsoil in the eyes of law remains with the owner though it is only a constructive possession but in the absence of anything to show that with the knowledge of the owner the licensee held possession of subsoil and minerals therein and continued with that possession for statutory period of limitation, to continue its ownership, such plea of adverse possession in respect to subsoil cannot be accepted.

113. In *Basant Kumar Roy v. Secretary of State for India and others*, AIR 1917 PC 18, it was held:

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

114. In AIR 1931 18 (Privy Council) the observation in respect to adverse possession similar to what has been noted above, were made and the said judgment was followed in *Bhupendra Narayan Sinha* (supra).

115. The law in respect to adverse possession, therefore, is now well settled. It should be *nec vi nec clam nec precario*. ((1934) 66 MLJ 134 (Privy Council)). This decision has been referred and followed by the Apex Court in *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, (para 4). The Court further says that the possession required must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the competitor. [(1900) L.R. 27 I.A. 136 (Privy Council)]. The case before the Apex Court in *P. Lakshmi Reddy* (supra) was that of co-heirs where the plea of adverse possession was set up. In this regard it was held:

But it is well settled in order, to establish adverse possession of one-co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits, of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be

adverse, should be made out. The possession of one coheir is considered, in law, as possession of all the co-heirs. When one coheir is found to be in possession of the properties it is presumed to be on the basis of the joint title. The co-heir in possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus of his own part in derogation of the other co-heir title. It is settled rule of law that as between coheirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

116. In *Thakur Kishan Singh (dead) Vs. Arvind Kumar*, the Court said:

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

117. In *Sheo Raj Chamar and Another Vs. Mudeer Khan and Others*, , it was held:

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

118. In *Saroop Singh Vs. Banto and Others*, , the Court held in para 30:

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

(emphasis added)

119. In *T. Anjanappa and Others Vs. Somalingappa and Another*, the pre-conditions for taking plea of adverse possession has been summarised as under:

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

120. In *P.T. Munichikkanna Reddy and Others Vs. Revamma and Others*, it was held:

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

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

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

(Para 5)

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

(Para 6)

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

1. Application of limitation provision thereby jurisprudentially "willful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.
2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property.

(Para 9)

122. In para 12 of the judgment, referring to its earlier decision in T. Anjanappa (supra), the Court held that if the defendants are not sure who is the true owner,

the question of their being in hostile possession and the question of denying title of the true owner do not arise. It also referred on this aspect earlier decisions in *Des Raj and Others Vs. Bhagat Ram (Dead) By LRs. and Others*, and *Govindammal Vs. R. Perumal Chettiar and Others*, .

123. In *Annakili Vs. A. Vedanayagam and Others*, the Court pointed out that a claim of adverse possession has two elements (i) the possession of the defendant becomes adverse to the plaintiff; and (ii) the defendant must continue to remain in possession for a period of 12 years thereafter. *Animus possidendi* is held to be a requisite ingredient of adverse possession well known in law. The Court held:

It is now a well settled principle of law that mere possession of the land would not ripen into possessor title for the said purpose. Possessor must have *animus possidendi* and hold the land adverse to the title of the true owner. For the said purpose, not only *animus possidendi* must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more do not ripen into a title.

124. In *Vishwanath Bapurao Sabale Vs. Shalinibai Nagappa Sabale and Others*, the Court said:

....for claiming title by adverse possession, it was necessary for the plaintiff to plead and prove *animus possidendi*.

A peaceful, open and continuous possession being the ingredients of the principle of adverse possession as contained in the maxim *nec vi, nec clam, nec precario*, long possession by itself would not be sufficient to prove adverse possession.

125. In *Secretary of State v. Debendra Lal Khan (supra)* it was held that the period of possession of a series of independent trespassers cannot be added together and utilized by the last possessor to make up the statutory total period of adverse possession. This was followed in *AIR 1935 425 (Oudh)* .

126. In *AIR 1947 19 (Privy Council)* it was observed that in order to claim a right of ownership applying the principle of adverse possession it is a condition precedent that the possession must be adverse to a living person. Herein the appellant was possessing the property under a mosque after the death of the defendant, it was held that the possession cannot be said to be adverse.

127. In *Chhote Khan, deceased, Represented by his Son, Harmat and Others Vs. Mal Khan and Others*, , the Court observed that no question of adverse possession arises where the possession is held under an arrangement between the co-sharers.

128. The Court in *P. Lakshmi Reddy (supra)* quoted with approval *Mitra's Tagore Law Lectures on Limitation and Prescription (6th Edition) Vol. I, Lecture VI*, at page 159, quoting from *Angel on Limitation*:

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

129. It further held:

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

130. In *Karbalai Begum Vs. Mohd. Sayeed and Another*, in the context of a co-sharer, it was held:

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

131. In *Annasaheb Bapusaheb Patil and others Vs. Balwant alias Balasaheb Babusaheb Patil (dead) by LRs. and heirs etc.*, the Court, in para 15, said:

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

132. In *Vidya Devi alias Vidya Vati (Dead by L.R's) Vs. Prem Prakash and others*, the Court in paras 27 and 28 held:

27...it will be seen that in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it. This was also the observation of the Supreme Court in *P. Lakshmi Reddy* case which has since been followed in *Mohd. Zainulabudeen v. Sayed Ahmed Mohideen*.

28. "Ouster" does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-

owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.

133. In making above observations, the Court also relied on its earlier decisions in *P. Lakshmi Reddy (supra)* and *Mohd. Zainulabudeen (since Deceased) by Lrs. Vs. Sayed Ahmed Mohideen and Others, .*

134. In *Roop Singh (Dead) Through LRs Vs. Ram Singh (Dead) Through LRs.*, it was held that if the defendant got the possession of suit land as a lessee or under a batai agreement then from the permissive possession it is for him to establish by cogent and convincing evidence to show hostile animus and possession adverse to the knowledge of the real owner. Mere possession for a long time does not result in converting permissive possession into adverse possession. The Court relied on its earlier decisions in *Thakur Kishan Singh (supra)*.

135. In *Darshan Singh and Others Vs. Gujjar Singh (Dead) by Lrs. and Others*, in para 7 and 9, the Court held:

...It is well settled that if a co-sharer is in possession of the entire property, his possession cannot be deemed to be adverse for other co-sharers unless there has been an ouster of other co-sharers."

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

136. In order to defeat title of a plaintiff on the ground of adverse possession, it is obligatory on the part of the respondent to specifically plead and prove as to since when their possession came adverse. If it was permissive or obtained pursuant to some sort of arrangement, the plea of adverse possession would fail. In *Md. Mohammad Ali (Dead) by Lrs. Vs. Sri Jagadish Kalita and Others*, with reference to a case dealing with such an issue amongst co-sharers it was observed that "Long and continuous possession by itself, it is trite, would not constitute adverse possession. Even non-participation in the rent and profits of the land to a co-sharer does not amount to ouster so as to give title by prescription.

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

138. In *Amrendra Pratap Singh Vs. Tej Bahadur Prajapati and Others*, considering

as to what is adverse possession, the Court in para 22 observed:

What is adverse possession? Every possession is not, in law, adverse possession. Under Article 65 of the Limitation Act, 1963, a suit for possession of immovable property or any interest therein based on title can be instituted within a period of 12 years calculated from the date when the possession of the defendant becomes adverse to the plaintiff. By virtue of Section 27 of the Limitation Act, at the determination of the period limited by the Act to any person for instituting a suit for possession of any property, his right to such property stands extinguished. The process of acquisition of title by adverse possession springs into action essentially by default or inaction of the owner. A person, though having no right to enter into possession of the property of someone else, does so and continues in possession setting up title in himself and adversely to the title of the owner, commences prescribing title into himself and such prescription having continued for a period of 12 years, he acquires title not on his own but on account of the default or inaction on part of the real owner, which stretched over a period of 12 years results into extinguishing of the latter's title. It is that extinguished title of the real owner which comes to vest in the wrongdoer. The law does not intend to confer any premium on the wrong doing of a person in wrongful possession; it pronounces the penalty of extinction of title on the person who though entitled to assert his right and remove the wrong doer and re-enter into possession, has defaulted and remained inactive for a period of 12 years, which the law considers reasonable for attracting the said penalty. Inaction for a period of 12 years is treated by the Doctrine of Adverse Possession as evidence of the loss of desire on the part of the rightful owner to assert his ownership and reclaim possession.

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

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

with the object of protecting a weaker Section.

140. In L.N. Aswathama and Another Vs. P. Prakash, the Court, in para 17 and 18 said:

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

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

141. Further, in para 25 the Court said:

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

142. From the above discussion what boils down is that the concept of adverse possession contemplates a hostile possession, i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's right and, in fact deny the same. A person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. In order to determine whether the act of a person constitutes, adverse possession, is "animus in doing that act", and, it is most crucial factor. Adverse possession commences in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of owner's right excluded him from the enjoyment of his property. Adverse possession is that form of possession or occupancy of land which is inconsistent with the title of the rightful owner and tends to extinguish that person's title. Possession is not held to be adverse if it can be referred to a lawful title. The persons setting up adverse possession may have been holding under the rightful owner's title, i.e., trustees, guardians, bailiffs or agents, such person cannot set

up adverse possession. Burden is on the defendant to prove affirmatively.

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

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

145. In Hari Chand alias Harish Chandra Vs. Daulat Ram, the Court held if the encroachment was not new one but the structure was in existence prior to acquiring title over the property, the decree on the basis of adverse possession cannot be granted in favour of the plaintiff. Paras 10 and 11 of the judgment read as under:

10. On a consideration of these evidences it is quite clear that the disputed kachha wall and the khaprail over it is not a new construction, but existed for over 28 years and the defendant has been living therein as has been deposed to by Ramji Lal vendor of the plaintiff who admitted in his evidence that the land in dispute and the adjoining kachha walls had been affected by salt and the chhappar over the portion shown in red was tiled roof constructed about 28 years back. This is also supported by the evidence of the defendant, D.W. 1, that the wall in dispute was in existence when the partition was effected i.e., 28 years before. On a consideration of these evidences the Trial Court rightly held that the defendant had not trespassed over the land in question nor he had constructed a new wall or khaprail. The trial Court also considered the report 57C by the Court Amin and held that the wall in question was not a recent construction but it appeared 25-30 years old in its present condition as (is) evident from the said

report. The suit was therefore dismissed. The lower appellate Court merely considered the partition deed and map Exts. 3/1 and 3/2 respectively and held that the disputed property fell to the share of the plaintiff's vendor and the correctness of the partition map was not challenged in the written statement. The Court of appeal below also referred to Amin's map 47 A which showed the encroached portion in red colour as falling within the share of plaintiff's vendor, and held that the defendant encroached on this portion of land marked in red colour, without at all considering the clear evidence of the defendant himself that the wall and the khaprail in question existed for the last 28 years and the defendant has been living there all along. P.W. 1 Ramji Lal himself also admitted that the wall existed for about 28 years as stated by the defendant and the kachha walls and the khaprail has been effected by salt. The lower appellate Court though held that P.W. 1 Ramji Lal admitted in cross-examination that towards the north of the land in dispute was the khaprail covered room of Daulat Ram in which Daulat Ram lived, but this does not mean that the wall in dispute exists for the last any certain number of years, although it can be said that it is not a recent construction. Without considering the deposition of defendant No. 1 as well as the report of the Amin 57 C the IInd Addl. Civil Judge, Agra wrongly held that the defendant failed to prove that the wall in dispute and the khaprail existed for the last more than 12 years before the suit. The Civil Judge further held on surmises as "may be that the wall and khaprail have not been raised in May, 1961 as is the plaintiffs case, but they are recent constructions." This decision of the Court of appeal below is wholly incorrect being contrary to the evidences on record."

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

146. In AIR 1937 69 (Privy Council) , it was held that mere receipt of rent by persons claiming adversely is not sufficient to warrant finding of adverse possession. The possession of persons or their predecessors-in-title claiming by adverse possession must have "all the qualities of adequacy, continuity and

exclusiveness" necessary to displace the title of the persons against whom they claim. Relevant extracts from page 78 of the said judgment reads as follows:

the mere fact that many years after the sale the Gangbarar maliks or persons depriving title from them are obtaining rent for the land is in itself very significant. Even in a locality exposed to dilution by the action of the river this circumstance alone might be given considerable weight. But without sufficient proof to cover the intervening years it was most reasonably held by the learned Subordinate Judge to be insufficient. The circumstance that the Maharaja was not in possession or in receipt of rent is, it need hardly be said, insufficient under Art. 144 to warrant a finding of adverse possession on behalf of the respondents or their predecessors-in-title. Their Lordships are of opinion that on the materials produced it cannot be contended that the learned Subordinate Judge was obliged in law to find that the possession of the principal respondents had "all the qualities of adequacy, continuity and exclusive-ness" (per Lord Shaw 126 CWN 66610 at p.673) necessary to displace the title of the Maharaja, and they think that no reason in law exists why his finding of fact in this respect should not be final.

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

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

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

"30. Viewed as above, on the facts of the present case, the possession of the contesting defendants is not of the variety and degree which is required for

adverse possession to materialise.

148. In Qadir Bux Vs. Ramchand and Others, this Court has held that the term "dispossession" applies when a person comes in and drives out others from the possession. It implies ouster; a driving out of possession against the will of the person in actual possession. The term "discontinuance" implies a voluntary act and openness of possession followed by the actual possession of another. It implies that a person discontinuing as owner of the land and left it to be possessed by any one who has chosen to come in. Relevant para 30 of the said judgment reads as follows:

30. The main point for consideration is whether in such circumstances it can be said that the plaintiff had been dispossessed or had discontinued his possession within the meaning of Article 142 of the First Schedule to the Indian Limitation Act. The term "dispossession" applies when a person comes in and drives out others from the possession. It imports ouster: a driving out of possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" implies a voluntary act and abandonment of possession followed by the actual possession of another. It implies that the person discontinuing has given up the land and left it to be possessed by anyone choosing to come in. There must be an intention to abandon title before there can be said to be a discontinuance in possession, but this cannot be assumed. It must be either admitted or proved. So strong in fact is the position of the rightful owner that even when he has been dispossessed by a trespasser and that trespasser abandons possession either voluntarily or by vis major for howsoever short a time before he has actually perfected his title by twelve years" adverse possession the possession of the true owner is deemed to have revived and he gets a fresh starting point of limitation-vide Gurbinder Singh and Another Vs. Lal Singh and Another, . Wrongful possession cannot be assumed against the true owner when according to the facts disclosed by him he himself had voluntarily handed over possession and was not deprived of it by the other side.

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

3. In this appeal, it has been stressed by the appellant that the findings clearly establish the benami nature of the transaction of 1914. This is, perhaps, true but

the appellant cannot avail himself of it. The appellant's claim based upon the benami nature of the transaction cannot stand because Section 66 of the CPC bars it. That Section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff or on behalf of someone through whom the plaintiff claims. Formerly, the opening words were, no suit shall be maintained against a certified purchaser and the change was made to protect not only the certified purchaser but any person claiming title under a purchase certified by the Court. The protection is thus available not only against the real purchaser but also against anyone claiming through him. In the present case, the appellant as plaintiff was hit by the Section and the defendants were protected by it."

"4. It is contended that the case falls within the second sub-section under which a suit is possible at the instance of a third person who wishes to proceed against the property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner. Reliance is placed upon the transfer by Syed Aulad Ali in favour of the appellant which is described as a claim by the transferee against the real owner. The words of the second sub-section refer to the claim of creditors and not to the claims of transferees. The latter are dealt with in first sub-section, and if the meaning sought to be placed on the second sub-section by the appellant were to be accepted, the entire policy of the law would be defeated by the real purchaser making a transfer to another and the first sub-section would become almost a dead letter. In our opinion, such a construction cannot be accepted and the plaintiff's suit must be held to be barred under S. 66 of the Code."

"5. As an alternative, it was contended before us that the title of Hakim Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two Courts below. The plea of adverse possession is raised here. Reliance is placed before us on *Sukan v. Krishanand*, ILR 32 Pat 353 and *Sribhagwan Singh and Others Vs. Rambasi Kuer and Others*, to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son-in-law Hakim Alam Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakim Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with

regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse, if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered, because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in AIR 1940 202 (Privy Council) the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea.

150. In *B. Leelavathi Vs. Honnamma and Another*, the Court held, that, the adverse possession is a question of fact which has to be specifically pleaded and proved, and, in the absence of any plea of adverse possession, framing of an issue and adducing evidence it would not be held that the plaintiffs had perfected the title by way of adverse possession. Para 11 of the judgment read as follows:

11. Plea of adverse possession had been taken vaguely in the plaint. No categorical stand on this point was taken in the plaint. No issue had been framed and seemingly the same was not insisted upon by the plaintiff-respondent. Adverse possession is a question of fact which has to be specifically pleaded and proved. No evidence was adduced by the plaintiff-respondent with regard to adverse possession. Honnamma, the plaintiff in her own statement did not say that she is in adverse possession of the suit property. We fail to understand as to how the High Court, in the absence of any plea of adverse possession, framing of an issue and evidence led on the point, could hold that the plaintiff-respondent had perfected her title by way of adverse possession.

151. In *Dharmarajan and Others Vs. Valliammal and Others*, the Court has held that in a claim of adverse possession, openness and adverse nature of the possession has to be proved against the owner of the property in question. Relevant para 11 of the said judgment reads as follows:

11. In our opinion none of these questions could be said to be either question of law or a substantial question of law arising out of the pleadings of the parties. The first referred question of law could not and did not arise for the simple reason that the plea of adverse possession has been rightly found against the plaintiff. Karupayee Animal's possession, even if presumed to be in a valid possession in law, could not be said to be adverse possession as throughout it was the case of the appellant Dharmarajan that it was a permissive possession and that she was permitted to stay on the land belonging to the members of the Iyer family. Secondly it has nowhere come as to against whom was her possession adverse. Was it adverse against the Government or against the Iyer family? In order to substantiate the plea of adverse possession, the possession

has to be open and adverse to the owner of the property in question. The evidence did not show this openness and adverse nature because it is not even certain as to against whom the adverse possession was pleaded on the part of Karupayee Ammal, Further even the legal relationship of Doraiswamy and Karupayee Ammal is not pleaded or proved. All that is pleaded is that after Karupayee Ammal's demise Doraiswamy as her foster son continued in the thatched shed allegedly constructed by Karupayee Ammal. There was no question of the tacking of possession as there is ample evidence on record to suggest that Doraiswamy also was in the service of Iyer family and that he was permitted to stay after Karupayee Ammal. Further his legal heirship was also not decisively proved. We do not, therefore, see as to how the first substantial question of law came to be framed. This is apart from the fact that ultimately High Court has not granted the relief to the respondents on the basis of the finding of this question. On the other hand the High Court has gone into entirely different consideration based on reappreciation of evidence. The second and third questions are not the questions of law at all. They are regarding appreciation of evidence. The fourth question is regarding the admissibility of Exhibit A-8. In our opinion there is no question of admissibility as the High Court has found that Exhibit A-8 was not admissible in evidence since the Tehsildar who had issued that certificate was not examined. Therefore, there will be no question of admissibility since the document itself was not proved. Again the finding of the High Court goes against the respondent herein. Even the fifth question was a clear cut question of fact and was, therefore, impermissible in the Second Appeal.

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

5. Adverse possession is sought to be established on the supposition that Kanthimathi got possession of the premises as a licensee and on her death in, 1948, the appellant who was 4 years of age, must be presumed to have become a trespasser. And if he had remained in trespass for 12 years, the title stood perfected and in any case, a suit to recovery of possession would by then be time-barred. We are unable to appreciate this line of reasoning for it appears to us that there is no occasion to term the possession of Kanthimathi as that of a licensee. The possession was permissive in her hands and remained permissive in the hands of the appellant on his birth, as well as in the hands of his father living then with Kanthimathi. There was no occasion for any such licence to have been terminated. For the view we are taking there was no licence at all. Permissible possession of the appellant could rightfully be terminated at any moment by the rightful owners. The present contesting respondents thus had a right to institute the suit for possession against the appellant. No oral evidence has been referred to us which would go to support the plea of openness, hostility and notoriety which would go to establish adverse possession. On the contrary, the Municipal Tax receipts, Exts. B-39 and 40, even though suggestedly reflecting

payment made by the appellant, were in the name of Kuppuswami, the rightful owner. This negates the assertion that at any stage did the appellant assert a hostile title. Even by examining the evidence; at our end, we come to the same view as that of the High Court. The plea of adverse possession thus also fails. As a result fails this appeal. Accordingly, we dismiss the appeal, but without any order as to costs.

153. In *Goswami Shri Mahalaxmi Vahuji Vs. Ranchhoddas Kalidas and Others*, the Hon''ble Supreme Court held that a party cannot be allowed to set up a case wholly inconsistent with that pleaded in its written statement. Relevant para 8 of the said judgment reads as follows:

8. We may now proceed to examine the material on record for finding out "the true character of the suit properties viz. whether they are properties of a public trust arising from their dedication of those properties in favour of the deity Shree Gokulnathji or whether the deity as well as the suit properties are the private properties of Goswami Maharaj. In her written statement as noticed, earlier, the 1st defendant took up the specific plea that the idol of Shree Gokulnathji is the private property of the Maharaj the Vallabh Cult does not permit any dedication in favour of an idol and in fact there was no dedication in favour of that idol. She emphatically denied that the suit properties were the properties of the deity Gokulnathji but in this Court evidently because of the enormity of evidence adduced by the plaintiffs, a totally new plea was taken namely that several items of the suit properties had been dedicated to Gokulnathji but the deity being the family deity of the Maharaj, the resulting trust is only a private trust. In other words the plea taken in the written statement is that the suit properties were the private properties of the Maharaj and that there was no trust, private or public. But the case argued before this Court is a wholly different one viz., the suit properties were partly the properties of a private trust and partly the private properties of the Maharaj. The 1st defendant cannot be permitted to take up a case which is wholly inconsistent with that pleaded. This belated attempt to bypass the evidence adduced appears to be more a manor than a genuine explanation of the documentary evidence adduced. It is amply proved that ever since Mathuranathji took over the management of the shrine, two sets of account books have been maintained, one relating to the income and expenses of the shrine and the other relating to that of the Maharaj. These account books and other documents show that presents and gifts used to be made to the deity as well as to the Maharaj. The two were quite separate and distinct. Maharaj himself has been making gifts to the deity. He has been, at times utilising the funds belonging to the deity and thereafter reimbursing the same. The account books which have been produced clearly go to show that the deity and the Maharaj were treated as two different and distinct legal entities. The evidence afforded "by the account books is tell-tale. In the trial Court it was contended on behalf of the 1st defendant that none of the account books produced relate exclusively to the affairs of the temple. They all record the transactions of the Maharaj, whether pertaining to his personal dealings or dealings in connection with the

deity. This is an obviously untenable contention. That contention was given up in the High Court. In the High Court it was urged that two sets of account books were kept, one relating to the income and expenditure of the deity and the other of the Maharai so that the Maharai could easily find out his financial commitments relating to the affairs of the deity. But in this Court Mr. Narasaraju, learned Counsel for the appellant realising the untenability of the contention advanced in the Courts below presented for our consideration a totally new case and that is that Gokulnathji undoubtedly is a legal personality; in the past the properties had been dedicated in favour of that deity; those properties are the properties of a private trust of which the Maharaj was the trustee. On the basis of this newly evolved theory he wanted to explain away the effect of the evidence afforded by the account books and the documents. We are unable to accept this new plea. It runs counter to the case pleaded in the written statement. This is not a purely legal contention. The 1st defendant must have known whether there was any dedication in favour of Shri Gokulnathji and whether any portion of the suit properties were the properties of a private trust. She and her adviser's must have known at all relevant times the true nature of the accounts maintained. Mr. Narasaraju is not right in his contention that the plea taken by him in this Court is a purely legal plea. It essentially relates to questions of fact. Hence we informed Mr. Narasaraju that we will not entertain the plea in question.

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

155. In *P. Periasami (Dead) by Lrs. Vs. P. Periathambi and Others*, it was said:

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

156. In *Mohan Lal (Deceased) through his Lrs. Kachru and Others Vs. Mirza Abdul Gaffar and Another*, , the Court said"

As regards the first plea, it is inconsistent with the second plea. Having come into possession under the agreement, he must disclaim his right thereunder and plead and prove assertion of his independent hostile adverse possession to the knowledge of the transferor or his successor in title or interest and that the latter had acquiesced to his illegal possession during the entire period of 12 years, i.e., up to completing the period his title by prescription *nec vi, nec clam, nec precario*.

157. In *Karnataka Board of Wakf Vs. Government of India and Others*, , the Court held that whenever the plea of adverse possession is projected, inherent

therein is that someone else is the owner of the property. In para 12 it said:

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

158. The decision in Mohan Lal v. Mirza Abdul Gaffar (supra) has also been followed in Karnataka Board of Wakf (supra) and in para 13, the Court said:

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

159. In AIR 1928 155 (Oudh) . This Court said:

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

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

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

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

11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is "nec vi, nec clam, nec precario", that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.....Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

162. Earlier also, a three-Judges Bench of Apex Court in *Parsinnin and another v. Sukhi* (supra) laid down the following three requisites for satisfying the claim based on adverse possession:

5. The appellants claimed adverse possession. The burden undoubtedly lies on them to plead and prove that they remained in possession in their own right adverse to the respondents.....

Possession is prima facie evidence of title. Party claiming adverse possession must prove that his possession must be "nec vi nec clam nec precario" i.e. peaceful, open and continuous. The possession must be adequate, in continuity, in publicity and in extent to show that their possession is adverse to the true owner.

163. In *Maharaja Sir Kesho Prasad Singh Bahadur* (supra), it was held that in order to obtain a favourable finding of adverse possession, one must have to satisfy all the qualities of adequacy, continuity and exclusiveness. Reliance was placed on AIR 1922 181 (Privy Council) .

164. Looking the matter in hand in the light of discussion, binding precedents and exposition of law, as referred to and discussed above, in my view, by no stretch of imagination, it can be said that either there existed appropriate pleadings to attract plea of adverse possession or that requisite facts to attract period of limitation so as to confer title upon respondents 3 and 4 of their

ancestors are there on record. The very necessity of proving possession *nec vi nec clam nec precario* is absent. Respondents 3 and 4 nowhere have pleaded that possession was hostile to the owner of the property in question and they had intention to hold the land in question with an intention to possess him against interest of true owner. The plea of adverse possession is not a pure question of law but a blended one of fact and law as held in Karnataka Board of Wakf (*supra*). The person claiming adverse possession should show:

- (a) On what date he came into possession,
- (b) What was the nature of his possession,
- (c) Whether factum of possession was known to other party.
- (d) How long has his possession has continued.
- (e) His possession was open, undisturbed and hostile to the owner.

165. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, therefore, it was for him to clearly plead and establish all facts necessary to establish his adverse possession. It is of utmost importance that one has to plead and prove that his possession was adverse to the true owner.

166. In the present case, objection filed before Prescribed Authority did say nothing in respect to nature of possession etc. and in the counter-affidavit filed before this Court, it is a clear case of respondent No. 4 that possession was with permission and mercy of erstwhile owner, That being so, by no stretch of imagination, it can be said to be an adverse possession. However, at this stage, I need not record any final opinion on this issue since, in my view, respondents No. 2 and 1 could not have gone into the question of title by recognizing plea of adverse possession in favour of respondent No. 3, since there was no proper pleading etc., and also the fact that respondents No. 1 and 2, in summary jurisdiction, could not have clothed themselves with the power to decide title, the impugned orders are unsustainable and liable to be set aside to the extent title of respondent No. 3 has been recognized and thereby respondent No. 2 has held application filed by petitioner as not maintainable under Act, 1972.

167. However, since a serious and bona fide dispute of tile has been raised, applications of petitioner in summary proceedings for eviction of respondents No. 3 and 4 also cannot be allowed to be maintained and also deserve to be rejected. It shall, however, be open to the petitioner to avail such remedy as available in common law and as advised to them.

168. The dates of orders, area of disputed property etc. though is different in all other connected writ petitions but issues are common and discussion made above apply to the orders impugned in all the connected writ petitions *le.* Writ Petitions (M/S) No. 6606 of 1990, 6607 of 1990, 6609 of 1990 and 6614 of 1990. Therefore all the reasons, observations and directions, discussed above,

shall equally be applicable to these connected petitions also.

169. In view of the above, with the aforesaid direction and manner, above writ petitions are allowed. The impugned orders dated 18th January, 1983 and 10th May, 1989, (Annexures 3 and 5 to Writ Petition (M/S) No. 6612 of 1990), 18th October, 1982 and 10th May, 1989 (Annexures 3 and 5 to Writ Petition (M/S) No. 6606 of 1990), 18th January, 1983 and 10th May, 1989 (Annexures 3 and 5 to Writ Petition (M/S) No. 6607 of 1990), 19th January, 1983 and 10th May, 1989 (Annexures 3 and 5 to Writ Petition (M/S) No. 6609 of 1990) and 15th January, 1983 and 10th May, 1989 (Annexures 3 and 5 to Writ Petition (M/S) No. 6614 of 1990), in the manner as directed above, are set aside, i.e. to the extent they have conferred title on the private respondents. However, the orders in so far as they dismiss applications of petitioners filed u/s 4 of Act, 1971 are sustained. There shall, however, no order as to costs.