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## Adverse Possession: Right or Theft? - Analysis of Property Law

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*The notion of adverse possession was historically associated with land being seized by force or captured by feudal lords, barons, and conquerors from the poor who were unable to preserve their claim and claim to such territories. This was usually done in the past when one nation or ruler invaded another, and then simply took the conquered territory from the original and genuine owner, although this notion has evolved with time. Adverse possession is a more than a century-old legal notion in India, and it is essentially founded on three key ideas. To begin with, there are conflicting ownership rights between the real owner and the person in charge of the property. The right of a person who takes care of the land and makes the greatest and greatest use of it will triumph over the right of a person who does not take care of the land. The author seeks to critique the concept of adverse possession and its implementation in India. A critical analysis of the relevant provisions of statutes relating to adverse possession accompanied by a study of its origins and criticisms thereof will help the reader better understand its place in the Indian legal regime. This is precisely what this paper shall do.*

**Keywords:** *adverse possession, right to property, limitation period, land owner, trespassing.*

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### INTRODUCTION

Adverse possession in simple terms is a kind of possession where a person/trespasser not having title to land, occupies it for a long period without the permission of the legal owner, and subsequently gains ownership of that land due to the legal owner's inaction. In a very

brief reading of the concept, it becomes evident that such a law basically converts the illegality of certain actions to legal. A person essentially guilty of a tort gets the benefit of the title of the land he encroaches, in the eyes of law. However, such an unconvincing interpretation of law demands a detailed look into its objects and an analysis of the very principles where it finds its basis, to ensure if the law really is as archaic and unjustifiable as it seems at the first glance. This paper will look at the various aspects of adverse possession as it is implemented in India, in light of its need and propensity to be misused given the socio-political scenario in the country, with the help of various judicial pronouncements.

## HISTORY OF THE CONCEPT

The legal doctrine finds its origins in English law and dates as far back as the thirteenth century in the statute of Westminster.<sup>1</sup> It originated from the concept of 'Seisin', a feudal law term that came to mean a type of possession that gained legitimacy with the passage of time.<sup>2</sup> The object of this early doctrine was to prevent legal property disputes that were not only expensive for the state but also time consuming.<sup>3</sup> Additionally, it also ensured that land was not wasted by their owners as they were made to monitor the same under fear of losing their proprietary rights. This was subsequently adopted by the United States, which mirrored the English-law counterpart, so far as having the same period of limitation (twenty years). As property rights developed and the land became scarce, changes were made to the law pertaining to adverse possession to adapt to the changing times. Such laws were also used by the government of the United States to claim lands that legally belonged to Native Americans, a ground on which the law is still criticized today. Over time the courts in both countries started looking at this concept negatively in light of the expanding jurisprudence of human rights, and other factors which will be talked about in the later sections of this paper.

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<sup>1</sup> Pradeep Kumar Mani, 'Adverse Possession: A Critique' 43 (*Ujala*) <<https://ujala.uk.gov.in/files/ch06.pdf>> accessed 12 May 2021

<sup>2</sup> 'Adverse Possession' (*Britannica Encyclopedia*) <<https://www.britannica.com/topic/adverse-possession>> accessed 12 May 2021

<sup>3</sup> Mani (n 1)

## THE LAW AS INTERPRETED IN INDIA

Indian property law has had its foundations in colonial legislation and the concept of adverse possession is no exception. The laws relating to this concept are contained in the Indian Limitation Act, 1963. The following are sections of the act are relevant to the discussion –

Section 3 – entails that a suit cannot be filed once the limitation period for the said suit has ended, extinguishing the right of the property owner (in this case) to file a suit.

Section 27 – expands upon the consequences of not filing a suit for possession of the property, by extinguishing the right to ownership of such property.

Article 64 – prescribes a limitation of 12 years for a suit of possession based on previous possession and not on title, when the plaintiff has been dispossessed and the period of limitation starts from the date of dispossession.

Article 65 – prescribes a limitation of 12 years for a suit of possession of immovable property where the period of limitation starts from the date of adverse possession which is hostile towards the plaintiff.

Article 112 – provides that for any suit by the state or central government, the period of limitation for a similar suit would be 30 years instead.

It becomes clear now that a reading of Section 3 and Section 27 along with one of the three above mentioned Articles is where we derive the legal right of adverse possession in Indian law. Together these laws prescribe that when a cause of action exists to file a suit of possession and if the suit is not filed within the limitation period prescribed, not only will the right to file a suit come to an end but also the right to such property.<sup>4</sup> The title of the property, in this case, will transfer onto the possessor and his possessory rights will transform into ownership rights. The possession only needs to be open and without concealment. It need not be as effective so as to bring it to the specific knowledge of the actual owner.<sup>5</sup> It must however be hostile to the

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<sup>4</sup> *Villiamma Champaka v Sivathanu Pillai* (1964) 1 MLJ, 161 (FB)

<sup>5</sup> *Kshitij Chandra Bose v Commissioner of Ranchi* AIR 1981 SC 707

owner,<sup>6</sup> adequate in continuity,<sup>7</sup> and comprise *Animus Possidendi*.<sup>8</sup> In simpler terms, the possession must be long term and adverse to the rights of the true owner, and there must be an intention to possess.

The concept was succinctly described by the Judicial Committee of the Privy Council in *Perry v. Clissold*<sup>9</sup>:

*“It cannot be disputed that a person in possession of land in the assumed character of the 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.”*

This statement of law was later adopted by the Apex court in India in *Nair Service Society Ltd. v. K.C. Alexander*<sup>10</sup>. The three judge bench stated that:

*“The cases of the Judicial Committee are not binding on us. But we approve of the dictum in 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.”*

Eventually, the Supreme Court elucidated the meaning of adverse possession perfectly in the Indian context. One such extract can be taken from the relatively recent case of *Amarendra Pratap Singh v. Tej Bahadur Prajapati*<sup>11</sup> to perfectly summarise the meaning as well as the essentials demanded by the law in India:

*“A person, though having no right to enter into possession of the property of someone else, does so and continues in possession setting up title in himself and adversely to the title of the owner,*

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<sup>6</sup> *Premendu Bhushan Mondal v Sripati Ranjan Chakravarty* AIR 1976 Cal 55

<sup>7</sup> *S M Karim v Bibi Sakina* AIR 1964 SC 1254, para 5

<sup>8</sup> *Annakili v A Vedanayagam* AIR 2008 SC 346, para 22

<sup>9</sup> *Perry v Clissold* (1907) AC 73, para 79

<sup>10</sup> *Nair Service Society Ltd v KC Alexander* AIR 1968 SC 1165

<sup>11</sup> *Amarendra Pratap Singh v Tej Bahadur Prajapati* (2004) 10 SCC 65

*commences prescribing title into himself and such prescription having continued for a period of 12 years, he acquires title not on his own but on account of the default or inaction on part of the real owner, which stretched over a period of 12 years results into extinguishing of the latter's title."*

## JUSTIFICATION

The rationale for the concept rests on the belief that owing to the scarcity of land, its title must not remain in doubt for long. Society will benefit from one making use of land that is left idle by another, and the first person, in this case, must be protected if he has been the occupant of the land for a considerable period.<sup>12</sup> The law only protects those who are vigilant, not those that sleep over their rights.<sup>13</sup> Jurist Henry W. Ballantine describes the purpose of adverse possession as to "quite all titles which are openly and consistently asserted, to provide proof of meritorious titles and correct errors in conveyancing".<sup>14</sup> In conclusion, the real aim of the law is neither to punish the owner nor to reward a trespasser, but to rid the society from being bothered by disputes for eternity. Hence the stipulated limitation provides for a time period for quarrels and disputes to be settled within.<sup>15</sup>

One aspect specific to India is the lack of practical documentation and digitalization of land records. The multitude of people in the country, especially in rural areas, have legitimately owned land for multiple generations whether by inheritance or purchase, but without proper documentation and recognised title deeds. In the absence of such a law, such people will become vulnerable to the authoritative actions of the state. The Bodo tribe's dislocation from the land they had traditionally owned<sup>16</sup> is a glaring example of the possible consequences of the complete abolition of adverse possession.

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<sup>12</sup> William B Stoebeck, 'The Law of Adverse Possession in Washington' (1960) 35(1) Washington Law Review 53

<sup>13</sup> Team @Law Times Journal, 'Vigilantibus non dormientibus jura subveiunt' (Law Times Journal, 7 October 2019) <<https://lawtimesjournal.in/vigilantibus-non-dormientibus-jura-subveniunt/>> accessed 18 May 2021

<sup>14</sup> Henry W Ballantine, 'Title by Adverse Possession' (1918) 32(2) Harvard Law Review 135

<sup>15</sup> Mani (n 1)

<sup>16</sup> Chandan Kumar Sharma, 'Assam: Tribal Land Alienation' (2001) 36(52) Economic and Political Weekly

Another line of argument in favour of such a law is squatters' rights in lieu of social justice. It is an undisputable fact that a major portion of India's population lives in slums and *jhuggis* without any title to that land. The state must consider the welfare of these people before instituting any amendments to the law of adverse possession. It is further strengthened by the fact that the UN has established the right to housing as an international human right<sup>17</sup> and the apex court in India has also held the right to shelter as a fundamental right.<sup>18</sup>

## CRITICISM

Despite the numerous justifications, the fact is that the law seeks to punish non-diligent owners of land who fail to ascertain their rights within a stipulated time period but conversely also rewards any trespasser or wrong-doer, provided that his illegal possession satisfies the time period. This forms the basis of the modern criticism of the concept of adverse possession which is often referred to by legal scholars across the globe as legalised land theft and a means of unjust enrichment. At the forefront of such criticism in India have been two leading Supreme Court judgements, *Hemaji Waghaji v. Bikhabhai Khengarbhai*<sup>19</sup> and *State of Haryana v. Mukesh Kumar*<sup>20</sup>.

Immoral Narrative – In the *Hemaji* case, the Supreme Court borrowed language from the High Court of England in *Pye Ltd. v. Graham*<sup>21</sup> to describe this law as irrational, illogical, and disproportionately harsh towards the true owner and “a windfall for dishonest a person who had taken illegal possession of the property”. Moreover, in the *Mukesh Kumar* case, the court deemed the law to be, “morally and logically speaking, baffling”. It further went on to state the dangerous precedent that such a law can and has set in the country where people attempt to attain ownership of land with a dishonest intent via such a law. The worst of such cases is when the very protectors of law become grabbers of land, leaving the victims of such acts without any protection or viable remedy. This trend of individuals asserting interest over land

<sup>17</sup> Brian Gardiner, 'Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws' (1997) 8(1) *Indiana International & Comparative Law Review* 120

<sup>18</sup> *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180

<sup>19</sup> *Hemaji Waghaji v Bikhabhai Khengarbhai* AIR 2009 SC 103

<sup>20</sup> *State of Haryana v Mukesh Kumar* 2011 (10) SCC 404

<sup>21</sup> *Pye Ltd v Graham* (2000) 3 WLR 242

which they have possessed because it remains out of the attention of the legal owner not only helps them evade eviction but also makes their claim legal, which was initially appropriated illegally. It is indeed a dangerous narrative that needs an immediate fresh look and due deliberation.

Human Rights Angle - It is also pertinent to note that while the Indian law on adverse possession had developed from English laws, the former has seen very few changes to it since its inception in the country whereas the latter has been changed and amended substantially to reflect the existing socio-political climate, especially in view of the fact that property has been adopted as a human right by the European Commission.<sup>22</sup> The same was most recently reiterated in the Indian context by the Supreme Court in *Vidaya Devi v. State of Himachal Pradesh*<sup>23</sup>. Right to property might not be a fundamental right in the country (post the forty fourth amendment)<sup>24</sup> but it continues to be a human right in a welfare state and a constitutional right guaranteed under Article 300 of the Constitution. No one can be deprived of his/her property except in accordance with a procedure established by law, but what's questionable is the fact that if the procedure laid down in the adverse possession laws really a fair and just procedure?

Environmental Criticism - Another popular criticism of the concept comes from environmentalists. Efforts to preserve wild lands through private ownership have only accelerated in the past twenty years. Various conservation organisations and environmentally concerned citizens with adequate resources have acquired huge spaces of natural land to protect their natural inhabitants. Adverse possession threatens the existence and integrity of these privately owned sanctuaries. The law is a pre-development nineteenth century ideology that encourages the consumption of land and poses a threat to environmental concerns. Hence, it is fundamentally antagonistic to the twentieth century concerns for preservation.<sup>25</sup>

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<sup>22</sup> Waghaji (n 19)

<sup>23</sup> *Vidaya Devi v State of Himachal Pradesh* Civil Appeal No 6061 of 2020

<sup>24</sup> Constitution (Forty-Fourth Amendment) Act 1978

<sup>25</sup> John G Sprankling, *Environmental Critique of Adverse Possession*, pg.817

Shield or a Sword – One essential adverse possession in India was the fact that it could only be used as a shield and not a sword. What this meant was that the person in possession could not seek a declaration of title even after the adverse possession had matured into ownership. Only if proceedings were filed against him could he use this as a shield/defence.<sup>26</sup> This was in line with the negative view the courts had of this concept at the time as it pacified the law so as to not be used as a sword instead. However, this was only the position up until the *Ravinder Kaur* judgement<sup>27</sup>, which held that once the title has been perfected by adverse possession, it can be used both as a sword or a shield. This has created a situation where the doctrine is strengthened by having a positive dimension to it by enabling it to be used offensively to file suits, which is not desirable and is contradictory to the view of the court in judgements like the *Hemaji* case (supra) and *Mukesh Kumar* case (supra).<sup>28</sup> This also meant an increase in the application of this principle as it is no more only defence and thus an increased number of property disputes, which is again contradictory to the very object of such a law which is to reduce these disputes instead.

## CONCLUSION

It is clear that there is an increasingly negative view of adverse possession amongst the general public as well as the judiciary. At the same time, it is difficult to argue for its complete abolition in a country like India. What is needed instead is a fresh look upon the law by the legislation so as to make it less harsh and fairer for the title owners of property without disregard of the dependency of the rural population on this concept. These amendments must be in line with the human rights and socio-political advancements that have taken place since its first inception and must consider the points made by the apex court in the plethora of case law on the subject. Changes might be of extreme urgency, but they themselves cannot be extreme in nature, or else they will lead to more issues than they sought to extinguish.

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<sup>26</sup> *Gurudwara Sahib v Gram Panchayat Village Sirthala and Another* 2014 (4) Mh LJ 74

<sup>27</sup> *Ravinder Kaur Grewal v Manjit Kaur* (2019) 8 SCC 729

<sup>28</sup> Milind Sharma, 'Comparative Study of Adverse Possession in India: Necessary Shield or Dangerous Sword?' (1994) 79(4) Cornell Law Review 4

## SUGGESTIONS

Given the state of affairs pertaining to land ownership records and the interests of vulnerable groups, it can be argued that adverse possession is a necessary evil that cannot be completely abolished.<sup>29</sup> Keeping this in mind various suggestions were made by the apex court which is worth considering. The first of these is for the parliament to consider abolishing adverse possession in '*bad faith*' i.e., adverse possession asserted via intentional trespassing.<sup>30</sup> While some claims based on such law may deserve to be recognized, it can at least be ensured that possession based on dishonesty and foul means does not receive the same recognition in law. Only those with established attachments to the land via honest means should be entitled to relief. However, one must question if there can be a straight-forward way of separating cases of 'good faith' occupations from those done with a 'bad/dishonest faith' considering the law itself requires the possession to be 'hostile'. Another means of ensuring that the individuals entitled to relief under this law are not trespassers but people who have lived on the land for generations is simply increasing the limitation period from 12 years to a longer duration of 30-50 years. This would also mean that only the most passive and unprotected owners lose their title. Lastly, there could be a set price that has to be paid to acquire title by adverse possession, which will be less than the market rate, to make the law less harsh towards the non-diligent owners. In conclusion, the legislation will have to strike a balance between all the competing considerations while amending any law relating to adverse possession.

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<sup>29</sup> *Ibid* 9

<sup>30</sup> *Waghaji* (n 19)