

(2013) 02 AHC CK 0297

In the Allahabad High Court

Case No : Second Appeal No's. 970 to 978, 980 of 1982

Uttar Pradesh Gandhi Smarak Nidhi

APPELLANT

Vs

Aziz Mian

RESPONDENT

Date of Decision : 08-02-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 1(e), 66
Constitution of India, 1950 — Article 296
Criminal Procedure Code, 1973 (CrPC) — Section 145
General Clauses Act, 1897 — Section 3(31)
Government of India Act, 1858 — Section 54
Government of India Act, 1915 — Section 20(3)(iii)
Government of India Act, 1935 — Section 174
Limitation Act, 1963 — Section 23, 27, 28, 9
Specific Relief Act, 1963 — Section 42
Transfer of Property Act, 1882 — Section 35
Uttar Pradesh General Clauses Act, 1904 — Section 4(25)

Citation : (2013) 4 ALJ 149 : (2013) 119 RD 106

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : U.S.M. Tripathi and Shambhavi Nandan, for the Appellant; Shashi Nandan and Durga Tiwari, for the Respondent

Final Decision : Dismissed

Judgement

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

2. Against the judgment impugned in these appeals Second Appeal No. 979 of

1982 has already been decided vide order dated 17.10.2012 on the basis of a compromise between the parties and, therefore, this Court is not concerned with that. This judgment shall not affect the aforesaid matter in any manner.

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

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

5. The Trial Court framed following issues:

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

2. Whether the disputed construction lie in the land in suit?
3. Whether the land in suit is Abadi land and it is settled with the defendants u/s 9 of the Act No. 1 of 1951 as the site of the defendants shop?
4. Whether the defendants in possession over the land in suit since the last 62 years with the permission of the then Zamindars? If so its effect?
5. Whether the suit is barred by time?
6. Whether the suit is barred by estoppel?
7. To what relief if any is the plaintiff entitled?

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

(Vernacular Matter Omitted....Ed)

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

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

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

7. The issue Nos. 1 and 2 were decided in affirmance, i.e., in favour of appellant. Issue Nos. 3, 4, 5 and 6 were decided against the defendants. Accordingly suits were decreed vide judgments dated 10.01.1969. The Trial Court passed order for demolition of shops in question and recovery of possession of site thereafter from defendants. It also decreed for recovery of damages for illegal use and occupation of sites in suit, from defendants.

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

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

10. While considering issue No. 8, the Lower Appellate Court also recorded a finding that construction said to have been raised by defendants relate back to a period prior to 1952 though the suit was filed in 1965, i.e., beyond the period of

limitation. It is, however, interesting that the Lower Appellate Court did not consider the appeal on other issues, i.e., issue Nos. 3 to 6, separately as to whether decision of Trial Court is correct or not. Since the appellant has not challenged the findings on these issues except Issue No. 5, I would not endeavour to touch the Findings of Trial Court on Issue Nos. 3, 4 and 6 and treat the same final.

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

1. Whether Article 112 of the Indian Limitation Act is applicable to the facts of the case as the suit was filed on behalf of the State of Uttar Pradesh?

2. Whether the plaintiff's suit is within limitation as it became barred in 1958 and the suit was filed in 1965.

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

1. Whether the suits were barred by time under Limitation Act, 1908 or 1963, as the case may be?

2. Whether requisite pleadings for deciding an issue of adverse possession were made by parties?

3. Whether it was open to defendants to raise a plea of adverse possession while on the one hand they pleaded that plaintiff is not the owner?

4. Whether, issue of adverse possession can be treated to be the limitation for tiling suit, i.e., inter se relation of provisions relating to transfer of title from owner to occupant on the ground of adverse possession and limitation applicable for maintainability of suit.

13. From the judgments of courts below, particularly the findings recorded by Trial Court in respect to issue Nos. 1 and 2, which have been upheld and confirmed by Lower Appellate Court, it is beyond doubt that land in question is a Nazul land. A Nazul land means the land vested in the Government. It is owned and vested in the State Government. The defendants have no otherwise right either to possess the property or to hold it except, if their rights are matured in their title, by virtue of adverse possession.

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

15. What is a Nazul land? It has been considered by a Special Bench of this Court in *Sunni Central Board of Waqfs v. Sri Gopal Singh Visharad and others*, 2010

ADJ 1 (SFB)(LB) and, in the judgment delivered by myself, from page 2830, para 4430 and onwards, the Court said:

4430. In the Legal Glossary 1992, fifth edition, published by the Legal Department of the Government of India at page 589, the meaning of the word "Nazul" has been given as "Rajbhoomi i.e. Government land". It is an Arabic word and it refers to a land annexed to Crown. During the British Regime, immovable property of individuals, Zamindars, Nawabs and Rajas when confiscated for one or the other reason, it was termed as "Nazul property". The reason being that neither it was acquired nor purchased after making payment. In the old record, we are told when they used to be written in Urdu, this kind of land was shown as "Jaidad Munzabta".

4431. For dealing with such property under the authority of the Lt. Governor of North Western provinces, two orders were issued in October, 1846 and October, 1848 wherein after the words "Nazul property" its english meaning was given as "Escheats to the Government". Sadar Board of Revenue on 20th May, 1845 issued a circular order in reference to Nazul land and in para 2 thereof it mentioned "The Government is the proprietor of those land and no valid title to them can be derived but from the Government." The Nazul land was also termed as confiscated estate. Under circular dated 13th July, 1859, issued by the Government of North Western Provinces, every Commissioner was obliged to keep a final confiscation statement of each district and lay it before the Government for orders. The kingdom of Oudh was annexed by East India Company in 1856. It declared the entire land as vested in the Government and thereafter settled the land to various individuals Zamindars, Nawabs etc.

4437.....the law, whether Islam or Hindu Shastras, do not recognise any personal right of ownership upon immovable property. The entire property within the suzerainty of the king belong to him, who had right to tax its subject in the form of tax or otherwise by realising share in the agricultural or other income in the immovable property. The percentage of share may differ and that may not be relevant for our purpose.

4438. The second aspect of the matter is that since ancient time the right of ownership proceeded with possession and is recognized by the well known principle "possession follows title". The individual right of ownership therefore was well recognized in the various personal laws and the only right the king had to acquire the land in known valid means, namely by purchase or gift etc. The obligation upon the king is to protect the subject and his property from enemies and for that purpose he used to raise revenue from the subject in the form of tax and/or share from the income of the property etc. It is said that the King, by virtue of its authority, was not the sole owner of the entire immovable property within his suzerainty but though the immovable property was subject to his suzerainty, the individual right of the owner on the property continued to be recognized. Besides, the fact that the land could have been acquired by the king by valid means like purchase, gift etc., meaning thereby other modes of

acquisition of immovable property by King existed otherwise no private owner of the land in question would have been there within his suzerainty.

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

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

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

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

.....

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

4444. This decision has been followed in *Raja Rajinder Chand Vs. Sukhi*, .

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

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

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

19. In *Abubakar Abdul Inamdar (dead) by LRs. and others Vs. Harun Abdul Inamdar and Others*, in the context of Articles 64 and 65 of Limitation Act, 1963 (hereinafter referred to as the "LA, 1963") emphasizing the importance of pleadings in para 5 of the judgment the Apex Court said:

With regard to the plea of adverse possession,....one has to turn to the pleadings of the appellant in his written statement. There he has pleaded a duration of his having remained in exclusive possession of the house, but nowhere has he pleaded a single overt act on the basis of which it could be inferred or ascertained that from a particular point of time his possession became hostile and notorious to the complete exclusion of other heirs, and his being in possession openly and hostilely. It is true that some evidence, basically of Municipal register entries, were inducted to prove the point but no amount of proof can substitute pleadings which are the foundation of the claim of a litigating party. The High Court caught the appellant right at that point and

drawing inference from the evidence produced on record, concluded that correct principles relating to the plea of adverse possession were not applied by the courts below. The finding, as it appears to us, was rightly reversed by the High Court requiring no interference at our end. (Para 5)

(Emphasis added)

20. Recently, the Apex Court has considered in detail the 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 the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession.

21. The Court also referred to its earlier decision in *D.N. 13 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.

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

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

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

apart from the actual and continuous possession which are among other ingredients of adverse possession, there should be necessary animus on the part of the person who intends to perfect his title by adverse possession.

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

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

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

23. 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 Defendant Nos. 2 to 5 as the case may be, is rejected.

24. 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.

25. 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.

26. 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)

27. 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 as to who was in possession of land, the presumption is that the true owner was in such possession. In other words, 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.

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

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

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

31. In paras 20, 21 and 22 of written statement, however, the claim of appellant

in respect to disputed property has been denied in its entirety stating:

(Vernicular Matter Omitted...Ed)

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

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

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

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

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

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

35. The nature of the statute on limitation was considered in C. Beepathumma and Others Vs. V.S. Kadambolihaya and Others, and it say.

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

(Emphasis added)

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

37. Thus prior to 05.05.1859 there was no common law of limitation applicable to whole of India. The Provincial Courts in each Presidency established by East India Company were governed by certain Regulations, like; Regulation III of 1793 (Bengal); Regulation II of 1802 (Madras); Regulation I of 1800 (Bombay)

and the Acts particularly applicable to them like Act I of 1845; Act XIII of 1848; Act XI of 1859. The Non-Regulation Provinces i.e. Punjab and Oudh etc. were governed by Codes of their own and sometimes by Circular Orders of Judicial Commissioner. The three Supreme Courts established by Royal Charter adopted English Law of Limitation.

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

39. The first codified statute was Act No. 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. It was repealed by Act No. IX of 1871, Act XV of 1877, by Act IX of 1908, i.e., LA 1908 and lastly the Courts in India are now governed by LA, 1963 after repeal of LA, 1908.

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

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

42. Act IX of 1871 extended the scope and made provisions relating to limitation to suits, appeals and certain applications to Courts. It received assent of Governor General on 24th March, 1871. Second Schedule, First Division, Articles 118, 143 and 145 provided limitation for possession of immovable property and read as under:

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

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

45. The Law of Prescription prescribes the period at the expiry of which not only

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

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

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

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

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

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

51. The doctrine of limitation is founded on considerations of public policy and expediency. It does not give a right where there exist none, but to impose a bar after a certain period to the remedy for enforcing an existing right. The object is

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

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

53. In *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.

54. Mere expiry of limitation could have extinguished remedy but the principle embodied in Section 28 extinguishes the right also and thereby makes the said general principle inapplicable. Once the right of getting possession extinguished it cannot be revived by entering into possession again [See *Salamat Raj v. Nur Mohamed Khan* (1934) ILR 9 Lucknow 475; *Ram Murti and others Vs. Puran Singh and another and Bailochan Karan Vs. Basant Kumari Naik and Another*,].

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

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

57. Between the Articles 142 and 144 the later one is a kind of residuary provision while Article 142 applies in a specific type of case [See *Sidram Lachmaya Vs. Mallaya Lingaya Chilaka*, (Para9); *Ranchordas Vandravandas v. Parvatibai* (1902) 29 IA 71 (PC)].

58. A Full Bench of this Court in Bindhyachal Chand and Others Vs. Ram Gharib Chand and Others, held where Article 142 is applicable, Article 144 cannot be applied. First it has to be seen whether Article 142 applies in the case or not and when it clearly becomes inapplicable only then resort can be taken to Article 144

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

60. In reference to Article 143 of Act 9 of 1871 the Privy Council in (1881) ILR 8 224 (Privy Council) said:

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

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

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

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

presumption of possession goes with it unless proved otherwise.

64. Privy Council in (1889) L.R. 16 I.A. 186 (Privy Council) agreed with the view of this court that possession is a good title against all the world except the person who can show a better title. By reason of his possession such person has an interest which can be sold or devised.

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

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

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

68. Privy Council in 17 CWN 389 (Privy Council) said:

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

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

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

nothing is better settled than that the onus of establishing title to property by

reason of possession for a certain requisite period lies upon the person asserting such possession. It is too late in the day to suggest the contrary of this proposition. If it were not correct it would be open to the possessor for a year or a day to say, "I am here; be your title to the property ever so good, you cannot turn me out until you have demonstrated that the possession of myself and my predecessors was not long enough to fulfil all the legal conditions.".....It would be contrary to all legal principles to permit the squatter to put the owner of the fundamental right to a negative proof upon the point of possession.

(Emphasis added)

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

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

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

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

73. In *Shyam Sunder Prasad and Others Vs. Raj Pal Singh and Another*, in reference to Articles 142 and 144 of L.A., 1908 the Apex Court said:

Under the old Limitation Act, all suits for possession whether based on title or on

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

74. Thus, the judicial consensus now binding on this Court is to the effect that Article 142 is one of the specific provision governing suits for possession of immovable property and contemplates a suit for possession when the plaintiff, while in possession has been dispossessed or has discontinued possession [See also *Abbas Dhali and Others Vs. Masabdi Karikar*,].

75. Article 144 in the matter of an occasion for possession of immovable property or an interest therein is a residuary Article hence the allegations made in the plaint if brings the suit within Article 142, there is no justification or occasion to take the matter out of that Article and then to apply Article 144. It is only when Article 142 is not applicable and no other Article applies, based on the pleadings, then if attracted, Article 144 may be applied. Article 142 is neither subordinate nor subject to Article 144 but will have application on its own and independent. Article 144 thus is a kind of residuary Article and will have application when no other Article has application to the matter. In *Bindhyachal Chand and Others Vs. Ram Gharib Chand and Others*, Justice Mukherjee observed, if, on the allegations made in the plaint, suit falls within Article 142, there is no justification to take it out of Article 142 and attempt to bring Article 144 into picture.

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

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

been discussed above in detail.

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

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

(A) In "Mitra's Legal & Commercial Dictionary" 5th Edition (1990) by A.N. Sana, published by Eastern Law House Prv. Ltd., at pages 232-233:

Dispossession. The term "dispossession" applies when a person comes in and drives out others from possession. It imports ouster; a driving out of possession against the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against the will of the person in possession but in accordance with his wishes and active consent. The term "discontinuance" implies a voluntary act and abandonment of possession followed by the actual possession of another. *Qadir Bux Vs. Ramchand and Others*, .

Unless the possession of a person prior to his alleged dispossession is proved, he cannot be said to have been dispossessed. *Rudra Pratap Singh and Others Vs. Jagdish Maharaj and Others*, .

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

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

(C) In "The Judicial Dictionary of Words and Phrases Judicially Interpreted, to which has been added Statutory Definitions" by F. Stroud Second Edition Vol. 1 (1903), at page 485:

"DISPOSSESSION." Dispossession, or Discontinuance of Possession," S.3, Real Property Limitation Act, 1833, means the ABANDONMENT of possession by one entitled to it (*Rimington v. Cannon*, 22 LJ CP 153; 12 CB 18), followed by actual possession by another (*Smith v. Lloyd*, 23 LJ Ex 194; 9 Ex 562; *McDonnell v. McKinty*, 10 Ir LR 514); ignorance on the part of the rightful owner that such adverse possession has been taken making no difference (*Rains v. Buxton*, 49 LJ Ch 473; 14 Ch D 537; 28 WR 954).

Acts of user which do not interfere, and are consistent, with the purpose to which the owner intends to devote the land, do not amount to Discontinuance of Possession by him (*Leigh v. Jack*, 5 Ex D 264; 49 LJ Ex 220); Dispossession "involves an animus possidendi with the intention of excluding the owner as well as other people" (per Lindley, M.R., *Littledale v. Liverpool College*, 69 L.J. Ch. 89, cited DISCONTINUANCE).

SMALL ACTS by the rightful owner will disprove "Dispossession or Discontinuance," e.g. small repairs (Leigh v. Jack, sup), or, as regards a boundary wall, an inscription claiming it (Phillipson v. Gibbon, 40 LJ Ch 406; 6 Ch. 428).

Vh, Watson, Eq. 574, 575; and for a full examination of the cases on "Dispossession" and "Discontinuance," V. 35 S.J. 715, 742, 750.

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

DISPOSSESSION. The act of putting out of possession, the ejectment or exclusion of a person from the realty, if not to his injury, then certainly against his interest and without his consent, ouster.

The term has been held not to imply necessarily a wrongful act; and, although it has been defined as a wrong that carries with it the emotion of possession, an act whereby the wrongdoer gets the actual possession of the land or hereditament, including abatement, intrusion, disseisin, discontinuance, deforcement, it has been said that it may be by right or by wrong, that it is necessary to look at the intention in order to determine the character of the act, and that, in this respect, the word is to be distinguished from "disseisin."

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

DISPOSSESSION [A partnership was dissolved, and the continuing partner, Hudson, agreed, in consideration of an assignment to him of the partnership property, to pay an annuity to the retiring partner. In order to carry into effect this agreement an indenture was entered into and executed between the parties; and Hudson bound himself to trustees, in the sum of ? 2,000, by a bond of even date conditioned to be void on payment of the annuity "or in case he should at any time after the expiration of the then existing lease, be dispossessed of and be compelled and obliged to leave and quit the premises without any collusion, contrivance, consent, act, or default" on his part.] "It seems that the species of dispossession in contemplation was a compulsory eviction; and they meant to provide that, if Hudson should be evicted, not through any fault of his own, he should no longer be burdened with payment of the annuity.... The expulsion intended to be provided for, was such an expulsion as would leave Hudson no benefit from the premises." Heyland v. De Mendez (1817), 3 Mer 184, per Grant, MR, at p. 189.

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

Dispossession. Where the heirs of the deceased could not realise rent owing to successful intervention of another person, it must be taken that they were

dispossessed. "Dispossession" implies ouster, and the essence of ouster lies in that the person ousting is in actual possession.

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

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

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

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

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

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

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

Discontinuance of Possession. Discontinuance of possession connotes abandonment of possession by the owner followed by the taking of possession by another. Nawab Syed Mahammad Hashim Ali Khan and Another Vs. Iffat Ara Hamidi Begum and Others, .

Discontinuance implies a voluntary act and abandonment of possession followed by the actual possession of another. Qadir Bux Vs. Ramchand and Others, .

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

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

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

"DISCONTINUANCE." "Discontinuance" is an ancient word in the law (Litt. S. 592). "A discontinuance of estates in lands or tenements is properly (in legal understanding) an alienation made or suffered by tenant in taile, or by any that is seized in auter droit, whereby the issue in taile, or the heir or successor, or those in reversion or remainder, are driven to their action, and cannot

enter" (Co. Litt. 325 a).Vf, Termes de la Ley : 3 Bl.Com. 171.

"Discontinuance of POSSESSION," Ss. 3, 3 & 4 W. 4, c. 27; V. Leigh v. Jack, 5 Ex D 264; 49 LJ Ex 220: Littledale v. Liverpool College, 1900, 1 Ch. 19; 69 LJ Ch 87; 81 LT 564; 48 WR 177.

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

DISCONTINUANCE. The word "discontinuance" is defined generally as meaning the act of discontinuing; cessation; intermission; interruption of continuance.

As defined in Dismissal and Nonsuit; 2, the word "discontinuance" means an interruption in the proceedings of a case caused by the failure of the plaintiff to continue the suit regularly as he should, and it is either voluntary or involuntary, and is similar to a dismissal, nonsuit, or nolle prosequi, but differs from a retraxit.

In a particular connection, it has been held that the term connotes a voluntary, affirmative, completed act, and that it cannot mean a temporary non-occupancy of a building or a temporary cessation of a business.

The term may be employed as synonymous with "abandonment."

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

DISCONTINUANCE-A "discontinuance" of case is a gap or chasm in proceeding after suit is pending.

The term "discontinuance" means voluntary withdrawal of a suit by a plaintiff.

There exists no essential difference between a "discontinuance" and a "voluntary nonsuit."

A criminal suit may be discontinued, "discontinuance" being a gap or chasm in prosecution after suit is pending.

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

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

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

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

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

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

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

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

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

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

Discontinuance, an interruption or breaking off. This happened when he who had an estate tail granted a larger estate of the land than by law he was entitled to do; in which case the estate was good so far as his power extended to make it, but no further (Finch L. 190; 1 Co. Rep. 44).

Formerly, in the law of real property, discontinuance was where a man wrongfully alienated certain lands or tenements and dies, whereby the person entitled to them was deprived of his right of entry and was compelled to bring an action to recover them,. The term was specially applied to alienations by husbands seised jure uxoris, by ecclesiastics seised jure ecclesiae, and by tenants in tail: thus, if a tenant in tail alienated the land and died leaving issue, the issue could not enter on the land but was compelled to bring and action (Litt. 470, 592, 614; Co. Litt. 325A; Termes de la Ley; 3 Bl.Comm.171).

The principal action appropriate to discontinuance were formedon, cui in vita,

and *cui ante divortium*. The effect of discontinuance was taken away by the Real Property Limitation Act, 1833, S. 39. See *Miscontinuance*; *Recontinuance*; *Withdrawal*.

In the procedure of the High Court discontinuance is where the plaintiff in an action voluntarily puts an end to it, either by giving notice in writing to the defendant not later than fourteen days after service of the defence (R.S.C. Ord. 21, R. 2(1)) or later with leave of the court (R.3). The effect of discontinuance is that the plaintiff has to pay the defendant's costs (R.S.C. Ord. 62, R. 10(1)) and any subsequent action may be stayed until these costs are paid (R.S.C. Ord. 21, R. 5). A defendant may withdraw his defence at any time and may discontinue a counterclaim by notice not later than fourteen days after service of a defence to the counterclaim (R. 2(2)). A counterclaim may be discontinued later by leave of the court (R.3). He must pay the costs of the plaintiff (R.S.C. Ord. 62, R. 5). If all the parties consent the action may be withdrawn without leave of the court (R.2(4)).

81. The term "dispossession" and "discontinuance of possession" in Article 142, Act IX of 1908 came to be considered before the Calcutta High Court in *Brojendra Kishore Roy Chowdhury and Baikuntha Nath Sharma and Others Vs. Bharat Chandra Roy and Others*, and the Court held:

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

82. In 21 CWN 642 (Privy Council) , the Court explained the term "dispossession" in Article 142 of Limitation Act of 1877:

The Limitation Act, of 1877, does not define the term "dispossession", but its meaning is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not thereby discontinue his possession : constructively it continues until he is dispossessed; and, upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives. "There can be no discontinuance by absence of use and enjoyment, when the land, is not capable of use and enjoyment",....It seems to follow that there can be no continuance of adverse possession, when the land is not capable of use and enjoyment, so long as such adverse possession must rest on *de facto* use and occupation.

83. The distinction between "dispossession" and "discontinuance" has been noticed in 1942 NLJ 99 (Nagpur) , Nagpur Law Journal 99 observing that "dispossession" is not voluntary, "discontinuance" is. In dispossession, there is an element of force and adverseness while in the case of discontinuance, the person occupying may be an innocent person. For discontinuance of possession, the person in possession goes out and followed into possession by other person.

84. In *Agency Company v. Short*, 1888(13) AC 793 the Privy Council observed

that there is discontinuance of adverse possession when possession has been abandoned. The reason for the said observation finds mention on page 798 that there is no one against whom rightful owner can bring his action. The adverse possession cannot commence without actual possession and this would furnish cause of action.

85. Dispossession is a question of fact. The term refers to averments in the plaint exclusively and cannot be construed as referring to averments in the plaint in the first instance and at a later stage to the finding on the evidence. The indicia of discontinuance are also similar to some extent. It implies going out of the person in possession and is being followed into possession by another. In *Abdul Latif v. Nawab Khwaja Habibullah*, 1969 Calcutta Law Journal 28, the Court observed that discontinuance connotes three elements i.e. actual withdrawal, with an intention to abandon, and another stepping in after the withdrawal. Same is the view taken by this Court and Kerala High Court in *Qadir Bux Vs. Ramchand and Others*, and *Pappy Amma Vs. Prabhakaran Nair*, .

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

87. In AIR 1935 425 (Oudh) , referring to Article 142 of Limitation Act, 1908 the Court held where the plaintiff or the Muslim community whom they represent were dispossessed from the land in question belong to the graveyard, by erection of a house thereon, and, the suit is filed after 12 years therefrom, it would be barred by Article 142 of the Limitation Act.

88. In *R.H. Bhutani Vs. Miss Man J. Desai and Others*, , the Court said that dispossession means to be out of possession, removed from the premises, ousted, ejected or excluded. It applies when a person comes in and drives out others in possession.

89. In *Shivagonda Subraigonda Patil and Others Vs. Rudragonda Bhimagonda Patil and Another*, , the Court held that dispossession for the purpose of this Article must be by the defendant and that must be the basis of the suit. If there is no dispossession by the defendant, this Article would have no application. The dispossession, therefore, implies taking possession without consent of the person in possession and is a wrong to the person in possession. It must result in termination of possession of the person in possession earlier.

90. Application of Articles 142 and 144 of L.A., 1908 was considered in *Jamal Uddin and Another Vs. Mosque at Mashakganj and Others*, and in para 29 the Court said:

29. The next point that was urged by the counsel for the appellants was that the courts below committed a legal error in applying Art. 144 of the Limitation Act, 1908, to the suit and placing the burden on the defendants to prove their

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

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

92. In *Ponnu Nadar and Others Vs. Kumaru Reddiar and Others*, , the Court held that the real cause of action was the date of the order of the Magistrate and limitation started from the date of order. Article 120 of the Limitation Act, 1908 was applicable and not Section 23 of the said Act. The relevant portions of the said judgment read as follows:

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

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

93. In AIR 1931 9 (Privy Council) , Privy Council held that in case of an accrual of the right asserted in the suit and its infringement or at least clear and

unequivocal threat to infringe that right by the defendant against whom the suit is instituted for the purpose of limitation Article 120 of the Limitation Act, 1908 is applied. Relevant para of the judgment from page 12 reads as under:

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

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

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

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

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

96. In Garib Das and Others Vs. Munshi Abdul Hamid and Others, the Court said that in a suit for recovery of possession after cancellation of sale deed in favour of the defendants on the ground that a previous valid waqf had been created, Article 142 was not applicable, the suit was to be filed within a period of six years that is to say Article 120 was applicable. Para 13 of the judgment reads as

follows:

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

97. In *Dwijendra Narain Roy Vs. Joges Chandra De and Others*, (page 609) the Court said:

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

98. This has been approved in *P. Lakshmi Reddy Vs. L. Lakshmi Reddy*, .

99. In AIR 1925 42 (Privy Council) , it was observed that the claims declaratory in their nature falling u/s 42 of the Specific Relief Act are governed by Article 120 of LA 1908.

100. In *Draupadi Devi and Others Vs. Union of India (UOI) and Others*, the Court said:

73. We may notice here that under the Code of Civil Procedure, Order VII, Rule 1(e) requires a plaint to state "the facts constituting the cause of action and when it arose". The plaintiff was bound to plead in the plaint when the cause of action arose. If he did not, then irrespective of what the defendants may plead in the written statement, the court would be bound by the mandate of Section 3 of the Limitation Act, 1908 to dismiss the suit, if it found that on the plaintiff's own pleading his suit is barred by limitation. In the instant case, the plaint does not plead clearly as to when the cause of action arose. In the absence of such pleadings, the defendants pleaded nothing on the issue. However, when the facts were ascertained by evidence, it was clear that the decision of the Government of India not to recognise the suit property as private property of the Maharaja was taken some time in the year 1951, whether in March or May. Dewan Jarmanidass, the plaintiff and the Maharaja were very much aware of this decision. Yet, the suit was filed only on 11.5.1960.

74. The Division Bench was, therefore, right in applying Article 120 of the Limitation Act, 1908 under which the period of limitation for a suit for which no specific period is provided in the Schedule was six years from the date when the right to sue accrues. The suit was, therefore, clearly barred by limitation and by virtue of Section 3 of the Limitation Act, 1908, the court was mandated to

dismiss it.

75. As rightly pointed out by the Division Bench, the learned single Judge ought to have permitted the plea to be raised on the basis of the facts which came to light. The Division Bench has correctly appreciated the plea of limitation, in the facts and circumstances of the case, and rightly came to the conclusion that the suit of the plaintiff was liable to be dismissed on the ground of limitation. We agree with the conclusion of the Division Bench on this issue.

101. In AIR 1930 270 (Privy Council) , right to sue for the purpose of Article 120, Limitation Act was considered and it was held:

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

102. In Mamidi Venkata Satyanarayana Manikyala Rao and Another Vs. Mandela Narasimhaswami and Others, , the words "right to sue" under Article 120, LA 1908 was considered by the Apex Court and it was held that right to sue occurs for the purpose of the said Article. There is an accrual of the right asserted in the suit and unequivocal threat by the respondents to infringe it. Every threat by a party to such a right, however, ineffective and innocuous it may be, cannot be considered to be a clear and unequivocal threat so as to compel him to file a suit. Whether a particular threat gives rise to a compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the said right. [See: Mst. Rukhmabai Vs. Lala Laxminarayan and Others,]. It has been held in a catena of decisions that in a suit for declaration of title to immovable property, it is Article 120, LA 1908 and Article 113, LA 1963 which would be applicable.

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

104. In Aftab Ali Khan and Others Vs. Akbar Ali Khan and Others, , the Court said that Article 120 undoubtedly applies to all declaratory suits except where separate provision is made. In such a case of declaration, it is no doubt has been held by this Court in Mt. Salamat Begam Vs. Sheikh Ikram and Others and Parjapati and Others Vs. Jot Singh and Others , that where owner is in possession, he acquires a cause of action on each occasion on which his rights are denied.

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

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

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

108. In *C. Natrajan Vs. Ashim Bai and Another*, : AIR 2008 SC 363, the Apex Court noticed the distinction between Articles 142 and 144 of LA 1908 and Articles 64 and 65 of LA 1963 in para 15 of the judgment as under:

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

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

110. In the matter of limitation sympathy, hardship, discretion etc. have no place. In AIR 1935 85 (Privy Council) , Lord Tomlin observed, "there is no judicial discretion to relieve the appellants from the operation of the Limitation Act in a case of hardship or any authority in the Court to dispense with its provision." This has been followed in *The Firm of AIR 1940 276 (Rangoon)* , by a Full Bench of Rangoon High Court. In the above judgment, the Court also disapprove the contention that continued attachment would confer a continuous cause of action.

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

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

3(31) "local authority" shall mean a municipal committee, district board, body of port commissioners" or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal of local fund;

4(25) "local authority" shall mean a municipal board or Nagarpalika, Nagar Mahapalika, Notified Area Committee, Town Area Committee, Zila Parishad, Cantonment Board, Kshetra Samiti. Gaon Sabha or any other authority constituted for the purpose of Local Self Government or village administration or legally entitled to or entrusted by the State Government with the control or management of municipal or local fund;

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

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

115. In this case there is no declaration sought by plaintiff, therefore, Article 58 of Act, 1963 also will have no application. It is only Articles 64, 65 or 113, at the best, could have governed the matter. Article 64 apparently is applicable if the plaintiff was earlier in possession but dispossessed. The limitation would commence from the date of dispossession. It is admitted by plaintiff-appellant that lease having been executed in 1954, possession of land other than the disputed part got in hands of plaintiff in 1954 itself. While according to the findings of the court below, defendants were in possession since before 1952. The plaintiff was never in possession of the disputed property since it was with defendants. Even before the other part of land got in the hand of appellant, the question of dispossession does not arise. It is in these circumstances even Article 64 of Act 1963 has no application.

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

117. Article 65 of LA 1963 in substances is the amalgamation of Articles 47, 136,

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

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

119. In a suit for possession the knowledge of plaintiff about otherwise possession of property by defendant would construe the time from which period begins to run, i.e., right to sue accrues therefrom. In the present case as held by courts below the property in dispute though belong to State but was in possession of defendants since before 1952 and, therefore, despite lease deed executed on 06.03.1954, possession of disputed property must be with defendants and this must have accrued right to sue to plaintiff to get possession of disputed property at the time other part of land came in their possession. The right to sue, therefore, was available to owner of property as soon as defendants occupy disputed land and in any case to appellant, when after execution of lease deed dated 06.03.1954, appellant was handed over possession of leased land except the disputed land over which defendants were already in possession. The cause of action or right to sue, therefore, accrued to appellant in March, 1954 itself and if that is so the limitation to file suit expired in March, 1957. By no stretch of imagination it can be said that in 1965 when suits in question were filed the same were within the period of limitation unless appellant would have been successful in proving their case that defendants occupied land in dispute in November, 1962 which was their pleading in plaint for the purpose of determining limitation but unfortunately on this aspect, the appellant having failed to prove their case, hence cannot be extended any benefit thereupon.

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

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

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

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

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

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

The most celebrated system of jurisprudence known to the world begins, as it

ends, with a Code. From the commencement to the close of its history, the expositors of Roman Law consistently employed language which implied that the body of their system rested on the Twelve Decemviral Tables, and therefore on a basis of written law....

The ancient Roman Code belongs to a class of which almost every civilized nation in the world can show a sample, and which, so far as the Roman and Hellenic worlds were concerned, were largely diffused over them at epochs not widely distant from one another. (Page 1)

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

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

127. Further he says:

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

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

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

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

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

130. "Sir Maine" further says:

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

piece of good luck, was instinctively mutinied against by some of the most adventurous nations in Europe, the Dutch, the English, and the Portuguese. Our own countrymen, without expressly denying the rule of International Law, never did, in practice, admit the claim of the Spaniards to engross the whole of America, south of the Gulf of Mexico, or that of the King of France to monopolise the valleys of the Ohio and the Mississippi. From the accession of Elizabeth to the accession of Charles the Second, it cannot be said that there was at any time thorough peace in the American waters, and the encroachments of the New England Colonists on the territory of the French King continued for almost a century longer. Bentham was so struck with the confusion attending the application of the legal principle, that he went out of his way of eulogize the famous Bull of Pope Alexander the Sixth, dividing 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. (Pages 206-207)

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

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

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

132. Explaining occupancy, "Maine" observes:

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

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

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

Occupancy is the advised assumption of physical possession; and the notion that an act of this description confers a title to "*res nullius*", so far from being characteristic of very early societies, is in all probability the growth of a refined jurisprudence and of a settled condition of the laws. It is only when the rights of property have gained a sanction from long practical inviolability, and when the vast majority of the objects of enjoyment have been subjected to private ownership, that mere possession is allowed to invest the first possessor with dominion over commodities in which no prior proprietorship has been asserted.

The sentiment in which this doctrine originated is absolutely irreconcilable with that infrequency and uncertainty of proprietary rights which distinguish the beginnings of civilisation. Its true basis seems to be, not an instinctive bias towards the institution of Property, but a presumption, arising out of the long continuance of that institution, that everything ought to have an owner. When possession is taken of a "res nullius", that is, of an object which is not, or has never been, reduced to dominion, the possessor is permitted to become proprietor from a feeling that all valuable things are naturally the subjects of an exclusive enjoyment, and that in the given case there is no one to invest with the right of property except the Occupant. The Occupant in short, becomes the owner, because all things are presumed to be somebody's property and because no one can be pointed out as having a better right than he to the proprietorship of this particular thing. (Pages 212-213)

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

The Roman jurisprudence will not here assist in enlightening us, for it is exactly the Roman jurisprudence which, transformed by the theory of Natural Law, has bequeathed to the moderns the impression that individual ownership is the normal state of proprietary right, and that ownership in common by groups of men is only the exception to a general rules. There is, however, one community which will always be carefully examined by the inquirer who is in quest of any lost institution of primeval society. How far soever any such institution may have undergone change among the branch of the Indo European family which has been settled for ages in India, it will seldom be found to have entirely cast aside the shell in which it was originally reared. It happens that, among the Hindoos, we do find a form of ownership which ought at once to rivet our attention from its exactly fitting in with the ideas which our studies in the Law of Persons would lead us to entertain respecting the original condition of property. The Village Community of India is at once an organised patriarchal society and an assemblage of co-proprietors. The personal relations to each other of the men who compose it are indistinguishably confounded with their proprietary rights, and to the attempts of English functionaries to separate the two may be assigned some of the most formidable miscarriages of Anglo-Indian administration. The Village Community is known to be of immense antiquity. In whatever direction research has been pushed into Indian history, general or local, it has always found the Community in existence at the farthest point of its progress. A great number of intelligent and observant writers, most of whom had no theory of any sort to support concerning its nature and origin, agree in considering it the least destructible institution of a society which never willingly surrenders any one of its usages to innovation. Conquests and revolutions seem to have swept over it without disturbing or displacing it, and the most beneficent systems of Government in India have always been those which have recognised it as the basis of administration.

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

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

The process which I have described as that under which a Village Community is formed, may be regarded as typical. Yet it is not to be supposed that every Village Community in India drew together in so simple a manner. Although, in the North of India, the archives, as I am informed, almost invariably show that the Community was founded by a single assemblage of blood-relations, they also supply information that men of alien extraction have always, from time to time, been engrafted on it, and a mere purchaser of a share may generally, under certain conditions, be admitted to the brotherhood. In the South of the Peninsula there are often Communities which appear to have sprung not from one but from two or more families; and there are some whose composition is known to be entirely artificial; indeed, the occasional aggregation of men of different castes in the same society is fatal to the hypothesis of a common descent. Yet in all these brotherhoods either the tradition is preserved, or the assumption made, of an original common parentage. Mountstuart Elphinstone, who writes more particularly of the Southern Village Communities, observes of them (History of India, i. 126): "the popular notion is that the Village landholders are all descended from one or more individuals who settled the village, and that the only exceptions are formed by persons who have derived their rights by purchase or otherwise from members of the original stock. The supposition is confirmed by

the fact that, to this day, there are only single families of landholders in small villages and not many in large ones; but each has branched out into so many members that it is not uncommon for the whole agricultural labour to be done by the landholders, without the aid either of tenants or of labourers. The rights of the landholders are theirs collectively and, though they almost always have a more or less perfect partition of them, they never have an entire separation. A landholder, for instance, can sell or mortgage his rights; but he must first have the consent of the village, and the purchaser steps exactly into his place and takes up all his obligations. If a family becomes extinct, its share returns to the common stock. (Pages 217-219)

136. On page 223 he further says:

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

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

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

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

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

46. Spotted wealth is (of the following seven sorts) : what is acquired by lending money at interest, tillage, commerce, in the shape of Sulka, by artistic performances, by servile attendance, or as a return for a benefit conferred on some one.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9. He who does not raise a protest when a stranger is giving away (his) landed

property in his sight, cannot again recover that estate, even though he be possessed of a written title to it.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

139. Thus in brief, the concept of possession in ancient laws may be stated that

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

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

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

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

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

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

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

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

147. According to Salmond on "Jurisprudence", 12th Edition (1966) (First Edition published in 1902) by PJ Fitzgerald, Indian Economy Reprint 2006 published by

Universal Law Publishing Co. Pvt. Ltd., Delhi (hereinafter referred to as "Salmond's Jurisprudence"). On page 51, it says that the concept of "possession" is as difficult to define as it is essential to protect. It is an abstract notion and is not purely a legal concept. It is both a legal and a non-legal or a pre-legal concept. He tried to explain the concept of possession with reference to different factual and legal concepts.

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

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

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

151. Another facet of possession is "immediate" or "mediate possession". The possession held by one through another is termed "mediate" while that acquired or retained directly or personally can be said to be "immediate or direct". There is a maxim of civil law that two persons could not be in possession of the same thing at the same time. (*Plures eandem rem in solidum possidere non possunt*). As a general proposition exclusiveness is of the essence of possession. Two adverse claims of exclusive use cannot both be effectually realised at the same

time. There are, however, certain exceptions, namely, in the case of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. Two or more persons may possess the same thing in common just as they may own it in common.

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

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

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

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

155. Corpus possessionis means that there exists such physical contact of the thing by the possessor as to give rise to the reasonable assumption that other persons will not interfere with it. Existence of corpus broadly depend on (1) upon the nature of the thing itself, and the probability that others will refrain from interfering with the enjoyment of it; (2) possession of real property, i.e., when a man sets foot over the threshold of a house, or crosses the boundary line of his estate, provided that there exist no factors 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, then upon the physical capacity of an individual to exclude others.

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

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

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

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

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

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

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

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

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

possess poz-es" vt to inhabit, occupy (obs.); to have or hold as owner, or as if owner; to have as a quality; to seize; to obtain; to attain (Spenser); to maintain; to control; to be master of; to occupy and dominate the mind of; to put in possession (with of, formerly with in); to inform, acquaint; to imbue; to impress with the notion of feeling; to prepossess (obs).

possession the act, state or fact of possession or being possessed, a thing possessed; a subject foreign territory.

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

Possession expresses the closest relation of fact which can exist between a corporeal thing and the person who possesses it, implying an actual physical contact, as by sitting or standing upon a thing; denoting custody coupled with a right or interest of proprietorship; and "possession" is inclusive of "custody," although "custody" is not tantamount to "possession." In its full significance, "possession" connotes domination or supremacy of authority. It implies a right and a fact; the right to enjoy annexed to the right of property, and the fact of the real detention of thing which would be in the hands of a master or of another for him. It also implies a right to deal with property at pleasure and to exclude other persons from meddling with it. Possession involves power of control and intent to control, and all the definitions contained in recognized law dictionaries indicate that the element of custody and control is involved in the term "possession."

The word "possession" is also defined as meaning the thing possessed; that which anyone occupies, owns, or controls; and in this sense, as applied to the thing possessed, the word is frequently employed in the plural, denoting property

in the aggregate; wealth; and it may include real estate where such is the intention, although this is not the technical signification.

It is also defined as meaning dominion; as, foreign possessions; and, while in this sense the term is not a word of art descriptive of a recognised geographical or Governmental entity, it is employed in a number of federal statutes to describe the area to which various congressional statutes apply.

"Possession" in the sense of ownership, and as a degree of title, and as indicating the holding or retaining of property in one's power or control, is treated in Property.

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

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

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

actual possession. Physical occupancy or control over property.

adverse possession. A method of acquiring title to real property by possession for a statutory period under certain conditions, esp. a non-permissive use of the land with a claim of right when that use is continuous, exclusive, hostile, open, and notorious.

constructive adverse possession. Adverse possession in which the claim arises from the claimant's payment of taxes under colour of right rather than by actual possession of the land.

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

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

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

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

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

direct possession. Something that a person owns or controls.

effective possession. See constructive possession.

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

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

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

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

indirect possession. See mediate possession.

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

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

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

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

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

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

possession in fact. Actual possession that may or may not be recognized by law. -- Also termed *possessio naturalis*.

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

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

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

quasi possession. See incorporeal possession.

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

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

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

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

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

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

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

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

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

Possession, the visible possibility of exercising physical control over a thing, coupled with the intention of doing so. either against all the world, or against all the world except certain persons. There are, therefore, three requisites of possession. First, there must be actual or potential physical control. Secondly, physical control is not possession, unless accompanied by intention; hence, if a thing is put into the hand of a sleeping person, he has not possession of it. Thirdly, the possibility and intention must be visible or evidenced by external signs, for, if the thing shows no signs of being under the control of anyone, it is not possessed; hence, if a piece of land is deserted and left without fences or other signs of occupation, it is not in the possession of anyone, and the possession is said to be vacant. The question whether possession of land is vacant is of importance in actions for recovering possession.

Possession is actual, where a person enters into lands or tenements conveyed to

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

.....

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

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

Possession does not necessarily imply use or enjoyment.

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

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

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

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

Possession without right is called wrongful or adverse, according to the rights of the owner or those of the possessor are considered. Wrongful possession is where a person takes possession of property to which he is not entitled, so that the possession and the right of possession are in one person, and the right to

possession in another. Where an owner is wrongfully dispossessed, he has a right of action to recover his property, or, if he has an opportunity, he can exercise the remedy of reception in the case of goods, or of entry in the case of land.

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

POSSESSION (Ownership), noun

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

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

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

.....

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

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

Possession need not be physical possession, but can be constructive, having power and control over the gun. *Gunwantlal Vs. The State of Madhya Pradesh*, .

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

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

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

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

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

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

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

There can be no possession without intention or consciousness or will. *Norendra Nath Mozumdar Vs. The State*, . (S.19(f) Arms Act, 1878).

Possession need not be physical possession but can be constructive, having power and control over the gun, while the person to whom physical possession is given holds it subject to that power or control. *Gunwantlal Vs. The State of Madhya Pradesh*, .

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

The word "possession" naturally signifies lawful possession. The possession of a trespasser could not be a possession of a tenant so as to attract Section 14(1). *Bhagat Ram Vs. Smt. Lilawati Galib*, .

The word "possessed" means the state of owning or having in one's hand or power but even this broad meaning will not apply in the case of a share or a woman when there has been no partition by metes and bounds. *Modi Nathubhai Motilal and Others Vs. Chhotubhai Manibhai Desai*, .

Obtaining a symbolic possession is in law equivalent to obtain actual physical possession and has the effect of terminating the legal possession of the person bound by the decree and order. *Umrao Singh Vs. Union of India*, .

The word "possession" implies a physical capacity to deal with the thing as we like to the exclusion of every one and a determination to exercise that physical power on one's own behalf. In *Re: Pachiripalli Satyanarayana*, .

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

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

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

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

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

171. There is a distinction between the terms "possession", "occupation" and "control". The distinction between "possession" and "occupation" was considered in 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.

172. 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 pre judicial reports, there were some letters in the box addressed to the applicant. Held, (1) that, *prima facie*, the box containing the documents would be in the possession of the husband and

the mere fact that in his absence he had left the keys with the applicant (wife) would not make her in joint possession with himself; nor did the fact that there were letters in the box addressed to the wife mean that she was in joint possession of all the contents of the box; (2) that the wife was in the circumstances in possession of the box within the meaning of R. 39(1) of the Defence of India Rules; (3) that occupation in R. 39(2) of the Defence of India Rules meant legal occupation, and the applicant could not be held to be in occupation or control of the house so as to render her guilty under R. 39 of the Defence of India Rules.

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

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

Effective possession. -- Where the plaintiff did not get the possession of the land as to control it as per his desire means that he is not having effective possession of the land as held in Alkapuri Co-operative Housing Society Ltd. Vs. Jayantibhai Naginbhai (deceased) Thr. LRs., .

De jure possession. -- A possession deemed in law though actually it is in possession of another is de jure possession as held in The Kottakkal Co-op. Urban Bank Ltd. Vs. T. Balakrishnan, .

Exclusive possession. -- In Nirmal Kanta (Dead) through Lrs. Vs. Ashok Kumar and Another, , the respondent No. 2 was accommodated by respondent No. 1 to assist him in his cloth business by helping customers to assess the amount of cloth required for their particular purposes. The said activity did not give respondent No. 2 exclusive possession for that part of the shop room from where he was operating and where his sewing machine had been affixed. This view taken by the Court below was upheld by the Apex Court.

Hostile possession. -- A possession against the real owner within his knowledge constitute hostile possession. Where a person is not sure who is the true owner, the question of his being in hostile possession does not arise and it would also not result in assuming that he was denying title of true owner. This is what was held by this Court in Ramzan and Others Vs. Smt. Gafooran and Others, . When a person claims possession over a property showing himself to be the owner, the question of showing hostile possession would not arise. Similarly, in Gopendra Goswami and Others Vs. Haradhan Das and Others, , it was held that mere possession over a land cannot be treated hostile to the title of the real owner

unless it is shown that the real owner has the knowledge and thereupon the possession of the stranger continued.

Physical possession. -- It is the actual possession over the land.(See: Dhara Singh Vs. Fateh Singh and Others,).

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

174. Possession can also be classified as under:

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

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

176. In Supdt. & Remembrancer of Legal Affairs, 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.

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

178. The defendants on the contrary claimed hostile possession on essential feature of the concept of adverse possession. A person other than owner, if continued to have possession of immoveable property for a period as prescribed in a Statute providing limitation, openly, without any interruption and interference from the owner, though he has knowledge of such possession, would crystallise in ownership after the expiry of the prescribed period or limitation, if the real owner has not taken any action for re-entry and he shall be denuded of his title to the property in law. "Permissible possession" shall not mature a title since it cannot be treated to be an "adverse possession". Such possession, for however length of time be continued, shall not either be converted into adverse possession or a tide. It is only the hostile possession which is one of the condition for adverse possession.

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

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

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

182. In 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 require by adverse possession will be strictly limited to what he has actually so possessed. That was an interesting case of dispute of ownership in respect to subsoil. It was held that there can be separate ownership of different strata of subsoil, at all events where minerals are involved. If a grant of surface right was given by the owner and the licensee is given possession to carry out the said right, by quarrying stones etc. possession

of subsoil in the eyes of law remain with the owner though it is only a constructive possession but in the absence of anything to show that with the knowledge of the owner the licensee held possession of subsoil and minerals therein and continued with that possession for statutory period of limitation to continue its ownership such plea of adverse possession in respect to subsoil cannot be accepted.

183. In 21 CWN 642 (Privy Council) , it was held:

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

184. In 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 AIR 1931 162 (Privy Council) .

185. 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 co-heir 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 coheir 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 coheir title. It is settled rule of law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster.

186. In Thakur Kishan Singh (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.

187. 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.

188. 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.....

189. In T. Anjanappa and Others Vs. Somalingappa and Another, the preconditions 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.

190. 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.

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

Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence

of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. (Para 5)

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

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

1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper-owner.

2. Specific positive intention to dispossess on the part of the adverse possessor effectively shifts the title already distanced from the paper owner, to the adverse possessor. Right thereby accrues in favour of adverse possessor as intent to dispossess is an express statement of urgency and intention in the upkeep of the property (Para 9)

192. In para 12 of the judgment, referring to its earlier decision in *T. Anjanappa and Others Vs. Somalingappa and Another*, , the Court held that if the defendants are not sure who is the true owner, the question of their being in hostile possession and the question of denying title of the true owner do not arise. It also referred on this aspect its earlier decision in *Des Raj and Others Vs. Bhagat Ram (Dead) By LRs. and Others*, and *Govindammal Vs. R. Perumal Chettiar and Others*, .

193. 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.

194. 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.

195. The title of property can vest in idols also by adverse possession as held in Ananda Chandra Chakravarti Vs. Broja Lal Singh and Others, wherein reliance was also placed on (1883) L.R. 10 I.A. 90 (Privy Council); 43 M.I.A. 73 (Privy Council); 26 CWN 537 (Privy Council); 26 CWN 495 (Privy Council); (1910) XX MLJ 624 (Privy Council) .

196. In Dasami Sahu Vs. Param Shameshwar Uma Bhairabeshwar Ban Lingeshar and Another , Hon"ble Sulaiman, J. of this Court held that there can be adverse possession, not only as against the idols but over the idols themselves. That adverse possession can be acquired against idols in respect of property dedicated in their favour and for the said purpose, reliance was placed on 8 CWN 809 (Privy Council); AIR 1925 2 (Privy Council) and Damodar Das v. Lakhan Das (Supra). It further held:

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

197. In (1934) 66 MLJ 134 (Privy Council) 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) .

198. 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.

199. 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.

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

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

201. It further held:

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

202. In *Karbalai Begum Vs. Mohd. Sayeed and Another*, in the context of a cosharer, it was held:

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

203. 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.

204. 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 Vs. L. Lakshmi Reddy*, which has since been followed in *Mohd. Zainulabudeen (since deceased by L.Rs.) Vs. Sayed Ahmed Mohideen and Others*, .

28. "Ouster" does not mean actual driving out of the cosharer from the property. It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.

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

206. 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 (dead) Vs. Arvind Kumar*, .

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

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

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

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

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

210. In *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 tide of the owner, commences prescribing title into himself and such prescription having continued for a period of 12 years, he acquires title not on his own but on account of the default or inaction on part of the real owner, which stretched over a period of 12 years results into extinguishing of the latter's title. It is that extinguished tide of the real owner which comes to vest in the wrongdoer. The law does not intend to confer any premium on the wrong doing of a person in wrongful possession; it pronounces the penalty of extinction of title on the person who though entitled to assert his right and remove the wrong doer and reenter into possession, has defaulted and remained inactive for a period of 12 years, which the law considers reasonable for attracting the said penalty. Inaction for a period of 12 years is treated by the Doctrine of Adverse Possession as evidence of the loss of desire on the part of the rightful owner to assert his ownership and reclaim possession.

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

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

in extinguishing one's title in property and vesting the same in the wrong doer in possession of property and thus amounts to "transfer of immovable property" in the wider sense assignable in the context of social welfare legislation enacted with the object of protecting a weaker section.

212. In *L.N. Aswathama and Another Vs. P. Prakash*, the Court, in paras 17 and 18 said:

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

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

213. Further, in para 25 the Court said:

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

214. Where a plea of adverse possession is taken, the pleadings are of utmost importance and anything, if found missing in pleadings, it may be fatal to such plea of adverse possession. Since mere long possession cannot satisfy the requirement of adverse possession, the person claiming it must prove as to how and when the adverse possession commenced and whether fact of adverse possession was known to real owner. (*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 Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others,].

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

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

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

218. 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.

219. 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 Ali granted a mortgage by conditional sale of the entire estate of Ambhapur (commonly known as the Taluka of Gandara) and certain villages to the then Maharaja of Balrampur. The mortgaged property situated in District Bahraich, which was in the Province of Oudh. The mortgagee brought an action to enforce his right, got a decree in his favour and ultimately possession of the property in 1922. The sons of Asghar Ali thereafter brought an action in civil Court for recovery of their share of the mortgaged property on the ground that it was the absolute property of their father and on his death devolved on all the persons who were his heirs under the Mahomedan Law. They challenged Iqbal Ali's right to mortgage the whole of estate and impeached the mortgaged transaction on various grounds. The claim was resisted on the ground that succession to the estate was governed by the rule of primogeniture according to which the whole of the estate descended first to Asghar Ah and after his death to his eldest son Iqbal Ali. The defence having been upheld the claim was negated

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.

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

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

221. It appears that the defendants initially sought to maintain their claim of continued ownership, possession and disruption against the Government authorities but later on the plea of adverse possession against the plaintiff has been taken which makes the stand of the defendants inherently inconsistent and

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

222. In *Nagubai Ammal and Others 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 (1907) 34 Ind App 27 (B), where this statement of the law was adopted. No exception can be taken to this proposition. But before it can be invoked, it must be shown that there is a clear and unambiguous statement by the opponent, such as will be conclusive unless explained.

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

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

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

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

It is clear from the above observations that the maxim that a person cannot "approbate and reprobate" is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in

Halsbury's Laws of England, Volume XIII, page 454, para 512:

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

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

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

224. This has been followed in several cases noticed and followed by a Division Bench of Madras High Court in Ammalu Achi, 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.

225. 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).

226. 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.

227. 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.

228. In AIR 1942 47 (Privy Council) it was held that the defendant-appellant has to establish that the title to the land in suit held by the owner under the First Settlement of 1865 had been extinguished u/s 28 of the Limitation Act due to the adverse possession of the defendant-appellant or his predecessors for the appropriate statutory period of limitation and completed prior to the possession taken under attachment by Tehsildar who thereafter held it for the true owner. It also says:

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

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

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

230. AIR 1935 44 (Privy Council) is a judgment which deals with the issue of commencement of limitation under Article 144 of Limitation Act 1908. It was held therein that a person in actual possession of Math is entitled to maintain a suit for recovery of property pertaining to Math not for his own benefit but for the benefit of Math. On the matter of limitation the Court held:

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

231. To the same effect is the view taken in *Gopal Datt and Another Vs. Babu Ram and Another*, .

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

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

234. Adverse possession is of two kinds. (A) Adverse from the beginning or (B) that become so subsequently. If a mere trespasser takes possession of A's

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

235. In Hari Chand 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 47A 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 plaintiff's case, but they are recent constructions." This decision of the court of appeal below is wholly incorrect being contrary to the evidences on record.

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

236. In AIR 1937 69 (Privy Council) the Hon^{ble} Privy Council has 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 exclusiveness" (per Lord Shaw 126 CWN

666 (1922) at p. 673) necessary to displace the title of the Maharaja, and they think that no reason in law exists why his finding of fact in this respect should not be final.

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

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

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

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

238. In *Qadir Bux Vs. Ramchand and Others*, the Hon''ble Allahabad High Court has held that the term "dispossession" applies when a person comes in and drives out others from the possession. It implies ouster; a driven out of possession against the will of the person in actual possession. The term "discontinuance" implies a voluntary act and openness of possession followed by the actual possession of another. It implies that a person discontinuing as owner of the land and left it to be dispossessed by any one who has not to come in. Relevant para 30 of the said judgment reads as follows:

30. The main point for consideration is whether in such circumstances it can be said that the plaintiff had been dispossessed or had discontinued his possession within the meaning of Article 142 of the First Schedule to the Indian Limitation Act. The term "dispossession" applies when a person comes in and drives out others from the possession. It imports ouster a driving out of possession against

the will of the person in actual possession. This driving out cannot be said to have occurred when according to the case of the plaintiff the transfer of possession was voluntary, that is to say, not against 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.

239. In Gurbinder Singh and Another Vs. Lal Singh and Another, the Hon"ble Supreme Court held that in order that Article 142 is attracted the plaintiff must initially be found in possession of the property and should have been dispossessed by the defendant or someone through whom the defendants claim or alternatively the plaintiff should have discontinued possession. It has also been held that in a suit to which Article 144 attracted the burden is on the party who claims adverse possession to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of an independent trespasser. Relevant paras 6, 8 and 10 of the said judgment read as follows:

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

8. Mr. Tarachand Brijmohanlal, however, advanced an interesting argument to the

effect that if persons entitled to immediate possession of land are somehow kept out of possession may be by different trespassers for a period of 12 years or over, their suit will be barred by time. He points out that as from the death of Raj Kaur her daughters, through one of whom the respondents claim, were kept out of possession by trespassers and that from the date of Raj Kaur's death right up to the date of the respondents' suit, that is, for a period of nearly 20 years trespassers were in possession of Mahan Kaur's, and after her death, the respondents' share in the land, their suit must therefore be regarded as barred by time. In other words the learned counsel wants to tack on the adverse possession of Bakshi Singh and Pratap Singh to the adverse possession of the Raja and those who claim through him. In support of the contention reliance is placed by learned counsel on the decision in *Vendnam Ramayya Vs. Kosuru Kotamma and Others*, . In order to appreciate what was decided in that case a brief resume of the facts of that case is necessary. Mallabattudu, the last male holder of the properties to which the suit related, died in the year 1889 leaving two daughters Ramamma and Govindamma. The former died in 1914. The latter surrendered her estate to her two sons. The plaintiff who was a transferee from the sons of Govindamma instituted a suit for recovery of possession of Mallabattudu's property against Punnayya, the son of Ramamma to whom Mallabattudu had made an oral gift of his properties two years before his death. Punnayya was minor at the date of gift and his elder brother Subbarayudu was managing the property on his behalf. Punnayya, however, died in 1894 while still a minor and thereafter his brothers Subbarayudu and two others were in possession of the property. It would seem that the other brothers died and Subbarayudu was the last surviving member of Punnayya's family. Upon Subbarayudu's death the properties were sold by his daughters to the third defendant. The plaintiffs-appellants suit failed on the ground of limitation. It was argued on his behalf in the second appeal before the High Court that as the gift to Punnayya was oral it was invalid, that consequently Punnayya was in possession as trespasser, that on Punnayya's death his heir would be his mother, that as Subbarayudu continued in possession Subbarayudu's possession was also that of a trespasser, that as neither Subbarayudu nor Punnayya completed possession for 12 years they could not tack on one to the other and that the plaintiff claiming through the nearest reversioner is not barred. The contention for the respondents was that there was no break in possession so as to retest the properties in the original owners, that Punnayya and Subbarayudu cannot be treated as successive trespassers and that in any event the real owner having been out of possession for over 12 years the suit was barred by limitation. The High Court following the decision of Mookerjee J. in *Mohendra Nath v. Shamsunnessa*, 21 Cal LJ 157 at p. 164 : (AIR 1915 Cal 629 at p 633), held that time begins to run against the last full owner if he himself was dispossessed and the operation of the law of limitation would not be arrested by the fact that on his death he was succeeded by his widow, daughter or mother, as the cause of action cannot be prolonged by the mere transfer of title. It may be mentioned that as Mallabattudu had given up possession to Punnayya under an invalid gift

Art. 142 of the Limitation Act was clearly attracted. The sons of Govindamma from whom the appellant had purchased the suit properties claimed through Mallabattudu and since time began to run against him from 1887 when he discontinued possession it did not cease to run by the mere fact of his death. In a suit to which that Article applies the plaintiff has to prove his possession within 12 years of his suit. Therefore, so long as the total period of the plaintiff's exclusion from possession is, at the date of the plaintiff's suit, for a period of 12 years or over, the fact that this exclusion was by different trespassers will not help the plaintiff provided there was a continuity in the period of exclusion. That decision is not applicable to the facts of the case before us. This is a suit to which Art. 144 is attracted and the burden is on the defendant to establish that he was in adverse possession for 12 years before the date of suit and for computation of this period he can avail of the adverse possession of any person or persons through whom he claims but not the adverse possession of independent trespassers.

10. This view has not been departed from in any case. At any rate none was brought to our notice where it has not been followed. Apart from that what we are concerned with is the language used by the legislature in the third column of Art.144. The starting point of limitation there stated is the date when the possession of the defendant becomes adverse to the plaintiff. The word "defendant" is defined in S. 2(4) of the Limitation Act thus:

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

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

(emphasis added)

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

substitute for a plea. Relevant paras 3 to 5 of the said judgment read as follows:

3. In this appeal, it has been stressed by the appellant that the findings clearly establish the benami nature of the transaction of 1914. This is, perhaps, true but the appellant cannot avail himself of it. The appellant's claim based upon the benami nature of the transaction cannot stand because S. 66 of the 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.

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

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

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

11. In our opinion none of these questions could be said to be either question of law or a substantial question of law arising out of the pleadings of the parties. The first referred question of law could not and did not arise for the simple reason that the plea of adverse possession has been rightly found against the plaintiff. Karupayee Ammal's possession, even if presumed to be in a valid possession in law, could not be said to be adverse possession as throughout it

was the case of the appellant Dharmarajan that it was a permissive possession and that she was permitted to stay on the land belonging to the members of the Iyer family. Secondly it has nowhere come as to against whom was her possession adverse. Was it adverse against the Government or against the Iyer family? In order to substantiate the plea of adverse possession, the possession has to be open and adverse to the owner of the property in question. The evidence did not show this openness and adverse nature because it is not even certain as to against whom the adverse possession was pleaded on the part of Karupayee Ammal. Further even the legal relationship of Doraiswamy and Karupayee Ammal is not pleaded or proved. All that is pleaded is that after Karupayee Ammal's demise Doraiswamy as her foster son continued in the thatched shed allegedly constructed by Karupayee Ammal. There was no question of the tacking of possession as there is ample evidence on record to suggest that Doraiswamy also was in the service of Iyer family and that he was permitted to stay after Karupayee Ammal. Further his legal heirship was also not decisively proved. We do not, therefore, see as to how the first substantial question of law came to be framed. This is apart from the fact that ultimately High Court has not granted the relief to the respondents on the basis of the finding of this question. On the other hand the High Court has gone into entirely different consideration based on reappraisal of evidence. The second and third questions are not the questions of law at all. They are regarding appreciation of evidence. The fourth question is regarding the admissibility of Exhibit A8. In our opinion there is no question of admissibility as the High Court has found that Exhibit A8 was not admissible in evidence since the Tehsildar who had issued that certificate was not examined. Therefore, there will be no question of admissibility since the document itself was not proved. Again the finding of the High Court goes against the respondent herein. Even the fifth question was a clear cut question of fact and was, therefore, impermissible in the Second Appeal.

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

5. Adverse possession is sought to be established on the supposition that Kanthimathi got possession of the premises as a licensee and on her death in 1948, the appellant who was 4 years of age, must be presumed to have become a trespasser. And if he had remained in trespass for 12 years, the title stood perfected and in any case, a suit to recovery of possession would by then be time barred. We are unable to appreciate this line of reasoning for it appears to us that there is no occasion to term the possession of Kanthimathi as that of a licensee. The possession was permissive in her hands and remained permissive in the hands of the appellant on his birth, as well as in the hands of his father living then with Kanthimathi. There was no occasion for any such licence to have been terminated. For the view we are taking there was no licence at all. Permissible possession of the appellant could rightfully be terminated at any

moment by the rightful owners. The present contesting respondents thus had a right to institute the suit for possession against the appellant. No oral evidence has been referred to us which would go to support the plea of openness, hostility and notoriety which would go to establish adverse possession. On the contrary, the Municipal Tax receipts, Exts. B39 and 40, even though suggestedly reflecting payment made by the appellant, were in the name of Kuppuswami, the rightful owner. This negates the assertion that at any stage did the appellant assert a hostile title. Even by examining the evidence, at our end, we come to the same view as that of the High Court. The plea of adverse possession thus also fails. As a result fails this appeal. Accordingly, we dismiss the appeal, but without any order as to costs.

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

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

246. In *P. Periasami (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.

247. 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*.

248. 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.

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

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

250. It would be useful to refer certain observations of a single Judge of this Court in AIR 1928 155 (Oudh) , which, in my view, squarely applies to the facts and pleadings of this case and I am in respectful agreement therewith:

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

"Adverse against whom?" It certainly cannot be adverse against the plaintiff, who was not then in existence. It may have been adverse against any other person, but we are not concerned with such person unless the plaintiff can be shown to have derived his title from such person. (page 189-190)

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

for claiming title by adverse possession, it was necessary for the plaintiff to plead

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

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

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

253. Earlier also, a three Judges Bench of *Parsinni (Dead) by Lrs. and Others Vs. Sukhi and Others*, 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.

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

placed on AIR 1922 181 (Privy Council) .

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

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

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

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

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

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