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# Law Summary

( Founder : Late Sri G.S. GUPTA)

FORTNIGHTLY

(Estd: 1975)

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PART - 15 (15TH AUGUST 2019)


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Held - High Court ought not to have convicted the Appellant under Section 498A for demand of dowry without a detailed discussion of the evidence on record, especially when the Trial Court found that there is no material on record to show that there was any demand of dowry - Judgment of the High Court is set aside and appeal stands allowed. **(S.C.)** ***160***

**(INDIAN) PENAL CODE,** Secs.498-A & 406 - An Order passed by the Magistrate, declining permission to respondent No. 2 to prosecute the Appellants/Accused for the offences punishable u/Secs. 498A, 406 read with Sec.34 of Indian Penal Code, was set aside and allowed by the High Court only for the reason that the application has been made by an aggrieved party – Order of High Court is challenged by the Appellants/ Accused in the present appeal.

Held - Though the Magistrate is not bound to grant permission at the mere asking but the victim has a right to assist the Court in a trial before the Magistrate

and magistrate may consider as to whether the victim is in a position to assist the Court and as to whether the trial does not involve such complexities which cannot be handled by the victim - On satisfaction of such facts, the Magistrate would be within its jurisdiction to grant of permission to the victim to take over the inquiry of the pendency before the Magistrate - High Court has granted permission to the complainant to prosecute the trial without examining the parameters - Therefore, we set aside the Order passed by the High Court and that of the Magistrate. - Matter is remitted to the Magistrate to consider as to whether the complainant should be granted permission to prosecute the offences u/Sec.498-A, 406 read with Sec.34 IPC. **(S.C.)** ***178***

**(INDIAN)** STAMP ACT, Sec.42 -Revision is filed challenging the Order in O.S - Suit was filed by 1st respondent herein against petitioners and other respondents for declaration that 1st respondent is the owner and possessor of the suit schedule property and to direct petitioners and other respondents to deliver peaceful possession of the schedule property to him - Petitioners wanted to mark three unregistered sale deeds for collateral purpose during the further chief-examination of D.W.1. - 1st respondent contended that these three documents being unregistered sale deeds, they cannot be marked by petitioners and other respondents, and the Court should hold that they are inadmissible in evidence - Court below held that, proof of title cannot be treated as collateral purpose, and these documents cannot be marked as Exs. in the further chief-examination of D.W.1 even if they had been revalidated subsequently by paying deficit stamp duty and penalty - Petitioners have challenged this in present Revision.

Held - A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration - A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in Immovable property of the value of one hundred rupees and upwards - In a document of sale, possession is treated as collateral purpose affecting the immovable property and unregistered sale deed is inadmissible in evidence for the collateral purpose - Civil Revision Petition is allowed - Order in O.S. is set asideand petitioners are permitted to mark Exs. in evidence not for the purpose of proving their acquisition of title of the suit schedule property under the said sale deeds, but only to the limited extent of showing their possession/ nature of possession/character of possession, which are collateral to the sale transaction. **(T.S.)** ***79***

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***--X--***

# CORPUS DELICTI

**A. Krishna Prasad**
Prl.Junior Civil Judge
Chodavaram, Visakhapatnam

The term *corpus delicti*, which literally means "body of crime," is best understood in realizing a person cannot be put on trial for a crime, unless it is first proven that the crime happened to begin with. In other words, the prosecution would need to demonstrate that something bad happened as a result of a law having been violated, and that someone–the accused–was the one who violated it. Corpus delecti means the substance or foundation of a crime i.e., a fundamental fact required to prove that a particualr crime was committed and the material substance or object upon which a crime has been committed. There are two elements of *corpus delicti* in any offense:

1. A certain consequence, or injury, has occurred.

2. The consequence, or injury, is a result of a person's intentional, unlawful act**.**

**Corpus delecti from the Latin meaning body of evidence is the proff that a crime has taken place. When applied to a criminal case, proof of a crime must be shown in order to convit a person of the crime. The presentation corpus delicti is often necessary in a criminal case to prove beyond reasonable doubt that the accused is guilty of the charges against him/her. The prosecution in a criminal case has the burden of proving each element of a crime in order to secure convition. When a person is charged with theft, the corpus delecti is proof that property was stolen. When a person is charged with the crime of arson, the corpus delicti is the burned of property or evidence that the arson was committed. In a murder case, the corpus delicti is the dead body of the victim.**

**Corpus Delicti and a Confession**:-

When someone confesses to a crime, the issue of *corpus delicti* becomes a little more tricky, as a person's confession, without substantial proof that the required elements of *corpus delicti* exist, is not generally sufficient to convict the person. As a matter of fact, a person's statement, or confession, may not even be admissible in court, if the prosecution has not already presented some independent evidence that that the crime even occurred. Remember that the Latin term means "the body of the offense," not necessarily referring to the body of the victim. To convict someone of murder in such a case, the prosecution must first prove the two required elements, that the victim was killed, and that the death was the result of a criminal act, using evidence other than what might be found on the missing body. In this way, the legal system defines *corpus delicti* as the fact of a crime having actually been committed.

**Example of Corpus Delicti in Arson Cases**:-

**While the term** *corpus delicti* **commonly makes people to think of the need for a body in a murder case, it is necessary to have this "body of evidence" in other**

**types of crime as well. Arson cases are especially challenging to prosecute, as the state must show proof that (1) a fire occurred, causing damages, and (2) the fire was caused by a criminal or intentional act, rather than accident or nature. Arson cases require the same presentation of evidence surrounding the fact of the crime, other than a person's confession, as murder.**

**The Issue of 'No Corpse, No Crime:-**

Throughout the years, television and big screen crime dramas have portrayed *corpus delicti* in the sense that, if there is no body, there is no crime. The general rule is also that an accused cannot be convicted of murder if a corpse cannot be produced. This is not true. There is an exception to this rule, however in certain cases, it may be admissible to prove the basis of corpus delicti based on presumptive (circumstantial) evidence rather than conclusive evidence. If the prosecution can show presumptive evidence of corpus delicti beyond reasonable doubt, the defendant can be found guilty even if the actual body of the crime cannot be directly presented.

**In all murder cases recovery of dead body is not mandatory:** In Ram Gulam Chaudhury and others Vs State of Bihar (SC) it was held that "it is not at all necessary for a conviction for murder that the corpus delicti be found. Undoubtedly, in the absence of corpus delicti there must be direct or circumstantial leading to the inescapable conclusion that the person had died and that the accused are the persons who had committed the murder. In a trial for murder it is not an absolute necessity or an essential ingredient to establish corpus delicit. The fact of death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. In the absence of corpus delicti what the court looks for is clinching evidence that proves that the victim has been done to death. If the prosecution is successful in providing cogent and satisfactory proof of the victim having met a homicidal death, absence of corpus delicti will not by itself be fatal to a charge of murder.

**Elements of corpus delicti:-**

**1. Mental State (Mens Rea).**
**2.Conduct (Actus Reus).**
**3.Concurrence.**
**4.Causation.**
**5.Attendant Circumstances.**
**6.Harm.**
**1. Mens Rea:-**

**M**ens rea or evil intent or guilty mind. This is the mental element of the crime. A guilty mind means an intention to commit some wrongful act. Intention under criminal law is separate from a person's motive. There can be no crime of any nature without mens rea or an evil mind. Every crime requires a mental element and that is considered as the fundamental principle of criminal liability. The basic requirement of the principle mens rea is that the accused must have been aware of those elements in his act which make the

crime with which he is charged. There is a well known maxim in this regard, i.e. “actus non facit reum nisi mens sit rea” which means that, the guilty intention and guilty act together constitute a crime. It comes from the maxim that no person can be punished in a proceeding of criminal nature unless it can be showed that he had a guilty mind. A lower threshold of *mens rea* is satisfied when a defendant recognizes an act is dangerous but decides to commit it anyway. This is recelessness. It is the mental state of mind of the person at the time the actus reus was committed. For instance, if *C* ears a gas meter from a wall to get the money inside, and knows this will let flammable gas escape into a neighbour’s house, he could be liable for poisoning. Courts often consider whether the actor did recognize the danger, or alternatively ought to have recognized a risk. Of course, a requirement only that one *ought* to have recognized a danger (though he did not) is tantamount to erasing *intent* as a requirement. In this way, the importance of mens rea has been reduced in some areas of the criminal law but is obviously still an important part in the criminal system. Wrongfulness of intent also may vary the seriousness of an offense and possibly reduce the punishment but this is not always the case. A killing committed with specific intent to kill or with conscious recognition that death or suerious bodily harm will result, would be murder, whereas a killing effected by reckless acts lacking such a consciousness could be manslaughter. On the other hand, it matters not who is actually harmed through a defendant’s actions. The doctrine of transferred malice means, for instance, that if a man intends to strike a person with his belt, but the belt bounces off and hits another, mens rea is transferred from the intended target to the person who actually was struck.

**2. Actus Reus [Guilty Act Or Omission]:-**

***Actus reus* is “guilty act” and is the physical element of committing a crime. It may be accomplished by an action, by threat of action, or exceptionally, by an ommission to act, which is a legal duty to act. For example, the act of *A* striking *B* might suffice, or a parent’s failure to give food to a young child also may provide the actus reus for a crime. Where the actus reus is a *failure* to act, there must be a *duty of care*.** In other words, some overt act or illegal omission must take place in pursuance of the guilty intention. Actus reus is the manifestation of mens rea in the external world. Prof. Kenny was the first writer to use the term ‘actus reus’. He has defined the term thus- “such result of human conduct as the law seeks to prevent”. An actus reus may be nullified by an absence of causation. For example, a crime involves harm to a person, the person’s action must be the but for cause and proximate cause of the harm. If more than one cause exists (e.g. harm comes at the hands of more than one culprit) the act must have “more than a slight or trifling link” to the harm.

**3.Concurrence:-**

**Concurrence** (also **contemporaneity** or **simultaneity**) is the apparent need to prove the simultaneous occurrence of both actus reus (“guilty action”) and mens rea (“guilty mind”), to constitute a crime; except in crimes of strict liability. Suppose for example that the accused accidentally injures a pedestrian while driving. Aware of the collision, the accused rushes from the car only to find that the victim is a hated enemy. At this point, the accused joyfully proclaims his pleasure at having caused the injury. The conventional

rule is that no crime has been committed. In this case actus reus is compled but mens rea is not there, he only moved from his car as victim is enemy. To be convicted, the accused must have formed the *mens rea* either before or during the commission of the *actus reus*. In the vast majority of cases, this rule works without difficulty.

**Two types of concurrence in criminal law**:-

1. Temporal concurrence – the *actus reus* and *mens rea* occur at the same time.
2. Motivational concurrence – the *mens rea* motivates the *actus reus*.

**4. Causation:-**

It is the "causal relationship between conduct and result". In other words, causation provides a means of connecting conduct with a resulting effect, typically an injury. In criminal law, it is defined as the actus reus (an action) from which the specific injury or other effect arose and is combined with mens rea (a state of mind) to comprise the elements of guilt. Causation only applies where a result has been achieved and therefore is immaterial with regard to inchoate offenses. Legal systems more or less try to uphold the notions of fairness and justice. If a state is going to penalize a person or require that person pay compensation to another for losses incurred, liability is imposed according to the idea that those who injure others should take responsibility for their actions. Although some parts of any legal system will have qualities of strict liability, in which the mens rea is immaterial to the result and subsequent liability of the actor, most look to establish liability by showing that the defendant was the cause of the particular injury or loss. Even the youngest children quickly learn that, with varying degrees of probability, consequences flow from physical acts and omissions. The more predictable the outcome, the greater the likelihood that the actor caused the injury or loss intentionally. There are many ways in which the law might capture this simple rule of practical experience: that there is a natural flow to events, that a reasonable man in the same situation would have foreseen this consequence as likely to occur, that the loss flowed naturally from the breach of contractual duties or tortuous actions, etc. However it is phrased, the essence of the degree of fault attributed will lie in the fact that reasonable people try to avoid injuring others, so if harm was foreseeable, there should be liability to the extent that the extent of the harm actually resulting was foreseeable.

**Relationship between causation and liability:-**

Causation of an event alone is insufficient to create legal liability. Sometimes causation is one part of a multi-stage test for legal liability. For example, for the defendant to be held liable for the tort of negligence, the defendant must have owed the plaintiff a duty of care, breached that duty, by so doing caused damage to the plaintiff, and that damage must not have been too remote. Causation is but one component of the tort. On other occasions, causation is the only requirement for legal liability (other than the fact that the outcome is proscribed). For example, in the law of product liability, the courts have come to apply to principle of strict liability: the fact that the defendant's product caused the plaintiff harm is the only thing that matters. The defendant need not also have been negligent. On still

other occasions, causation is irrelevant to legal liability altogether. For example, under a contract of indemnity insurance, the insurer agrees to indemnify the victim for harm not caused by the insurer, but by other parties. Because of the difficulty in establishing causation, it is one area of the law where the case law overlaps significantly with general doctrines of analytic philosophy to do with causation. The two subjects have long been somewhat intermingled.

**Establishing causation**:-

Where establishing causation is required to establish legal liability, it usually involves a two-stage inquiry, firstly establishing 'factual' causation, then 'legal' causation. 'Factual' causation must be established before inquiring into legal causation, perhaps by assessing if the defendant acted in the plaintiff's loss. Determining 'legal' causation often involves a question of public policy regarding the sort of situation in which, despite the outcome of the factual enquiry, the defendant might nevertheless be released from liability, or impose liability.

**Establishing factual causation:**-

The usual method of establishing factual causation is the but-for test. The but for test inquires 'But for the defendant's act, would the harm have occurred?' A shoots and wounds B. We ask 'But for A's act, would B have been wounded?' The answer is 'No.' So we conclude that A caused the harm to B. The but for test is a test of necessity. It asks was it 'necessary' for the defendant's act to have occurred for the harm to have occurred. One weakness in the but-for test arises in situations where each of several acts alone are sufficient to cause the harm. For example, if both A and B fire what would alone be fatal shots at C at approximately the same time, and C dies, it becomes impossible to say that but-for A's shot, or but-for B's shot alone, C would have died. Taking the but-for test literally in such a case would seem to make neither A nor B responsible for C's death.

**Establishing legal causation:**-

Notwithstanding the fact that causation may be established in the above situations, the law often intervenes and says that it will nevertheless not hold the defendant liable because in the circumstances the defendant is not to be understood, in a legal sense, as having caused the loss. The most important doctrine is that of *novus actus interveniens*, which means a 'new intervening act' which may 'cut the chain of causation'.

**Proximate cause*:-***

The but-for test is factual causation and often gives us the right answer to causal problems, but sometimes not. Two difficulties are immediately obvious. The first is that under the but-for test, almost anything is a cause. But for a tortfeasor's grandmother's birth, the relevant tortious conduct would not have occurred. But for the victim of a crime missing the bus, he or she would not have been at the site of the crime and hence the crime would not have occurred. Yet in these two cases, the grandmother's birth or the victim's missing

the bus are not intuitively causes of the resulting harm. This often does not matter in the case where cause is only one element of liability, as the remote actor will most likely not have committed the other elements of the test. The legally liable cause is the one closest to or most proximate to the injury. This is known as the Proximate Cause rule. However, this situation can arise in strict liability situations.

**Intervening cause**:-

A critically injures B. As B is wheeled to an ambulance, she is struck by lightning. She would not have been struck if she had not been injured in the first place. Clearly then, A caused B's whole injury on the 'but for' or NESS test. However, at law, the intervention of a supervening event renders the defendant not liable for the injury caused by the lightning.

**The effect of the principle may be stated simply:**-

if the new event, whether through human agency or natural causes, does not break the chain, the original actor is liable for all the consequences flowing naturally from the initial circumstances. But if the new act breaks the chain, the liability of the initial actor stops at that point, and the new actor, if human, will be liable for all that flows from his or her contribution.

**Independent sufficient causes:-**

When two or more negligent parties, where the consequence of their negligence joins together to cause damages, in a circumstance where either one of them alone would have caused it anyway, each is deemed to be an "Independent Sufficient Cause," because each could be deemed a "substantial factor," and both are held legally responsible for the damages. For example, where negligent firestarter A's fire joins with negligent firestarter B's fire to burn down House C, both A and B are held responsible. The other problem is that of overdetermination. Imagine two hunters, A and B, who each negligently fire a shot that takes out C's eye. Each shot on its own would have been sufficient to cause the damage. But for A's shot, would C's eye have been taken out? Yes. The same answer follows in relation to B's shot. But on the but-for test, this leads us to the counterintuitive position that neither shot caused the injury. However, courts it can be held that in order to prevent each of the defendants avoiding liability for lack of actual cause, it is necessary to hold both of them responsible,

**Concurrent actual causes:-**

Suppose that two actors' negligent acts combine to produce one set of damages, where but for either of their negligent acts, no damage would have occurred at all. This is two negligences contributing to a single cause, as distinguished from two separate negligences contributing to two successive or separate causes. These are "concurrent actual causes". In such cases, courts have held both defendants liable for their negligent acts. Example: A leaves truck parked in the middle of the road at night with its lights off. B fails to notice

it in time and plows into it, where it could have been avoided, except for want of negligence, causing damage to both vehicles. Both parties were negligent.

**Foreseeability:-**

Legal Causation is usually expressed as a question of 'foreseeability'. An actor is liable for the foreseeable, but not the unforeseeable, consequences of his or her act. For example, it is foreseeable that if I shoot someone on a beach and they are immobilized, they may drown in a rising tide rather than from the trauma of the gunshot wound or from loss of blood. However it is not (generally speaking) foreseeable that they will be struck by lightning and killed by that event. This type of causal foreseeability is to be distinguished from foreseeability of extent or kind of injury, which is a question of remoteness of damage, not causation. For example, if I conduct welding work on a dock that lights an oil slick that destroys a ship a long way down the river, it would be hard to construe my negligence as anything other than causal of the ship's damage. There is no *novus actus interveniens*. However, I may not be held liable if that damage is not of a type foreseeable as arising from my negligence:

Example:-An example of how foreseeability does not apply to the extent of an injury is the eggshell skull rule. If A punched B in the jaw, it is foreseeable that B will suffer a bodily injury that he will need to go to the hospital. However, if his jaw is very weak, and his jaw comes completely off from A's punch, then the doctor bills, which would have been about Rs.5,000/- for wiring his jaw shut had now become Rs.1,00,000/- for a full-blown jaw re-attachment. A would still be liable for the entire Rs.1,00,000, even though Rs.95,000 of those damages were not reasonably foreseeable.

**5.Attendant circumstances:-**

Attendant circumstances (sometimes external circumstances) are the facts surrounding an event. Accompanying factors relevant ot the crime. Generally in commission of offence several actions to be done inaddition to the concept of mens rea. All the said relevant actions shall be construced as attendant circumstnaces which are necessary to evalute the concept of corpus delecti. In order for a person to be found guilty of this crime, the evidence must prove that the accused uttered a profanity (the act) in a public place (the contextual attendant circumstance) with the intention of provoking a violent reaction (the mental element demonstrating the right type of culpability) and thereby causes a breach of the peace (the result prohibited by law). There are no attendant circumstances that might invoke an excuse or other general defence. Indeed, the victim in this instance being a police officer would probably be considered an aggravating *circumstance* and increase the penalty for the crime.

**6.Harm:-**

Harm is final Damages resultant from criminal act. The general principle is that every crime must has its outcome by way of harm, it is called crime. It may be in

physical or in mental form. The exception is victimless crime, it is an illegal act that typically either directly involves only the perpetrator, or occurs between consenting adults; because it is consensual in nature, there is arguably no true victim. Three characteristics can be used to identify whether a crime is victimless crime - if the act is excessive, is indicative of a distinct pattern of behavior, and its adverse effects impact only the person who has engaged in it. Examples of these types of crimes include possession of illegal contraband, and a typical sexual behavior. Recreational drug use and prostitution, public drunkness, vagarancy, obseenity are other examples for victimless crimes.

**Conclusion:-**

This principle prevents wrongful conviction as well as wrongful acquittals.

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**2019(2) L.S. 79 (T.S.)**

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
M.S. Ramachandra Rao

Kamala Devi ..Petitioner

Vs.

Anthi Reddy ..Respondent

**INDIAN STAMP ACT, Sec.42 - Revision is filed challenging the Order in O.S - Suit was filed by 1st respondent herein against petitioners and other respondents for declaration that 1st respondent is the owner and possessor of the suit schedule property and to direct petitioners and other respondents to deliver peaceful possession of the schedule property to him - Petitioners wanted to mark three unregistered sale deeds for collateral purpose during the further chief-examination of D.W.1. - 1st respondent contended that these three documents being unregistered sale deeds, they cannot be marked by petitioners and other respondents, and the Court should hold that they are inadmissible in evidence - Court below held that, proof of title cannot be treated as collateral purpose, and these documents cannot be marked as Exs. in the further chief-examination of D.W.1 even if they had been revalidated subsequently by paying deficit stamp duty and penalty - Petitioners have challenged this in present Revision.**

**Held - A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration - A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in Immovable property of the value of one hundred rupees and upwards - In a document of sale, possession is treated as collateral purpose affecting the immovable property and unregistered sale deed is inadmissible in evidence for the collateral purpose - Civil Revision Petition is allowed - Order in O.S. is set asideand petitioners are permitted to mark Exs. in evidence not for the purpose of proving their acquisition of title of the suit schedule property under the said sale deeds, but only to the limited extent of showing their possession/nature of possession/ character of possession, which are collateral to the sale transaction.**

Mr.S. Srinivas Reddy, Advocate for the Petitioner.
Mr.C. Raghu, Advocate for the Respondent.

**J U D G M E N T**

1. This Revision is filed under Article 227 of the Constitution of India challenging the order dt.16-04-2019 in O.S.No.539 of 2012 on the file of the VIII Additional District and Sessions Judge, Ranga Reddy District at L.B. Nagar.

2. Petitioners herein are defendant Nos.4

to 6 in the said suit.

3. The said suit was filed by 1st respondent herein against petitioners and other respondents for declaration that 1st respondent is the owner and possessor of the suit schedule property and to direct petitioners and other respondents to deliver peaceful possession of the schedule property to him.

4. During the course of evidence, petitioners wanted to mark three unregistered sale deeds Exs.B-18 to B-20 for collateral purpose during the further chief-examination of D.W.1.

5. It was the objection of the 1st respondent that these three documents being unregistered sale deeds, they cannot be marked by petitioners and other respondents, and the Court should hold that they are inadmissible in evidence.

6. It is the contention of the petitioners that these sale deeds had been revalidated by the District Registrar under Section 42 of the Indian Stamp Act, 1899 on 07-06-1997 and deficit stamp duty had also been collected thereon, and this makes them admissible in evidence. They contended that even if these documents are unregistered, they can be admitted for collateral purpose.

7. By order dt.16-04-2019, the Court below held that the suit having been filed by 1st respondent for the relief of declaration of title and possession, and since petitioners are contesting the claim of 1st respondent by setting up independent right, title and possession over the suit schedule property, these documents cannot be admitted in evidence since they are being relied upon by petitioners to prove their title over the suit schedule property. According to the Court below, proof of title cannot be treated as collateral purpose, and these documents cannot be marked as Exs.B-18 to B-20 in the further chief-examination of D.W.1 even if they had been revalidated subsequently by paying deficit stamp duty and penalty.

8. Challenging the same, petitioners have filed this Revision.

9. Learned counsel for petitioners contended that though the suit is filed by 1st respondent for declaration of his title and recovery of possession, it is the defence of the petitioners that they have perfected title to the property through adverse possession from 1995 and to prove the nature of their possession, they wish to rely on these documents and that they are not relying on them to prove their title. They also pointed out that in the written statement they pleaded their uninterrupted possession from 15-12-1995 as owners and possessors and that the 1st respondent cannot challenge their title or possession after 17 years. Learned counsel for petitioners relied upon the decisions in Satish Chand Makhan and others Vs. Govardhan Das Byas and others (AIR 1984 SC 143), M/s.Sms Tea Estates P. Ltd. Vs. M/s.Chandmari Tea Co. P. Ltd. (2011(5) ALD 149 (SC), Bondar Singh and others Vs. Nihal Singh and others (2003) 4 SCC 161), K.Ramamoorthi Vs. C.Surenderanatha Reddy (2012 (6) ALD 163) in support his submissions.

10. Learned counsel 1st respondent refuted the said contentions and supported the order passed by the Court below. He relied upon the judgment of the Supreme Court in K.B.Saha & Sons Pvt. Ltd. Vs. Development Consultant Ltd (2008(6) ALD 92 (SC), Golla Dharmanna Vs. Sakari Poshetty and others (2013(5) ALD 490), and Dangu @ Kadamenda Yellaiah (Died) per LRs., and others Vs. Ch.Sridhar Reddy and another (2013(1) ALT 461) to contend that an unregistered sale deed cannot be received in evidence in a suit for declaration of property even for collateral purpose under proviso to Section 49 of the Registration Act, 1908.

11. I have noted the submission of both sides.

12. From the facts narrated above, it is clear that three sale deeds are unregistered documents and though they were also insufficiently stamped, the deficit stamp duty was paid along with penalty under Section 42 of the Stamp Act, 1899 on 07-06-1997. So proper stamp duty is now paid on them.

13. In Satish Chand Makhan (1 supra), an unregistered lease agreement was sought to be marked by plaintiff in a suit for eviction against a tenant and also for mesne profits. Defendant contended that it was inadmissible in evidence for want of registration under Section 49 of the Registration Act, 1908. The trial Court admitted the document into evidence and marked it for being used by plaintiff for the collateral purpose of proving the term of the subsequent lease under proviso to Section 49 of the Registration Act and this was confirmed by the High Court. But the Supreme Court reversed it stating that an unregistered lease agreement is inadmissible in evidence except for the collateral purpose of proving the nature and character of possession of the defendant. It also observed that the terms of lease are not a collateral purpose within the meaning of proviso to Section 49 of the Act and for the said purpose, they cannot be marked in evidence.

14. This was reiterated in M/s.Sms Tea Estates P. Ltd (2 supra) and it was held that under proviso to Section 49, an unregistered document can be received evidence of contract in a suit for specific performance and also as evidence of any collateral transaction which by itself is not required to be effected by a registered instrument. It explained that a collateral transaction is not the transaction affecting the immovable property, but a transaction which is incidentally connected with that transaction. In that case, it was held that an arbitration clause was contained in an unregistered lease agreement, but the said deed is admissible to prove the said collateral term relating to resolution of disputes by arbitration, unrelated to the transfer or transaction affecting the immovable property. It also observed that it can be relied upon for the limited purpose of showing that possession of lessee is lawful.

15. In Bondar Singh (3 supra), in a suit for declaration of title on the basis of the plea that plaintiffs have become the owners of suit schedule property by adverse possession, an unregistered sale deed

dt.09-05-1931, was sought to be marked in evidence. The said document was admitted into evidence and the suit was decreed. This judgment of the trial Court and the subsequent judgment of the High Court were confirmed by the Supreme Court. The Supreme Court held that a document like a sale deed in the present case, even though not admissible in evidence, can be looked into as collateral purpose and in the said case, collateral purpose is nature of possession of the plaintiffs over the suit land and it shows the initial possession of the plaintiffs over the suit land was not illegal and not unauthorized.

16. These decisions were followed in K.Ramamoorthi (4 supra), by a learned Single Judge of this Court, who observed :

"24. On a compendious reference of the case law discussed above, the followings conclusions emerge:

i) A document, which is compulsorily registrable, but not registered, cannot be received as evidence of any transaction affecting such property or conferring such power. The phrase "affecting the immovable property" needs to be understood in the light of the provisions of Section 17(b) of the Registration Act, which would mean that any instrument which creates, declares, assigns, limits or extinguishes a right to immovable property, affects the immovable property.

ii) The restriction imposed under Section 49 of the Registration Act is confined to the use of the document to affect the immovable property and to use the document as evidence of a transaction affecting the immovable property.

iii) If the object in putting the document in evidence does not fall within the two purposes mentioned in (ii) supra, the document cannot be excluded from evidence altogether.

iv) A collateral transaction must be independent of or divisible from a transaction to affect the property i.e., a transaction creating any right, title or interest in the immovable property of the value of rupees hundred and upwards.

v) The phrase "collateral purpose" is with reference to the transaction and not to the relief claimed in the suit.

vi) The proviso to Section 49 of the Registration Act does not speak of collateral purpose but of collateral transaction i.e., one collateral to the transaction affecting immovable property by reason of which registration is necessary, rather than one collateral to the document.

vii) Whether a transaction is collateral or not needs to be decided on the nature, purpose and recitals of the document.

25. Having culled out the legal propositions, the discussion on this issue will be incomplete if a few illustrations as to what constitutes collateral transaction are not enumerated as given out in Radhomal Alumal (AIR (29) 1942 Sind 27) and other Judgments. They are as under:

a) If a lessor sues his lessee for rent on an unregistered lease which has expired at the date of the suit, he cannot succeed for two reasons, namely, that the lease which is registrable is unregistered and that the period of lease has expired on the date of filing of the suit. However, such a lease deed can be relied upon by the plaintiff in a suit for possession filed after expiry of the lease to prove the nature of the defendant's possession.

b) An unregistered mortgage deed requiring registration may be received as evidence to prove the money debt, provided, the mortgage deed contains a personal covenant by the mortgagor to pay (See: Queen-Empress v Rama Tevan ('92) 15 Mad. 253, P.V. M.Kunhu Moidu v T. Madhava Menon('09) 32 Mad. 410 and Vani v Bani ('96) 20 Bom. 553).

c) In an unregistered agreement dealing with the right to share in certain lands and also to a share in a cash allowance, the party is entitled to sue on the document in respect of movable property (Hanmantapparao v Ramabai Hanmant('19) 6 AIR 1919 Bom. 38 = 21 Bom. L.R.716).

d) An unregistered deed of gift requiring registration under Section 17 of the Registration Act is admissible in evidence not to prove the gift, but to explain by reference to it the character of the possession of the person who held the land and who claimed it, not by virtue of deed of gift but by setting up the plea of adverse possession [Varada Pillai (43 Madras 244 (PC)].

(e) A sale deed of immovable property requiring registration but not registered can be used to show nature of possession (Radhomal Alumal AIR (29) 1942 Sind 27), Bondar Singh (3 supra) and A. Kishore (2004 (3) ALD 817 (DB).

The above instances are only illustrative and not exhaustive. There may be many more situations where a transaction can be collateral to the transaction which affects the immovable property. The Courts will have to carefully decide on a case to case basis in the light of the legal principles contained in the above discussed and various other judgments holding the field."

(emphasis supplied)

17. This Court then categorically held that an unregistered sale deed is admissible for collateral purpose to the limited extent of showing possession of plaintiff and that in a document of sale, possession is treated as collateral to the main transaction affecting the immovable property.

18. Having regard to the above decision and the decision of the Supreme Court in Bondar Singh (3 supra), the view expressed by Dangu @ Kadamenda Yellaiah (7 supra) that an unregistered sale deed cannot be received in evidence in a suit for declaration of title even for collateral purpose under proviso to Section 49 of the Registration Act, 1908 is not good law.

19. In K.B.Saha and Sons Pvt. Ltd. (5 supra) also, the Supreme Court held that though a document purporting to be a lease and required to be registered under Section

107 of the Transfer of Property Act, will not be admissible in evidence if the same is not registered, the proviso to Section 49 provides that an unregistered lease deed may be looked into as evidence of collateral purpose, but term in lease deed cannot be proved as a collateral fact. It was observed in para-21 as under:

"21. From the principles laid down in the various decisions of this Court and the High Courts, as referred to hereinabove, it is evident that:

1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.

2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the Proviso to Section 49 of the Registration Act.

3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.

4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in Immovable property of the value of one hundred rupees and upwards.

5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

20. This judgment was relied upon in Golla Dharamanna (6 supra) by this Court to hold that even if stamp duty and penalty was paid on an unregistered sale deed, the document would not be admissible in evidence to establish title to the property.

21. The contention of the learned counsel for respondents that the recital in the unregistered sale deed about delivery of possession is a term of the unregistered sale deed, and so it is not a collateral fact, cannot be accepted because as held in K.Ramamoorthi (4 supra), the Courts have been consistently holding that in a document of sale, possession is treated as collateral purpose affecting the immovable property and unregistered sale deed is inadmissible in evidence for the collateral purpose.

22. Therefore, the Civil Revision Petition is allowed; the order dt.16-04-2019 in O.S.No.539 of 2012 of the VIII Additional District and Sessions Judge, Ranga Reddy District at L.B. Nagar is set aside; and petitioners are permitted to mark Exs.B-18 to B-20 in evidence not for the purpose of proving their acquisition of title of the suit schedule property under the said sale deeds, but only to the limited extent of showing their possession/nature of possession/character of possession, which are collateral to the sale transaction. No costs.

23. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

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**2019(2) L.S. 85 (T.S.)**

IN THE HIGH COURT OF TELANGANA

Present:
The Hon'ble Mr. Justice
M.S. Ramachandra Rao

T. Mallesh Yadav ..Petitioner

Vs.

K.Sri Ram Reddy ..Respondent

**A.P. RIGHTS IN LAND & PATTADAR PASS BOOKS ACT, Sec.5 - Suit was filed by the Appellant/Plaintiff for declaration of his title to the plaint schedule property and for a perpetual injunction restraining the Respondents/ Defendants from interfering with his alleged peaceful possession and enjoyment of the plaint schedule property - Pending suit, the plaintiff filed I.A. under Order XXXIX Rule 1 and 2 CPC for a temporary injunction restraining the defendants from interfering with his alleged peaceful possession and enjoyment of the plaint schedule property and he also filed I.A. under Order XXXIX Rule 1 and 2 CPC for grant of temporary injunction restraining the defendants from alienating or creating any third party interest over this plaint schedule property - By separate orders dt.26.03.2019, the court below dismissed both applications.**

**Held - Court below did not commit any error of law or fact in refusing to grant relief to the plaintiff in both I.A. and its finding that the plaintiff was prima facie not in possession of the plaint schedule property on the date of filing of the suit does not warrant any interference by this Court – Appeals stand dismissed.**

**C O M M O N J U D G M E N T**

1. These two Civil Miscellaneous Appeals arise out of the same suit between the same parties and so they are being disposed of by this common order.

2. The appellant in both the Civil Miscellaneous Appeals is the plaintiff in O.S. No.1143 of 2018 on the file of III Additional District Judge, Ranga Reddy District at L.B. Nagar.

3. The said suit was filed by the appellant/ plaintiff for declaration of his title to the plaint schedule property and for a perpetual injunction restraining the respondents/ defendants from interfering with his alleged peaceful possession and enjoyment of the plaint schedule property.

4. The plaint schedule property is an extent of Ac.13.05 gts in Sy. No.494 of Nadergul village, Balapur Mandal, Ranga Reddy District.

5. Pending suit, the plaintiff filed I.A. No.931 of 2018 under Order XXXIX Rule 1 and 2 CPC for a temporary injunction restraining the defendants from interfering with his alleged peaceful possession and enjoyment of the plaint schedule property.

6. He also filed I.A. No.29 of 2019 under

Order XXXIX Rule 1 and 2 CPC for grant of temporary injunction restraining the defendants from alienating or creating any third party interest over this plaint schedule property.

7. Counter-affidavits were filed by the defendants opposing the said applications.

8. By separate orders dt.26.03.2019, the court below dismissed both applications.

9. Challenging the order in I.A. No.931 of 2018, plaintiff filed CMA No.505 of 2019 and challenging the order in I.A. No.29 of 2019, the plaintiff filed CMA No.504 of 2019.

**The case of the plaintiff**

10. The plaintiff's case is that his ancestor is Tharre Mallaiah; that the said Mallaiah and Sama Raji Reddy were joint tenants over the lands belonging to late Raghava Rao, S/o Papaiah in Nadergul village; they were recorded as joint tenants of late Raghava Rao in proceedings under the A.P. Land Reforms (Ceiling on Agricultural Holdings) Act, 1973; that the Land Reforms Tribunal passed orders under Section 9 of the said Act in proceeding No.854/E/75 declaring the plaint schedule property in favour of Tharre Mallaiah and Sama Raji Reddy confirming a sale agreement; this is also evidenced in the declarations filed by Mallaiah in C.C. No.855, 857 to 860 dt.10.03.1976 and orders under Section 9(1) were passed holding that Mallaiah was not holding excess land. He contended that the legal heirs of Mallaiah were entitled to retain the lands described in the orders passed including the plaint schedule property herein as absolute owners and that plaintiff is in peaceful possession and enjoyment over the said land as owner thereof.

11. According to him, the name of Tharre Lingaiah is recorded in the revenue record, being the eldest member of the joint family after the death of T. Jangaiah; and legal heirs of Mallaiah and Sama Raji Reddy entered into a memorandum of compromise relinquishing their rights and confirming the fact that plaintiff is exclusively entitled to claim rights over the plaint schedule land apart from other lands in the vicinity. He also contended that the legal heirs of Sama Raji Reddy also signed the said compromise which was filed before the Legal Services Authority, Ranga Reddy District in PLC No.247 of 2018 and confirmed the terms of the said compromise.

12. He contended that the defendants, by virtue of certain illegal and invalid documents of sale, in collusion with revenue officials, got their names incorporated in the revenue records from 2010 and 2015 without any notice under Section 5 of the A.P. Rights in Land and Pattadar Pass Books Act, 1971 and the plaintiff came to know of the same prior to the filing of the suit. He alleged that he filed objections before the Tahsildar and Commissioner, HMDA on 24.09.2018 against the defendants which are pending.

13. Plaintiff alleged that the defendants took advantage of the recording of their name in the revenue records pending appeal and are attempting to illegally dispossess the plaintiff from the plaint schedule property with the help of antisocial elements. Hence the suit.

14. In the I.As the plaintiff marked Exs.P-1 to P-39.

**The case of the defendants**

15. The defendants contended that the plaintiff is not concerned with the plaint schedule property and is misrepresenting and also suppressing vital facts like purchase by himself and his brother of open plots admeasuring 2500 square yards forming part of the plaint schedule property under Exs.R-36 to R-40 registered sale deeds dt.22.05.2015 from defendants 1 and 2 accepting and admitting their ownership to an extent of Ac.6.37 gts.

16. While admitting that late Raghava Rao was the original pattedar of the plaint schedule property, the defendants denied that Tharre Mallaiah and Sama Raji Reddy were joint tenants in the said land. They contended that Tharre Lingamaiah and Tharre Anjaiah purchased Ac.6.07 gts in Sy. No.494 from the legal heirs of late Raghava Rao by name N. Amrutha Rao and others under a sale agreement-cum-GPA dt.29.01.2001 (Ex.R-5) and later sold the same under registered sale deed Ex.R-4 dt. 30.10.2002 to B. Karunakar Reddy, husband of the 3rd defendant.

17. According to them, there are prospective purchasers from defendants 1 and 2 who are also in physical possession and enjoyment of their respective plots in the plaint schedule property and so the suit is liable to be dismissed for non-joinder of necessary and proper parties.

18. They alleged that revenue authorities issued endorsement dt.12.07.2016 in file Nos.C/404/2016 contending that there is no entry in the Protected Tenancy register in respect of Sy. No.494 of Nadergul village, and that the Land Reforms Tribunal had also passed orders dt.15.01.1977 in file No.1724/E/75 wherein the land in Sy.No.494 was retained with Raghava Rao and his family members. They allege that mere filing of declarations before Land Ceiling Authorities will not confer any title on the plaintiff's predecessors, and he did not file any document showing that they were given ownership certificate from revenue authorities in respect of the plaint schedule property.

19. They alleged that the name of Lingaiah and Sathi Reddy were continued in the revenue records by order dated 13.06.2003 vide proceeding No.B/4787/2003 even after they alienated land in favour of B.Karunakar Reddy; that the defendants then approached the Special Grade Deputy Collector who passed orders on 30.04.2016 vide proceeding No.B/738/2016 by correcting entries in the revenue records; and thereafter the defendants' names were entered and continued in the revenue records. According to them, they are bonafide purchasers of the plaint schedule property and they are in physical possession and enjoyment of the same.

20. They denied the allegation that they attempted to dispossess the plaintiff from the plaint schedule property. They alleged that defendant Nos.1 and 2 are absolute owners and possessors of the land admeasuring Ac.6.37 gts and had alienated part of it by converting into residential plots

in favour of third parties including the plaintiff herein and his brother and the remaining extent of land is admeasuring Ac.4.30 gts. They further contend that the land admeasuring Ac.6.07 gts belongs to defendant No.3 and these two bits together measure Ac.10.37 gts and is being developed into residential plots by obtaining Layout/Permission from the Hyderabad Metropolitan Development Authority.

**The order of the III Additional District Judge, Ranga Reddy District in I.A.No.931 of 2018 and in I.A.No.29 of 2019**

21. By separate orders dt.26-03-2019, the III Additional District Judge, Ranga Reddy District dismissed I.A.No.931 of 2018 and I.A.No.29 of 2019.

22. The said court held that based on Ex.R-5 sale deed dt.29-01-2001, the legal heirs of late Raghava Rao sold away Ac.6.07 gts in Sy.No.494/P in favour of B.Karunakar Reddy, husband of 3rd defendant through Ex.R-4 sale deed dt.30-10-2002; and thereafter legal heirs of late Raghava Rao by name Hanumantha Rao, Amrutha Rao, Vasudeva Rao and Srinivasa Rao sold away the balance extent of Ac.6.37 gts in Sy.No.494 to defendant Nos.1 and 2 through Ex.R-3 sale deed dt.31-01-2001. It held that if so, plaintiff cannot claim to be in possession of the plaint schedule property.

23. Adverting to the claim of the plaintiff that he and his family members succeeded to the plaint schedule property from their ancestors, it observed that plaintiff's ancestors Tarre Lingaiah and Tarre Anjaiah sold Ac.6.07 gts in favour of husband of 3rd defendant by executing Ex.R-3 document and the remaining land of Ac.0.37 gts was sold away to defendant Nos.1 and 2 by the legal heirs of late Raghava Rao. It therefore concluded that no land is left in Sy.No.494 for the plaintiff to be in possession and his claim for possession is unbelievable and imaginary.

24. It held that plaintiff suppressed all material facts of alienations made by their ancestors and is claiming to be in possession only on the basis of some revenue records and land reforms proceedings and consequently has no prima facie case in his favour.

25. It observed that vide proceedings Ex.R-6 dt.20-07-2010, the Dy.Collector-cum-Tahsildar, Saroornagar Mandal recorded the names of defendant Nos.2 and 1 as pattedar and possessor in respect of Ac.6.37 gts in Sy.No.494; and Ex.R-7, proceedings of the Tahsildar shows that the V.R.O., Nadergul was ordered to implement the above orders.

26. It also took note of Ex.R-8 and R-9 title deeds issued to the husband of 3rd defendant in respect of Ac.6.07 gts in Sy.No.494 and the proceedings Ex.R-10 dt.18-08-2008 of the Dy.Collector recording 3rd defendant's name as pattedar and possessor. It also took note of Exs.R-11 and R-12 passbooks of defendant Nos.1 and 2 and Ex.R-13 passbook of 3rd defendant. It thus concluded that plaintiff is not in possession of the plaint schedule properties after 2001 and also on the date of the filing of the I.As.

27. It referred to Exs.R-36 to R-39 sale deeds showing that plaintiff purchased plot No.80, 78, 79 and 81 of extent 2000 sq. yds from defendant Nos.2 and 1 and also noted that plaintiff sold plot No.81 to K.Anjaiah through Ex.R-41 sale deed on 23-05-2016. It held that having done so, he is estopped from taking a plea that he is in possession of Ac.13.05 gts on the date of filing of the suit. It held that plaintiff suppressed facts and approached the Court with unclean hands and is not entitled to relief in I.A.No.931 of 2018.

28. Coming to I.A.No.29 of 2019, it held that Exs.R-36 to R-39 and Ex.R-41 show that plaintiff is not in possession and enjoyment of the property. It observed that the pahanis from 2005 onwards filed by the defendants show the possession of defendant Nos.1 to 3, and without agitating before the Revenue authorities with regard to rectification of entries, cancellation of pattedar passbooks and title deeds issued to defendant Nos.1 to 3, plaintiff cannot seek injunction restraining the defendants from alienating the plaint schedule property.

**Contentions of the parties in the C.M.As.**

29. Sri Vedula Venkata Ramana, learned Senior Counsel appearing for Sri K.Rama Krishna, counsel for appellant/plaintiff contended that in the declaration Ex.P-1 filed under A.P. Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 by Tarre Lakshmamma, w/o.Tarre Mallaiah, an extent of Ac.6.56 cents in Sy.No.494 was shown to be belonging to late Raghava Rao, but possession was shown to be with the sons of the declarant; that in Ex.P-2 order in C.C.No.860/E/75 etc. dt.10-03-1976 of the Land Reforms Tribunal, Hyderabad East Division, Tarre Jangaiah, Tarre Lingaiah, Tarre Komaraiah, Tarre Anjaiah and Tarre Narasimha, sons of Mallaiah are shown to have possession of the land in Sy.No.494 of extent Ac.6.56 gts jointly; in contrast, in the order dt.15-01-1979 (Ex.P-30) of the Land Reforms Tribunal, Hyderabad East Division in C.C.No.1724/E/75 relating to N.Raghava Rao, only the ownership of Raghava Rao was discussed and not his possession of the land in Sy.No.494 and there is a reference to Ac.13.13 cents in Sy.No.494 as belonging to him along with other lands. He also pointed out that in the order dt.19-01-1977 (Ex.P-32) relating to N.Hanumantha Rao, s/o.late N. Raghava Rao, it is mentioned that the land in Sy.No.494 was sold to different persons; and this shows that the family of N. Ragahva Rao never had possession of the plaint schedule property in Sy.No.494 at all and it was the ancestors of the plaintiff who had possession of the plaint schedule property. He also contended that the said state of affairs is presumed to continue in view of the presumption under Section 114 of the Evidence Act, 1872 and unless the defendants show that they obtained possession of the plaint schedule properties from the plaintiff's ancestors, they cannot claim to be in possession of the said land.

30. Sri D.Prakash Reddy, learned Senior Counsel appearing for Sri G.Purushotham Reddy, counsel for respondents, contended that the findings of the trial Court are based on appreciation of evidence adduced by the parties and the reasoning of the trial Court is unexceptionable and does not warrant

any interference in appeal by this Court.

**Consideration by the Court**

31. The suit having been filed by the plaintiff for declaration of title and recovery of possession in September, 2018, the plaintiff must show his possession of the plaint schedule property on the date of filing of the suit if he seeks injunction restraining the defendants from interfering with his possession of the plaint schedule property or restraining them from alienating the same.

32. He has only filed Pahanis from 1995-96 (Ex.P-5) to 2014-15 (Ex.P- 17). No doubt in some of these Pahanis, in Column No.13, names of Tarre Lingaiah and Sama Sattireddy appear as being in possession of Ac.13.05 gts in Sy.No.494. But in Ex.P-14 (Pahani of 2009-10) and P-17 (Pahani of 2014-15), the possession of the 3rd defendant is reflected in Column No.13 dealing with possession for Ac.6.07 gts in Sy.No.494 as well. In Ex.P-11 (Pahani of 2005-06) also, the name of B.Karunakar Reddy, the husband of 3rd defendant is reflected in Col.No.13 as regards Ac.6.07 gts in Sy.No.494.

33. In Ex.R-23 to R-25, which are Pahanis for 2017 the names of defendant Nos.1 to 3 are shown in Col.No.12 relating to pattedar and also in Col.No.13 relating to occupation for 3 bits of Ac.3.19 gts, Ac.3.19 gts and Ac.6.07 gts. respectively in Sy.No.494.

34. Except stating that these pahanis are obtained by the defendants by managing the Revenue authorities, there is no other explanation from the plaintiff. He also has no explanation as to how in Exs.P-11, P-14 and P-17, 3rd defendant or her husband are shown to be in occupation of Ac.6.07 gts in Sy.No.494.

35. The plaintiff admitted that the plaint schedule property belonged to N.Raghava Rao. His case is that Tarre Mallaiah and Sama Rajireddy were joint tenants of the said land. No evidence of such tenancy such as a Protected Tenancy Certificate or even a lease deed is adduced by the plaintiff. Ex.R1/ the endorsement dt.12.07.2016 in file Nos.C/404/2016 of the Dy.Tahsildar, Saroornagar shows that there is no entry in the Protected Tenancy register in respect of Sy. No.494 of Nadergul village.

36. He has also not adduced any evidence of transfer of title by legal heirs of N.Raghava Rao to his ancestors. Though in the plaint there is a reference to a sale agreement being confirmed by the Land Reforms Tribunal, Hyderabad East Division, Hyderabad in proceeding No.854/E/75 dt.15-03-1976 (Ex.P-1) of Tarre Lakshmamma, w/o.Mallaiah, the said order contains no such recital.

37. Also, in the said order, to which is annexed the statement under Section 8 of the said Declarant, only an extent of Ac.6.56 cents in Sy.No.494 is shown to be in possession of her sons. How the plaintiff is claiming Ac.13.05 gts in Sy.No.494, in the light of the said statement of his grand mother, is not explained by him.

38. Admittedly Ac.13.05 gts in Sy.No.494 was not excluded from the holding of N.Raghava Rao as per Ex.P-30 dt.15-01-

the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the valuebased social mainstream may be the guiding factors. Needless to emphasise, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial discretion. Neither the personal perception of a Judge nor selfadhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.

19. A court, while imposing sentence, has to keep in view the various complex matters in mind. To structure a methodology relating to sentencing is difficult to conceive of. The legislature in its wisdom has conferred discretion on the Judge who is guided by certain rational parameters, regard been had to the factual scenario of the case. In certain spheres the legislature has not conferred that discretion and in such circumstances, the discretion is conditional. In respect of certain offences, sentence can be reduced by giving adequate special reasons. The special reasons have to rest on real special circumstances. Hence, the duty of the court in such situations becomes a complex one. The same has to be performed with due reverence for the rule of law and the collective conscience on one hand and the doctrine of proportionality, principle of reformation and other concomitant factors on the other. The task may be onerous but the same has to be done with total empirical rationality sans any kind of personal philosophy or individual experience or any a priori notion."

27. We do find substance in what being submitted by the learned counsel for the appellant and in the first place, it is to be noted that the trial Court, while awarding sentence to the appellant has not made any analysis of the relevant facts as can be discerned from the judgment (page 9697 of the paper book) dated 12th January, 1998. Even the High Court has not considered the issue of quantum of sentence. From the factual position which emerge from the record, it is to be noticed that they were young boys having no previous enmity and were collectively sitting and watching Jagjit Singh night. On some comments made to the girls sitting in front of the deceased, some altercation took place and they entered into a scuffle and without any premeditation, the alleged unfortunate

incident took place between two group of young boys and it is informed to this Court that the appellant has served the sentence of more than three years and five months. Taking into consideration in totality that the incident is of June 1995 and no other criminal antecedents has been brought to our notice, and taking overall view of the matter, we find force in the submission of the appellant that the quantum of sentence is excessive and deserves to be interfered by this Court.

28. Considering the overall facts of the case in totality with the nature of crime, the tender age of the appellant at the time of offence, subsequent conduct and other ancillary circumstances, including that no untoward incident has been reported against him and the mitigating circumstances, it is appropriate that in the obtaining factual score, the sentence of rigorous imprisonment be altered to the period already undergone for offence under Section 304 Part II/34 IPC, to meet the ends of justice.

29. The appeal is allowed to the extent indicated above.

30. Pending application(s), if any, stand disposed of.

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## 2019 (2) L.S. 160 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
L. Nageswara Rao &
The Hon'ble Mr.Justice
Hemant Gupta

Wasim ..Appellant

Vs.

State NCT of Delhi ..Respondents

**INDIAN PENAL CODE,Sec.498A, 304B – Case of harassment – Wife/ Deceased committed suicide - Trial Court convicted the appellant U/S 498A and 306 of IPC - Appeal filed by the Appellant before High Court was partly allowed and appellant was acquitted for the offence under Section 306 IPC but the conviction and sentence under Section 498A IPC was upheld by the High Court – High Court affirmed the conviction of the Appellant under Section498A IPC by holding that there was sufficient evidence on record regarding the demand of dowry – Hence instant appeal.**

**Held - High Court ought not to have convicted the Appellant under Section 498A for demand of dowry without a detailed discussion of the evidence on record, especially when the Trial Court found that there is no material on record to show that there was any demand of dowry - Judgment**

**of the High Court is set aside and appeal stands allowed.**

**J U D G M E N T**

(per the Hon'ble Mr.Justice L. Nageswara Rao )

Leave granted.

1. On receipt of information on 27.10.2015 about a suicide, PW-23 Sub-Inspector Bijender Dahia attached to Police Station Aman Vihar rushed to Nithari village, Delhi. By the time he reached, the body of the deceased i.e. Moniya had already been brought down from hanging position. Ashwani (PW-12), the brother of the deceased was found sitting besides the body of the deceased. The elder brother of the Appellant was also present. A suicide note was seized. PW-23 sent the body of the deceased for postmortem. The statement of Ashwani was recorded by PW-23. Inquest was conducted by the Executive Magistrate on the next day. According to the post-mortem, the cause of death of Moniya was due to asphyxia as a result of ante mortem handing.

2. FIR was registered on the statement of Sunita (PW-11), the mother of the deceased on 04.11.2015. A charge sheet was filed on 05.02.2016. Later, charges were framed against the Appellant under Section 498A/ 304B of the Indian Penal Code, 1860 (hereinafter 'IPC). 23 witnesses were examined by the prosecution and several documents relied upon to prove the guilt of the Appellant. The Trial Court convicted the Appellant under Section 498A and 306 IPC. Sentence of three years' simple imprisonment for the offence under Section 498A IPC and four years simple imprisonment for the offence under Section 306 IPC was imposed on the Appellant. The appeal filed by the Appellant was partly allowed by the High Court. The Appellant was acquitted for the offence under Section 306 IPC. The conviction and sentence under Section 498A IPC was upheld by the High Court. Hence, this appeal.

3. The deceased Moniya who was working as a teacher was married to the Appellant on 02.05.2015. PW-11 Sunita deposed that her daughter Moniya was being harassed by the Appellant by demanding dowry. She testified in the Court that on two occasions she gave Rs.40,000/- and Rs.50,000/- to the deceased for handing over the same to the Appellant to meet his demands of dowry. She stated that the same was not informed either to her husband or her son and that she made the payments from her savings. She also spoke about the demand for a bigger car. The Appellant was working in Nagercoil District, Tamil Nadu and he was demanding for air fare to travel to the place of his work. PW-11 further stated that she was informed by the deceased that the Appellant had extra marital relations with one Poonam and he informed the deceased that he intended to marry Poonam after leaving the deceased.

4. The statement of PW-12 Ashwani was recorded on the day of the incident in which he did not mention about the demand of

dowry by the Appellant. He stated that the deceased was depressed by the behavior of the Appellant. PW-10 Sukhbir, the father of the deceased, who reached the place of incident also did not accuse the Appellant of any demand of dowry. The suicide note which was seized from the place of incident was proved on a comparison of the admitted hand writing of the deceased from the school records with the suicide note. The suicide note also did not contain any allegation of demand of dowry by the Appellant. The suicide note which was reproduced in the judgment of the Trial Court is as follows:

"Relations have come heavy on dreams" Always lived with head ups and never did nay work

by which I have to down my neck.

I love a lot to my dad and brother. Today they have

tears in their eyes

I have broken from inside. I love a lot to my

profession and education.

I have done nothing that is why I cannot tolerate

I want to live my life with Master Ji, He also

manipulated. I do not have any complaint to anyone.

5. After examining the evidence on record, the Trial Court held that the demand of dowry was not proved. However, the Trial Court was convinced that the prosecution proved the extra marital relationship of the Appellant with Poonam. The oral evidence relating to the Appellant informing the deceased about such extra marital relations to the deceased was accepted by the Trial Court. Having found that the Appellant was guilty of mental cruelty, the Trial Court convicted the Appellant under Section 498A, IPC. Though, there was no charge under Section 306 IPC, relying upon the judgments of this Court, the Trial Court was of the opinion that the conviction under Section 306 IPC was permissible. The Trial Court found that the offence under Section 306 IPC was made out against the Appellant and convicted him.

6. The main issue that was considered by the High Court in the appeal against the judgment of the Trial Court was the correctness of the conviction under Section 306 IPC without a charge being framed. The Appellant contended before the High Court that the charge that was framed against him was under Section 304B, IPC and that he could not have been convicted under Section 306 IPC. Placing reliance on the judgments of this Court, it was held that a conviction under Section 306 IPC is permissible even without a charge being framed in a case where the accused is charged under Section 304 B IPC. The High Court held that such conviction would not

amount to failure of justice. However, the High Court found no convincing evidence to hold that the Appellant abetted the commission of suicide by the deceased. The Appellant was acquitted for the offence under Section 306 IPC on the basis that there was no evidence to show that the deceased was subjected to mental or physical cruelty before her death. The High Court affirmed the conviction of the Appellant under Section498A IPC by holding that there was sufficient evidence on record regarding the demand of dowry.

7. The acquittal of the Appellant under Section 306 IPC has become final as no appeal is preferred by the State against the judgment of the High Court. Ms. Aishwarya Bhati, learned Senior Counsel on instructions submitted that a decision was taken not to file the appeal in view of the fact that the Appellant has already undergone the sentence under Section 498A IPC. The learned counsel for the Appellant submitted that his conviction under Section 498A is impermissible after he was acquitted for the offence under Section 306 IPC. He relied upon the reasons given by the Trial Court regarding the non availability of any evidence pertaining to demand of dowry.

8. Ms. Bhati, learned Senior Counsel for the State submitted that it is clear from the evidence of the family members of the deceased that there was demand of dowry by the Appellant and the High Court was justified in holding that the Appellant is guilty of committing an offence under Section 498A.

9. The conviction of the Appellant by the Trial Court under Section 498A was not for demand of dowry. The conviction under Section 498A was on account of mental cruelty by the Appellant in having an extra marital relation and the threats held out by him to the deceased that he would leave her and marry Poonam.

10. The High Court acquitted the Appellant under Section 306 IPC by reaching a conclusion on the basis of evidence that the charge of abetment of suicide on part of the Appellant was not proved. Without any discussion of the evidence pertaining to demand of dowry and without dealing with the findings recorded by the Trial Court regarding the demand of dowry, the High Court held that the offence under Section 498A was made out.

11. Cruelty is dealt with in the Explanation to Section 498A as follows:

[498A. Husband or relative of husband of a woman subjecting her to cruelty. -Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine. Explanation.-For the purpose of this section, “cruelty” means-(a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

(b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand.]

12. Conviction under Section 498A IPC is for subjecting a woman to cruelty. Cruelty is explained as any wilful conduct which is likely to drive a woman to commit suicide or to cause grave injury or danger to life, limb or health. Harassment of a woman by unlawful demand of dowry also partakes the character of 'Cruelty'. It is clear from a plain reading of Section 498A that conviction for an offence under Section 498A IPC can be for wilful conduct which is likely to drive a woman to commit suicide OR for dowry demand. Having held that there is no evidence of dowry demand, the Trial Court convicted the Appellant under Section 498A IPC for his wilful conduct which drove the deceased to commit suicide. The Appellant was also convicted under Section 306 IPC as the Trial Court found him to have abetted the suicide by the deceased.

13. Section 306 IPC provides for punishment with imprisonment that may extend to ten years. There should be clear mens rea to commit the offence for conviction under Section 306 IPC. It also requires an active act or direct act which led the deceased to commit suicide seeing no option and this act must have been intended to push the deceased into such a position that he/she committed suicide - See M. Mohan vs. State, (2011) 3 SCC 626. To attract the ingredients of abetment, the intention of the accused to aid or instigate or abet the deceased to commit suicide is necessary - See Pallem Deniel Victoralions Victor Manter vs. State of Andhra Pradesh, (1997) 1 Crimes 499 (AP). Whereas, any wilful conduct which is likely to drive the woman to commit suicide is sufficient for conviction under Section 498A IPC. In this case, the High Court recorded a categorical finding that neither mental nor physical cruelty on the part of the Appellant was proved. Therefore, the conviction under Section 498A IPC is not for wilful conduct that drove the deceased to commit suicide. The High Court held that though there was no demand of dowry soon before the death, the prosecution proved dowry demand by the Appellant immediately after the marriage.

14. The High Court ought not to have convicted the Appellant under Section 498A for demand of dowry without a detailed discussion of the evidence on record, especially when the Trial Court found that there is no material on record to show that there was any demand of dowry. The High Court did not refer to such findings of the Trial Court and record reasons for its disapproval.

15. For the aforementioned reasons, the judgment of the High Court is set aside. The appeal is allowed.

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## 2019 (2) L.S. 165 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Justice
Ashok Bhushan &
The Hon'ble Mr.Justice
Navin Sinha

Jagdish & Anr., ..Appellants
Vs.
The State of Haryana ..Respondents

**INDIAN PENAL CODE, Secs.302, 149 and 148 – Conviction - Solitary witness - Appellants convicted under sections of IPC - Can evidence of a solitary doubtful eye witness be sufficient for conviction.**

**Held - Conviction on basis of a solitary eye witness is undoubtedly sustainable if there is reliable evidence cogent and convincing in nature along with surrounding circumstances - But in nature of materials available against Appellants on sole testimony of PW-1 which is common to all accused in so far as assault is concerned, court do not consider it safe to accept her statement as a gospel truth in facts of case – If PW-1 could have gone to police station alone with her sister-in-law at an unearthly hour, there had to be an explanation why it was delayed by six hours – It is virtually impossible that two women folk went to a police station at that hour of night unaccompanied by any male - These become crucial in background of pre-existing enmity between parties leading to earlier police cases between them also - Possibility of false implication therefore cannot be ruled out completely in facts of case - Order of High Court is unsustainable and set aside - Appellants are acquitted – Appeal stands allowed.**

**J U D G M E N T**
(per the Hon'ble Mr.Justice
Navin Sinha )

The two appellants have been convicted under Sections 302, 149 and 148 of the Indian Penal Code (hereinafter referred to as 'IPC'). Originally there were 13 accused. Only six were charge-sheeted. Two of them were tried by the juvenile court. Seven were summoned under Section 319. The Trial Court convicted three persons. One of them, Ishwar has been acquitted by the High Court.

2. Sri S.R. Singh, learned senior counsel, on behalf of the appellants submits that once the other accused have been acquitted, the two appellants alone cannot be convicted with the aid of Section 149 of the Indian Penal Code. The High Court erred in convicting with the aid of Section 34 in absence of a charge framed under that Section. There is no evidence of any common intention, displaying a prior meeting of minds to commit the assault. PW-1 and PW-8 were not eye witnesses. They reached after the occurrence. Their claim to be eye witnesses is highly improbable from their own evidence. An alternative submission was made that in any event at best it was a case for conviction under Section 304 Part-II I.P.C. Reliance was placed on **Dalip**

**Singh vs. State of Punjab**, AIR 1953 SC 364::1954 SCR 145, and **Sakharam Nangare vs. State of Maharashtra**, 2012 (9) SCC 249.

3. Learned counsel for the State submitted that PW-1 and PW-8, the eye-witnesses to the occurrence had stated that Appellant no.2 made the fatal assault on the head of the deceased with a lathi while appellant no.1 also assaulted the deceased. The parties resided in the same locality and there is evidence of a street light. Relying on **Khem Karan and others vs. State of U.P. and another**, 1974 (4) SCC 603, it was submitted that because PW-1 was the sister of the deceased, the credibility of her evidence as an eye-witness to the occurrence cannot be doubted to grant acquittal in the nature of materials available on the records.

4. We have considered the submissions on behalf of the parties and perused the materials on record. The parties resided in the same locality and were known to each other. Animosity existed between them because the son of the second appellant had written love letters to the daughter of PW-1. Earlier an altercation had taken place between the parties on 20.05.1995 leading to a police case being lodged against both sides. There was another incident on 12.06.1995 for which the appellants and the deceased were proceeded with under Sections 107, 151, Cr.P.C. The deceased had been released on bail and was returning from the house of PW-1 on 16.06.1995 at about 9.00 P.M. when the assault is stated to have taken place.

5. PW-8 and PW-1 are husband and wife holding arms licence in their individual names. They are stated to have been accompanied to the place of occurrence by Kamla the sister of PW-8 and one Pali Ram who was also an arms licensee. Surprisingly, the latter two have been given up by the prosecution and have not been examined. All four are stated to have moved away from the place of assault out of fear, as claimed. If three of them were possessed of weapons there has to be an explanation why they did not act in self defence when the assault is alleged by lathis, gandasi and guns. It is also difficult to accept that her husband PW-8 and Palli continued to hide in fear while PW-1 accompanied by her sister-in-law alone shortly returned to the place of occurrence to check on the deceased. An additional fact which is not only improbable but highly unnatural according to normal societal rural customs and mores is that PW-1 accompanied by her sister-in-law alone went to the police station at 3.00 A.M, a kilometer away, to lodge the F.I.R. while her husband and Pali Ram who was staying with them remained at home.

6. In the F.I.R. PW-1 made generalized allegations of assault by all the 13 accused who are stated to have surrounded the deceased. But her court statement was more specific with regard to the nature of assault made by each of the accused. A total of 11 injuries were found on the person of the deceased. The first injury was bone deep in the right parieto occipital region with damage to brain and pieces of bone in the wound. There was injury on the neck, lacerated wound over the right shoulder, lacerated wound over the dorsum of both ring and little fingers causing fracture, lacerated wound over the right wrist joint over the middle of forearm, on the left side

of the chest wall, over the iliac crest, over the left scapular region with a linear incision due to sharp weapon, over left deltoid region and lacerated wound over the right knee left ankle and left forearm. The two appellants were armed with lathis by which an incised wound could not have been caused. In any event, the number of injuries on the deceased leaves us satisfied that it was the result of a mob assault and not an assault by the two appellants alone.

7. The High Court has committed an error of record by considering PW-8 to be an eye witness without any discussion when his presence at the time of occurrence has been disbelieved by the Trial Court. With regard to PW-1, the Trial Court has itself observed that her deposition "does not contain the entire truth and it makes the court to sit up and to find out the kernel out of the chaff". This observation assumes significance in view of the acquittal of the remaining accused by the Trial Court itself, excluding the juveniles.

8. The question that arises to our mind is that in the mob assault by 13 persons who had surrounded the deceased at night, PW-1 was the sole eye-witness. Even if a light was burning some of them undoubtedly must have had their back to PW-1 making identification improbable if not impossible. The witness has been severely doubted both by the trail court and the High Court to grant acquittal to the other accused. Can the evidence of a solitary doubtful eye witness be sufficient for conviction? We may have a word of caution here. Conviction on basis of a solitary eye witness is undoubtedly sustainable if there is reliable evidence cogent and convincing in nature along with surrounding circumstances. The evidence of a solitary witness will therefore call for heightened scrutiny. But in the nature of materials available against the appellants on the sole testimony of PW-1 which is common to all the accused in so far as assault is concerned, we do not consider it safe to accept her statement as a gospel truth in the facts and circumstances of the present case. If PW-1 could have gone to the police station alone with her sister-in-law at an unearthly hour, there had to be an explanation why it was delayed by six hours. Given the harsh realities of our times we find it virtually impossible that two women folk went to a police station at that hour of the night unaccompanied by any male. These become crucial in the background of the pre-existing enmity between the parties leading to earlier police cases between them also. The possibility of false implication therefore cannot be ruled out completely in the facts of the case.

9. The High Court concluded that the appellants alone were the assailants of the deceased. Ishwar is also stated to have assaulted with a lathi capable of causing lacerated wounds. We find it difficult to hold that the appellants were any differently situated than Ishwar. The susceptibility of eleven injuries, including incised wounds, by two accused is considered highly improbable.

10. Therefore, in the entirety of the facts and circumstances of the case, the relationship between PW-1 and the deceased, the existence of previous animosity, we do not consider it safe and cannot rule out false implication to uphold the conviction of the appellants on the evidence of a doubtful solitary witness, as observed in **State of Rajasthan vs. Bhola**

**Singh and Anr.**, AIR 1994 SC 542, (Crl. Appeal No. 65 of 1980 decided on 25.08.1993):

"4. From the above-stated facts, it can be seen that the case is rested entirely on the solitary evidence of P.W.1. The High Court has pointed out several infirmities in the evidence of P.W.1. It is well-settled that if the case is rested entirely on the sole evidence of eye-witness, such testimony should be wholly reliable. In this case, occurrence admittedly took place in the darkness…."

11. In **Lallu Manjhi and another vs. State of Jharkhand**, (2003) 2 SCC 401, it was observed that if ten persons were stated to have dealt with blows with their respective weapons on the body of the deceased, and that if each one of them assaulted then there would have been minimum of ten injuries on the person of the deceased. In the present case, as noticed there are 11 injuries on the person of the deceased. Giving the benefit of doubt granting acquittal, it was observed as follows:

"13….. The version of the incident given by the sole eyewitness who is also an interested witness on account of his relationship with the deceased and being inimically disposed against the accused persons is highly exaggerated and not fully corroborated by medical evidence. The version of the incident as given in the Court is substantially in departure from the earlier version as contained and available in the first information report. We cannot, therefore, place reliance on the sole testimony of Mannu (PW 9) for the purpose of recording the conviction of all the accused persons."

12. We therefore find the order of the High Court to be unsustainable and accordingly set it aside. The appellants are acquitted. They are directed to be released forthwith if they are not required in any other case.

13. The appeal is allowed.

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## 2019 (2) L.S. 168 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr.Chief Justice
Ranjan Gogoi
The Hon'ble Mr.Justice
Deepak Gupta &
The Hon'ble Mr.Justice
Sanjiv Khanna

Ritesh Sinha ..Petitioner
Vs.
State of Uttar Pradesh
& Anr., ..Respondents

**CRIMINAL PROCEDURE CODE, Sec.482 - Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?**

**Held - Fundamental right to privacy cannot be construed as absolute**

**and but must bow down to compelling public interest - Until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime - Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India.**

**J U D G M E N T**

(per the Hon'ble Mr.Justice Ranjan Gogoi)

1. Leave granted in Special Leave Petition (Criminal) Nos. 9671 of 2017, 1048 of 2018, 2225 of 2018 and 3272 of 2018.

2. Criminal Appeal No.2003 of 2012.

Facts:

On 7th December, 2009 the In-charge of the Electronics Cell of Sadar Bazar Police Station located in the district of Saharanpur of the State of Uttar Pradesh lodged a First Information Report ("FIR" for short) alleging that one Dhoom Singh in association with the appellant – Ritesh Sinha, was engaged in collection of monies from different people on the promise of jobs in the Police. Dhoom Singh was arrested and one mobile phone was seized from him. The Investigating Authority wanted to verify whether the recorded conversation in the mobile phone was between Dhoom Singh and the appellant – Ritesh Sinha. They, therefore, needed the voice sample of the appellant and accordingly filed an application before the learned jurisdictional Chief Judicial Magistrate ("CJM" for short) praying for summoning the appellant to the Court for recording his voice sample.

3. The learned CJM, Saharanpur by order dated 8th January, 2010 issued summons to the appellant to appear before the Investigating Officer and to give his voice sample. This order of the learned CJM was challenged before the High Court of Allahabad under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Cr.P.C."). The High Court having negatived the challenge made by the appellant by its order dated 9th July, 2010, the present appeal has been filed.

4. The appeal was heard and disposed of by a split verdict of a two Judge Bench of this Court requiring the present reference.

5. Two principal questions arose for determination of the appeal which have been set out in the order of Justice Ranjana Prakash Desai dated 7th December, 2012 in the following terms.

"(1) Whether Article 20(3) of the Constitution of India, which protects a person accused of an offence from being compelled to be a witness against himself, extends to protecting such an accused from being compelled to give his voice sample during the course of investigation into an offence?

(2) Assuming that there is no violation of Article 20(3) of the Constitution of India, whether in the absence of any provision in

the Code, can a Magistrate authorize the investigating agency to record the voice sample of the person accused of an offence?"

6. While the first question was answered in the negative by both the learned Judges (Justice Ranjana Prakash Desai and Justice Aftab Alam) following the ratio of the law laid down in State of Bombay vs. Kathi Kalu Oghad (A.I.R. 1961 SC 1808), difference of opinion has occurred insofar as second question is concerned.

7. Justice Desai took the view that voice sample can be included in the phrase "such other tests" appearing in Explanation (a) to Section 53 Cr.P.C. by applying the doctrine of ejusdem generis and, therefore, the Magistrate would have an implied power under Section 53 Cr.P.C. to pass an order permitting taking of voice sample in the aid of criminal investigation.

8. On the other hand, Justice Aftab Alam took the view that compulsion on an accused to give his/her voice sample must be authorized on the basis of a law passed by the Legislature instead of a process of judicial interpretation. In this regard, the learned judge (Aftab Alam, J.) also took note of the amendments in Sections 53, 53A and 311-A of the Cr.P.C. by Act No.25 of 2005 introduced with effect from 23rd June, 2006 which amendments did not bring, within the fold of the aforesaid provisions of the Cr.P.C., any power in the trial Court to compel an accused to give sample of his/her voice for the purpose of investigation of a criminal charge.

9. Despite unanimity amongst the learned Judges hearing the appeal on the first question on which the learned counsel for the appellant has also not laid much stress it would be appropriate to make the discussions complete to answer the question on the strength of the test laid down by this Court in State of Bombay vs.Kathi Kalu Oghad (supra). Speaking on behalf of the majority the then learned Chief Justice B.P. Sinha was of the view that the prohibition contemplated by the constitutional provision contained in Article 20(3) would come in only in cases of testimony of an accused which are self-incriminatory or of a character which has the tendency of incriminating the accused himself. The issue in the case was with regard to specimen writings taken from the accused for comparison with other writings in order to determine the culpability of the accused and whether such a course of action was prohibited under Article 20(3) of the Constitution. The following observations of the then Chief Justice B.P. Sinha would be apt for recollection as the same conclusively determines the first question arising. The same, therefore, is extracted below:

"(11)…….It is well-established that cl. (3) of Art. 20 is directed against self-incrimination by an accused person. Self-Incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge…….

(12) In order that a testimony by an accused person may be said to have been self-incriminatory, the compulsion of which comes within the prohibition of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if not also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous, because they are unchangeable; except, in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable. They are neither oral nor documentary evidence but belong to the third category of material evidence which is outside the limit of 'testimony'.

[emphasis supplied]"

10. We may now proceed to answer the second question, namely, whether in the absence of any specific provision in the Cr.P.C. would a Court be competent to authorize the Investigating Agency to record the voice sample of a person accused of an offence. We are told that no authoritative pronouncement of this Court has been rendered by this Court.

11. Medical examination of an accused for the purposes of effective investigation of a criminal charge has received a wider meaning by the amendment to the Explanation to Section 53 Cr.P.C. made by Act No.25 of 2005 with effect from 23rd June, 2006. Similarly, Section 53A has been inserted by the same Amending Act (No.25 of 2005) to provide for examination of a person accused of rape. Likewise, by insertion of Section 311-A by the same Amending Act (No.25 of 2005) a Magistrate has been empowered to order any person, including an accused person, to give specimen signatures or handwriting for the purposes of any investigation or proceeding under the Cr.P.C.

12. None of the said amendments specifically authorize or empower a Magistrate to direct an accused person or any other person to give his/her voice sample for the purposes of an inquiry or investigation under the Code. "Omission" of the Legislature to specifically so provide has led the learned judge (Justice Aftab Alam) on the two judge Bench to doubt as to whether legislative wisdom was in favour of a specific exclusion or omission so as to make a judicial exercise through a process of interpretation impermissible.

13. The Law Commission of India, in its 87th report dated 29th August, 1980, also had an occasion to deal with the question presently confronting the Court. The Law Commission examined the matter (almost four decades earlier) in the context of the working of the provisions of the Identification of Prisoners Act, 1920. The view taken was that a suitable legislation which could be in the form of an amendment to Section 5 of the Identification of Prisoners Act, 1920 would be appropriate so as to specifically

empower a Judicial Magistrate to compel an accused person to give a sample of his voice. The following extract from the 87th Report of the Law Commission dated 29th August, 1980 would be relevant.

"A voice print is a visual recording of voice. It mainly depends on the position of "formants". These are concentrates of sound energy at a given frequency. It is stated that their position in the "frequency domain" is unique to each speaker. Voice prints resemble finger prints, in that each person has a distinctive voice with characteristic features dictated by vocal cavities and articulates.

Voice-print Identification seems to have a number of practical uses. In England, in November 1967, at the Winchester Magistrate's Court, a man was accused of making malicious telephone calls. Voice-print Identification (spectrograph) was used and the accused was found guilty (Paragraph 5.27, 87th Report of the Law Commission of India)."

*** *** ***

"Often, it becomes desirable to have an accused person speak for the purposes of giving to the police an opportunity to hear his voice and try to identify it as that of the criminal offender. A comparison may even be desired between the voice of an accused person and the recorded voice of a criminal which has been obtained by, say, telephone tapping. To facilitate proof of the crime the police may like that the accused should be compelled to speak,- and even that his voice as recorded may be converted into a "voice print"

……

……

However, if the accused refuses to furnish such voice, there is no legal sanction for compelling him to do so, and the use of force for that purpose would be illegal (Paragraph 3.16, 87th Report of the Law Commission of India)."

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"The scope of Section 5 needs to be expanded in another aspect. The general power of investigation given to the police under the Criminal Procedure Code may not imply the power to require the accused to furnish a specimen of his voice. Cases in which the voice of the accused was obtained for comparison with the voice of the criminal offender are known but the question whether the accused can be compelled to do so does not seem to have been debated so far in India

There is no specific statutory provision in India which expressly gives power to a police officer or a court to require an accused person to furnish a specimen of his voice (Paragraph 5.26, 87th Report of the Law Commission of India)."

14. Section 5 of the Identification of Prisoners Act, 1920 coincidentally empowers the Magistrate to order/direct any person to allow his measurements or photographs to be taken for the purposes of any investigation or proceeding. It may be

significant to note that the amendments in the Cr.P.C., noticed above, could very well have been a sequel to the recommendation of the Law Commission in its Report dated 29th August, 1980 though the said recommendation was in slightly narrower terms i.e. in the context of Section 5 of the Identification of Prisoners Act, 1920. In this regard, it may also be usefully noticed that though this Court in State of Uttar Pradesh vs. Ram Babu Misra (A.I.R. 1980 S.C. 791) after holding that a Judicial Magistrate has no power to direct an accused to give his specimen writing for the purposes of investigation had suggested to Parliament that a suitable legislation be made on the analogy of Section 5 of the Identification of Prisoners Act, 1920 so as to invest a Magistrate with the power to issue directions to any person including an accused person to give specimen signatures and writings. The consequential amendment, instead, came by way of insertion of Section 311-A in the Cr.P.C by the Code of Criminal Procedure (Amendment) Act, 2005 (Act No.25 of 2005) with effect from 23rd June, 2006.

15. The legislative response in remaining silent or acting at a "slow" pace can always be explained by legislative concerns and considerations of care and caution. It is in the aforesaid context and in the admitted absence of any clear statutory provision that the question arising has to be answered which is primarily one of the extent to which by a process of judicial interpretation a clear gap in the statute should be filled up pending a formal legislative exercise. It is the aforesaid question that we shall now turn to.

16. "Procedure is the handmaid, not the mistress, of justice and cannot be permitted to thwart the fact-finding course in litigation (A.I.R. 1975 SC 349 [Vatal Nagaraj vs. R. Dayanand Sagar)". We would like to proceed in the matter keeping the above view of this Court in the backdrop.

17. A detailed reference to the facts of a case decided by this Court in "Sushil Kumar Sen vs. State of Bihar (1975) 1 SCC 774)" is deemed appropriate.

The appellant in the above case was the owner of a plot of land measuring about 3.30 acres located in the district of Purnea in Bihar. The said parcel of land was acquired under the provisions of the Land Acquisition Act, 1894. The Land Acquisition Officer by order/Award dated 12th October, 1957 awarded compensation to the appellant(s) therein at the rate of Rs.14 per katha. The learned Additional District Judge, Purnea while hearing the reference under Section 18 of the Land Acquisition Act, 1894 enhanced the compensation to Rs.200 per katha. This was by order dated 18th August, 1961. The State of Bihar sought a review of the aforesaid order dated 18th August, 1961 which was allowed on 26th September, 1961 scaling down the compensation to Rs.75 per katha. Not satisfied, the State of Bihar preferred an appeal before the High Court against the order dated 26th September, 1961 passed in the review application granting compensation at the rate of Rs.75 per katha. No appeal was, however, filed by the State of Bihar against the original order dated 18th August, 1961 awarding compensation at the rate of Rs.200

per katha. Cross appeal(s) before the High Court against the order dated 26th September, 1961 passed in the review application was filed by the appellant – landowner. The High Court by its order dated 16th February, 1968 held the review application of the State of Bihar, in which the order dated 26th September, 1961 was passed, to be not maintainable. However, the High Court adjudicated the case on merits and awarded compensation to the landowner(s) at the rate of Rs.75 per katha. Aggrieved, the landowner – Sushil Kumar Sen approached this Court.

Justice K.K. Mathew who delivered the lead judgment in the case took the view that the original decree/award of the Reference Court dated 18th August, 1961 stood superseded by the decree/award dated 26th September, 1961 passed in the review application. However, once the said decree/award dated 26th September, 1961 was set aside in the cross appeal filed by the landowner(s) the earlier decree/award dated 18th August, 1961 stood revived. As there was no appeal against the said decree/award dated 18th August, 1961 the landowner(s) would be entitled to compensation in terms of the said original decree/award dated 18th August, 1961.

Justice Krishna Iyer delivered a concurring opinion agreeing with the aforesaid conclusions but expressing a thought process which would be of significant relevance to the issue in hand. The position can be best explained by extracting the following observations from the opinion rendered by Justice Krishna Iyer in Sushil Kumar Sen vs. State of Bihar (supra)

"I concur regretfully with the result reached by the infallible logic of the law set out by my learned Brother Mathew, J. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

6. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. In the present case, almost every step a reasonable litigant could take was taken by the State to challenge the extraordinary increase in the rate of compensation awarded by the civil court. And, by hindsight, one finds that the very success, in the review application, and at the appellate stage has proved a disaster to the party. Maybe, Government might have successfully attacked the increase awarded in appeal, producing the additional evidence there. But maybes have no place in the merciless consequence of vital procedural flaws. Parliament, I hope, will consider the wisdom of making the Judge the ultimate guardian of justice by a comprehensive, though guardedly worded, provision where the hindrance to rightful relief relates to infirmities, even serious, sounding in procedural law. Justice is the goal of jurisprudence — processual, as much as substantive. While this appeal has to be allowed, for reasons set out impeccably by my learned brother, I must sound a pessimistic note that it is too puritanical

for a legal system to sacrifice the end product of equity and good conscience at the altar of processual punctiliousness and it is not too radical to avert a breakdown of obvious justice by bending sharply, if need be, the prescriptions of procedure. The wages of procedural sin should never be the death of rights."

[Emphasis is ours]

18. In the present case, the view that the law on the point should emanate from the Legislature and not from the Court, as expressed in the judgment of this Court from which the reference has emanated is founded on two main reasons, viz., (i) the compulsion to give voice sample does in some way involve an invasion of the rights of the individual and to bring it within the ambit of the existing law would require more than reasonable bending and stretching of the principles of interpretation and (ii) if the legislature, even while making amendments in the Criminal Procedure Code (Act No.25 of 2005), is oblivious and despite express reminders chooses not to include voice sample either in the newly introduced explanation to Section 53 or in Sections 53A and 311A of CR.P.C., then it may even be contended that in the larger scheme of things the legislature is able to see something which perhaps the Court is missing.

19. Insofar as the first reservation is concerned, the same would stand dispelled by one of the earlier pronouncements of this Court on the subject in State of Bombay vs.Kathi Kalu Oghad (supra), relevant extracts of which judgment has already been set out. The following views in the concurring opinion of Justice K.C. Das Gupta in State of Bombay vs.Kathi Kalu Oghad (supra) would further strengthen the view of this Court to the contrary.

"(32) ……It has to be noticed that Article 20(3) of our Constitution does not say that an accused person shall not be compelled to be a witness. It says that such a person shall not be compelled to be a witness against himself. The question that arises therefore is: Is an accused person furnishing evidence against himself, when he gives his specimen handwriting, or impressions of his fingers, palm or foot? The answer to this must, in our opinion, be in the negative.

(33) ……the evidence of specimen handwriting or the impressions of the accused person's fingers, palm or foot, will incriminate him, only if on comparison of these with certain other handwritings or certain other impressions, identity between the two sets is established. By themselves, these impressions or the handwritings do not incriminate the accused person, or even tend to do so. That is why it must be held that by giving these impressions or specimen handwriting, the accused person does not furnish evidence against himself. So, when an accused person is compelled to give a specimen handwriting or impressions of his finger, palm or foot, it may be said that he has been compelled to be a witness; it cannot however be said that he has been compelled to be a witness against himself."

[Emphasis is ours]

20. So far as the second basis for the view

taken is concerned, we have already expressed an opinion that what may appear to be legislative inaction to fill in the gaps in the Statute could be on account of justified legislative concern and exercise of care and caution. However, when a yawning gap in the Statute, in the considered view of the Court, calls for temporary patchwork of filling up to make the Statute effective and workable and to sub-serve societal interests a process of judicial interpretation would become inevitable.

21. The exercise of jurisdiction by Constitutional Courts must be guided by contemporaneous realities/existing realities on the ground. Judicial power should not be allowed to be entrapped within inflexible parameters or guided by rigid principles. True, the judicial function is not to legislate but in a situation where the call of justice and that too of a large number who are not parties to the lis before the Court, demands expression of an opinion on a silent aspect of the Statute, such void must be filled up not only on the principle of ejusdem generis but on the principle of imminent necessity with a call to the Legislature to act promptly in the matter.

22. Illustratively, we may take the decision of this Court in Bangalore Water Supply & Sewerage Board vs. A Rajappa and others (1978) 2 SCC 213). A lone voice of dissent against expansion of the frontiers of judicial interpretation to fill in gaps in the Statute enunciated by Lord Denning, L.J, in Seaford Court Estates Ltd. vs. Asher (1949) 2 All. E.R. 155 (at 164) though did not find immediate favour of the learned Judge's contemporaries was acknowledged to have carried within itself the vision and the perception of the future. Coincidentally, the view enunciated by Lord Justice Denning in Seaford Court Estates Ltd. vs. Asher (supra) of ironing of the creases in the legislation has been approved by the Indian Supreme Court in the following words of the then Chief Justice M.H. Beg:

"147. My learned Brother has relied on what was considered in England a somewhat unorthodox method of construction in Seaford Court Estates Ltd. v. Asher [(1949) 2 ALL ER 155, 164] where Lord Denning, L.J., said:

"When a defect appears a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament — and then he must supplement the written words so as to give 'force and life' to the intention of legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases."

When this case went up to the House of Lords it appears that the Law Lords disapproved of the bold effort of Lord Denning to make ambiguous legislation more comprehensible. Lord Simonds found it to be "a naked usurpation of the legislative function under the thin disguise of interpretation". Lord Morton (with whom Lord Goddard entirely agreed) observed: "These heroics are out of place" and Lord Tucker

said “Your Lordships would be acting in a legislative rather than a judicial capacity if the view put forward by Denning, L.J., were to prevail.”

148. Perhaps, with the passage of time, what may be described as the extension of a method resembling the “arm-chair rule” in the construction of wills. Judges can more frankly step into the shoes of the legislature where an enactment leaves its own intentions in much too nebulous or uncertain a state. In M. Pentiah v. Muddala Veeramallappa [AIR 1961 SC 1107, 1115] Sarkar, J., approved of the reasoning, set out above, adopted by Lord Denning. And, I must say that, in a case where the definition of “industry” is left in the state in which we find it, the situation perhaps calls for some judicial heroics to cope with the difficulties raised.”

[Emphasis is ours]

23. A similar view of Lord Justice Denning in Magor & St. Mellons Rural District Council vs. Newport Corporation (1951) 2 All.E.R. 1226) would be equally apt to notice.

“we sit here to find out the intention of Parliament and of ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis.”

24. Would a judicial order compelling a person to give a sample of his voice violate the fundamental right to privacy under Article 20(3) of the Constitution, is the next question. The issue is interesting and debatable but not having been argued before us it will suffice to note that in view of the opinion rendered by this Court in Modern Dental College and Research Centre and others vs.State of Madhya Pradesh and others (2016) 7 SCC 353), Gobind vs. State of Madhya Pradesh and another (1975) 2 SCC 148) and the Nine Judge’s Bench of this Court in K.S. Puttaswamy and another vs. Union of India and others (2017) 10 SCC 1) the fundamental right to privacy cannot be construed as absolute and but must bow down to compelling public interest. We refrain from any further discussion and consider it appropriate not to record any further observation on an issue not specifically raised before us.

25. In the light of the above discussions, we unhesitatingly take the view that until explicit provisions are engrafted in the Code of Criminal Procedure by Parliament, a Judicial Magistrate must be conceded the power to order a person to give a sample of his voice for the purpose of investigation of a crime. Such power has to be conferred on a Magistrate by a process of judicial interpretation and in exercise of jurisdiction vested in this Court under Article 142 of the Constitution of India. We order accordingly and consequently dispose the appeals in terms of the above.

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## 2019 (2) L.S. 178 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr. Justice
L. Nageswara Rao
The Hon'ble Mr.Justice
Hemant Gupta &

Amir Hamza Shaikh
& Ors., ..Appellants

Vs.

State of Maharashtra
& Anr., ..Respondents

**INDIAN PENAL CODE, Secs.498-A & 406 - An Order passed by the Magistrate, declining permission to respondent No. 2 to prosecute the Appellants/Accused for the offences punishable u/Secs. 498A, 406 read with Sec.34 of Indian Penal Code, was set aside and allowed by the High Court only for the reason that the application has been made by an aggrieved party – Order of High Court is challenged by the Appellants/Accused in the present appeal.**

**Held - Though the Magistrate is not bound to grant permission at the mere asking but the victim has a right to assist the Court in a trial before the Magistrate and magistrate may consider as to whether the victim is in a position to assist the Court and as to whether the trial does not involve such complexities which cannot be handled by the victim - On satisfaction of such facts, the Magistrate would be within its jurisdiction to grant of permission to the victim to take over the inquiry of the pendency before the Magistrate - High Court has granted permission to the complainant to prosecute the trial without examining the parameters - Therefore, we set aside the Order passed by the High Court and that of the Magistrate. - Matter is remitted to the Magistrate to consider as to whether the complainant should be granted permission to prosecute the offences u/Sec.498-A, 406 read with Sec.34 IPC.**

**J U D G M E N T**
(per the Hon'ble Mr.Justice
Hemant Gupta)

1) Leave granted.

2) The challenge in the present appeal is to an order passed by the High Court of judicature at Bombay on November 27, 2018 whereby an order passed by the Magistrate declining permission to respondent No. 2 to prosecute the appellants-accused for the offences punishable under Sections 498A, 406 read with Section 34 of Indian Penal Code, 1860 (for short, 'IPC'), was allowed.

3) The respondent No. 2 had sought permission to conduct prosecution in terms of Section 302 of the Code of Criminal Procedure, 1973 (for short, 'Code')for the aforesaid offences. The learned Magistrate declined permission without giving any reason but the High Court considered the

Crl.A.No.1217/2019 Date:7-8-2019

judgments on the subject and granted permission to conduct prosecution only for the reason that the application has been made by an aggrieved party.

4) Learned counsel for the appellants argued that the High Court is not required to give permission to prosecute mechanically only for the reason that such permission is sought by an aggrieved party. It is contended that the prosecution is to be conducted by a Public Prosecutor who is an officer of the Court and required to assist the Court to do justice rather than to be vindictive and take side with any of the parties. If the party is allowed to proceed to take over the investigation, the avowed object of fairness in the criminal justice dispensation system shall be shaken.

5) The present Section 302 of the Code is similar to Section 495 of the Code of Criminal Procedure, 1898. Section 302 of the Code reads as under:

"**Permission to conduct prosecution. –** (1) Any Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than police officer below the rank of Inspector; but no person, other than the Advocate-General or Government Advocate or a Public Prosecutor or Assistant Public Prosecutor, shall be entitled to do so without such permission:

Provided that no police officer shall be permitted to conduct the prosecution if he has taken part in the investigation into the offence with respect to which the accused is being prosecuted.

(2) Any person conducting the prosecution may do so personally or by a pleader."

6) It may be noticed that under Section 301 of the Code, the Public Prosecutor may appear and plead without any authority before any Court in which that case is under inquiry, trial or appeal and any person may instruct a pleader who shall act under the directions of the Public Prosecutor and may with the permission of the Court submit written submissions.

7) A Division Bench of Kerala High Court in **Babu** v. **State of Kerala (**1984 CriLJ 499)examined as to when permission should be granted. The Court held as under:

"3. …In **Subhash Chandran** v. **State of Kerala** 1981 KLT Case No. 125 a learned Jude of this Court held:

Whether permission should be granted or not is a matter left to the discretion of the Court, the discretion being used in a judicial manner. It is true that the petitioner as the son of the deceased and as a person who has a right to make out that there was rashness and negligence on the part of the accused and claim damages from him may be interested in the prosecution. But that fact is not by itself a ground for permitting him to conduct the prosecution in the place of the Assistant Public Prosecutor who is in charge of the case. It is settled law that where a cognisable offence is committed and a prosecution is launched by the State it is for the Public Prosecutor to attend to the prosecution. The object of a criminal prosecution is not to vindicate the grievances

of a private person.

4. Under Section 301, a Pleader engaged by a private person can assist the Public Prosecutor or the Assistant Public Prosecutor as the case may be in the conduct of the prosecution while under Section 302 the Magistrate may permit the prosecution itself to be conducted by any person or by a pleader instructed by him. The distinction is when permission under Section 302 is given the Public Prosecutor or the Assistant Public Prosecutor as the case may be disappears from the scene and the pleader engaged by the person who will invariably be the de facto complainant will be in full charge of the prosecution……This does not mean that permission cannot at all be granted under Section 302. Under very exceptional circumstances permission can be granted under Section 302. Otherwise, there is no reason why the provision is there in the Code. But that is to be done only in cases where the circumstances are such that a denial of permission under Section 302 will stand in the way of meeting out, justice in the case. A mere apprehension of a party that the Public Prosecutor will not be serious in conducting the prosecution simply because a conviction or an acquittal in the case will affect another case pending will not by itself be enough. At the same time, if the apprehension of the party is going to materialise the court can pending the trial, grant permission under Section 302 even if a request for permission was rejected at the outset."

8) This Court in **Shiv Kumar** v. **Hukam Chand & Anr. (**(1999) 7 SCC 467)has examined the distinction between the scope of Section 301 and 302 of the Code. It has been held that Section 302 of the Code is applicable in respect of the offences triable by Magistrate. It enables the Magistrate to permit any person to conduct the prosecution whereas in terms of Section 301 of the Code, any private person may instruct a pleader to act under the directions of the Public Prosecutor or Assistant Public Prosecutor in any trial before any court and to submit written arguments after the close of the evidence. This Court held as under:

"12. In the backdrop of the above provisions we have to understand the purport of Section 301 of the Code. Unlike its succeeding provision in the Code, the application of which is confined to Magistrate Courts, this particular section is applicable to all the courts of criminal jurisdiction. This distinction can be discerned from employment of the words "any court" in Section 301. In view of the provision made in the succeeding section as for Magistrate Courts the insistence contained in Section 301(2) must be understood as applicable to all other courts without any exception. The first sub-section empowers the Public Prosecutor to plead in the court without any written authority, provided he is in charge of the case. The second subsection, which is sought to be invoked by the appellant, imposes the curb on a counsel engaged by any private party. It limits his role to act in the court during such prosecution "under the directions of the Public Prosecutor". The only other liberty which he can possibly exercise is to submit written arguments after the closure of evidence in the trial, but that too can be done only if

the court permits him to do so.

13. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the fore and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor."

9) In a three Judge Bench of this Court in **J.K. International** v. **State (Govt. of NCT of Delhi) & Ors. (**(2001) 3 SCC 462), where offences under Sections 420, 406 and 120-B IPC were investigated and charge sheet filed on the basis of complaint of the appellant, the accused filed a petition for quashing of the charges in which the complainant wanted to be heard. The Public Prosecutor filed an application before the Magistrate for amending the charge for incorporating two more offences which were exclusively triable by the Court of Sessions. The Magistrate dismissed the application but the said order was not challenged by the prosecution. It was held that the scheme in the Code indicates that the person who is aggrieved by the offence committed is not altogether wiped out from the scene of the trial merely because the investigation was taken over by the police. This Court while considering the provisions of sub-section (2) of Section 301 and Section 302, held as under:

"9. The scheme envisaged in the Code of Criminal Procedure indicates that a person who is aggrieved by the offence committed, is not altogether wiped out from the scenario of the trial merely because the investigation was taken over by the police and the charge-sheet was laid by them. Even the fact that the court had taken cognizance of the offence is not sufficient to debar him from reaching the court for ventilating his grievance. Even in the Sessions Court, where the Public Prosecutor is the only authority empowered to conduct the prosecution as per Section 225 of the Code, a private person who is aggrieved by the offence involved in the case is not altogether debarred from participating in the trial. This can be discerned from Section 301(2) of the Code which reads thus:

"301. (2) If in any such case any private

person instructs a pleader to prosecute any person in any court, the Public Prosecutor or Assistant Public Prosecutor in charge of the case shall conduct the prosecution, and the pleader so instructed shall act therein under the directions of the Public Prosecutor or Assistant Public Prosecutor, and may, with the permission of the court, submit written arguments after the evidence is closed in the case."

10. The said provision falls within the Chapter titled "General Provisions as to Inquiries and Trials". When such a role is permitted to be played by a private person, though it is a limited role, even in the Sessions Courts, that is enough to show that the private person, if he is aggrieved, is not wiped off from the proceedings in the criminal court merely because the case was charge-sheeted by the police. It has to be stated further, that the court is given power to permit even such private person to submit his written arguments in the court including the Sessions Court. If he submits any such written arguments the court has a duty to consider such arguments before taking a decision.

11. In view of such a scheme as delineated above how can it be said that the aggrieved private person must keep himself outside the corridors of the court when the case involving his grievance regarding the offence alleged to have been committed by the persons arrayed as accused is tried or considered by the court. In this context it is appropriate to mention that when the trial is before a Magistrate's Court the scope of any other private person intending to participate in the conduct of the prosecution is still wider…

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12. The private person who is permitted to conduct prosecution in the Magistrate's Court can engage a counsel to do the needful in the court in his behalf. It further amplifies the position that if a private person is aggrieved by the offence committed against him or against anyone in whom he is interested he can approach the Magistrate and seek permission to conduct the prosecution by himself. It is open to the court to consider his request. If the court thinks that the cause of justice would be served better by granting such permission the court would generally grant such permission. Of course, this wider amplitude is limited to Magistrates' Courts, as the right of such private individual to participate in the conduct of prosecution in the Sessions Court is very much restricted and is made subject to the control of the Public Prosecutor. The limited role which a private person can be permitted to play for prosecution in the Sessions Court has been adverted to above. All these would show that an aggrieved private person is not altogether to be eclipsed from the scenario when the criminal court takes cognizance of the offences based on the report submitted by the police. The reality cannot be overlooked that the genesis in almost all such cases is the grievance of one or more individual that they were wronged by the accused by committing offences against them."

10) Both the aforesaid judgments came up for consideration before this Court in

**Dhariwal Industries Limited** v. **Kishore Wadhwani & Ors. (**(2016) 10 SCC 378)wherein the learned Magistrate had held that the complainant is not alien to the proceeding and, therefore, he has a right to be heard even at the stage of framing of charge. The High Court modified the order and permitted the counsel engaged by the complainant to act under the directions of the Public Prosecutor in charge of the case. The Court held as under:

"13. Having carefully perused both the decisions, we do not perceive any kind of anomaly either in the analysis or ultimate conclusion arrived at by the Court. We may note with profit that in Shiv Kumar [Shiv Kumar v. Hukam Chand, (1999) 7 SCC 467 : 1999 SCC (Cri) 1277] , the Court was dealing with the ambit and sweep of Section 301 CrPC and in that context observed that Section 302 CrPC is intended only for the Magistrate's Court. In J.K. International [J.K. International v. State (Govt. of NCT of Delhi), (2001) 3 SCC 462 : 2001 SCC (Cri) 547] from the passage we have quoted hereinbefore it is evident that the Court has expressed the view that a private person can be permitted to conduct the prosecution in the Magistrate's Court and can engage a counsel to do the needful on his behalf. The further observation therein is that when permission is sought to conduct the prosecution by a private person, it is open to the court to consider his request. The Court has proceeded to state that the court has to form an opinion that cause of justice would be best subserved and it is better to grant such permission. And, it would generally grant such permission. Thus, there is no cleavage of opinion."

11) In **Mallikarjun Kodagali (Dead) represented through LRs** v. **State of Karnataka & Ors. (**(2019) 2 SCC 752), three Judge Bench of this Court considered the victim's right to file an appeal in terms of proviso to Section 372 inserted by Central Act No. 5 of 2009 w.e.f. December 31, 2009. This Court considered 154th Report of the Law Commission of India submitted on August 14, 1996; the Report of the Committee on Reforms of Criminal Justice System commonly known as the Report of the Justice Malimath Committee; Draft National Policy on Criminal Justice of July, 2007 known as the Professor Madhava Menon Committee and 221st Report of the Law Commission of India, April, 2009, and observed as under:

"5. Parliament also has been proactive in recognising the rights of victims of an offence. One such recognition is through the provisions of Chapter XXI-A CrPC which deals with plea bargaining. Parliament has recognised the rights of a victim to participate in a mutually satisfactory disposition of the case. This is a great leap forward in the recognition of the right of a victim to participate in the proceedings of a non-compoundable case. Similarly, Parliament has amended CrPC introducing the right of appeal to the victim of an offence, in certain circumstances. The present appeals deal with this right incorporated in the proviso to Section 372 CrPC.

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8. The rights of victims, and indeed victimology, is an evolving jurisprudence and it is more than appropriate to move forward

in a positive direction, rather than stand still or worse, take a step backward. A voice has been given to victims of crime by Parliament and the judiciary and that voice needs to be heard, and if not already heard, it needs to be raised to a higher decibel so that it is clearly heard."

12) The Court dealt with Justice Malimath Committee in the following manner:

"16. Thereafter, in the substantive Chapter on Justice to Victims, it is noted that victims of crime, in many jurisdictions, have the right to participate in the proceedings and to receive compensation for injury suffered. It was noted as follows:

"6.3. Basically two types of rights are recognised in many jurisdictions, particularly in continental countries in respect of victims of crime. They are, firstly, the victim's right to participate in criminal proceedings (right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth) and secondly, the right to seek and receive compensation from the criminal court itself for injuries suffered as well as appropriate interim reliefs in the course of proceedings.""

13) In **J.K. International**, it has been held that if the cause of justice would be better served by granting such permission, the Magistrate's court would generally grant such permission. An aggrieved private person is not altogether eclipsed from the scenario when the criminal court take cognizance of the offences based on the report submitted by the police.

14) In **Mallikarjun Kodagali**, this Court approved the Justice Malimath Committee, wherein the victim's right to participate in the criminal proceedings which includes right to be impleaded, right to know, right to be heard and right to assist the court in the pursuit of truth had been recognised.

15) In view of such principles laid down, we find that though the Magistrate is not bound to grant permission at the mere asking but the victim has a right to assist the Court in a trial before the Magistrate. The Magistrate may consider as to whether the victim is in a position to assist the Court and as to whether the trial does not involve such complexities which cannot be handled by the victim. On satisfaction of such facts, the Magistrate would be within its jurisdiction to grant of permission to the victim to take over the inquiry of the pendency before the Magistrate.

16) We find that the High Court has granted permission to the complainant to prosecute the trial without examining the parameters laid down hereinabove. Therefore, we set aside the order passed by the High Court and that of the Magistrate. The matter is remitted to the Magistrate to consider as to whether the complainant should be granted permission to prosecute the offences under Sections 498-A, 406 read with Section 34 IPC. The appeal is allowed.

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## 2019 (2) L.S. 185 (S.C)

IN THE SUPREME COURT OF INDIA
NEW DELHI

Present:
The Hon'ble Mr. Justice
Arun Mishra
The Hon'ble Mr.Justice
S.Abdul Nazeer &
The Hon'ble Mr.Justice
M.R. Shah

Ravinder Kaur Grewal &Ors., ..Appellants
Vs.
Manjit Kaur & Ors., ..Respondents

**LIMITATION ACT, Art.65 - Adverse plea of acquisition of title by adverse possession can be taken by plaintiff under Article 65 of the Limitation Act and there is no bar under the Limitation Act, 1963 to sue on aforesaid basis in case of infringement of any rights of a plaintiff.**

**J U D G M E N T**
(per the Hon'ble Mr.Justice
Arun Mishra )

1. The question of law involved in the present matters is quite significant. Whether a person claiming the title by virtue of adverse possession can maintain a suit under Article 65 of Limitation Act, 1963 (for short, "the Act") for declaration of title and for a permanent injunction seeking the protection of his possession thereby restraining the defendant from interfering in the possession or for restoration of possession in case of illegal dispossession by a defendant whose title has been extinguished by virtue of the plaintiff remaining in the adverse possession or in case of dispossession by some other person? In other words, whether Article 65 of the Act only enables a person to set up a plea of adverse possession as a shield as a defendant and such a plea cannot be used as a sword by a plaintiff to protect the possession of immovable property or to recover it in case of dispossession. Whether he is remediless in such a case? In case a person has perfected his title based on adverse possession and property is sold by the owner after the extinguishment of his title, what is the remedy of a person to avoid sale and interference in possession or for its restoration in case of dispossession?

2. Historically, adverse possession is a pretty old concept of law. It is useful but often criticised concept on the ground that it protects and confers rights upon wrongdoers. The concept of adverse possession appeared in the Code of Hammurabi approximately 2000 years before Christ era. Law 30 contained a provision "If a chieftain or a man leaves his house, garden, and field …. 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 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." However, there was an exception to the aforesaid rule: for a soldier captured or killed in battle and the case of the juvenile son of the owner. In Roman times, attached to the land, a kind of spirit that was nurtured by

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the possessor. Possessor or user of the land was considered to have a greater "ownership" of the land than the titled owner. We inherited the Common Law concept, being a part of the erstwhile British colony. William in 1066 consolidated ownership of land under the Crown. The Statute of Westminster came in 1275 when land records were very often scarce and literacy was rare, the best evidence of ownership was possession. In 1639, the Statute of Limitation fixed the period for recovery of possession at 20 years. A line of thought was also evolved that the person who possesses the land and produces something of ultimate benefit to the society, must hold the best title to the land. Revenue laws relating to land have been enacted in the spirit to confer the title on the actual tiller of the land. The Statute of Wills in 1540 allowed lands to be passed down to heirs. The Statute of Tenures enacted in 1660 ended the feudal system and created the concept of the title. The adverse possession remained as a part of the law and continue to exist. The concept of adverse possession has a root in the aspect that it awards ownership of land to the person who makes the best or highest use of the land. The land, which is being used is more valuable than idle land, is the concept of utilitarianism. The concept thus, allows the society as a whole to benefit from the land being held adversely but allows a sufficient period for the "true owner" to recover the land. The adverse possession statutes permit rapid development of "wild" lands with the weak or indeterminate title. It helps in the Doctrine of Administration also as it can be an effective and efficient way to remove or cure clouds of title which with memories grow dim and evidence becomes unclear. The possessor who maintains and improves the land has a more valid claim to the land than the owner who never visits or cares for the land and uses it, is of no utility. If a former owner neglects and allows the gradual dissociation between himself and what he is claiming and he knows that someone else is caring by doing acts, the attachment which one develops by caring cannot be easily parted with. The bundle of ingredients constitutes adverse possession.

3. We have heard learned counsel appearing for the parties at length and also the Amicus Curiae, Shri P.S. Patwalia and Shri Huzefa Ahmadi, senior counsel. Various decisions of this Court and Privy Council and English Courts have been cited in which the suit filed by the plaintiff based on adverse possession has been held to be maintainable for declaration of title and protection of the possession or the restoration of possession. Nature of right acquired by adverse possession and even otherwise as to the right to protect possession against unlawful dispossession of the plaintiff or for its recovery in case of illegal dispossession.

4. Before dilating upon the issue, it is necessary to refer the decision in Gurudwara Sahab v. Gram Panchayat Village Sirthala (2014) 1 SCC 669 in which this court has referred to the decision of the Punjab and Haryana High Court in Gurudwara Sahib Sannauli v. State of Punjab since reported in (2009) 154 PLR 756, to opine that no declaration of title can be sought by a plaintiff on the basis of adverse

possession inasmuch as adverse possession can be used as a shield by a defendant and not as a sword by a plaintiff. This Court while deciding the question gave the only reason by simply observing that there is "no quarrel" with the proposition to the extent that suit cannot be based by the plaintiff on adverse possession. Thus, this point was not contested in Gurudwara Sahib v. State Gram Panchayat Village, Sirthala (supra) when this Court expressed said opinion.

5. It is pertinent to mention here that before the aforesaid decision of this court, there was no such decision of this court holding that suit cannot be filed by a plaintiff based on adverse possession. The views to the contrary of larger and coordinate benches were not submitted for consideration of the Two Judge Bench of this Court which decided the aforesaid matter.

6. A Three-Judge Bench decision in Sarangadeva Periya Matam & Anr. v. Ramaswami Gondar (Dead) by Lrs. AIR 1966 SC 1603of this Court in which the decision of Privy Council in Musumut Chundrabullee Debia v. Luchea Debia Chowdrain 1865 SCC Online PC 7 had been relied on, was not placed for consideration before the division bench deciding Gurudwara Sahib v. Gram Panchayat, Sirthala.7. Learned Amicus pointed out that in Sarangadeva Periya Matam & Anr. v. Ramaswami Goundar (Dead) by Lrs. (supra) the plaintiff was in the possession of the suit land until January 1950 when the 'mutt' obtained possession of the land. On February 18, 1954, plaintiff instituted the suit against the 'mutt' for "recovery of possession" of the suit land o based on an acquisition of title to land by way of "adverse possession". A Three-Judge Bench of this Court has held that the plaintiff acquired the title by his adverse possession and was entitled to recover the possession. Following is the relevant discussion:"1. Sri Sarangadevar Periya Matam of Kumbakonam was the inam holder of lands in Kannibada Zamin, Dindigul Taluk, Madurai District. In 1883, the then mathadhipathi granted a perpetual lease of the melwaram and kudiwaram interest in a portion of the inam lands to one Chinna Gopiya Goundar, the grandfather of the plaintiff-respondent on an annual rent of Rs. 70. The demised lands are the subject-matter of the present suit. Since 1883 until January 1950 Chinna Gopiya Goundar and his descendants were in uninterrupted possession and enjoyment of the suit lands. In 1915, the mathadhipathi died without nominating a successor. Since 1915, the descendants of Chinna Gopiya Goundar did not pay any rent to the math. Between 1915 and 1939 there was no mathadhipathi. One Basavan Chetti was in management of the math for a period of 20 years from 1915. The present mathadhipathi was elected by the disciples of the Math in 1939. In 1928, the Collector of Madurai passed an order resuming the inam lands and directing the full assessment of the lands and payment of the assessment to the math for its upkeep. After resumption, the lands were transferred from the "B" Register of inam lands to the "A" Register of ryotwari lands and a joint patta was issued in the name of the plaintiff and other persons in possession of the lands. The plaintiff continued to possess the suit lands

until January 1950 when the math obtained possession of the lands. On February 18, 1954, the plaintiff instituted the suit against the math represented by its present mathadhipathi and an agent of the math claiming recovery of possession of the suit lands. The plaintiff claimed that he acquired title to the lands by adverse possession and by the issue of a ryotwari patta in his favour on the resumption of the inam. The Subordinate Judge of Dindigul accepted the plaintiff's contention and decreed the suit. On appeal, the District Judge of Madurai set aside the decree and dismissed the suit. On second appeal, the High Court of Madras restored the judgment and decree of the Subordinate Judge. The defendants now appeal to this Court by special leave. During the pendency of the appeal, the plaintiffrespondent died and his legal representatives have been substituted in his place.2. The plaintiff claimed title to the suit lands on the following grounds : (1) Since 1915 he and his predecessors-in-interest were in adverse possession of the lands, and on the expiry of 12 years in 1927, he acquired prescriptive title to the lands under s. 28 read with Art. 144 of the Indian Limitation Act, 1908; (2) by the resumption proceedings and the grant of the ryotwari patta a new tenure was created in his favour and he acquired full ownership in the lands; and (3) in any event, he was in adverse possession of the lands since 1928, and on the expiry of 12 years in 1940 he acquired prescriptive title to the lands under s. 28 read with Art. 134-B of the Indian Limitation Act, 1908. We are of the opinion that the first contention of the plaintiff should be accepted, and it is, therefore, not necessary to consider the other two grounds of his claim.

6. We are inclined to accept the respondents' contention. Under Art. 144 of the Indian Limitation Act, 1908, limitation for a suit by a math or by any person representing it for possession of immovable properties belonging to it runs from the time when the possession of the defendant becomes adverse to the plaintiff. The math is the owner of the endowed property. Like an idol, the math is a juristic person having the power of acquiring, owning and possessing properties and having the capacity of suing and being sued. Being an ideal person, it must of necessity act in relation to its temporal affairs through human agency. See Babajirao v. Laxmandas (1904) ILR 28 Bom 215 (223). It may acquire property by prescription and may likewise lose property by adverse possession. If the math while in possession of its property is dispossessed or if the possession of a stranger becomes adverse, it suffers an injury and has the right to sue for the recovery of the property. If there is a legally appointed mathadhipathi, he may institute the suit on its behalf; if not, the de facto mathadhipathi may do so, see Mahadeo Prasad Singh v. Karia Bharti 62 Ind App 47 at p.51 and where, necessary, a disciple or other beneficiary of the math may take steps for vindicating its legal rights by the appointment of a receiver having authority to sue on its behalf, or by the institution of a suit in its name by a next friend appointed by the Court. With due diligence, the math or those interested in it may avoid the running of time. The running of limitation against the math under Art. 144 is not suspended by the absence of a legally

appointed mathadhipathi; clearly, limitation would run against it where it is managed by a de facto mathadhipathi. See Vithalbowa v. Narayan Daji, (1893) I.L.R 18 Bom 507 at p.511, and we think it would run equally if there is neither a de jure nor a de facto mathadhipathi.

10. We hold that by the operation of Art. 144 read with s. 28 of the Indian Limitation Act, 1908 the title of the math to the suit lands became extinguished in 1927, and the plaintiff acquired title to the lands by prescription. He continued in possession of the lands until January 1950. It has been found that in January 1950 he voluntarily delivered possession of the lands to the math, but such delivery of possession did not transfer any title to the math. The suit was instituted in 1954 and is well within time.(emphasis supplied)"

8. In Balkrishan vs. Satyaprakash & Ors., 2001 (2) SCC 498, decided by a Coordinate Bench, the plaintiff filed a suit for declaration of title on the ground of adverse possession and a permanent injunction. This Court considered the question, whether the plaintiff had perfected his title by adverse possession. This Court has laid down that the law concerning adverse possession is well settled, a person claiming adverse possession has to prove three classic requirements i.e. nec – nec vi, nec clam and nec precario. The trial court, as well as the First Appellate Court, decreed the suit while the High Court dismissed it. This Court restored the decree passed by the trial court decreeing the plaintiff suit based on adverse possession and observed:"6. The short question that arises for consideration in this appeal is: whether the High Court erred in holding that the appellant had not perfected his title by adverse possession on the ground that there was an order of a Tahsildar against him to deliver possession of the suit land to the auction purchasers.

7. The law with regard to perfecting title by adverse possession is well settled. A person claiming title by adverse possession has to prove three "neck" nec vi, nec clam and nec precario. In other words, he must show that his possession is adequate in continuity in publicity and in extent. In S.M. Karim vs. Bibi Sakina [1964] 6 SCR 780 speaking for this Court Hidayatullah, J. (as he then was) observed thus:

"Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found."

14. In Sk. Mukbool Ali vs. Sk. Wajed Hossein, (1876) 25 WR 249 the High Court held:

"Whatever the decree might have been, the defendant's possession could not be considered as having ceased in consequences of that decree, unless he were actually dispossessed. The fact that there is a decree against him does not prevent the statute of limitation from running."

15. In our view, the Madras High Court correctly laid down the law in the aforementioned cases.

17. From the above discussion, it follows that the judgment and decree of the High Court under challenge cannot be sustained. They are accordingly set aside and the judgment and decree of the First Appellate Court confirming the judgment and decree of the trial court is restored. The appeal is accordingly allowed but in the circumstances of the case without costs."

(emphasis supplied)

9. In Des Raj and Ors. v. Bhagat Ram (Dead) by Lrs. and Ors., (2007) 9 SCC 641, a suit filed by the plaintiff for declaration of title and also for a permanent injunction based on adverse possession. The Courts below decreed the suit of the plaintiff on the ground of adverse possession. The same was affirmed by this Court. This Court considered the change brought about in the Act by Articles 64 and 65 vis-à-vis to Articles 142 and 144. Issue No.1 was framed whether the plaintiff becomes the owner of the suit property by way of adverse possession? This Court has observed that a plea of adverse possession was indisputably be governed by Articles 64 and 65 of the Act. This Court has discussed the matter thus :"20. A plea of adverse possession or a plea of ouster would indisputably be governed by Articles 64 and 65 of the Limitation Act.

22. The mere assertion of title by itself may not be sufficient unless the plaintiff proves animus possidendi. But the intention on the part of the plaintiff to possess the properties in suit exclusively and not for and on behalf of other co-owners also is evident from the fact that the defendants-appellants themselves had earlier filed two suits. Such suits were filed for partition. In those suits the defendants-appellants claimed themselves to be co-owners of the plaintiff. A bare perusal of the judgments of the courts below clearly demonstrates that the plaintiff had even therein asserted hostile title claiming ownership in himself. The claim of hostile title by the plaintiff over the suit land, therefore, was, thus, known to the appellants. They allowed the first suit to be dismissed in the year 1977. Another suit was filed in the year 1978 which again was dismissed in the year 1984. It may be true, as has been contended on behalf of the appellants before the courts below, that a co-owner can bring about successive suits for partition as the cause of action, therefor, would be a continuous one. But, it is equally well-settled that pendency of a suit does not stop running of 'limitation'. The very fact that the defendants despite the purported entry made in the revenue settlement record of rights in the year 1953 allowed the plaintiff to possess the same exclusively and had not succeeded in their attempt to possess the properties in Village Samleu and/or otherwise enjoy the usufruct thereof, clearly goes to show that even prior to institution of the said suit the plaintiff-respondent had been in hostile possession thereof.24. In any event the plaintiff made his hostile declaration claiming title for the property at least in his written statement in the suit filed in the year 1968. Thus, at least from 1968 onwards, the plaintiff continued to exclusively possess the suit land with a knowledge of the defendants-appellants.

26. Article 65 of the Limitation Act, 1963, therefore, would in a case of this nature have its role to play, if not from 1953, but

at least from 1968. If that be so, the finding of the High Court that the respondent perfected his title by adverse possession and ouster cannot be said to be vitiated in law.

28. We are also not oblivious of a recent decision of this Court in Govindammal v. R. Perumal Chettiar and Ors., (2006) 11 SCC 600 wherein it was held: (SCC p. 606, para 8)

"In order to oust by way of adverse possession, one has to lead definite evidence to show that to the hostile interest of the party that a person is holding possession and how that can be proved will depend on facts of each case."

31. We, having regard to the peculiar facts obtaining in the case, are of the opinion that the plaintiff-respondent had established that he acquired title by ousting the defendant-appellants by declaring hostile title in himself which was to the knowledge of his co-sharers."

(emphasis supplied)

10. In Kshitish Chandra Bose v. Commissioner of Ranchi, (1981) 2 SCC 103 a three-Judge Bench of this Court considered the question of adverse possession by a plaintiff. The plaintiff has filed a suit for declaration of title and recovery of possession based on Hukumnama and adverse possession for more than 30 years. The trial court decreed the suit on both the grounds, 'title' as well as of 'adverse possession'. The plaintiff's appeal was allowed by this Court. It has been observed by this Court that adverse possession had been established by a consistent course of conduct of the plaintiff in the case, possession was hostile to the full knowledge of the municipality. Thus, the High Court could not have interfered with the finding as to adverse possession and could not have ordered remand of the case to the Judicial Commissioner. The order of remand and the proceedings thereafter were quashed. This court restored decree in favour of plaintiff for declaration of title and recovery of possession and also for a permanent injunction, has dealt with the matter thus:

"2. The plaintiff filed a suit for declaration of his title and recovery of possession and also a permanent injunction restraining the defendant municipality from disturbing the possession of the plaintiff. It appears that prior to the suit, proceedings under Section 145 were started between the parties in which the Magistrate found that the plaintiff was not in possession but upheld the possession of the defendant on the land until evicted in due course of law.

3. In the suit the plaintiff based his claim in respect of plot No. 1735, Ward No. 1 of Ranchi Municipality on the ground that he had acquired title to the land by virtue of a hukumnama granted to him by the landlord as far back as April 17, 1912 which is Ex.18. Apart from the question of title, the plaintiff further pleaded that even if the land belonged to the defendant municipality, he had acquired title by prescription by being in possession of the land to the knowledge of the municipality for more than 30 years, that is to say, from 1912 to 1957.

10. Lastly, the High Court thought that as the land in question consisted of a portion of the tank or a land appurtenant thereto, adverse possession could not be proved. This view also seems to be wrong. If a person asserts a hostile title even to a tank which as claimed by the municipality, belonged to it and despite the hostile assertion of title no steps were taken by the owner, (namely, the municipality in this case), to evict the trespasser, his title by prescription would be complete after thirty years."

11. In Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165, the plaintiff filed a suit claiming to be in possession for over 70 years. The plaintiff claimed possession of the excess land from the society, its Manager and Defendants Nos.3 to 6. The society denied the rights of the plaintiff to bring a suit for ejectment or its liability for compensation. Alternatively, the society claimed the value of improvements. The main controversy decided by the High Court was whether the plaintiff can maintain a suit for possession without proof of title. This court observed that in case the rightful owner does not come forward within the period of limitation his right is lost, and the possessory owner acquires an absolute title. The plaintiff was in de facto possession and was entitled to remain in possession and only the State could evict him. The State was not impleaded as a party in the case. The action of the society was a violent invasion of his possession and in the law, as it stands in India, the plaintiff can maintain a possessory suit under the provisions of the Specific Relief Act, 1963. The plaintiff has asserted that he had perfected his title by "adverse possession" but he did not join the State in a suit to get a declaration. He may be said to have not rested the suit on the acquired title. The suit was thus limited to recovery of possession from one who had trespassed against him. The Court observed that for the plaintiff to maintain suit based on adverse possession, it was necessary to implead the State Government i.e. the owner of the land as a party to the suit. A plaintiff can maintain a suit based on adverse possession as he acquires absolute title. The Court observed:

"(17) In our judgment this involves an incorrect approach to our problem. To express our meaning we may begin by reading 1907 AC 73 to discover if the principle that possession is good against all but the true owner has in any way been departed from. 1907 AC 73 reaffirmed the principle by stating quite clearly:

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the statute of Limitation applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."

Therefore, the plaintiff who was peaceably in possession was entitled to remain in possession and only the State could evict him. The action of the Society was a violent

invasion of his possession and in the law, as it stands in India the plaintiff could maintain a possessor suit under the provisions of the Specific Relief Act in which title would be immaterial or a suit for possession within 12 years in which the question of title could be raised. As this was a suit of latter kind title could be examined. But whose title? Admittedly neither side could establish title. The plaintiff at least pleaded the statute of Limitation and asserted that he had perfected his title by adverse possession. But as he did not join the State in his suit to get a declaration, he may be said to have not rested his case on an acquired title. His suit was thus limited to recovering possession from one who had trespassed against him. The enquiry thus narrows to this: did the Society have any title in itself, was it acting under authority express or implied of the true owner or was it just pleading a title in a third party? To the first two questions we find no difficulty in furnishing an answer. It is clearly in the negative. So the only question is whether the defendant could plead that the title was in the State? Since in every such case between trespassers the title must be outstanding in a third party a defendant will be placed in a position of dominance. He has only to evict the prior trespasser and sit pretty pleading that the title is in someone else. As Erle J put it in Burling v. Read (1848) 11 QB 904 'parties might imagine that they acquired some right by merely intruding upon land in the night, running up a hut and occupying it before morning'. This will be subversive of the fundamental doctrine which was accepted always and was reaffirmed in 1907 AC 73. The law does not, therefore, countenance the doctrine of 'findings keepings'.(22) The cases of the Judicial Committee are not binding on us but we approve of the dictum in 1907 AC 73. No subsequent case has been brought to our notice departing from that view. No doubt a great controversy exists over the two cases of (1849) 13 QB 945 and (1865) 1 QB 1 but it must be taken to be finally resolved by 1907 AC 73. A similar view has been consistently taken in India and the amendment of the Indian Limitation Act has given approval to the proposition accepted in 1907 AC 73 and may be taken to be declaratory of the law in India. We hold that the suit was maintainable."

(emphasis supplied)

12. In Lallu Yashwant Singh (dead) by his legal representative v. Rao Jagdish Singh & Ors., AIR 1968 SC 620, this Court has observed that taking forcible possession is illegal. In India, persons are not permitted to take forcible possession. The law respect possession. The landlord has no right to re-enter by showing force or intimidation. He must have to proceed under the law and taking of forcible possession is illegal. The Court affirmed the decision of Privy Council in Midnapur Zamindary Company Ltd. V. Naresh Narayan Roy AIR 1924 PC 144 and other decisions and held:"10. In Midnapur Zamindary Company Limited v. Naresh Narayan Roy, 51 Ind App 293 = at p. 299 (AIR 1924 PC 144 at p.147), the Privy Council observed:"In India persons are not permitted to take forcible possession; they must obtain such possession as they are entitled to through a Court."

11. In K.K. Verma v. Naraindas C. Malkani (AIR 1954 Bom 358 at p. 360) Chagla C.J., stated that the law in India was essentially different from the law in England. He observed:

"Under the Indian law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy his possession is juridical and that possession is protected by statute. Under Section 9 of the Specific Relief Act a tenant who has ceased to be a tenant may sue for possession against his landlord if the landlord deprives him of possession otherwise than in due course of law, but a trespasser who has been thrown out of possession cannot go to Court under Section 9 and claim possession against the true owner."

12. In Yar Mohammad v. Lakshmi Das (AIR 1959 All 1 at p.4), the Full Bench of the Allahabad High Court observed:

"No question of title either of the plaintiff or of the defendant can be raised or gone into in that case (under Section 9 of the Specific Relief Act). The plaintiff will be entitled to succeed without proving any title on which he can fall back upon and the defendant cannot succeed even though he may be in a position to establish the best of all titles. The restoration of possession in such a suit is, however, always subject to a regular title suit and the person who has the real title or even the better title cannot, therefore, be prejudiced in any way by a decree in such a suit. It will always be open to him to establish his title in a regular suit and to recover back possession."

The High Court further observed:

"Law respects possession even if there is no title to support it. It will not permit any person to take the law in his own hands and to dispossess a person in actual possession without having recourse to a Court. No person can be allowed to become a Judge in his own cause. As observed by Edge C.J., in Wali Ahmad Khan v. Ayodhya Kundu (1891) ILR 13 All. 537 at p.556:

"The object of the section was to drive the persons who wanted to eject a person into the proper Court and to prevent them from going with a high hand and ejecting such persons."

14. In Hillava Subbava v. Narayanappa, (1911) 13 Bom. LR 1200 it was observed:

"No doubt, the true owner of property is entitled to retain possession, even though he has obtained it from a trespasser by force or other unlawful means: Lillu v. Annaji, (1881) ILR 5 Bom. 387 and Bandu v. Naba, (1890) ILR 15 Bom 238."

We are unable to appreciate how this decision assists the respondent. It was not a suit under Section 9 of the Specific Relief Act. In (1881) ILR 5 Bom 387, it was recognised that "if there is a breach of the peace in attempting to take possession, that affords a ground for criminal prosecution, and, if the attempt is successful, for a summary suit also for a restoration to possession under Section 9

of the Specific Relief Act I of 1877- Dadabhai Narsidas v. The Sub-Collector of Broach, (1870) 7 Bom. HC AC 82." In (1890) ILR 15 Bom 238 it was observed by Sargent C J., as follows:

"The Indian Legislature has, however, provided for the summary removal of anyone who dispossesses another, whether peaceably or otherwise than by due course of law; but subject to such provision there is no reason for holding that the rightful owner so dispossessing the other is a trespasser, and may not rely for the support of his possession on the title vested in him, as he clearly may do by English law. This would also appear to be the view taken by West J., in (1881) ILR 5 Bom 387."

15. In our opinion, the law on this point has been correctly stated by the Privy Council, by Chagla C.J., and by the Full Bench of the Allahabad High Court, in the cases cited above."

(emphasis supplied)

This Court has approved the decision of the Privy Council as well as Full Bench of the Allahabad High Court in Yar Mohammad v. Laxmi Das AIR 1959 All. 1.

13. In Somnath Berman v. Dr. S.P. Raju & Anr. AIR 1970 SC 846, this Court has recognized the right of a person having possessory title to obtain a declaration that he was the owner of the land in a suit and an injunction restraining the defendant from interfering with his possession. This Court has further observed that section 9 of the Specific Relief Act, 1963 is in no way inconsistent with the position that as against a wrongdoer, prior possession of the plaintiff, in an action of ejectment is sufficient title even if the suit is brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and the right to possession vested in a third party. This Court has observed:

"10. In Narayana Row v. Dharmachar, (1903) ILR 26 Mad 514 a bench of the Madras High Court consisting of Bhashyam Ayyangar and Moore, JJ. held that possession is, under the Indian, as under the English law, good title against all but the true owner. Section 9 of the Specific Relief Act is in no way inconsistent with the position that as against a wrongdoer, prior possession of the plaintiff, in an action of ejectment, is sufficient title, even if the suit be brought more than six months after the act of dispossession complained of and that the wrong-doer cannot successfully resist the suit by showing that the title and right to possession are in a third person. The same view was taken by the Bombay High Court in Krishnarao Yashwant v. Vasudev Apaji Ghotikar, (1884) ILR 8 Bom 871. That was also the view taken by the Allahabad High Court-see Umrao Singh v. Ramji Das, ILR 36 All 51, Wali Ahmad Khan v. Ahjudhia Kandu, (1891) ILR 13 All 537. In Subodh Gopal Bose v. Province of Bihar, AIR 1950 Pat 222 the Patna High Court adhered to the view taken by the Madras, Bombay and Allahabad High Courts. The contrary view taken by the Calcutta High Court in Debi Churn Boldo v. Issur Chunder Manjee, (1883) ILR 9 Cal 39; Ertaza

Hossein v. Bany Mistry, (1883) ILR 9 Cal 130, Purmeshur Chowdhry v. Brijo Lall Chowdhry, (1890) ILR 17 Cal 256 and Nisa Chand Gaita v. Kanchiram Bagani, (1899) ILR 26 Cal 579, in our opinion does not lay down the law correctly."

(emphasis supplied)

It is apparent from the aforesaid decision that a person is entitled to bring a suit of possessory title to obtain possession even though the title may vest in a third person. A person in the possessory title can get injunction also, restraining the defendant from interfering with his possession.

14. Given the aforesaid, a question to ponder is when a person having no title, merely on the strength of possessory title can obtain an injunction and can maintain a suit for ejectment of a trespasser. Why a person who has perfected his title by way of adverse possession cannot file a suit for obtaining an injunction protecting possession and for recovery of possession in case his dispossession is by a third person or by an owner after the extinguishment of his title. In case a person in adverse possession has perfected his title by adverse possession and after the extinguishment of the title of the true owner, he cannot be successfully dispossessed by a true owner as the owner has lost his right, title and interest.

15. In Padminibai v. Tangavva & Ors., AIR 1979 SC 1142, a suit was filed by the plaintiff for recovery of possession on the basis that her husband was in exclusive and open possession of the suit lands adversely to the defendant for a period exceeding 12 years and his possession was never interrupted or disturbed. It was held that he acquired ownership by prescription. The suit filed within 12 years of his death was within limitation. Thus, the plaintiff was given the right to recover possession based on adverse possession as Tatya has acquired ownership by adverse possession. This Court has observed thus:

"1. Tatya died on February 2, 1955. The respondents, Tangava and Sundra Bai are the co widows of Tatya. They were co-plaintiffs in the original suit.

11. We have, therefore, no hesitation in holding in agreement with the courts below that Tatya had acquired title by remaining in exclusive and open possession of the suit lands adversely to Padmini Bai for a period far exceeding 12 years, and this possession was never interrupted or disturbed. He had thus acquired ownership by prescriptions."

(emphasis supplied)

16. In State of West Bengal v. The Dalhousie Institute Society, AIR 1970 SC 1778, this Court considered the question of adverse possession of Dalhousie Institute Society based on invalid grant. It was held by this Court that title was acquired by adverse possession based on invalid grant and the right was given to the claimant/applicant to claim compensation. This Court held that a person acquires title by adverse possession and observed:

"16. There is no material placed before us to show that the grant has been made in

the manner required by law though as a fact a grant of the site has been made in favour of the Institute. The evidence relied on by the Special Land Acquisition Judge and the High Court also clearly establishes that the respondent has been in open, continuous and uninterrupted possession and enjoyment of the site for over 60 years. In this respect, the material documentary evidence referred to by the High Court clearly establishes that the respondent has been treated as owner of the site not only by the Corporation but also by the Government. The possession of the respondent must have been on the basis of the grant made by the Government, which, no doubt, is invalid in law. As to what exactly is the legal effect of such possession has been considered by this Court in Collector of Bombay v. Municipal Corporation of the City of Bombay, [1952] SCR 43 as follows:

"...the position of the respondent Corporation and its predecessor in title was that of a person having no legal title but nevertheless holding possession of the land under colour of an invalid grant of the land in perpetuity and free from rent for the purpose of a market. Such possession not being referable to any legal title it was prima facie adverse to the legal title of the Government as owner of the land from the very moment the predecessor in title of the respondent Corporation took possession of the land under the invalid grant. This possession has continued openly, as of right and uninterruptedly for over 70 years and the respondent Corporation has acquired the limited title to it and its predecessor in title had been prescribing for during all this period, that is to say, the right to hold the land in perpetuity free from rent but only for the purposes of a market in terms of the Government Resolution of 1865...."

17. The above extract establishes that a person in such possession clearly acquires title by adverse possession. In the case before us, there are concurrent findings recorded by the High Court and the Special Land Acquisition Judge in favour of the respondent on this point and we agree with those findings."

(emphasis supplied)

It is apparent from the aforesaid discussion that title is acquired by adverse possession.17. In Mohammed Fateh Nasib v. Swarup Chand Hukum Chand & Anr. AIR 1948 PC 76, Privy Council considered the question of adverse possession by a plaintiff. In the plaint, his case was based upon continuous, open, exclusive and undisturbed possession. He averred that he had acquired an indefeasible title to the suit property by adverse possession against the whole world. In 1928, he was surreptitiously dispossessed from the suit property. The question arose for consideration whether the plaintiff remained in adverse possession for 12 years and whether it was adverse to the wakf. The Privy Council agreed with the findings of the High Court that the "plaintiff" and his predecessors-in-interest had remained in possession of the suit property for more than 12 years before 1928 to acquire a title under section 28 of the Act and the plaintiff was not a mere trespasser. The court further held that title by the adverse possession can be established against wakf property also. The

Privy Council observed:-"On that basis the first question to be determined is whether the plaintiff proved continuous, open exclusive and undisturbed possession of the property in suit for 12 years and upwards before 1928 when he was dispossessed, that being the relevant date under Article 142 of the Limitation Act. If that question is answered in the affirmative then the further question arises whether such possession was adverse to the wakf.Their Lordships agree that this is the correct test to apply and, having examined the evidence, oral and documentary, they agree with the finding of the High Court that the plaintiff and his predecessors-in-interest had been in possession of the suit property for more than 12 years prior to 1928 so as to acquire a title under Section 28 of the Limitation Act. It is no doubt true, as the learned Subordinate Judge held, that the claim of a mere trespasser to title by adverse possession will be confined strictly to the property of which he has been in actual possession. But that principle has no application in the present case. The plaintiff is not a mere trespasser; he himself purchased the property for a large sum and Aberjan, upon whose possession the claim ultimately rests, was put into possession by an order of the Court, whether or not such order was rightly made. Apart from this, their Lordships think that the character of the possession established by the plaintiff was adequate to found title even in a trespasser.Their Lordships feel no hesitation in agreeing with the High Court that adverse possession by the plaintiff and his predecessorsin-interest has been proved for the requisite period. The only question which then remains is whether such possession was adverse to the wakf. It is not disputed that in law a title by adverse possession can be established against wakf property, but it is clear that a trustee for a charity entering into possession of property belonging to the charity cannot, whilst remaining a trustee, change the character of his possession, and assert that he is in possession as a beneficial owner." (emphasis supplied)

The plaintiff's title was declared based on adverse possession.

18. The question of perfecting title by adverse possession again came to be considered by the Privy Council in Gunga Govind Mundul & Ors. v. The Collector of the Twenty-Four Pergunnahs & Ors. 11 M.I.A. 212, it observed that there is an extinguishment of title by the law of limitation. The practical effect is the extinction of the title of the owner in favour of the party in possession and this right is an absolute interest. The Privy Council has observed thus:

"4. The title to sue for dispossession of the lands belongs, in such a case, to the owner whose property is encroached upon ; and if he suffers his right to be barred by the Law of Limitation, the practical effect is the extinction of his title in favour of the party in possession; see Sel. Rep., vol. vi., p. 139, cited in Macpherson, Civil Procedure, p. 81 (3rd ed.). Now, in this case, the family represented by the Appellants is proved to have been upwards of thirty years in possession. The High Court has decided that the Prince's title is barred, and the

effect of that bar must operate in favour of the party in possession.

(emphasis supplied)

Supposing that, on the extinction of the title of a person having a limited interest, a right to enter might arise in favour of a remainderman or a reversioner, the present case has no resemblance to that."8. It is of the utmost consequence in India that the security which long possession efforts should not be weakened. Disputes are constantly arising about boundaries and about the identity of lands, contiguous owners are apt to charge one another with encroachment. If twelve years' peaceable and uninterrupted possession of lands, alleged to have been enjoyed by encroachment on the adjoining lands, can be proved, a purchaser may taken that title in safety; but, if the party out of possession could set up a sixty years' law of limitation, merely by making common cause with a Collector, who could enjoy security against interruption? The true answer to such a contrivance is; the legal right of the Government is to its rent; the lands owned by others; as between private owners contesting inter see the title of the lands, the law has established a limitation of twelve years; after that time, it declares not simply that the remedy is barred, but that that the title is extinct in favour of the possessor. The Government has no title to intervene in such contests, as its title to its rent in the nature of jumma is unaffected by transfer simply of proprietary right in the lands. The liability of the lands of Jumma is not affected by a transfer of proprietary right, whether such transfer is affected simply by transfer of title, or less directly by adverse occupation and the law of limitation."

19. In S.M. Karim v. Mst. Bibi Sakina, AIR 1964 SC 1254, a question arose under section 66 of the Code of Civil Procedure, 1908 which provides that no suit shall be maintained against a certified purchaser. The question arose for consideration that in case possession is disturbed whether a plaintiff can take the alternative plea that the title of the person purchasing benami in court auction was extinguished by long and uninterrupted adverse possession of the real owner. If the possession of the real owner ripens into title under the Act and he is dispossessed, he can sue to obtain possession. This Court has held that in such a case it would be open for the plaintiff to take such a plea but with full particulars so that the starting point of limitation can be found. A mere suggestion in the relief clause that there was an uninterrupted possession for several 12 years or that the plaintiff had acquired an absolute title was not enough to raise such a plea. Long possession was not necessarily an adverse possession and the prayer clause is not a substitute for a plea of adverse possession. The opinion expressed is that plaintiff can take a plea of adverse possession but with full particulars.

The Court has observed:

"5. As an alternative, it was contended before us that the title of Hakir Alam was extinguished by long and uninterrupted adverse possession of Syed Aulad Ali and after him of the plaintiff. The High Court did not accept this case. Such a case is, of

course, open to a plaintiff to make if his possession is disturbed. If the possession of the real owner ripens into title under the Limitation Act and he is dispossessed, he can sue to obtain possession, for he does not then rely on the benami nature of the transaction. But the alternative claim must be clearly made and proved. The High Court held that the plea of adverse possession was not raised in the suit and reversed the decision of the two courts below. The plea of adverse possession is raised here. Reliance is placed before us on Sukhan Das v. Krishanand, ILR 32 Pat 353 and Sri Bhagwan Singh v. Ram Basi Kuer, AIR 1957 Pat 157, to submit that such a plea is not necessary and alternatively, that if a plea is required, what can be considered a proper plea. But these two cases can hardly help the appellant. No doubt, the plaint sets out the fact that after the purchase by Syed Aulad Ali, benami in the name of his son--in--law Hakir Alam, Syed Aulad Ali continued in possession of the property but it does not say that this possession was at any time adverse to that of the certified purchaser. Hakir Alam was the son-in-law of Syed Aulad Ali and was living with him. There is no suggestion that Syed Aulad Ali ever asserted any hostile title against him or that a dispute with regard to ownership and possession had ever arisen. Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found. There is no evidence here when possession became adverse if it at all did, and a mere suggestion in the relief clause that there was an uninterrupted possession for "several 12 years" or that the plaintiff had acquired "an absolute title" was not enough to raise such a plea. Long possession is not necessarily adverse possession and the prayer clause is not a substitute for a plea. The cited cases need hardly be considered because each case must be determined upon the allegations in the plaint in that case. It is sufficient to point out that in Bishun Dayal v. Kesho Prasad, AIR 1940 PC 202 the Judicial Committee did not accept an alternative case based on possession after purchase without a proper plea."

(emphasis supplied)

20. There is an acquisition of title by adverse possession as such, such a person in the capacity of a plaintiff can always use the plea in case any of his rights are infringed including in case of dispossession. In Mandal Revenue Officer v. Goundla Venkaiah & Anr., (2010) 2 SCC 461 this Court has referred to the decision in State of Rajasthan v. Harphool Singh (2000) 5 SCC 652 in which the suit was filed by the plaintiff based on acquisition of title by adverse possession. This Court has referred to other decisions also in Annakili v. A. Vedanayagam (2007) 14 SCC 308 and P.T. Munichikkanna Reddy v. Revamma (2007) 6 SCC 59. It has been observed that there can be an acquisition of title by adverse possession. It has also been observed that adverse possession effectively shifts the title already distanced from the paper owner to the adverse possessor. Right thereby accrues in favour of the adverse possessor. This Court has considered the matter thus:"48. In State of Rajasthan v. Harphool Singh, 2000 (5) SCC

652, this Court considered the question whether the respondents had acquired title by adverse possession over the suit land situated at Nohar-Bhadra Road at Nohar within the State of Rajasthan. The suit filed by the respondent against his threatened dispossession was decreed by the trial court with the finding that he had acquired title by adverse possession. The first and second appeals preferred by the State Government were dismissed by the lower appellate court and the High Court respectively. This Court reversed the judgments and decrees of the courts below as also of the High Court and held that the plaintiff--respondent could not substantiate his claim of perfection of title by adverse possession. Some of the observations made on the issue of acquisition of title by adverse possession which have bearing on this case are extracted below: (SCC p. 660, para 12)

"12. So far as the question of perfection of title by adverse possession and that too in respect of public property is concerned, the question requires to be considered more seriously and effectively for the reason that it ultimately involves destruction of right/ title of the State to immovable property and conferring upon a third-party encroacher title where he had none. The decision in P. Lakshmi Reddy v. L. Lakshmi Reddy, AIR 1957 SC 314, adverted to the ordinary classical requirement that it should be nec vi, nec clam, nec precario that is the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. It was also observed therein that whatever may be the animus or intention of a person wanting to acquire title by adverse possession, his adverse possession cannot commence until he obtains actual possession with the required animus."

50. Before concluding, we may notice two recent judgments in which law on the question of acquisition of title by adverse possession has been considered and reiterated. In Annakili v. A. Vedanayagam, 2007 (14) SCC 308, the Court observed as under: (SCC p. 316, para 24)

"24. Claim by adverse possession has two elements: (1) the possession of the defendant should become adverse to the plaintiff; and (2) the defendant must continue to remain in possession for a period of 12 years thereafter. Animus possidendi as is well known is a requisite ingredient of adverse possession. It is now a well-settled principle of law that mere possession of the land would not ripen into possessory title for the said purpose. Possessor must have animus possidendi and hold the land adverse to the title of the true owner. For the said purpose, not only animus possidendi must be shown to exist, but the same must be shown to exist at the commencement of the possession. He must continue in the said capacity for the period prescribed under the Limitation Act. Mere long possession, it is trite, for a period of more than 12 years without anything more does not ripen into a title."

51. In P.T. Munichikkanna Reddy v. Revamma, 2007 (6) SCC 59, the Court considered various facets of the law of adverse possession and laid down various propositions including the following: (SCC

pp. 66 & 68, paras 5 & 8)

x x x

8. ... to assess a claim of adverse possession, two-pronged enquiry is required:

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

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

21. In P.T. Munichikkanna Reddy v. Revamma, (2007) 6 SCC 59, this Court has observed as under:

2. The defendant--respondents in their written statement denied and disputed the aforementioned assertion of the plaintiffs and pleaded their own right, title and interest as also possession in or over the said 1 acre 21 guntas of land. **The learned trial Judge decreed the suit inter alia holding that the plaintiff-appellants have acquired title by adverse possession as they have been in possession of the lands in question for a period of more than 50 years**. On an appeal having been preferred there against by the respondents before the High Court, the said judgment of the trial court was reversed holding:

"(i) … The important averments of adverse possession are twofold. One is to recognise the title of the person against whom adverse possession is claimed. Another is to enjoy the property adverse to the title-holder's interest after making him known that such enjoyment is against his own interest. These two averments are basically absent in this case both in the pleadings as well as in the evidence….

(ii) The finding of the court below that the possession of the plaintiffs became adverse to the defendants between 1934-36 is again an error apparent on the face of the record. As it is now clarified before me by the learned counsel for the appellants that the plaintiffs' claim in respect of the other land of the defendants is based on the subsequent sale deed dated 5-7-1936.

It is settled law that mere possession even if it is true for any number of years will not clothe the person in enjoyment with the title by adverse possession. As indicated supra, the important ingredients of adverse possession should have been satisfied."

6. Efficacy of adverse possession law in most jurisdictions depends on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has

ignored the property. **Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time but also to vest the possessor with title**. The intention of such statutes is not to punish one who neglects to assert rights, but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See American Jurisprudence, Vol. 3, 2d, p. 81.) It is important to keep in mind while studying the American notion of adverse possession, especially in the backdrop of limitation statutes, that the intention to dispossess cannot be given a complete go-by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim.

8. Therefore, to assess a claim of adverse possession, two-pronged enquiry is required:1. Application of limitation provision thereby jurisprudentially "wilful neglect" element on part of the owner established. Successful application in this regard distances the title of the land from the paper--owner

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

30. In Karnataka Wakf Board the law was stated, thus: (SCC p. 785, para 11)

"11. In the eye of the law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. **Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of the true owner. It is a wellsettled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous**. The possession must be adequate in continuity, in publicity, and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period. (See S.M. Karim v. Bibi Sakina, Parsinni v. Sukhi and D.N. Venkatarayappa v. State of Karnataka.) Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show: (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession

has continued, and (e) his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of the true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

22. In State of Haryana v. Mukesh Kumar & Ors., (2011) 10 SCC 404, the court considered the question whether the plaintiff had become the owner of the disputed property by way of adverse possession and in that context considered the decisions in Revamma (supra) and Fairweather v. St. Marylebone Property Co. Ltd. (1962) 2 AER 288 (HL) and Taylor v. Twinberrow 1930 All ER Rep 342 (DC) and observed that adverse possession confers negative and consequential right effected only as somebody else's positive right to access the court is barred by operation of law. Right of the paper owner is extinguished and that competing rights evolve in favour of adverse possessor as he cared for the land, developed it as against the owner of the property who had ignored the property. This Court has observed thus:

"32. This Court in Revamma (2007) 6 SCC 59 observed that to understand the true nature of adverse possession, Fairweather v. St Marylebone Property Co. Ltd. (1962) 2 All ER 288 (HL) can be considered where the House of Lords referring to Taylor v. Twinberrow (1930) 2 K.B. 16 termed adverse possession as a negative and consequential right effected only because somebody else's positive right to access the court is barred by operation of law. As against the rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property."

(emphasis supplied)

23. In Krishnamurthy S. Setlur (dead) by LRs. v. O.V. Narasimha Setty & Ors., (2007) 3 SCC 569, the Court pointed out that the duty of the plaintiff while claiming title based on adverse possession. The suit was filed by the plaintiff on 11.12.1981. The trial court held that the plaintiff has perfected the title in the suit lands based on adverse possession, and decreed the suit. This Court has observed that the plaintiff must plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question arose for consideration whether tenant's possession could be treated as possession of the owner for computation of the period of 12 years under the provisions of the Act. What is the nature of pleading required in the plaint to constitute a plea of adverse possession has been emphasised by this Court and another question also arose whether the plaintiff was entitled to get back the possession from the defendants? This Court has observed thus:

"12. 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 which the lawful owner has and against whom a claim for adverse possession is made,

therefore, the plaintiff who makes a claim for adverse possession has to plead and prove the date on and from which he claims to be in exclusive, continuous and undisturbed possession. The question whether possession is adverse or not is often one of simple 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 and has to be considered by the court.

13. As stated, this civil appeal arises from the judgment of the High Court in RFA No. 672 of 1996 filed by the original defendants under Section 96 CPC. The impugned judgment, to say the least, is a bundle of confusion. It quotes depositions of witnesses as findings. It quotes findings of the courts below which have been set aside by the High Court in the earlier round. It criticizes the findings given by the coordinate Bench of the High Court in the earlier round of litigation. It does not answer the question of law which arises for determination in this case. To quote an example, one of the main questions which arises for determination, in this case, is whether the tenant's possession could be treated as possession of the owner in computation of the period of twelve years under Article 64 of the Limitation Act, 1963. Similarly, as an example, the impugned judgment does not answer the question as to whether the decision of the High Court dated 14.8.1981 in RSA No. 545 of 1973 was at all binding on the LRs. of Iyengar/their alienees. Similarly, the impugned judgment does not consider the effect of the judgment dated 10.11.1961 rendered by the trial court in Suit No. 94 of 1956 filed by K.S. Setlur against Iyengar inter alia for reconveyance in which the court below did not accept the contention of K.S. Setlur that the conveyance executed by Kalyana Sundram Iyer in favour of Iyengar was a benami transaction. Similarly, the impugned judgment has failed to consider the effect of the observations made by the civil court in the suit filed by Iyengar for permanent injunction bearing Suit No. 79 of 1949 to the effect that though Shyamala Raju was in possession and cultivation, whether he was a tenant under Iyengar or under K.S. Setlur was not conclusively proved. Similarly, the impugned judgment has not at all considered the effect of Iyengar or his LRs. not filing a suit on title despite being liberty given to them in the earlier Suit No. 79 of 1949. In the matter of adverse possession, the courts have to find out the plea taken by the plaintiff in the plaint. In the plaint, the plaintiff who claims to be owner by adverse possession has to plead actual possession. He has to plead the period and the date from which he claims to be in possession. The plaintiff has to plead and prove that his possession was continuous, exclusive and undisturbed to the knowledge of the real owner of the land. He has to show a hostile title. He has to communicate his hostility to the real owner. None of these aspects have been considered by the High Court in its impugned judgment. As stated above, the impugned judgment is under Section 96 CPC, it is not a judgment under Section 100 CPC. As stated above, adverse possession or ouster is an inference to be drawn from the facts proved (sic) that work is of the first appellate court."

(emphasis supplied)

24. In P.T. Munichikkanna Reddy v. Revamma, (2007) 6 SCC 59, the plaintiff claimed the title based on adverse possession. The court observed:

"5. Adverse possession in one sense is based on the theory or presumption that the owner has abandoned the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. It follows that sound qualities of a typical adverse possession lie in it being open, continuous and hostile. [See Downing v. Bird 100 So. 2d 57 (Fla. 1958); Arkansas Commemorative Commission v. City of Little Rock 227 Ark. 1085: 303 S.W. 2d 569 (1957); Monnot v. Murphy 207 N.Y. 240 100 N.E. 742 (1913); City of Rock Springs v. Sturm 39 Wyo. 494: 273 P. 908: 97 A.L.R. 1 (1929).

6. Efficacy of adverse possession law in most jurisdictions depend on strong limitation statutes by operation of which right to access the court expires through efflux of time. As against rights of the paper-owner, in the context of adverse possession, there evolves a set of competing rights in favour of the adverse possessor who has, for a long period of time, cared for the land, developed it, as against the owner of the property who has ignored the property. Modern statutes of limitation operate, as a rule, not only to cut off one's right to bring an action for the recovery of property that has been in the adverse possession of another for a specified time but also to vest the possessor with title. The intention of such statutes is not to punish one who neglects to assert rights but to protect those who have maintained the possession of property for the time specified by the statute under claim of right or colour of title. (See American Jurisprudence, Vol. 3, 2d, Page 81). It is important to keep in mind while studying the American notion of Adverse Possession, especially in the backdrop of Limitation Statutes, that the intention to dispossess cannot be given a complete go by. Simple application of limitation shall not be enough by itself for the success of an adverse possession claim."

(emphasis supplied)

25. In Halsbury's Laws of England, 4 th Edn., Vol. 28, para 777 positions of person in adverse possession has been discussed and it has been observed on the basis of various decisions that a person in possession has a transmissible interest in the property and after expiration of the statutory period, it ripens as good a right to possession. Para 777 is as under:"**777. Position of person in adverse possession:** 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."

(emphasis supplied)

26. In Halsbury's Laws of England, extinction of title by the effect of the expiration of the period of limitation has also been discussed in Para 783 and once right is lost to recover the possession, the same cannot be revested by any re-entry or by a subsequent acknowledgment of title. Para 783 is extracted hereunder:

"783. Extinction of title: 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 advowson is extinguished. This is subject to the special provisions relating to settled land and land held on trust and the provisions for constituting the proprietor of registered land a trustee for the person who has acquired title against him. The extinguished title cannot afterward be revested either by re-entry or by a subsequent payment or acknowledgment of title. A rent-charge is extinguished when the remedy to recover it is barred."(emphasis supplied)

27. Nature of title acquired by adverse possession has also been discussed in the Halsbury's Laws of England in Para 785. It has been observed that adverse possession leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the rights of others to eject him. Same is a "good title", both at law and in equity. Para 785 is also extracted hereunder:

"**785. Nature of title acquired**: The operation of the statutory provision for the extinction of title is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him.A title gained by the operation of the statute is a good title, both at law and in equity, and will be forced by the court on a reluctant purchaser. Proof, however, that a vendor and those through whom he claims have had independent possession of an estate for twelve years will not be sufficient to establish a saleable title without evidence to show the state of the title at the time that possession commenced. If the contract for purchase is an open one, possession for twelve years is not sufficient, and a full length of the title is required. Although possession of land is prima facie evidence of seisin in fee, it does not follow that a person who has gained a title to land from the fact of certain persons being barred of their rights has the fee simple vested in himself; for, although he may have gained an indefeasible title against those who had an estate in possession, there may be persons entitled in reversion or remainder whose rights are quite unaffected by the statute."

(emphasis supplied)

28. In an article published in Harvard Law Review on "Title by Adverse Possession" by Henry W. Ballantine, as to the question of adverse possession and acquisition of title it has been observed on strength of

various decisions that adverse possession vests the possessor with the complete title as effectually as if there had been a conveyance by the former owner. As held in Toltec Ranch Co. v. Cook, 191 U.S. 532, 542 (1903). But the title is independent, not derivative, and "relates back" to the inception of the adverse possession, as observed. (see Field v. Peoples, 180 Ill. 376, 383, 54 N.E. 304 (1899); Bellefontaine Co. v. Niedringhaus, 181 Ill. 426, 55 N.E. 184 (1899). Cf. La Salle v. Sanitary District, 260 Ill. 423, 429, 103 N.E. 175 (1913); AMES, LECTURES ON LEGAL HIST. 197; 3 ANGLO-AMERICAN ESSAYS, 567). The adverse possessor does not derive his title from the former owner, but from a new source of title, his possession. The "investitive fact" is the disseisin and exercise of possession as observed in Camp v. Camp, 5 Conn. 291 (1824); Price v. Lyon, 14 Conn. Conn. 279, 290 (1841); Coal Creek, etc. Co. v. East Tenn. I. & C. Co., 105 Tenn. 563; 59 S.W. 634, 636 (1900). It has also been observed that titles to property should not remain uncertain and in dispute, but that continued de facto exercise and assertion of a right should be conclusive evidence of the de jure existence of the right.

29. In Lala Hem Chand v. Lala Pearey Lal & Ors., AIR 1942 PC 64, the question arose of the adverse possession where a trustee had been in possession for more than 12 years under a trust which is void under the law, the Privy Council observed that if the right of a defendant owner is extinguished the plaintiff acquires it by adverse possession. In case the owner suffers his right to be barred by the law of limitation, the practical effect is the extinction of his title in favour of the party in possession. The relevant portion is extracted hereunder:"…. The inference from the evidence as a whole is irresistible that it was with his knowledge and implied consent that the building was consecrated as a Dharmasala and used as such for charitable and religious purposes and that Lala Janaki Das, and after him, Ramchand, was in possession of the property till 1931. As forcibly pointed out by the High Court in considering the merits of the case, "during the course of more than 20 years that this building remained in the charge of Janaki Das, and on his death in that of his son, Ramchand, the defendant had never once claimed the property as his own or objected to its being treated as dedicated property." This Board held in ('66) 11 M.I.A. 345: 7 W.R. 21: 1 Suther. 676: 2 Sar. 284 (P.C.), Gunga Gobindas Mundal v. The Collector of the Twenty Four Pergunnahs, at page 361, that if the owner whose property is encroached upon suffers his right to be barred by the law of limitation the practical effect is the extinction of his title in favour of the party in possession." Section 28, Limitation Act, says:"At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished." Lala Janaki Das and Ramchand having held the property adversely for upwards of 12 years on behalf of the charity for which it was dedicated, it follows that the title to it, acquired by prescription, has become vested in the charity and that of the defendant, if he had any, has become extinguished by operation of S. 28, Limitation Act. Their Lordships have no doubt that the Subordinate Judge

would also have come to the conclusion that the title of the defendant has become barred by limitation, had he not been of the view that Lala Janaki Das retained possession of the suit property as trustee for the benefit of the author of the trust and his legal representatives, and that presumably S. 10, Limitation Act, would apply to the case, though he does not specifically refer to the section. For the above reasons, their Lordships hold that the plaintiffs have established their title to the suit property by adverse possession for upwards of 12 years before the defendant obtained possession of it; and since the suit was brought in January 1933, within so short a time as two years of dispossession, the plaintiffs are entitled to recover it from the defendant, whose title to hold it if he had any has become extinct by limitation, in whichever manner he may have obtained possession permissively or by trespass."(emphasis supplied)

30. In Tichborne v. Weir, (1892) 67 LT 735, it has been observed that considering the effect of limitation is not that the right of one person is conveyed to another, but that the right is extinguished and destroyed. As the mode of conveying the title is not prescribed in the Act, the Act does not confer it. But at the same time, it has been observed that yet his "title under the Act is acquired" solely by the extinction of the right of the prior rightful owner; not by any statutory transfer of the estate. In the said case question arose for transfer of the lease formerly held by Baxter to Giraud who for over 20 years had been in possession of the land without any acknowledgment to Baxter who had equitably mortgaged the lease to him. The question arose whether the statute transferred the lease to Giraud and he became the tenant of the landlord. In that context, the aforesaid observations have been made. It has been held what is acquired would depend upon what right person has against whom he has prescribed and acquisition of title by adverse possession would not more be than that. The lease is not transferred under a statute but by the extinguishment of rights. The other person ripens the right. Thus, the decision does not run counter to the various decisions which have been discussed above and deals with the nature of title conferred by adverse possession.

31. The decision in Taylor v. Twinberrow, (1930) 2 K.B. 16 has also been referred to submit to the contrary. In that case, also it was a case of a dispute between the tenant and sub-tenant. The Kings Bench considered the effect of the expiration of 12 years' adverse possession under section 7 of the Act of 1833 and observed that that does confer a title, whereas its effect is merely negative to destroy the power of the then tenant Taylor to claim as a landlord against the sub-tenant in possession. It would not destroy the right of the freeholder, if Taylor's tenancy was determined, by the freeholder, he could eject the subtenant. Thus, Taylor's right would be defeated and not that of the freeholder who was the owner and gave the land on the tenancy to Taylor. In our opinion, the view is in consonance with the law of adverse possession as administered in India. As the basic principle is that if a person is having a limited right, a person against him can prescribe only to acquire that limited right which is

extinguished and not beyond that. There is a series of decisions laying down this proposition of law as to the effect of adverse possession as against limited owner if extinguishing title of the limited owner not that of reversion or having some other title. Thus, the decision in Taylor v. Twinberrow (supra) does not negate the acquisition of title by way of adverse possession but rather affirms it.32. The operation of the statute of limitation in giving a title is merely negative; it extinguishes the right and title of the dispossessed owner and leaves the occupant with a title gained by the fact of possession and resting on the infirmity of the right of others to eject him. Perry v. Clissold (1907) AC 73 has been referred to in Nair Service Society Ltd. v. K.C. Alexander (supra) in which it has been observed that it cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the original owner, and if the original owner does not come forward and assert his title by the process of law within the period prescribed under the statute of limitation applicable to the case, his right is forever extinguished and the possessory owner acquires an absolute title. In Ram Daan (Dead) through LRs. v. Urban Improvement Trust, (2014) 8 SCC 902, this Court has observed thus:"11. It is settled position of law laid down by the Privy Council in Perry v. Clissold 1907 AC 73 (PC) (AC p. 79)

"It cannot be disputed that a person in possession of land in the assumed character of owner and exercising peaceably the ordinary rights of ownership has a perfectly good title against all the world but the rightful owner. And if the rightful owner does not come forward and assert his title by the process of law within the period prescribed by the provisions of the Statute of Limitations applicable to the case, his right is forever extinguished, and the possessory owner acquires an absolute title."

The above statement was quoted with the approval by this Court in Nair Service Society Ltd. v. K.C. Alexander, AIR 1968 SC 1165. Their Lordships at para 22 emphatically stated: (AIR p. 1175)

"22. The cases of the Judicial Committee are not binding on us but we approve of the dictum in Perry v. Clissold 1907 AC 73 (PC).""

33. The decision in Fairweather v. St. Marylebone Property Co. Ltd. (1962) 2 AER 288 (HL) has also been referred, to submit that adverse possession is a negative concept where the possession had been taken against the tenant, its operation was only to bar his right against men in possession. As already discussed above, it was a case of limited right possessed by the tenant and a sub-tenant could only perfect his right against the tenant who inducted him as sub-tenant prescribed against the tenant and not against the freeholder. The decision does not run counter to any other decision discussed and is no help to hold that plaintiff cannot take such a plea or hold that no right is conferred by adverse possession. It may be a negative right but an absolute one.

It confers title as owner in case extinguishment is of the right of ownership.

34. The plaintiff's right to raise the plea of adverse possession has been recognized in several decisions of the High Court also. If such a case arises on the facts stated in the plaint and the defendant is not taken by surprise as held in Nepen Bala Debi v. Siti Kanta Banerjee, (1910) 8 Ind Cas 41 (DB) (Cal), Ngasepam Ibotombi Singh v. Wahengbam Ibohal Singh & Anr., AIR 1960 Manipur 16, Aboobucker s/o Shakhi Mahomed Laloo v. Sahibkhatoon, AIR 1949 Sindh 12, Bata Krista Pramanick v. Shebaits of Thakur Jogendra Nath Maity & Ors., AIR 1919 Cal. 339, Ram Chandra Sil & Ors. v. Ramanmani Dasi & Ors. AIR 1917 Cal. 469, Shiromani Gurdwara Parbhandhak Committee, Khosakotla & Anr. v. Prem Das & Ors., AIR 1933 Lah 25, Rangappa Nayakar v. Rangaswami Nayakar, AIR 1925 Mad. 1005; Shaikh Alimuddin v. Shaikh Salim, 1928 IC 81 (PC).

35. In Pannalal Bhagirath Marwadi v. Bhaiyalal Bindraban Pardeshi Teli, AIR 1937 Nagpur 281, it has been observed that in-between two trespassers, one who is wrongly dispossessed by the other trespasser, can sue and recover possession. A person in possession cannot be dispossessed otherwise than in due course of law and can sue for injunction for protecting the possession as observed in Krishna Ram Mahale (dead) by L.Rs v. Shobha Venkat Rao, (1989) 4 SCC 131, State of U.P. v. Maharaja Dharmander Prasad Singh, (1989) 2 SCC 505.

36. In Radhamoni Debi v. The Collector of Khulna & Ors. (1900) ILR 27 Cal. 943 it was observed that to constitute a possessory title by adverse possession, the possession required to be proved must be adequate in continuity in publicity, and in the extent to show for a period of 12 years.

37. In Somnath Burman v. S.P. Raju, (1969) 3 SCC 129, the Court recognized the right of the plaintiff to such declaration of title and for an injunction. Section 9 of the Specific Relief Act is in no way inconsistent, the wrongdoer cannot resist suit on the ground that title and right are in a third person. Right to sue is available to the plaintiff against owners as well as others by taking the plea of adverse possession in the plaint.

38. In Hemaji Waghaji Jat v. Bhikhabhai Khengarbhai Harijan & Ors., (2009) 16 SCC 517, relying on T. Anjanappa v. Somalingappa (2006) 7 SCC 570, observed that title can be based on adverse possession. This Court has observed thus:

"23. This Court had an occasion to examine the concept of adverse possession in T. Anjanappa v. Somalingappa, 2006 (7) SCC 570.

The court observed that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his title was hostile to the real owner and amounted to denial of his title to the property claimed. The court further observed that: (SCC p.577, para 20)

"20.... The classical requirements of

acquisition of title by adverse possession are that such possession in denial of the true owner's title must be peaceful, open and continuous. The possession must be open and hostile enough to be capable of being known by the parties interested in the property, though it is not necessary that should be evidence of the adverse possessor actually informing the real owner of the former's hostile action.""

At the same time, this Court has also observed that the law of adverse possession is harsh and Legislature may consider a change in the law as to adverse possession.

39. In the light of the aforesaid discussion, when we consider the decision in Gurdwara Sahib v. Gram Panchayat Village Sirthala & Anr., (2014) 1 SCC 669 decided by two-Judge Bench wherein a question arose whether the plaintiff is in adverse possession of the suit land this Court referred to the Punjab & Haryana High Court decision on Gurdwara Sahib Sannauli v. State of Punjab (2009) 154 PLR 756 and observed that there cannot be 'any quarrel' to the extent that the judgments of 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. The discussion made is confined to para 8 only. The same is extracted hereunder:

"4. In so far as the first issue is concerned, it was decided in favour of the plaintiff returning the findings that the appellant was in adverse possession of the suit property since 13.4.1952 as this fact had been proved by a plethora of documentary evidence produced by the appellant. However, while deciding the second issue, the court opined that no declaration can be sought on the basis of adverse possession inasmuch as adverse possession can be used as a shield and not as a sword. The learned Civil Judge relied upon the judgment of the Punjab and Haryana High Court in Gurdwara Sahib Sannuali v. State of Punjab (2009) 154 PLR 756 and thus, decided the issue against the plaintiff. Issue 3 was also, in the same vein, decided against the appellant.

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/defence."

(emphasis supplied)

It is apparent that the point whether the plaintiff can take the plea of adverse possession was not contested in the aforesaid decision and none out of the plethora of the aforesaid decisions including of the larger Bench were placed for consideration before this Court. The judgment is based upon the proposition of law not being questioned as the point was not disputed. There no reason is given, only observation has been recorded in one line.

40. It is also pertinent to mention that the decision of this court in Gurudwara Sahib v. Gram Panchayat Village, Sirthala (supra) has been relied upon in State of Uttarakhand v. Mandir Sri Laxman Sidh Maharaj, (2017) 9 SCC 579. In the said case, no plea of adverse possession was taken nor issue was framed as such this Court held that in the absence of pleading, issue and evidence of adverse possession suit could not have been decreed on that basis. Given the aforesaid, it was not necessary to go into the question of whether the plaintiff could have taken the plea of adverse possession. Nonetheless, a passing observation has been made without any discussion of the aspect that the court below should have seen that declaration of ownership rights over the suit property could be granted to the plaintiff on strength of adverse possession (see: Gurudwara Sahib v. Gram Panchayat, Sirthala). The Court observed:

"24. By no stretch of imagination, in our view, such a declaration of ownership over the suit property and right of easement over a well could be granted by the trial court in the plaintiff's favour because even the plaintiff did not claim title in the suit property on the strength of "adverse possession". Neither were there any pleadings nor any issue much less evidence to prove the adverse possession on land and for grant of any easementary right over the well. The courts below should have seen that no declaration of ownership rights over the suit property could be granted to the plaintiff on the strength of "adverse possession" (see Gurdwara Sahib v. Gram Panchayat Village Sirthala, (2014) 1 SCC 669. The courts below also should have seen that courts can grant only that relief which is claimed by the plaintiff in the plaint and such relief can be granted only on the pleadings but not beyond it. In other words, courts cannot travel beyond the pleadings for granting any relief. This principle is fully applied to the facts of this case against the plaintiff."

(emphasis supplied)

41. Again in Dharampal (Dead) through LRs v. Punjab Wakf Board, (2018) 11 SCC 449, the court found the averments in counterclaim by the defendant do not constitute plea of adverse possession as the point of start of adverse possession was not pleaded and Wakf Board has filed a suit in the year 1971 as such perfecting title by adverse possession did not arise at the same time without any discussion on the aspect that whether plaintiff can take plea of adverse possession. The Court held that in the counterclaim the defendant cannot raise this plea of adverse possession. This Court at the same relied upon to observe that it was bound by the decision in Gurdwara Sahib v. Gram Panchayat Village Sirthala (supra), and logic was applied to the counterclaim also. The Court observed:

"28. In the first place, we find that this Court in Gurdwara Sahib v. Gram Panchayat Village Sirthala, (2014) 1 SCC 669 has held in para 8 that a plea of adverse possession cannot be set up by the plaintiff to claim ownership over the suit property but such plea can be raised by the defendant by way of defence in his written statement in answer to the plaintiff's claim. We are bound by

this view.34. Applying the aforementioned principle of law to the facts of the case on hand, we find absolutely no merit in this plea of Defendant 1 for the following reasons:

34.1. First, Defendant 1 has only averred in his plaint (counterclaim) that he, through his father, was in possession of the suit land since 1953. Such averments, in our opinion, do not constitute the plea of "adverse possession" in the light of law laid down by this Court quoted supra.

34.2. Second, it was not pleaded as to from which date, Defendant 1's possession became adverse to the plaintiff (the Wakf Board).

34.3. Third, it was also not pleaded that when his adverse possession was completed and ripened into the full ownership in his favour.

34.4. Fourth, it could not be so for the simple reason that the plaintiff (Wakf Board) had filed a suit in the year 1971 against Defendant 1's father in relation to the suit land. Therefore, till the year 1971, the question of Defendant 1 perfecting his title by "adverse possession" qua the plaintiff (Wakf Board) did not arise. The plaintiff then filed present suit in the year 1991 and, therefore, again the question of perfecting the title up to 1991 qua the plaintiff did not arise."

(emphasis supplied)

42. In State of Uttarakhand v. Mandir Shri Lakshmi Siddh Maharaj (supra) and Dharampal (dead) through LRs v. Punjab Wakf Board (supra), there is no discussion on the aspect whether the plaintiff can later take the plea of adverse possession. It does not appear that proposition was contested and earlier binding decisions were also not placed for consideration of the Court. As there is no independent consideration of the question, we have to examine mainly the decision in Gurdwara Sahib v. Gram Panchayat Village Sirthala (supra).

43. When we consider the decision rendered by Punjab & Haryana High Court in Gurdwara Sahib Sannauli (supra), which has been referred by this Court in Gurudwara Sahib v. Gram Panchayat, Sirthala (supra), the following is the discussion made by the High Court in the said decision:"10. I have heard learned Counsel for the parties and perused the record of the appeal. I find force in the contentions raised by learned counsel for the respondents. In Bachhaj Nahar v. Nillima Mandal and Anr. J.T. 2008 (13) S.C. 255 the Hon'ble Supreme Court has authoritatively laid down that if an argument has been given up or has not been raised, same cannot be taken up in the Regular Second Appeal. It is also relevant to mention here that in Bhim Singh and Ors. v. Zile Singh and Ors., (2006) 3 RCR Civil 97, this Court has held that no declaration can be sought by a plaintiff about ownership based on adverse possession as such plea is available only to a defendant against the plaintiff. Similarly, in R.S.A. No. 3909 of 2008 titled as State of Haryana v. Mukesh Kumar and Ors. (2009) 154 P.L.R. 753, decided on 17.03.2009 this Court has also taken the same view as aforesaid in Bhim Singh's case (supra)."

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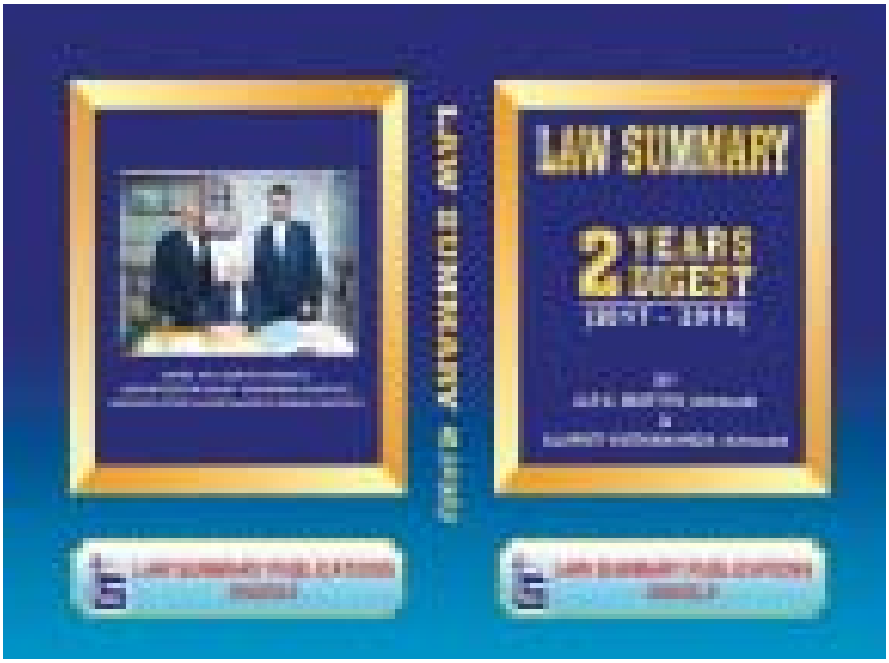


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