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Possession is the Nine Point of Law

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ABSTRACT

Possession is the most difficult concept. Possession means physical control of a person over a thing. Possession shows the relation of a person over the thing. Possession is the evidence of ownership unless contrary is proved. In the eyes of law, the person who holds possession over material things has got nine points out of ten and he is considered to be the owner of that thing unless someone else questions his possession over that thing. According to Henry Maine, possession involves the physical contact with an object with the intention of excluding others from such object. When any object comes under the possession of any person, he becomes entitled to some rights and duties depending upon the circumstances. Hon'ble Supreme Court observed that possession is the evidence of ownership. Therefore possession is the direct relation of a person with the material thing. Possession may be legal or illegal, direct or indirect, mediate or immediate etc.. Possession is the difficult concept because the person even if in the wrongful possession of an object is considered legally entitled to that object. Possession is the subject of great interest and therefore needed to be carefully interpreted.

I. INTRODUCTION

Possession of a thing is necessary for the life because without possessing the things, it would be difficult to think about the social life. The growth of the society depends upon the Duguit's social solidarity theory. Social solidarity means interdependency of people. For fulfillment of daily needs, people have to come in contact with others. They fulfill their needs by transferring the goods or things and for that purpose they have to possess the things. Consumption of the things would be impossible without possessing them. The acquisition and loss of the things results in various consequences such as the person who lost the possession of the things is deemed to have lost the title also and the person who holds the possession is considered as the owner of the thing unless contrary is proved. Therefore possession is the evidence of ownership and if another person claims his rights over the thing he has to show his title.

In India, the property laws the ancient times were developed on the concept of possession. In the ancient time, land was considered as the property of the people and land holder as the

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owner. Basically the concept of possession is important from the point of ownership. The concept of possession is defined by the jurists variously.

(A) Definitions of Possession

1. According to Pollok “Having physical control over a thing is possession”.
2. Salmond defines possession as “the possession of a material object is the continuing exercise of control over the thing and claim to the exclusive use of it.”
3. Maine defines possession as “Physical detention of a thing with the intention to hold the thing detained as one’s own.”
4. According to Kant “There must be taking of possession conjoined with the will to have external object as one’s own.”
5. According to Markby “Possession is the determination to exercise physical control over a thing on one’s own behalf coupled with the capacity to do so.”

From the definitions it is clear that the concept of possession involves two essential elements i.e. physical control and intention to continue with the physical control over the thing.

II. ELEMENTS OF THE CONCEPT OF POSSESSION

The definitions mentioned above shows that the concept of possession has two essential elements. Firstly the physical control over the thing and secondly the intention to exclude others from interfering in physical control. The first element is called “corpus possession” and the second or mental element is called “animus possedendi”. The jurists defining the concept of possession are of the view that both the elements must co-exist. Absence of any one of the element will negate the concept of possession.

(A) Corpus Possession

Corpus possession means the actual and effective physical control of the person over an object excluding the others. The person having the corpus possession has right to exclude the interference of others by taking reasonable care and security of the thing. He may exclude the others by use of force or the law also. He may continue with the possession of the things when he put the thing in lock up although he may go out after putting them in secrecy. The things still assumed in his physical control. For e.g. if the person “A” puts his jewelry or money or any othe valuable thing in his almirah, locks up the same with the key and either puts the key in his pocket or some conspicuous place at his home and goes out of the home, he is still in the possession of the things. The person taking the things from the home of “A” can’t say that he

has not taken out the things from “A’s possession. If any person has lost the thing, it can’t be said that he has lost the possession also. He will still continue to be in possession of the thing. Corpus implies the physical contact of the possessor over the things including the absolute power to deal with the thing. The possessor has the right to enjoy the use of the object and even destroy it if he wishes to it. Therefore corpus possession includes two points in it. One is the physical control over the thing and secondly the capacity to exclude the others from interfering with the use of the thing. The person due to physical incapacity lost the control over the thing but he will continue with the possession. The physical control of the person with the things may be called as relation of the person with the object and the capacity of the person to exclude the others may be called the relation of the person with the people². The elements of corpus possession may be discussed as follows.

(I) Relation of the person with the object/thing³

Possession of the thing is the evidence of ownership and the possession of a thing shows the relation of that thing with the possessor. When an object is found in the possession of any person it is assumed that he is lawfully in the possession of the thing unless any other person claims lawful ownership over the thing. The possessor can insure his relation with that of the thing in the following way:

(i) By using physical force

After acquisition of the thing, physical force is the first way in which the possessor can secure his possession over the thing. By showing physical force, the person can exclude others from interfering with the use of the thing protect the thing from being used by the others against his will. Here using physical force does not mean that he is free to use violence for protecting his right. He can protect his right of possession with the help of putting the things in lock up etc.

(ii) By using the force of law

The possessor can insure his possession over the thing by retaining first or preferential right to use the thing. Preferential right means the person is not required to take permission of other to use the thing.

(iii) By showing intention

Not only by the physical force but by showing the intention also helps in insuring the possession. The person may not use the object himself but showing the intention not to allow

² www.shodhganga.inflibnet.ac.in

³ *ibid*

other person to use the thing is helpful in securing the right of peaceful possession of the thing.

(iv) By keeping in hidden

The possessor may keep the things hidden and insure his possession to be interrupt. This way is also an effective way but the person in unlawful possession of the thing is not included in this category.

Apart from these ways, the person can retain his possession by holding a lawful title by purchasing lawfully the thing from the right owner. However the person who does not have the better title and authority to possess and retain the objects is not entitled to possess if his possession to the things has been questioned by the person lawfully entitled to possess the thing.

(2) Relation of the possessor with the other⁴

When a person possesses anything, apart from establishing the relation with the object, the person also establishes his relation with the world also. It means he declares to the world that he is lawfully in possession of the object and if anybody will interfere with his right, he will be deemed to wrongdoer. But for the fulfillment of this element, it is necessary that the person must have come in possession of the thing lawfully. For e.g. if the person goes in to a shop, takes up an article and runs away, he becomes a criminal and not the lawful purchaser. He does not create a lawful title to the article and committed the offence of theft. Possession of a thing without any interruption is the first requirement to declare the relation of the possessor to the world.

(B) Animus Possidendi

Animus possidendi is the mental element in the concept of possession. Not only the physical aspect but the mental aspect is also necessary to hold the thing. For e.g. if the thief takes out the property from the possession of other person, the person must have the intention to take the property back from the thief. Animus possidendi shows the active mind of the possessor. Intention to possess the thing or the property is also necessary when it is not possible for the possessor to exercise active physical control over the property such as immovable property. The possessor of a house or building can't exercise active physical control over his property but he exercises his mental control over it. He has the intention not to allow others to interfere with his right to possession. However for the mental element to be exercised, it is not necessary that the person must be the real owner. If the person is in custody of the things as a trustee,

⁴ ibid

bailee etc. he may also have the intention to possess the thing until the real owner does not possess the things or objects back. The person may be in possession of the thing on behalf of a consumer such as the employee of the post office holds possession on the envelopes and parcels on behalf of others and they exercise the intentional possession till the delivery of the parcel to the consumers.

III. CATEGORIES OF POSSESSION:

The term "Possession" is divided in to two categories. They are possession in fact and possession in law. Possession in fact is called de facto possession where as possession in law is called de jure possession.

(A) De facto possession

De facto possession means possession in fact or actual physical possession. The person in possession of the object is in fact is deemed to be in possession in law also and therefore that possession is considered as best or undisputed possession. However it may be possible that the person may be in possession only in fact and without the law or in possession of the thing with the law. Possession in fact and without the law is strictly not considered as possession as it is only the custody of the thing however possession in fact shows the relation of the possessor with the thing and this relation is supported with by the law when the person possess the thing in the law also. Possession in fact is subject to some following conditions:

1. Certain things are not capable of being possessed such as Sun, Moon etc.
2. The person in possession of the thing in fact must obtain the possession either lawfully or with lawful authority.

(B) De jure possession

Possession in law is termed as de jure possession. The right to possession is protected by the law for saving the possessor from some consequences which may arise due to absence of title to the property or the object. Possession is called as the nine point of the law out of ten because the person who holds possession of the thing has secured majority of the points in the eyes of law as well as the society. Law protects the right to possession so that the wrong doer infringing the right of other can be punished. Possession in law is the test of possession in fact.

IV. MODES OF ACQUISITION AND LOSS OF POSSESSION

Generally there are three modes of acquisition and loss of possession. The possession may be acquired and lost by taking, delivery or by the law.

(A) By taking

The possession of a thing may be acquired by taking of the thing. Taking the possession may be legal or illegal. Taking the thing is legal when the person takes the thing with the permission of the previous possessor and in vice versa taking is illegal when the person takes the thing without the consent of the previous possessor. However there may be condition when the person takes the thing without the consent of any person and his possession is legal. It happens when the person takes possession of the ownerless thing. Such things are called *res nullius*. Taking of the things *res nullius* is called original taking and taking of the things in possession of other person is called derivative taking.

(B) By delivery

As mentioned above the person may take the possession of a thing with the consent of the previous possessor. Therefore the person takes the things when other person delivers the thing. Delivery is also one of the modes of acquisition and loss of the possession. By delivering the thing, one person takes the possession and other person loses the possession of the thing delivered. Delivery of the thing may be actual or constructive. Delivery is actual when the thing changes the hands from giver to taker. Thing is actually put in to the possession of other person by someone. Delivery is called constructive delivery when the person holds the possession of the things on behalf of his master or his agent and keeps them in his custody on behalf of his master or agent.

(C) By operation of law

The possession may be acquired through the operation of the law also. It happens when the person take possession of the things by the law. For e.g. when a person dies and his legal heirs becomes successors of his property, the successors get the possession through the operation of the law. Apart from this possession acquired by prescription is also an example of possessing the thing by law.

V. KINDS OF POSSESSION

Possession may be of various kinds such as corporeal and incorporeal possession, mediate and immediate possession, direct and indirect possession etc.

(I) Corporeal and incorporeal possession

Corporeal possession is the possession of the material things. Material things are those things which can be touch and seen over which actual physical possession can be hold like table, house etc. Incorporeal possession means the possession over immaterial things. Such things

cannot be hold physically and therefore the right over those things may also be called intellectual right. Unlike corporeal possession, things do not pass through hands of giver and taker. For e.g. trade mark, copy right etc.

(II) Mediate and immediate possession

When the person gets the possession of the objects through another person, it is called mediate possession. The actual possessor gets the possession of the things with the help of his agent and therefore such possession may also be called indirect possession. Opposite from it, immediate possession means the direct possession. The possessor gets the possession directly and without mediation of another person. For e.g. when the person goes to shop and byes the goods for himself, it is called immediate or direct possession and if the person purchases the goods through his agent, it is called mediate or indirect possession.

(III) Actual and Constructive possession

Possession may be actual or constructive. Possession is called actual possession when the person actually holds the physical control over the thing. Actual possession may also be supported by the law but physical and apparent control over the thing is necessary. Constructive possession opposite from it is the possession in the eyes of law only and the person does not hold the things in his actual physical control.

(IV) Adverse possession

Adverse possession may also be called possession by prescription. Adverse possession means the possession of one person over the land of the other. When one person enjoys undisputed possession of the land of another person for twelve years or more, the first one gets the adverse possession against the other. The essential condition for getting the right of adverse possession is that the possession to the land must be continues for twelve years or more and the use of land must be free, undisputed and peaceful.

VI. CASE LAWS ON POSSESSION

The concept of possession is old enough and therefore English case laws are available on this concept. Important case laws may be discussed as follows.

In the case of *Cartright vs. Green*⁵ English court held that the person continues with the possession of his things even when he has parted with the physical control of the things. In the present case, a study table was sent for repair to the carpenter. There was some amount of

⁵ 1808) 7 R R 99

money in the hidden drawer of the table. The carpenter during the work found the money and appropriated it. English court held that the money was still in the possession of the owner of the table and therefore the carpenter was held liable for theft.

In *R. vs. Hudson*⁶, an envelope was wrongly delivered to the accused. When he opened the envelope the envelope, he found a cheque endorsed on his name which was in fact not intended for him but for someone else of the same name as that of the accused. The accused appropriated the cheque. He was held liable for misappropriation of property because the English court was of the view that the element of animus was not present on the part of the accused.

In an English case *Bridges vs. Hawkesworth*⁷, the plaintiff was carrying a pocket book which he dropped in the shop of the accused by mistake. The book was taken by some other person. He handed over the book to the shopkeeper for returning it to the rightful person. But the shopkeeper did not return the book. The court held that the plaintiff and not the defendant acquired the title to the book as the plaintiff lost the book and he was not intended to transfer the possession to some other person.

In *R. vs. Moor*⁸ the decision was based on the same rule on which the decision was given in the previous case. The facts of the case are also almost same in this case also. In the present case, a person dropped a bank note in the shop of the accused. The accused knowingly well about the owner of the note took up the note and appropriated it. The accused was held liable for theft as there was no intention on the part of the victim/complainant to transfer the possession of the note to someone else.

VII. CONCEPT OF POSSESSION IN INDIA

The law relating to property has been specifically enacted in India. The transfer of property act as well as Hindu law specifically provides that a person can get the property either through succession, partition or by self acquirement. It means the person can acquire the property from his deceased heir or by purchasing the property himself. In both the cases right to possession is given to the person by also and the right is secured by the force of law. Apart from the right to possess the property of other's by way of adverse possession. According to Indian judicial view, property can be possessed in two ways:

- (a) Possession with the title
- (b) Possession without title

⁶ 1943) 1 KB, 458

⁷ 1851) 21, 1 J Q B, 75

⁸ 1861) L & C, 1

A person possessed the property with the title when he hold the property as full owner of the property and the property stand in his name where as he hold the property without title when he possessed the property of another by way of adverse possession or he hold the property on behalf of the owner for some duration or fulfillment of some purpose. Hon'ble Supreme Court in various cases recognized the right of adverse possession.

In the case of *P. Lakshmi Reddy vs. L. Lakshmi Reddy*⁹ Hon'ble Supreme Court while deciding the right of adverse possession of one co-heir on the property of other co-heirs said that property in possession of one co-heir is presumed to be in the possession of others also however it may be possible that only one co-heir is using and enjoying the property also. The right of other co-heirs not using the property can't be ousted just because they did not disputed the use of the property by their co-heir/relative. It is a settled law that for establishing the right as between the co-heirs, proof of assertion is necessary. The burden of proof lies upon the person claiming to replace himself with the other heir.

In the case of *S. M. Karim vs. Bibi Sakina*¹⁰ Hon'ble Supreme Court observed that the right of adverse possession exists only when the possession over the property of other is complete, continuous, peaceful and undisputed.

In the case of *R. Chandevaramappa & Others vs. State of Karnataka*¹¹ the question of right to adverse possession was raised in the trial court which was finally came before the Supreme Court for being decided. The important fact that the appellant came in to possession of the property by the delivery of the same by the owner itself was not raised and decided in the trial as well as the first appellate court. Supreme Court observed that possessing the property of other for a long period is not enough. The property which has been delivered by the owner to the other is presumed the property of other and right of adverse possession can't be established.

In the case of *N. Venkatarayappa vs. State of Karnataka*¹² Hon'ble Supreme Court observed that if there is no proof and best pleading in support of the claim, the right of adverse possession can't be established.

VIII. CONCLUSION

Right to possession is a legal as well as social right. Law has not only recognized but protected the right also. From the study of various case laws and jurist opinion it is clear that right to possession is a legal right. Possession is deemed as nine point of law. it means the person who

⁹ AIR 1957, SC 314

¹⁰ AIR 1964, SC, 1254

¹¹ AIR, 1995, SC, 309

¹² AIR, 1997, SC, 567

has the possession of anything, he has secured nine points of law out of ten. One point which remains to be secured depends upon the title i.e. ownership. If the person possessing the thing or property has the entitlement also, he becomes the absolute owner as well as possessor of the property. Possession shows the relation of the property with the person as well as against the society at large. Possession is the evidence of ownership. Possession is the de facto exercise of right to claim and guarantee of the right to use the property. But the possession of a person may be questioned if his possession is illegal. This evidence needs to be crucially examined. The concept of possession seeks best analysis before the right regarding the same can be decided. Judiciary has played important role for making a clear picture of this concept so that the possessor can enjoy his right to possession peacefully.
