

**INTERNATIONAL JOURNAL OF LAW
MANAGEMENT & HUMANITIES**
[ISSN 2581-5369]

Volume 9 | Issue 4

2026

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Declaration regarding Doctrine of Adverse Possession with Specific Emphasis on Limitation Act, 1963

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ABSTRACT

The law of adverse possession bears some resemblance to the law of prescription in easements and profits a prendre, in that both the adverse possessor and the prescriptive user acquire an interest in land through user. The significant distinction between them is that prescription operates positively, as a presumed grant, so that the prescriptive user derives a right from the owner of the land, whereas adverse possession operates negatively, so as to extinguish a prior and better competing title. Since an adverse possessor does not derive his title from the owner but merely extinguishes the owner's better title, he may not be able to bar the claim of a different person who also holds a better title against him. If, for example, a tenant is dispossessed and the tenant's claim is now statute-barred, the landlord may not be barred. There has been a sea change in the concept of adverse possession since the commencement of the Limitation Act, 1963. Article 64 applies where a suit is based on the plea of previous possession of immovable property and not on title. Article 65 deals with a suit for possession of immovable property, or any interest therein, based on title, and prescribes a period of twelve years, which commences when the possession of the defendant becomes adverse to the plaintiff. Where a suit is brought on the basis of title, the burden lies on the defendant to establish that the suit is barred by limitation and that he has perfected his title by adverse possession vis-a-vis the plaintiff, the period of limitation running from the date on which his possession became adverse.

Keywords: *adverse possession, Limitation Act 1963, Article 65, section 27, prescription, easement, declaration of title, Ravinder Kaur Grewal*

I. INTRODUCTION

Adverse possession is a very old concept of law. It is useful, but it is often criticised on the ground that it protects and confers rights upon wrongdoers. The concept appeared in the Code of Hammurabi, which dates to about 1755 to 1750 BC. Law 30 provided: "If a chieftain or a man leaves his house, garden and field and hires it out and someone else takes possession of his house, garden and field and uses it for three years, if the first owner returns and claims his

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house, garden and field, it shall not be given to him, but he who has taken possession of it and used it shall continue to use it.”¹ There was, however, an exception to that rule for a soldier captured or killed in battle and for the case of a minor son of the owner. In Roman times a kind of spirit was thought to attach to the land, nurtured by the possessor, and possession or use of land was considered to confer a greater “ownership” than that of the titled owner. The Statute of Westminster came in 1275, when land records were scarce and literacy was rare, and the best evidence of ownership was possession.²

The English statute of limitation of 1623, 21 Jac. I c. 16, fixed the period for the recovery of possession of land at twenty years. A line of thought also evolved that a person who possesses land and produces something of ultimate benefit to society must hold the best title to it. Revenue laws relating to land have been enacted in the same spirit, to confer title on the actual tiller of the land. The Statute of Wills of 1540 allowed land to be passed down to heirs, and the Statute of Tenures of 1660 ended the feudal system and created the concept of title. Adverse possession remained a part of the law and continues to exist.

The doctrine is rooted in the idea that ownership of land should be awarded to the person who makes the best or highest use of it. That is the utilitarian view of land. The concept allows society as a whole to benefit from land being held adversely, while allowing a sufficient period for a true owner to recover it. Statutes of adverse possession permit the rapid development of wild lands held under weak or indeterminate title. They also assist the administration of justice, because adverse possession can be an effective and efficient way of removing or curing clouds on title where memories have grown dim and evidence has become unclear. A possessor who maintains and improves the land has a more valid claim to it than an owner who never visits it, never cares for it and puts it to no use. Where a former owner neglects land and allows a gradual dissociation between himself and what he claims, knowing that another is caring for it, the attachment which that other develops by caring cannot easily be parted with. It is this bundle of ingredients that constitutes adverse possession.³

Adverse possession is not defined by statute, but its meaning is by now well settled by judicial pronouncement. There are two kinds of adverse possession. In the first, the initial entry is itself that of a trespasser. In the second, the initial entry is permissive or non-hostile but becomes adverse or wrongful by a change of *animus* on the part of the possessor, who then continues in possession in his own right, disclaiming his subordinate status. In these two classes of case a

¹ See CHILPERIC EDWARDS (TR.), THE HAMMURABI CODE AND THE SINAITIC LEGISLATION 32-33 (1904).

² John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994).

³ *Ravinder Kaur Grewal v. Manjit Kaur*, AIR 2019 SC 3827, 3831, (2019) 8 SCC 729.

court should draw its presumptions differently when evaluating the evidence and its cogency in establishing title by adverse possession. Unless that distinction is borne in mind the ratio of the decisions is liable to be misunderstood, because possession by a person of property belonging to another is *prima facie* presumed to be adverse unless it is shown to have originated in contract, in permission, or in a fiduciary or similar relationship.⁴

In India the doctrine took its modern statutory shape in the Indian Limitation Act, 1908, whose Article 144 became Article 65 of the Limitation Act, 1963; prescription of title by possession was already present in the Limitation Acts of 1859, 1871 and 1877. Three principles are said to underlie it. The first is that there should be no lasting doubt about the ownership of immovable property. The second is that a person who has held out ownership of property that does not in reality belong to him, but who looks after it, should be treated as its owner in preference to someone who bought the property and then left it unattended. The third is that a person who leaves property unattended for a long period and does not care for it may be taken to have waived his rights over it.

There is no separate legal provision in which a right of adverse possession is conferred in terms. What the Limitation Act does is to provide that where a person entitled to possession of property does not assert his right for twelve years after another has taken possession, the true owner can no longer bring his claim. Section 27 of the Act provides that where a person entitled to institute a suit for possession does not do so within the limitation period, his right to the property is extinguished. These two provisions together give effect to the doctrine of adverse possession and make the person who has held out possession over immovable property its owner. Where the property possessed belongs to the Government the limitation period is thirty years rather than twelve, so that for private land the period is twelve years and for Government land thirty years.

A possessor claiming adverse possession must prove that his possession was peaceful and continuous and that he was not interfered with for the limitation period of twelve years. His possession must also be within everyone's knowledge. A cycle of claiming a property and then leaving it from time to time does not amount to adverse possession, and it is necessary that the real owner should have knowledge of the possession; without that knowledge, however long the possession lasts, it will not fall within the doctrine.

⁴ BHUVAN S.K. GHOSH, LAW OF ADVERSE POSSESSION 209 (2015).

II. COMPREHENSIVE ASPECTS REGARDING ADVERSE POSSESSION

Possession is an abstract notion which is difficult to define, and it is a question of fact. Unlike ownership, possession is not a purely legal concept and it is of temporary duration. It is both a legal and a non-legal or pre-legal concept, and its legal meaning differs from its ordinary meaning and varies from State to State. The concept of possession is as difficult to define as it is essential to protect. “The possession of a material object”, says Salmond, “is the continuing exercise of a claim to the exclusive use of it”.⁵

Possession means effective physical control or occupation. There are three requisites of possession:

- (i) there must be actual or potential physical control;
- (ii) that control must be accompanied by intention; and
- (iii) the application of these requisites depends on the context, and possession does not necessarily carry with it a right to possession.

The word “possession” is not a purely legal concept but a polymorphous term which may have different meanings in different contexts. It implies both a right and a fact, and it involves the power of control and the intention to control.⁶

Law can protect possession in two different ways. First, the possessor may be given legal rights, such as a right to continue in possession free from interference by others. Secondly, the law may protect possession by prescribing criminal penalties for wrongful interference or dispossession. By such civil and criminal remedies the law safeguards a man’s *de facto* possession.⁷

The Supreme Court of India considered the doctrine at length in *Ravinder Kaur Grewal v. Manjit Kaur*.⁸ The Court resolved the doubts surrounding adverse possession and held that a person who has been in possession of immovable property for more than twelve years may claim ownership of it. The statute does not define adverse possession; it is a common law concept, the period for which has been prescribed by Article 65 of the Limitation Act, 1963 as twelve years. The Limitation Act neither defines adverse possession nor contains any provision that a plaintiff cannot sue on the basis of it. It deals only with limitation to sue and with the extinguishment of rights.⁹

⁵ ASHOK K. JAIN, JURISPRUDENCE II (Ascent Publications) (setting out Salmond’s definition of possession).

⁶ *Sudhir Jaggi v. Sunil Akash Sinha Choudhury*, (2004) 7 SCC 515.

⁷ JAIN, *supra* note 5.

⁸ *Ravinder Kaur Grewal*, *supra* note 3.

⁹ *Ravinder Kaur Grewal*, *supra* note 3, at 3828.

Article 65 opens with the words “for possession of immovable property or any interest therein based on title”. The expression “title” includes title acquired by the plaintiff by way of adverse possession, and a catena of decisions has held that title is perfected by adverse possession. Adverse possession requires the three classical requirements to co-exist: possession must be *nec vi*, that is without force, *nec clam*, that is without secrecy, and *nec precario*, that is without the permission of the owner. It must be adequate in continuity, in publicity and in extent, so that it is visible, notorious and peaceful. If the owner does not take care to know facts that are notorious, knowledge is attributed to him on the footing that with due diligence he would have known them.¹⁰

In HALSBURY’S LAWS OF ENGLAND the position of a person in adverse possession is discussed and it is observed, on the basis of various decisions, that such a person has a transmissible interest in the property which, after the expiry of the statutory period, ripens into as good a right to possession as that of the owner. Paragraph 777 reads:¹¹

“While a person who is in possession of land without title continues in possession, then before the statutory period has elapsed, he has a transmissible interest in the property which is good against all the world except the rightful owner, but an interest which is liable at any moment to be defeated by the entry of the rightful owner; and if that person is succeeded in possession by one claiming through him who holds until the expiration of the statutory period, the successor has then as good a right to the possession as if he himself had occupied for the whole period.”

Paragraph 783 of the same volume deals with the extinction of title.¹² At the expiration of the periods prescribed by the Limitation Act, 1939 for any person to bring an action to recover land, including a redemption action, or an action to enforce an advowson, the title of that person to the land or the advowson is extinguished. This is subject to the special provisions relating to settled land and to land held on trust, and to the provisions constituting the proprietor of registered land a trustee for the person who has acquired title against him. An extinguished title cannot afterwards be revived either by re-entry or by subsequent payment or acknowledgement of title, and a rent-charge is extinguished when the remedy to recover it is barred.

It is worth noting that the model in England and Wales revolves around procedural gatekeeping. Under Schedule 6 to the Land Registration Act 2002 a squatter may apply to be registered after ten years, the registered proprietor is notified and may object, and the application then fails

¹⁰ Ravinder Kaur Grewal, *supra* note 3, at 3829.

¹¹ HALSBURY’S LAWS OF ENGLAND vol. 28, para. 777 (4th edn.).

¹² HALSBURY’S LAWS OF ENGLAND vol. 28, para. 783 (4th edn.).

unless one of three narrow conditions is satisfied. That middle path corresponds to some extent with the Supreme Court of India's own instinct on the matter.

Adverse possession means hostile possession, that is, possession which is expressly or impliedly in denial of the title of the true owner. It follows that where a wrongdoer is not permitted by law to advance a hostile title against the true owner, his possession cannot be adverse to that owner. A person inducted as a licensee must continue to be regarded as a licensee until by some overt act he disclaims that character.¹³

A further point is the silence of the Indian legislature in this area, unlike that of Singapore or of England and Wales. Section 50 of the Land Titles Act 1993 of Singapore provides that, except as provided in section 174(7) and (8), no title to land adverse to or in derogation of the title of a proprietor of registered land is acquired by any length of possession by virtue of the Limitation Act or otherwise, nor is the title of any proprietor of registered land extinguished by the operation of that Act.¹⁴

Section 174(7) preserves the position where, at any time before 1 March 1994, a person was in adverse possession of registered land and had made an application for a possessory title under the provisions of the repealed Land Titles Act (Cap. 157, 1985 Revised Edition), provided that the application was not withdrawn and was still pending in the registry. Such an application is to be dealt with in accordance with the repealed Act as it stood immediately before that date.

Section 174(8) further provides for a person who, before 1 March 1994, was in adverse possession of registered land and was entitled to apply for a possessory title under the repealed Act. Such a person may, within six months of that date, apply to the court for an order granting the title, or make an application for a possessory title, and the matter is to be investigated in accordance with the provisions of the repealed Act in force immediately before that date.

Possession is the root of title and is a right in the nature of property. Ownership itself is of several kinds: sole ownership, contingent ownership, corporeal ownership, and legal and equitable ownership. A holder may enjoy limited ownership or a limited right to property, and what can be prescribed against is limited to the rights of that holder. Possession confers an enforceable right under section 6 of the Specific Relief Act, 1963. It is necessary to see what kind of possession is enjoyed: *de facto* or actual possession, *de jure* possession, constructive possession, or concurrent possession over a small portion of the property. Where the owner is in symbolic possession there is no dispossession. Possession may be formal, exclusive or joint,

¹³ BHUVAN S.K. GHOSH, LAW OF ADVERSE POSSESSION 210 (2015).

¹⁴ Land Titles Act 1993 (Sing.), s. 50; see also ss. 174(7) and 174(8) and the repealed Land Titles Act (Cap. 157, 1985 Rev. Ed.).

and joint possession or possession by a co-owner is not presumed to be adverse. Personal law also has a part to play in construing the nature of possession.

In *M. Radheyshyamlal v. V. Sandhya*¹⁵ the Supreme Court upheld concurrent findings that the plaintiff had failed to prove his plea of adverse possession, the High Court having held that he could not establish that his adverse possession commenced from any particular date. The Court observed that there was no foundation for the plea in the plaint itself, so that the suit for a declaration of ownership had to fail. The plaintiff claimed only on the basis of adverse possession, whereas the defendants claimed through the person who was admittedly the original owner; and even taking account of the failure to obtain probate or letters of administration, the defendants had a better title to the suit property than the plaintiff, a trespasser. It was therefore not possible to find fault with the concurrent findings of fact, and the appeals failed. The Court restated the ingredients that a plaintiff pleading adverse possession must establish:

- (a) the plaintiff must plead and prove that he was claiming possession adverse to the true owner;
- (b) the plaintiff must plead and establish that the factum of his long and continuous possession was known to the true owner;
- (c) the plaintiff must plead and establish when he came into possession; and
- (d) the plaintiff must establish that his possession was open and undisturbed.

It is settled law that by pleading adverse possession a party seeks to defeat the rights of the true owner, and that there is therefore no equity in his favour, the plea resting on continuous wrongful possession for a period of more than twelve years. The facts constituting the ingredients of adverse possession must accordingly be pleaded by the plaintiff.

It is sometimes said that this decision opened the door to a plaintiff suing on adverse possession. That is not so. Until 2019 the plea was in practice available only to a defendant, and the change was made five years earlier by *Ravinder Kaur Grewal*, which held that a person who has perfected title by adverse possession may sue upon it.¹⁶ *M. Radheyshyamlal* did not extend the doctrine; it dismissed the plaintiff's claim and restated the pleading requirements.

In *Karnataka Board of Wakf v. Government of India*¹⁷ the Supreme Court set out the law on the plea of adverse possession. In the eye of the law an owner is deemed to be in possession of property so long as there is no intrusion, and non-use of the property by the owner, even for a

¹⁵ *M. Radheyshyamlal v. V. Sandhya*, 2024 INSC 214, Civil Appeals Nos. 4322-4324 of 2024 (SC, 18 March 2024), para. 12.

¹⁶ *Ravinder Kaur Grewal*, *supra* note 3.

¹⁷ *Karnataka Board of Wakf v. Government of India*, (2004) 10 SCC 779, para. 11.

long time, does not affect his title. The position alters when another person takes possession and asserts a right over it. Adverse possession is hostile possession by clearly asserting a hostile title in denial of the title of the 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 it is adverse to the true owner, and it must start with a wrongful dispossession of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.

The ordinary classical requirement is thus that possession be *nec vi, nec clam, nec precario*, and adequate in continuity, publicity and extent to show that it is adverse to the competitor. It is equally well settled that it is not enough to show that one is in sole possession and enjoying the property; ouster of the non-possessing party by the party in possession, who claims that possession to be adverse, must be made out.

In MITRA'S TAGORE LAW LECTURES ON LIMITATION AND PRESCRIPTION,¹⁸ quoting from Angell on Limitation, the principle is stated in the following terms:

“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 who was in possession. 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.”¹⁹

In *Neelam Gupta v. Rajendra Kumar Gupta*²⁰ the trial court upheld the contention of the original defendants that the suit was barred by limitation, the plaintiff having been aware since 1968 of possession by the defendants adverse to his interest, and dismissed the suit on the footing that the suit land was joint Hindu family property. On appeal the first appellate court held that the land had never been joint Hindu family property, but confirmed the dismissal on the ground of limitation. In second appeal the High Court found that the appreciation of the evidence by the courts below was perverse and, on a proper appreciation of the evidence on record, held that the plaintiff had succeeded in establishing title over the land, relying on section 4 of the Benami Transactions (Prohibition) Act, 1988 and on Article 65 of the Limitation Act, 1963. The Supreme Court held that the High Court was justified in interfering with judgments that were

¹⁸ U.N. MITRA, TAGORE LAW LECTURES ON LIMITATION AND PRESCRIPTION vol. 1, lecture VI, at 159 (6th edn.).

¹⁹ *Iftikhar Ahmad Khan v. Md. Sahabuddin*, AIR 2010 Jhar 26.

²⁰ *Neelam Gupta v. Rajendra Kumar Gupta*, 2024 INSC 769, AIR 2024 SC 5374.

the outcome of a perverse appreciation of evidence, and dismissed the appeals preferred by the original defendants.

III. LIMITATION PERIOD REGARDING ADVERSE POSSESSION

After the commencement of the Limitation Act, 1963, once a plaintiff proves his title the entire burden lies on the defendant to prove that he has perfected title by adverse possession. Article 65 read with section 27 of the Act gives the law of adverse possession its content. Where a person has taken possession of property belonging to another for twelve years and the real owner does not sue for the recovery of possession, the property is treated as belonging to the person claiming adverse possession. Title to immovable property may be acquired by adverse possession against the Government in the same way as against a private person, but a person claiming prescriptive title against the Government must show possession for thirty years, Article 112 of the Limitation Act, 1963 prescribing that period. Articles 65 and 112 read together leave no doubt that a private person can prescribe title by adverse possession against the Government only on the expiry of thirty years.

The maximum period of thirty years under Article 112 dispels the difficulty that might otherwise arise in recovering possession of land belonging to local authorities and to the Government which has been encroached upon, or has otherwise come into the possession of a private person, to the extent dealt with by Articles 111 and 112. It is not advisable to amend the Limitation Act so as to take away the provisions relating to adverse possession in respect of land belonging to local authorities and to the Government, given the clear language of section 27 read with Articles 64, 65, 111 and 112.

Where title is acquired by prescription under Article 65 read with section 27, the person who has perfected title by adverse possession obtains all the rights of a title holder of the land, and the expression “title” includes title acquired by a plaintiff by way of adverse possession. In *Ravinder Kaur Grewal* the Supreme Court observed that section 27 of the Limitation Act, 1963 “provides for extinguishment of right on the lapse of limitation fixed to institute a suit for possession of any property, the right to such property shall stand extinguished”, and that “the concept of adverse possession as evolved goes beyond it on completion of period and extinguishment of right confers the same right on the possessor”.²¹ Even where title over Government land can be acquired by prescription, a petitioner who has not been in possession

²¹ *Ravinder Kaur Grewal*, *supra* note 3.

for thirty years at the time of filing cannot acquire title, since possession for at least thirty years is necessary for prescription to operate.²²

The Limitation Act, 1963 contains thirty-two sections, and its Schedule is divided into three divisions: suits (Articles 1 to 113), appeals (Articles 114 to 117) and applications (Articles 118 to 137). The Schedule contains three columns, namely the description of the suit, appeal or application; the period of limitation; and the time from which that period begins to run.

Article 65 of the Limitation Act, 1963 refers specifically to immovable property “or any interest therein”, which leaves room for the argument that an interest in immovable property falls outside the scope of the Article. The starting point of limitation under Article 64 is the date of the dispossession, while under Article 65 it is the date on which the possession of the defendant became adverse to the plaintiff.²³ Both Articles are rules of limitation, the only difference being that under the former the onus lies on the plaintiff to prove his possession within twelve years, while under the latter it is for the defendant to prove when his possession became adverse. To become adverse, possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation.²⁴

Section 27 of the Limitation Act, 1963 operates to extinguish the right to property of a person who does not sue for its possession within the time allowed by law. The right extinguished is the right of the lawful owner against whom the claim of adverse possession is made, and a plaintiff who makes such a claim must therefore plead and prove the date on and from which he claims to have been in exclusive, continuous and undisturbed possession. Whether possession is adverse is often a simple question of fact, but it may also be a conclusion of law or a mixed question of law and fact. The facts found must be accepted, but the conclusion drawn from them, namely ouster or adverse possession, is a question of law which has to be considered by the court.

Placing the Indian legal system beside others suggests that while Singapore and England and Wales have moved towards terminating or narrowing the doctrine, by abolition for registered land and by procedural gatekeeping respectively, India has offered only a vague extension of the limitation period.

²² *Maria Berta da Costa Miranda v. Court of the Deputy Collector, Goa*, AIR 1987 Bom 105, 121.

²³ Limitation Act, 1963, sch., arts. 64 and 65.

²⁴ *Nirakar Das v. Gourhari Das*, AIR 1995 Ori 270.

IV. PRESCRIPTIVE RIGHTS REGARDING ADVERSE POSSESSION

A right of easement is not indefeasibly established by enjoyment for less than twenty years, and however long the period of enjoyment may be, no indefeasible right is acquired until the right is brought into question in a suit. Until then the right is inchoate only, and in order to establish it when it is brought into question the enjoyment relied upon must be enjoyment for twenty years ending within two years before the institution of the suit.²⁵

Section 25 of the Limitation Act, 1963 provides:

(i) where the access and use of light or air to and for any building have been peaceably enjoyed therewith as an easement and as of right, without interruption, for twenty years, and where any way or watercourse, or the use of any water, or any other easement has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption, for twenty years, the right to such access and use of light or air, way, watercourse, use of water or other easement shall be absolute and indefeasible;

(ii) each of those periods of twenty years shall be taken to be a period ending within two years next before the institution of the suit in which the claim to which the period relates is contested; and

(iii) where the property over which a right is claimed under sub-section (1) belongs to the Government, that sub-section shall be read as if for the words “twenty years” the words “thirty years” were substituted.

Section 25 of the Limitation Act is concerned only with the acquisition of an easement and does not purport to measure the extent of the right or to indicate the remedy by which a disturbance of the right is to be vindicated.²⁶ An easement is exercisable by a person in relation to land that is not his own. Ownership of land and an easement over the same land cannot co-exist, and the right of easement is extinguished the moment the two tenements become vested in one and the same person.²⁷ For the acquisition of an easementary right by prescription, section 2(f) of the Limitation Act, 1963 provides that “easement” includes a right not arising from contract by which one person is entitled to remove and appropriate for his own profit any part of the soil belonging to another, or anything growing in, or attached to, or subsisting upon, the land of another. An easement, as defined in section 4 of the Indian Easements Act, 1882, is “a right which the owner or occupier of certain land possesses as such, for the beneficial enjoyment of

²⁵ S.R. MYNENI, LAW OF LIMITATION (Asia Law House).

²⁶ MYNENI, *supra* note 25.

²⁷ *Swapan Sinha v. Usha Rani Sahana*, (2001) 3 CALLT 166 (Cal.).

that land, to do, and continue to do something, or to prevent and continue to prevent something being done, in or upon, or in respect of certain other land not his own”.

The rule of twenty years’ user laid down in sub-section (1), the rule of thirty years’ user laid down in sub-section (3), and the period of two years prescribed in sub-section (2) do not apply to easements acquired otherwise than under the provisions of section 25, such as by grant, express or implied, or by custom. Section 25 does not exclude other modes of acquiring easements. The law of limitation has to be distinguished from the law of prescription, since there are special cases in which, as the remedy becomes barred by limitation, the right itself is extinguished. Section 27 of the Limitation Act, 1963 is such a provision: it says that at the determination of the period thereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished.

In the absence of a claim by the plaintiffs based on an easementary right, the first defendant had no opportunity to demonstrate that the plaintiffs had no such right. In the absence of pleadings, and of an opportunity to the first defendant to deny the claim, the High Court could not have converted a suit for title into a suit for the enforcement of an easementary right. The first appellate court had recorded a finding of fact that the plaintiffs had not made out title, and the High Court in second appeal did not disturb that finding. As no question of law arose for consideration, the second appeal ought to have been dismissed. Even if the High Court felt that a case of easement was made out, at best liberty could have been reserved to the plaintiffs to file a separate suit for easement. The High Court could not, in second appeal, while rejecting the plaintiffs’ plea that they were owners of the suit property, grant relief by way of injunction in regard to an easementary right to use the schedule property as a passage.²⁸

Where the defendant’s field lay on the southern side of the plaintiff’s field and the plaintiff could reach his agricultural land only by the disputed way, and the user of the way had continued for more than thirty to forty years, it was held that, the user being open, peaceful and without obstruction for that period, the plaintiff had acquired a right of easement by prescription.²⁹

V. DECLARATION OF ADVERSE POSSESSION

In a suit for a declaration of adverse possession, an assertion by the defendant that his possession was adverse to the knowledge of the plaintiff for a period of twelve years or more is necessary. Where adverse possession was not accepted in an earlier suit and a fresh suit was filed on the same cause of action, it was held that permissive possession before the dismissal of the earlier

²⁸ *Bachhaj Nahar v. Nilima Mandal*, AIR 2009 SC 1103.

²⁹ *Jivanlal Kannaiyalal Paliwal v. Krishnarao D. Sathone*, AIR 2004 Bom 89 (Nagpur Bench).

suit could not be clubbed with ten years' possession subsequent to that dismissal, and that the earlier decree operated as *res judicata* in the subsequent suit.³⁰ If the real owner of the property has permitted a person to take possession, that possession cannot be converted into adverse possession. The Supreme Court has repeatedly held that permissive possession cannot become adverse possession. For possession to be adverse there must be evidence that the person took possession without the permission of the owner and that the possession was known to the real owner. Mere possession for several years will not be treated as adverse possession where the owner has already permitted it with free consent.

In a suit for declaration and injunction concerning the use of a pathway, the plaintiff's father had purchased the first schedule property, but the second schedule property, the pathway, was not included in it. The plaintiff claimed ownership of the pathway but adduced no evidence to prove it. Since he had claimed only ownership and had failed to prove it, he could not afterwards claim a right of easement over the pathway. The trial court had rightly dismissed the suit, and the finding of the appellate court that the plaintiff had used the pathway to reach the first schedule property was based on no evidence and was therefore unsustainable.³¹ In a suit for a declaration of title to the suit property together with an easementary right and passage, where the construction of a wall by the defendants blocked the right of ingress and egress to a specified portion of the property, a commissioner was appointed who suggested that a passage for ingress and egress to the disputed portion be provided, and an interim order was passed directing the defendants to remove the wall forthwith and to permit access to the plaintiff through the main gate of the property.³²

A declaratory suit is one in which the plaintiff asks the court to declare his legal status. Once the declaration is made, the plaintiff's position is clarified and the doubt is removed. The law relating to declaratory suits is contained in section 34 of the Specific Relief Act, 1963, under which only a person entitled to any legal character or right which is denied by the defendant may institute the suit. It may be pointed out that sections 229-B and 229-D of the U.P. Zamindari Abolition and Land Reforms Act were not part of the Act as originally enacted; both were introduced by U.P. Act No. 20 of 1954, empowering the prescribed authority to declare title and to grant an injunction in favour of an aggrieved person on being satisfied by the documentary evidence. The competent authority, the Sub-Divisional Officer of the tahsil, is empowered to

³⁰ *Kaloo v. Madanlal*, AIR 2004 MP 51.

³¹ *Arunachalam Pillai v. Sorimuthu Pillai*, AIR 2004 Mad 185.

³² *Jaskirat Datwani v. Vidyavati*, (2002) 5 SCC 647.

punish under Order 39 Rule 2-A of the Code of Civil Procedure a person who deliberately disobeys or violates the injunction order passed by the authority concerned.³³

Under Article 64 of the Limitation Act, a suit for possession of immovable property by a plaintiff who, while in possession of the property, has been dispossessed from it, where the suit is based on previous possession and not on title, may be filed within twelve years from the date of dispossession. Under Article 65 a suit for possession of immovable property, or any interest therein, based on title may be filed by a person claiming title within twelve years, limitation commencing from the date when the possession of the defendant becomes adverse to the plaintiff. To contest a suit for possession filed on the basis of title, a defendant who is in hostile, continuous and open possession to the knowledge of the true owner may accordingly plead adverse possession if he has remained in possession for a period of twelve years.

It was long inferred from this language that the plea of adverse possession was a defence available only to a defendant. The inference drew support from the third column of Article 65,³⁴ which speaks of the time “when the possession of the defendant becomes adverse to the plaintiff”, and it was said to follow that no declaration could be sought by a plaintiff as to his ownership on the basis of adverse possession. That is no longer the law. In *Ravinder Kaur Grewal* the Supreme Court held that Article 65 is not confined to a defence, that the expression “title” in Article 65 includes title acquired by adverse possession, and that a person who has perfected such title may sue upon it and recover possession if he is subsequently dispossessed. Adverse possession now operates as a sword as well as a shield, and a declaratory suit on that footing is competent.

VI. CRIMINAL PROCEEDINGS REGARDING ADVERSE POSSESSION

On 1 July 2024 the colonial era criminal justice statutes were replaced by the Bharatiya Nyaya Sanhita, the Bharatiya Nagarik Suraksha Sanhita and the Bharatiya Sakshya Adhiniyam. The change altered the trajectory of the Indian criminal justice system, offering a more holistic approach to justice rather than the mere penalisation of the offender. Section 145 of the Code of Criminal Procedure, 1973 has been carried into the Bharatiya Nagarik Suraksha Sanhita as section 164 without change. Where there is a dispute over the possession of land or water or their boundaries and the Executive Magistrate believes that it is likely to cause a breach of the peace, he may act under section 164. Similarly, where there is a dispute over the right of use of

³³ *Ajab Lal v. Rakesh Kumar Mishra*, AIR 2007 All 158.

³⁴ Article 65 of the Limitation Act, 1963, third column, headed “Time from which period begins to run”, reads: “When the possession of the defendant becomes adverse to the plaintiff.”

land or water and the Executive Magistrate believes that it is likely to cause a breach of the peace, he may act under section 166.

These provisions aim to prevent disturbance and the unauthorised seizure of property by forcible dispossession. It is important to note, however, that an Executive Magistrate has no jurisdiction to decide legal rights of ownership.

The basis of action under section 145 of the Code of Criminal Procedure was the likelihood of a breach of the peace. It was designed to protect against deprivation of possession by persons taking the law into their own hands and had no concern with the determination of any legal right to possession. Section 164 of the Bharatiya Nagarik Suraksha Sanhita likewise serves to maintain peace and tranquillity in respect of immovable property until the rights of the parties are adjudicated, whether by the Executive Magistrate under that section or by a civil court.³⁵

Section 111(7) of the Bharatiya Nyaya Sanhita, 2023 provides that any person who, on behalf of a member of an organised crime syndicate, is or at any time has been in possession of movable or immovable property which he cannot satisfactorily account for shall be punishable with imprisonment for a term which shall not be less than three years but which may extend to ten years, and shall also be liable to a fine which shall not be less than one lakh rupees.

An order passed by an Executive Magistrate in proceedings under section 164 is an order of a criminal court made on a summary inquiry, whereas a decision of a civil court binds the criminal court. The magistrate's order is entitled to respect and weight before the competent court at the interlocutory stage; at the stage of the final adjudication of rights, which proceeds on the evidence adduced before the court, it is only one out of several pieces of evidence.

A civil court will be loath to make an order of interim injunction, or an interim arrangement, inconsistent with the one made by the Executive Magistrate. That, however, is merely a rule of caution or restraint on the exercise of discretion, dictated by prudence and by regard for urgent executive orders made within jurisdiction by their makers, and it is certainly not a curb on the power of the court. The court does have jurisdiction to make an interim order, including an *ad interim* injunction, inconsistent with the order of the Executive Magistrate, but that jurisdiction is to be exercised as an exception and not as a rule. Even at the stage of an interim order, the party unsuccessful before the Executive Magistrate may, on the material placed before the court, succeed in making out a strong *prima facie* case that the findings of the magistrate were without jurisdiction, palpably wrong or self-inconsistent, in which case the court may, after recording

³⁵ K. SWAMYRAJ, TEXTBOOK ON THE BHARATIYA NAGARIK SURAKSHA SANHITA, 2023 141 (Central Law Publications, 2024).

its reasons and satisfaction, make an order inconsistent with or in departure from the one made by the magistrate.³⁶

Where there is a dispute as to title or as to the right to possession between the parties, and the matter has gone to a civil court in which the question of possession is being examined, the continuance of proceedings under section 164 in respect of the same land and between the same parties is not permissible, and an order dropping those proceedings is just and proper.³⁷ The civil court is competent to decide questions of title as well as of possession, and its order binds the magistrate; where the suit between the parties is only for a declaration of title in respect of the same property, parallel proceedings under section 145 could not be instituted or allowed to continue.³⁸ Proceedings under section 145 of the Code, now section 164 of the Sanhita, cannot therefore be treated as equivalent to an adjudication of title by a civil court, and the question of title must be decided by the court after receiving oral and documentary evidence.

Where a civil suit for possession or for a declaration of title in respect of the same property is pending, and relief for the protection of the property can be granted by the civil court, proceedings under section 145 should not be allowed to continue.³⁹ Where proceedings under section 145 of the Code, now section 164 of the Sanhita, had been initiated to prevent a breach of the peace, it was held that the question of title could not be decided in those proceedings.⁴⁰

VII. SUPREME COURT FINDINGS REGARDING CHANGE IN THE LAW OF ADVERSE POSSESSION

In *Ravinder Kaur Grewal* the Supreme Court observed, in respect of land reserved for public utility, that as the law of adverse possession has developed in relation to property dedicated to public use, courts have been loath to confer rights by adverse possession. There are instances in which such properties are encroached upon and a plea of adverse possession is then raised. On land reserved for public utility it is desirable that no rights should accrue. Since the law of adverse possession may cause harsh consequences, the Court was constrained to observe that it would be advisable that, in respect of properties dedicated to a public cause, the statute of limitation should make it clear that no rights can accrue by adverse possession.⁴¹

³⁶ *Shanti Kumar Panda v. Shakuntala Devi*, (2004) 1 SCC 438, AIR 2004 SC 115; see also BHUVAN S.K. GHOSH, LAW OF ADVERSE POSSESSION 393 (2015).

³⁷ *Mohan Lal Kuer v. State of Bihar*, 1999 Cri LJ 4249 (Pat.).

³⁸ *Amresh Tiwari v. Lalta Prasad Dubey*, (2000) 4 SCC 440; see also BHUVAN S.K. GHOSH, LAW OF ADVERSE POSSESSION 394 (2015).

³⁹ *Amresh Tiwari*, *supra* note 38.

⁴⁰ *Union of India v. Mst. Azibun Nessa Khatun*, AIR 2001 NOC 8 (Gau.).

⁴¹ *Ravinder Kaur Grewal*, *supra* note 3, at 3861.

In *Kishundeo Rout v. Govind Rao*,⁴² decided in August 2025, the Supreme Court observed that a plea of adverse possession is not purely a plea of law; it rests on facts which must be asserted and proved. A person claiming adverse possession must show on what date he came into possession, what the nature of his possession was, whether the factum of his possession was known to the legal claimants, and how long his possession continued. He must show that his possession was open and undisturbed. These are all questions of fact and, unless they are asserted and proved, a plea of adverse possession cannot be inferred from them. In the normal case, therefore, an appellate court will not allow the plea to be raised before it for the first time. There are cases in which it will be allowed, because the allegations on which it can be raised were in some form made at the time and the facts necessary to prove the plea were brought before the court and proved. *Municipal Board, Etawah v. Mt. Ram Sri*⁴³ was such a case.

There the plaintiffs based their suit on title extending over a period of thirty years. The first plaintiff was the owner of the land, on which she had four small shops fetching a rent of about Rs 80 a month, and the second plaintiff was her lessee. The shops were burnt down in June 1926 and the land lay vacant. The plaintiffs applied to the Municipal Board for permission to build again on the land, but permission was refused on the ground that the Municipal Board, and not the plaintiff, was the owner of the land. The learned Judges of the Allahabad High Court held that a plea of adverse possession extending over a period of thirty years could be read into the claim and that, although it had not been specifically raised in the plaint, it could be raised at a later stage. In other words, the plea of adverse possession was held to be included in the plea of title. In coming to that conclusion the learned Judges took notice of the fact that the plaintiffs had clearly stated that actual physical possession of the property in dispute was with them.

It is important to remember that the basic rule of pleading is that a party can succeed only according to what he has alleged and proved; on the principle of *secundum allegata et probata* a party is not allowed to succeed where he has not set up the case which he seeks to substantiate.⁴⁴

The discussion leads to one conclusion, and that is that unless the plea of adverse possession has been specifically raised in the pleadings, put in issue, and then supported by cogent and convincing evidence on a multitude of points, with an opportunity to the other side to refute the case made out, the plea cannot be allowed to be flung as a surprise on an unsuspecting defendant for the first time in appeal.

⁴² *Kishundeo Rout v. Govind Rao*, 2025 INSC 956 (SC, 8 August 2025).

⁴³ *Municipal Board, Etawah v. Mt. Ram Sri*, AIR 1931 All 670.

⁴⁴ *Kishundeo Rout*, *supra* note 42, para. 24.

In that case the plaintiff instituted a title suit which was ultimately dismissed by the trial court. The plaintiff, dissatisfied with the judgment and decree dismissing the suit, preferred a first appeal. The first appeal was allowed and the suit decreed, the first appellate court having accepted the plea of adverse possession put forward by the plaintiff. The original defendants, dissatisfied with the judgment and order of the first appellate court, then preferred a second appeal to the High Court.

The High Court formulated two substantial questions of law for its consideration:

- (i) whether the lower appellate court was justified in framing an additional issue of adverse possession in an appeal filed by the plaintiffs, although the plaintiffs had never pleaded any case of adverse possession in the plaint; and
- (ii) whether the lower appellate court, after framing the additional issue of adverse possession, could decide the case without taking further evidence in connection with that issue.

Allowing the second appeal, the High Court took the view that there was no foundational pleading by the plaintiffs in connection with the claim of adverse possession, either in the plaint or in the written statement, and that there was no occasion for the first appellate court to frame an issue of adverse possession.

The Supreme Court observed that it is a settled position of law that the foundation for a plea of adverse possession must be laid in the pleadings and that an issue must then be framed and tried, and that a plea not properly raised in the pleadings or in the issues at the stage of trial cannot be permitted to be raised for the first time at the stage of first appeal under section 96 of the Code of Civil Procedure. The Court reproduced the following finding of the High Court:

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

The trend of these decisions suggests that the Supreme Court is moving towards a stricter stance on adverse possession, and that the judgment tightens the requirements imposed on those who invoke the doctrine. The Court had earlier expressed a view on the abrogation of the law of

adverse possession in *Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan*.⁴⁵ At paragraphs 34 and 36 the Court observed that the law of adverse possession, which ousts an owner on the basis of inaction within limitation, is irrational, illogical and wholly disproportionate; that the law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who has illegally taken possession of the property of the true owner; and that there is an urgent need for a fresh look at the law of adverse possession. It recommended that the Union of India seriously consider and make suitable changes in that law.

A similar question was considered in *State of Haryana v. Mukesh Kumar*.⁴⁶ The Court observed that India inherited the law of adverse possession from the British and that Parliament may consider abolishing it, or at least amending it and making substantial changes in the larger public interest. In that case Government instrumentalities, including the police, had attempted to possess land adversely, which the Court described as a testament to the absurdity of the law and a black mark upon the justice system's legitimacy: the Government should protect the property of a citizen, not steal it, and yet as the law stands it may do just that. If the law is to be retained, according to the wisdom of Parliament, the Court said, it must at least require those who adversely possess land to compensate title owners according to the prevalent market rate of the land or property in question. That would provide some balance of justice to those who have done nothing other than sit on their rights for the statutory period, while allowing the adverse possessor to remain on the property.

While it may be indefensible to require all adverse possessors, some of whom may be poor, to pay market rates for the land they possess, some lesser amount would be realistic in most cases. Parliament may either fix a set range of rates or leave the matter to the judiciary with the option of choosing from within a set range, so as to tailor the compensation to the equities of a given case.

This is precisely why the law validates the claim of a squatter only where the owner can be shown to have lost effective authority over the land, and why the owner can defeat the claim by showing that he continues to be in charge of the property. On this view the doctrine addresses not the question who the owner is, but the concern that the office of owner should be filled rather than left vacant.⁴⁷

⁴⁵ *Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan*, (2009) 16 SCC 517, paras. 34 and 36.

⁴⁶ *State of Haryana v. Mukesh Kumar*, (2011) 10 SCC 404, AIR 2012 SC 559, paras. 42 and 44.

⁴⁷ Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47 (2010).

The Court further observed that if Parliament decides to retain the law of adverse possession, it might require claimants to possess the property in question for a period of thirty to fifty years rather than a mere twelve. Such an extension would help to ensure that successful claimants have lived on the land for generations and are therefore less likely to be individually culpable for the trespass. A longer statutory period would also reduce the frequency of adverse possession suits and ensure that only those claimants most intimately connected with the land acquire it, while only the most passive and unprotective owners lose title.

VIII. CONCLUSION

Possession taken by a trespasser must be uninterrupted and peaceful. A person can claim adverse possession only if the real owner does not interrupt the possession he has taken of the property. Possession taken after threatening the real owner does not amount to adverse possession. The possession must be continuous for the prescribed period. The Limitation Act prescribes twelve years for private property and thirty years for Government property. The burden of proving adverse possession lies on the person taking the plea, who must specify the exact date on which his adverse possession began and the date on which the real owner came to know of it; he must satisfy the court that the real owner, knowing of the possession, took no action against it.

In *Ravinder Kaur Grewal* the Supreme Court held that adverse possession is heritable and that there can be tacking of adverse possession by two or more persons, the right being transmissible. It confers a perfected right which cannot be defeated on re-entry except as provided in Article 65 itself. Tacking depends on the fulfilment of certain conditions: possession may be taken by a purchaser, legatee or assignee, and to constitute continuity of possession the claimant must claim through the person whose possession is sought to be tacked, in respect of the same property and under some right.⁴⁸

Ordinarily the transfer of ownership of property is effected by proper registration and the payment of stamp duty; in adverse possession, transfer of property is the natural consequence of certain common law requirements, provided that they are satisfied for twelve years. In *State of Haryana v. Mukesh Kumar* the Supreme Court observed that adverse possession allows a trespasser, a person guilty of a tort or even a crime in the eyes of the law, to gain legal title to land which he has illegally possessed for twelve years, and that how twelve years of illegality can suddenly be converted into legal title is, logically and morally, baffling. The Court said that

⁴⁸ *Ravinder Kaur Grewal*, *supra* note 3, at 3861.

this outmoded law asks the judiciary to place its stamp of approval upon conduct that the ordinary Indian citizen would find reprehensible.⁴⁹

The doctrine of adverse possession has troubled a great many legal minds, and the courts have made it clear that the time has come for change. If the protectors of the law become the grabbers of property, whether land or building, people will be left with no protection. The Supreme Court has repeatedly observed that there is an urgent need for a fresh look at the entire law of adverse possession, and has recommended that the Union of India immediately consider and seriously deliberate either the abolition of the doctrine or suitable amendments to it. Parliament may consider repealing or amending the legislation so as to give owners some remedy for their inactivity, extending the period under Articles 64 and 65 of the Limitation Act, 1963 from twelve years to a period of thirty to fifty years, and requiring payment to the title holder of the market rate or a similar sum.

The judgments discussed in this paper suggest that Parliament should modify the law of adverse possession while keeping in mind the recommendations of the courts, so that the legal machinery of the country works smoothly and a person who has possessed immovable property through folly or malicious acts is not made its owner.

Drawing on the models adopted in other jurisdictions offers a more holistic approach and a trajectory for the Indian higher judiciary and for the Union legislature on how the law of adverse possession might be handled in a more sophisticated manner.

⁴⁹ *State of Haryana v. Mukesh Kumar*, *supra* note 46, para. 47, AIR 2012 SC 559, 560.