

# ADVERSE POSSESSION : A CRITIQUE

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*“Without courage there can be no truth and without truth there can be no other virtue.”*

*– Walter Scott*

Adverse possession is a doctrine under which a person in possession of land owned by someone else may acquire valid title to it, so long as certain common law requirements are met, and the adverse possessor is in possession for a sufficient period of time, as defined by a statute of limitations. Adverse Possession is that form of Possession or occupancy of land which is inconsistent with the title of any person to whom the land rightfully belongs and tends to extinguish that persons title, which provides that no person shall make an entry or distress, or bring an action to recover any land or rent, but within twelve years next after the time when the right first accrued and does away with the doctrine of adverse possession. Adverse possession is commenced in wrong and is aimed against right. Plea of Adverse Possession is not a pure question of law but a blended one of fact and law.

## **Historical background**

The concept of adverse possession was born in England around 1275 and was initially created to allow a person to claim the right of “seisin” from his ancestry. Many felt that the original law that relied on “seisin” was difficult to establish, and around 1623 a statute of limitation was put into place that allowed for a person in possession of property for twenty years or more to acquire title to that property. This early English doctrine was designed to prevent legal disputes over property rights that were time-consuming and costly. The doctrine was also created to prevent the waste of land by forcing the owners to monitor their property of suffer the consequence of losing title.

The concept of adverse possession was subsequently adopted in the United States. The doctrine was especially important in the early American periods to cure the growing number to title disputes. The

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American version mirrored the English law, which is illustrated by most States adopting a twenty-year statute of limitation for adverse possession claims. As America has developed to the present date, property rights have become increasingly more important and land has become limited. As a result, the time period to acquire land by adverse possession has been reduced in some States to as little as five years, while in others, it has remained as long as forty years. The United States has also changed the traditional doctrine by preventing the use of adverse possession against property held by a governmental entity.

During the colonial period, prior to the enactment of the Bill of Rights, property was frequently taken by the States from private landowners without compensation. Initially, undeveloped tracts of land were the most common type of property acquired by the Government, as they were sought for the installation of public road. Under the colonial system it was thought that benefits from the road would, in a newly opened country, always exceed the value of unimproved land.

The doctrine of adverse possession arose in an era where lands were vast particularly in the United States of America and documentation sparse in order to give quietus to the title of the possessor and prevent fanciful claims from erupting. The concept of adverse possession exists to cure potential or actual defects in real estate titles by putting a statute of limitation on possible litigation over ownership and possession. A landowner could be secure in title to his land; otherwise, long-lost heirs of any former owner, possessor or lien holder of centuries past could come forward with a legal claim on the property. Since independence of our country we have witnessed registered documents of title and more proper, if not perfect, entries of title in the government records. The situation having changed, the statute calls for a change.

Law is not dry subject, it's not static, it's dynamic. Law is dynamic in the sense that it is constantly changing due to changes in society such as new needs, different mores and obsolete principles. It changes by legislatures enacting new laws or by amending or repealing existing. It also changes by way of new precedents being set and old one overturned by the courts.

The subject of adverse possession has also been re-defined by the needs of the society as well as by operation of law. In this aspect

Hon'ble Apex Court has dealt with the subject in numerous cases. It will be relevant to discuss the same to understand the changing concept of law of adverse possession.

**ADVERSE POSSESSION AS EXPLAINED BY HON'BLE SUPREME COURT OF INDIA:-**

**In Annasaheb vs B.B.Patil AIR 1995 SC 895** Hon'ble court held that-

“Adverse possession means a hostile possession which is expressly or impliedly in denial of title of the true owner. Under Article 65 of the Limitation Act, burden is on the defendants to prove affirmatively. A person who bases his title on adverse possession must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In deciding whether the acts, alleged by a person, constitute adverse possession, regard must be had to the animus of the person doing those acts which must be ascertained from the facts and circumstances of each case. The person who bases his title on adverse possession, therefore, must show by clear and unequivocal evidence i.e. possession was hostile to the real owner and amounted to a denial of his title to the property claimed.”

**In Karnataka Board of Wakf Vs Govt. of India (2004)10 SCC 779** Hon'ble court in para 11 of the judgment held that-

“A person who claims adverse possession should show: (a) On what date he came into possession, (b) What was the nature of his possession, (c) Whether the factum of 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.”

**In T. Anjanappa & others Vs Somalingappa & another (2006)7 SCC 570** Hon'ble court held that -

“It is well recognized proposition in law that mere possession however long does not necessarily means 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 so 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 owners 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 formers hostile action. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. 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. Above being the position the High Courts judgment is clearly unsustainable.”

**In Chatti Konati Rao and other’s vs Palle Venkata Subba Rao (2010) 14 SCC 316** Hon’ble court in para 14 of the judgment held that-

“In view of the several authorities of this court, few whereof have been referred above, what can safely be said is that were possession however long does not necessarily mean that it is adverse to the true owner. It means hostile possession which is expressly or impliedly in denial of the title of the true owner and in order to constitute adverse possession the possession must be adequate in continuity, in publicity and in extent so as to show that it is adverse to the true owner. The possession must be open and hostile enough so that it is known by the parties interested in the property. The plaintiff is bound to prove his title as also possession within twelve years and once the plaintiff proves his title, the burden shifts on the defendant to establish that he has perfected his title by adverse possession. Claim by adverse possession has two basic elements i.e. the possession of the defendant should be adverse to the plaintiff and the defendant must continue to remain in possession for a period of twelve years thereafter.”

What is adverse possession, on whom the burden of proof lie, the approach of the Hon'ble court towards such plea, etc have been the subject matter of decision in a large number of cases such as **Ejas Ali vs. Special Manager, Coart of wards Balrampur Estate AIR 1935 PC 53, S.M. Karim vs. Bibi Sakina AIR 1964 SC 1254, Parsinni vs. Sukhi (1993) 4 SCC 375, Annasaheb Bapusaheb Patil vs Balwant (1995) 2 SCC 543, Vidya Devi vs. Prem Prakash (1995) 4 SCC 496, D. N. Venkatarayappa vs. State of Karnataka (1997) 7 SCC 567, Mahesh Chand Sharme vs. Raj Kumari Sharma (1996) 8 SCC 128, M.D.Mohammad Ali (Dead) by LRs. Vs. Jagdish Kalita & other's (2004) SCC 271, Saroop Singh vs. Banto & other's (2005) 8 SCC 330, Smt. Kalawati (Since deceased) vs. Girish Sharma (Since deceased) 2007 UAD 859, Nagar Palika Parishad Jaspur Distt. Udham Singh Nagar through its executive officer vs Sooraj Singh and 2 other's 2007 (2) UC 849, P.T. Munichikkanna Reddy vs. Revamma AIR 2007 SC 1753 & Annakili vs. Vedanayagam and other's AIR 2008 SC 346.**

**Adverse possession as a shield/defence:-** It is very much clear that claim of ownership by adverse possession can be made only by way of defence when arrayed as defendant in proceedings against him. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. No declaration can be sought by a plaintiff with regard to his ownership on the basis of an adverse possession.

**In Bhim Singh and others Vs Zile Singh & others, AIR 2006 PH 195** Hon'ble High Court of Punjab and Haryana in para 11 of the judgment held that:-

“11. Under Article 64 of the Limitation Act, as suit for possession of immovable property by a plaintiff, who while in possession of the property had been dispossessed from such possession, when such suit is based on previous possession and not based on title, can be filed within 12 years from the date of dispossession. Under Article 65 of the Limitation Act, a suit for possession of immovable property or any interest therein, based on title, can be field by a person claiming title within 12 years. The limitation under this Article commences from the date when the possession

of the defendant becomes adverse to the plaintiff. In these circumstances, it is apparent that to contest a suit for possession, filed by a person on the basis of his title, a plea of adverse possession can be taken by a defendant who is in hostile, continuous and open possession, to the knowledge of the true owner, if such a person has remained in possession for a period of 12 years. **It, thus, naturally has to be inferred that plea of adverse possession is a defense available only to a defendant.** This conclusion of mine is further strengthened from the language used in Article 65, wherein, in column 3 it has been specifically mentioned “when the possession of the defendant becomes adverse to the plaintiff.” Thus, a perusal of the aforesaid Article 65 shows that the plea is available only to a defendant against a plaintiff. In these circumstances, natural inference must follow that when such a plea of adverse possession is only available to a defendant, then no declaration can be sought by a plaintiff with regard to his ownership on the basis of an adverse possession.”

Recently Hon’ble Apex Court in the matter of **Gurdwara Sahib Vs Gram Panchayat Village Sirthala and another, (2014) 1 SCC 669** has held that no declaration can be sought by a plaintiff with regard to his ownership on the basis of an adverse possession. The relevant paragraphs of the judgment are reproduced as under:

“**8.** There cannot be any quarrel to this extent that the judgments of the courts, below are correct and without any blemish. Even if the plaintiff is found to be in adverse possession, it cannot seek a declaration to the effect that such adverse possession has matured into ownership. Only if proceedings are filed against the appellant and the appellant is arrayed as defendant that it can use this adverse possession as a shield/defense.

**10.** As the appellant is in possession of the suit property since 13-4-1952 and has been granted the decree of injunction, it obviously means that the possession of the appellant cannot be disturbed except by due process of law. We make it clear that though the suit of the appellant seeking relief of declaration has been dismissed, in case of respondents file suit for possession

and/or ejection of the appellant, it would be open to the appellant to plead in defence that the appellant had become the owner of property by adverse possession. Needless to mention at this stage, the appellant shall also be at liberty to plead that findings of issue 1 to the effect that the appellant is in possession of adverse possession since 13-4-1952 operates as *res judicata*. Subject to this clarification, the appeal is dismissed.”

It is pertinent to mention here that a new approach in defining the subject was made by the Hon'ble Apex court in the case of **State of Haryana vs. Mukesh Kumar and Other's (2011) 10 SCC 404**. The relevant paragraphs of the judgment are reproduced as under:

“**1&2.** People are often astonished to learn that a trespasser may take the title of a building or land from the true owner in certain conditions and such theft is even authorised by law. The theory of adverse possession is also perceived by the general public as a dishonest way to obtain title to property. Property right advocates argue that mistakes by landowners or negligence on their part should never transfer their property rights to a wrongdoer, who never paid valuable consideration for such an interest. The Government itself may acquire land by adverse possession. Fairness dictates and commands that if the Government can acquire title to private land through adverse possession, it should be able to lose title under the same circumstances.

39. We inherited this law of adverse possession from the British. Parliament may consider abolishing the law of adverse possession or at least amending and making substantial changes in the law in the larger public interest. The government instrumentalities-including the police-in the instant case have attempted to possess land adversely. This, in our opinion, is 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 currently stands, they may do just that. If this law is to be retained, according to the wisdom of Parliament, then at least the law must require those who adversely possess land to compensate the title owners according

to the prevalent market rate of the land or property in question. This alternative would provide some semblance of justice to those who have done nothing other than sitting on their rights for the statutory period, while allowing the adverse possessor to remain on 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, perhaps some lesser amount would be realistic in most of the cases. Parliament may either fix a set range of rates or to leave it to the judiciary with the option of choosing from within a set range of rates so as to tailor the compensation to the equities of a given case.

40. Parliament must seriously consider at least to abolish "bad faith" adverse possession i.e. adverse possession achieved through intentional trespassing, actually believing it to be their own could receive title through adverse possession, sends a wrong signal to the society at large. Such a change would ensure that only those who had established attachments to the land through honest means would be entitled to legal relief.

41. In case, Parliament decides to retain the law of adverse possession, Parliament might simply require the adverse possession claimants to possess the property in question for a period of 30 to 50 years, rather than a mere 12. Such an extension would help to ensure that the successful claimants have lived on the land for generations, and are therefore less likely to be individually culpable for the trespass (although their forebears might). A longer statutory period would also decrease 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.

### **Conclusion:**

Thus, to conclude it can be said that Paradoxical, it may seem the law seeks to punish a non-diligent title holder who fails to assert his rights within twelve long years, by denying his claim, but on the converse side the same law rewards a wrong doer and a trespasser by confirming his title by adverse possession, provided his possession satisfies the stipulated

condition. The real aim of law is neither to punish the one nor reward the other. But a society should not be bothered with disputes for eternity. So the law puts a limit of twelve years for such quarrels and disputes before which the title must be settled. Limitation Act and adverse possession have a close consanguinity between them.

The Law of adverse possession, which ousts the owner on the basis of in action within limitation, is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of true owner. The law ought not to be benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law.

On the basis of above discussion it can be said that the Parliament should consider abolishing the law of adverse possession or at least amending and making substantial changes in the law in the larger public interest. **If in a welfare state and under law, state and common man has same rights and same Acts being applicable, then why no adverse possession can be claimed over Government land and why only common man's land is been allowed to be retained under the garb of same laws.** If this law is to be retain, according to the wisdom of Parliament then at least the law must require those who adversely possess land to compensate the title owners according to the prevalent market rate of the land or property in question. Parliament might simply require the adverse possession claimants to possess the property in question for a period of 30 to 50 years, rather than a mere 12. A longer statutory period would also decrease 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.

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