

COMPARATIVE STUDY OF ADVERSE POSSESSION IN INDIA: NECESSARY SHIELD OR A DANGEROUS SWORD?

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ABSTRACT

Adverse possession in simple words is a kind of possession of the land where a person not having legal title to the land enters and occupies the land for long period with no continuing permission of the legal owner and the true owner subsequently loses his ownership rights after a legally permissible period of his inaction in recovering the possession from the possessor. This paper aims to analyse the concept of adverse possession in India by carrying out a comparative study with foreign jurisdictions.

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INTRODUCTION

In the Indian context, a close analysis of two significant judgements is required - *Ravinder Kaur Grewal vs Manjit Kaur*¹ and *State of Haryana vs Mukesh Kumar & Ors.*² Both cases take up seemingly contradictory opinions of the concept of adverse possession. While the *Mukesh Kumar* judgement called adverse possession an 'archaic' concept which legalizes the title of the possessor, the premise of which is an illegal act. The *Ravinder Kaur* judgement held that section 65 of the Limitation Act not only enables a person to set up a plea of adverse possession as a shield as a defendant but also allows a plaintiff to use it as a sword to protect the possession of immovable property or to recover it in case of dispossession. These judgements in question when analysed will hopefully reveal the answers to the following questions: -

- 1) How useful is the concept of adverse possession in the Indian context?
- 2) Will the *Ravinder Kaur* judgement have potential negative consequences for Indian courts?
- 3) What possible recommendations can be made to clarify the legal position regarding adverse possession in Indian law?

The questions will help in yielding possible solutions or answers. The criticism of adverse possession in modern times is partly ethical because of its foundations in tortious act of trespass. It is also important to understand the idea of adverse possession in the context of land rights of minorities in India, especially tribal groups and the changing relationship between them and the state and the goals of nation building and justice. In 2012, considering the *Mukesh Kumar* judgement, the Law Commission of India published a public questionnaire inviting responses as to whether the law regarding adverse possession should be abolished or not. However, no recommendations have been made by the Law Commission yet with regards to the same. By carrying out a comparative analysis with foreign jurisdictions, this paper will also highlight how the doctrine has been treated internationally which can provide insights into Indian law's contemporary jurisprudence and issues. Thus, the scope of this paper acquires practical, legal, historical, and sociological significance as to what could be the key implications of the law as it exists in a country like India.

¹ *Ravinder Kaur Grewal v. Manjit Kaur*, (2019) 8 SCC 729.

² *State of Haryana v. Mukesh Kumar and Others*, (2011) 10 SCC 404.

Adverse Possession is a legal principle by virtue of which a person acquires the legal title of a property based on continuous possession under a given statute of limitation. The principle was evolved in order to settle certain specific claims surrounding title disputes when land registration was not widespread and squatter rights deserved recognition. Under Indian law, adverse possession is recognised under Section 65 of the Limitation Act, 1963 where it is stated that after a period of 12 years of uninterrupted use, the property becomes adverse to the possessor and suit for possession of immovable property on the basis of title becomes barred by limitation.³The meaning of adverse possession has been elucidated by the Supreme Court in the case of *Amarendra Pratap Singh v. Tej Bahadur Prajapati*⁴ where the court opined-

*“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, 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.”*⁵

Thus, the major determinants in a claim of adverse possession are the period of use, the nature of use and failure on part of the owner to take suitable action to evict the possessor. However, mere uninterrupted use does not confer adverse possession. The apex court has clarified this in the decision of *S.M. Karim v. Bibi Sakina*⁶. The court held that, “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. 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.”⁷ Uninterrupted possession in the ordinary sense does not guarantee a claim. The point at which possession becomes adverse is thus critical and has to be established.

³ The Limitation Act, 1963, S. 65, No. 36, Acts of Parliament (1963).

⁴ *Amarendra Pratap Singh v. Tej Bahadur Prajapati* (2004) 10 SCC 65.

⁵ Una woods, *The English Law on Adverse Possession: A Tale Of Two Systems*, 38 Comm. L. World. Rev.24, 49 (2009).

⁶ *S.M. Karim v. Bibi Sakina*, (1964) 6 SCR 780.

⁷ *Supra* note at 5.

The legitimacy of adverse possession has been called into question in recent years. This criticism has been two-pronged, based on the usefulness of the doctrine and its ethical foundations. Thus, an analysis is needed to understand how courts across different countries have dealt with the issue of adverse possession in order to understand the key issues surrounding the current law as it exists in India. In the present times land rights of various participants in society must be balanced against the rule of law in the interest of justice and fairness. Recent judgements by the Supreme Court create a sense of confusion regarding the status of adverse possession and can create hurdles in having a clear law which either abolishes it or keeps it as legitimate. The *Mukesh Kumar* judgement held the basis of adverse possession to be irrational, illogical and without reason and urged for a fresh look at the law.⁸ The *Ravinder Kaur* judgement on the other hand, held that once a title has been perfected by way of adverse possession, it can be used as a sword by the plaintiff or a shield by the defendant within the ken of section 65 of the limitation act, 1963.⁹ The latter thus creates a situation where the doctrine is strengthened by having a positive dimension to it by enabling it to be used as a ‘sword’, which is not desirable and is contradictory to the former case. A comparative analysis with foreign court decisions and jurisprudence can enable us to understand these judgements and the doctrine’s relevance in India with greater clarity.

THE POSITION IN FOREIGN JURISDICTIONS

- England

The legal doctrine of adverse possession has its origins in English common law. An important case which deserves to be discussed is *Littledale v. Liverpool College*¹⁰. The case was one of the first to discuss the idea of *animus possidendi* i.e. intention to possess. Here the plaintiff had erected gates at both ends of a particular strip of land owned by the defendants which connected the plaintiff’s field to a road. These facts were significant in the plaintiff’s claim of adverse possession of the strip of land. However, the Court of Appeals found in favour of the defendants. One of the significant paragraphs of the judgement read:

“The defendants could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi – i.e. occupation with the intention of excluding the owner as well as other people. The evidence that the plaintiffs never had any such intention is

⁸ State of Haryana v. Mukesh Kumar and Others (2011) 10 SCC 404.

⁹ Ravinder Kaur Grewal v. Manjit Kaur (2019) 8 SCC 729.

¹⁰ Littledale v. Liverpool College, (1900) 1 Ch 19.

*extremely strong... when possession or dispossession has to be inferred from equivocal acts, the intention with which they were done is all-important.”*¹¹

This doctrine of adverse possession and how the law developed in England can be traced to influences from German legal scholarship according to Oliver Radley – Gardner.¹² Before that there was no known presence of this principle in English law before *Littledale*. In the case of *Pye v. Graham*, the court re-affirmed this idea, stating that the doctrine of adverse possession always incorporated this mental element of *animus possidendi*.¹³ This was one of the last cases before the Land Registration Act, 2002 which made it mandatory for adverse possessors to register their land with the land registry.¹⁴ This gave the opportunity to the title holder to object to the registration. The legislation aims to curb the practice of adverse possession in future cases in order to prevent decisions like the ones taken in *Pye v. Graham*. Thus, there appears to be an effort to counter its prevalence.

- United States Of America

In the United States, the law has had a precarious history leading to many scholars to criticize the doctrine based on a number of reasons. While its foundations are rooted in English law as well, the law has had an interesting history behind it. John Sprankling has argued that the doctrine had its origins in feudalism with the idea tied to possession rather than the modern notion of title.¹⁵ He further says that the courts of the new United States initially followed the limitations model but by the nineteenth century these courts had begun to reshape the doctrine into the mould of the development model.¹⁶ In Sprankling's understanding under the "limitations model," a person who continuously occupies land in an open, notorious and hostile manner gives the owner constructive notice of adverse title claim; the dilatory owner loses his right to sue in ejectment, regardless of the merits of the occupant's claim.¹⁷ The developmental model, in contrast, allows sporadic, inconspicuous activities to sufficiently create title making it far easier to adversely possess wild land than developed land. This developmental model has been subjected to criticism because of the environmental degradation caused by it. This was primarily because it encouraged the exploitation of sparsely populated regions. This has shown by Sprankling who has further

¹¹State of Haryana v. Mukesh Kumar and Others, (2011) 10 SCC 404..

¹² Civilized squatting p 747

¹³ J A Pye (Oxford) Ltd. V Graham, 1 AC 419 at 435 (2004).

¹⁴ Land Registration Act, S.97 (2002).

¹⁵ John G. Sprankling, An Environmental Critique of Adverse Possession, 79 Cornell L. Rev. 816, 822 (1994).

¹⁶ *Id.*

¹⁷ *Supra.* note at 15.

argued that American adverse possession law is fundamentally hostile to the private preservation of wild lands.¹⁸

Adverse possession has also been criticized on the ground that land to which Native Americans have legal title has been taken over by governments and that the plea of adverse possession cannot justify this encroachment as governments are not allowed to take such pleas.¹⁹ Nevertheless, it continues to exist as a legal doctrine in American law. This has also led to some people call into question its usefulness. Jeffrey Evans Stake has argued that even though modern technological innovation and record keeping have undermined the doctrine of adverse possession but a case can still be made with regard to adverse possession and its foundations in dictums of loss aversion.²⁰ Furthermore, Una Woods has argued that the emergence of marketable title legislation has resulted in the resolution of title defects without resorting to adverse possession.²¹ Hence we see that there has been a concerted effort towards tackling adverse possession in these countries.

THE POSITION IN INDIA: A TALE OF TWO JUDGEMENTS

Indian Property law has its foundation in colonial legislation which has gone through numerous changes and new acts which have overruled old ones. Acts like the Transfer of Property Act (1882), the Registration Act (1908) and Indian Stamp Act (1899) govern inter-vivos (between living persons) property transfers. These laws are based upon the jurisprudence evolved in England. The one we are concerned with is the Limitations Act, 1963, which replaced the Limitation Act of 1908. The 1908 act was enacted after the initial 1859 act was repealed in 1871, 1877 and 1908 and incorporated jurisprudence based on English law as well.

Two recent judgements given by the Supreme Court will shed light on the precarious position Indian law on adverse possession is stuck in. The first case is the two-judge bench decision in *State of Haryana v. Mukesh Kumar and Ors.*²² The state claimed ownership of a particular piece of land belonging to the defendant which it had possessed for over 55 years which it claimed as its own based on adverse possession because they had no title. The

¹⁸ *Id.*

¹⁹ Clifford Fisher & Thomas Fisher, Adverse Possession in Context of Native Americans, 1 Amer. Res. J Hist. & Culture 35,40 (2015).

²⁰ Jeffrey Evans Stake, The Uneasy Case for Adverse Possession, 89 Geo. L.J. 2419, 2473 (2001).

²¹ *Supra* note at (5).

²² *State of Haryana v. Mukesh Kumar and Others*, (2011) 10 SCC 404.

revenue records showed that the land belonged to the defendant. The court found in favour of the defendant and held the basis of adverse possession to be illogical and disproportionate.²³ The court reasoned that though the law was obtained from the British, English courts themselves were taking a very negative view of the doctrine and the law there has been substantially amended keeping into consideration the views the European commission has adopted regarding property as a human right.²⁴ The court noted that the expanding dimensions of human rights have become so wide that they include property disputes as well which has led to European courts of Human Rights expanding its jurisprudence and English courts taking a very negative view of adverse possession.²⁵ To support this claim, the court partly relied upon the judgement in *Pye v. Graham*, where the case was ruled in favour of the Grahams but the court noted the draconian nature of the law.²⁶ The court made several observations regarding adverse possession and how it should be struck down or at the very least, the law should be amended so as to negate its effects. The court opined that adverse possession allows a trespasser- a person guilty of a tort, or even a crime, in the eye of the law- to gain legal title to land which he has illegally possessed for twelve years.²⁷ This was noted as morally baffling with the court further stating that this outmoded law essentially asks the judiciary to place its stamp of approval upon conduct that the ordinary citizen would find reprehensible.²⁸ The court further observed that the parliament should consider abolishing the law of adverse possession or should substantially amend it so as to weaken the law. The court observed that this could be achieved by abolishing 'bad faith' adverse possession based on intentional trespassing²⁹, including compensation for the original title holder³⁰ and even extending the period of limitation from 12 years to about 30 or 50 years.³¹ All these suggestions if incorporated, could act as deterrents in the usage of the doctrine of adverse possession by litigants. The court's jurisprudence was thus in tune with contemporary understanding of the law and how the law was being interpreted in other countries.

²³ *Id.*

²⁴ Tilahun Weldie Hindeya, The Right to Self-Determination under the Ethiopian Constitution: A Legal Tool for Indigenous Peoples' Protection against Land Alienation? 64 J. African L. 359, 383 (2019).

²⁵ State of Haryana v. Mukesh Kumar and Others, (2011) 10 SCC 404 (34).

²⁶ *Supra* note 13.

²⁷ State of Haryana v. Mukesh Kumar and Others, (2011) 10 SCC 404 (44).

²⁸ *Id.*

²⁹ Neeraj Mishra, Computerisation of Land Records, 38 EPW 1921, 1921(2003).

³⁰ *Supra* note at 25.

³¹ *Supra* note at 29.

Following the recommendations made by the court in *Mukesh Kumar* to reconsider the law around adverse possession, the Law Commission drafted a questionnaire seeking responses and recommendations regarding what should be done to deal with it. It also asked for suggestions regarding possible reforms.³² However, there has been little discussion afterwards which has led to the law under Section 65 of the Limitation Act to persist as it is. However, in the three-judge bench decision in *Ravinder Kaur Grewal v. Manjit Kaur*³³, the Supreme court took a radically different view in its interpretation of adverse possession specifically under the limitation clause under Section 65 of the 1963 Act. The court held that a person in possession cannot be dispossessed except by due procedure of law and once the possessor has perfected their title by adverse possession and the twelve year period is over, the owner loses the right to eject the possessor who in turn acquires right, title and interest possessed. The court further held that this plea of adverse possession can be used by the plaintiff as a 'sword' or the defendant as a 'shield' to claim title of the possessed property.³⁴ This articulation of the use of the plea of adverse possession as a sword and shield prima facie appears as bad law given its contrary position to the one adopted in *Mukesh Kumar*. It lays precedent for people to claim stake to the land which they have possessed and just because an owner does not file a suit against them, they have the right to use this law to not only shield themselves from possible eviction but to actually use it as a positive force to claim the title of land which they had initially acquired illegally. The judgement was given by a three-judge bench which means that is likely to stay on as the law for a while unless it is overruled by a larger bench.

ANALYZING THE RELEVANCE OF ADVERSE POSSESSION

The judgement in *Ravinder Kaur* raises several questions regarding the future of the doctrine of adverse possession in India. It is difficult to argue that the judgement is completely bad in law as it is not in sync with how the jurisprudence of this aspect of property law has evolved. In India, the socio-political conditions are different, complicated and more nuanced as compared to England and the USA. There is a greater presence than ever of documentation among landowners which is increasingly making it easier for identification of title holders and solving the legal issues surrounding property law. Yet, India

³²Consultation Paper-cum-Questionnaire on Adverse Possession of Land/Immovable Property, Law Commission Reports (10)

³³ *Ravinder Kaur Grewal v. Manjit Kaur*, (2019) 8 SCC 729.

³⁴ *Id.*

remains a highly unequal society where most people do not have such documentation. And some of these vulnerable sections usually end up losing their land due to authoritarian actions of the state. Assam has experienced an influx of infiltrators and government action from the south and the north-west which has led to a significant proportion of the Bodo tribe to migrate to remote places, losing access to land they have traditionally owned.³⁵ Government efforts to promote development and industrialization has also resulted in the displacement of thousands of people from Odisha. People in Kashipur, Odisha have been made victims of forced displacement for the development of the Indravati Hydro Project.³⁶ As we saw in the case of *Mukesh Kumar*, governments do try to claim the title of land by way of adverse possession. However, the government's claim to indigenous land has been treated as not only unethical in certain cases but unconstitutional. Tilahun Windie Hindeya has argued that under the Ethiopian constitution, land acquisition by the government in practice is inconsistent with the right to self-determination given to indigenous groups by the constitution of Ethiopia.³⁷ He further argues that this right to self-determination is guaranteed under article 39 of the Ethiopian constitution and have to be read in light of international human rights instruments which the country has adopted. Similarly, the article 19(5) imposes reasonable restrictions in order to promote and protect the interests of the Scheduled tribes in India.³⁸ In practice, however, the Indian state like Ethiopia has subverted the land rights of tribals in numerous ways.

There is also the issue with regards to the digitization of land records which has been implemented in a largely ineffective manner allowing gaps to seep in which has contributed towards arduous litigation and title suits to determine the title of lands. Neeraj Mishra, a research scholar, has analysed the impact of the scheme of computerisation of land records (CLR) that was started in 1988-89. He has argued that the scheme has not achieved any remarkable progress.³⁹ This is primarily because of the large amount of investment needed and the technological constraints such as the purchase of computers.⁴⁰ Given the state of affairs regarding land ownership and keeping in mind the interests of vulnerable groups, it is argued that adverse possession is a necessary evil that cannot be outrightly abolished in Indian law. While the doctrine seems morally and legally reprehensible, the focus should

³⁵ Chandan Kumar Sharma, Assam: Tribal Land Alienation: government's Role, 36 EPW 4791, 4795(2001)

³⁶ Debaranjan Sarangi, Orissa: Surviving Against Odds, 37 EPW 3239, 3241 (2002).

³⁷ *Supra* note at 25.

³⁸ CONST IND. ART. 19.

³⁹ Neeraj Mishra, Computerisation of Land Records, 38 EPW 1921, 1921(2003).

⁴⁰ *Id.*

rather shift on promoting an infrastructure which standardizes land records. This can pave the way for the doctrine to be eventually rendered toothless. If the constitution in theory and practice gives enough protection to the interests of vulnerable groups, the abolishment can be considered. Attention must be given to state action. Governments should be prevented from seeking titles of land, based on adverse possession because the potential of authoritarian misuse is extremely high. This is true not only for India but other countries as well and this paper has tried to demonstrate this.

precedent. However, only time will tell whether the Supreme court can convene a larger bench to question the legitimacy of adverse possession. The court has previously made recommendations to the government in *State of Haryana v. Mukesh Kumar*⁴¹ to pass legislation which curtails its use. That has not happened. There is an urgent need to keep up with international jurisprudence as well. Hopefully, a larger bench could clarify the position better. Chintan Chandrachud has rightly argued that “the Supreme Court’s unique system of bench composition combined with differing conceptions of its own role has produced an idiosyncratic result from centric style of constitutional interpretation in recent years—with many small, sub-Supreme Courts adopting inconsistent approaches that produce incoherent jurisprudence.”⁴² The future remains uncertain as a result.

⁴¹ *State of Haryana v. Mukesh Kumar*, (2011) 10 SCC 404.

⁴² Pratap Bhanu Mehta et al., *The Oxford Handbook of the Indian Constitution*, 69 (2017).

CONCLUSION

This paper has tried to analyse the relevance of adverse possession in the Indian context by drawing a comparative analysis with other countries. While England passed the Land Registration Act in 2002 which aimed at curtailing the practice of taking title using this doctrine, the United States has made use of marketable title legislations as one of the ways to deal with property disputes. In India however, the recent jurisprudence of the supreme court has affirmed the position of adverse possession rather than subduing it. The court has clearly laid down that it can be used both as a defensive shield as well as a sword once the twelve year period lapses under the limitation act and that a person can take the plea of adverse possession to claim the title of the property over which (s)he has enjoyed continuous possession.

It is clear that adverse possession has increasingly acquired a negative view in most countries, but it is difficult to make an argument for its total abolishment in a country like India. There are several issues ranging from the digitisation of land records, protecting interests of tribal groups and preventing government misuse of the doctrine of adverse possession. While the Supreme Court has thwarted such attempts in the past, it remains a question for the future whether similar decisions will be followed. Among the various issues highlighted, the Supreme Court should envisage a clear stand apart from legislation similar to the Land Registration Act in England which can help in tackling property disputes easily without litigants resorting to adverse possession pleas. It is difficult to assess as to how long will it take for these changes to be implemented. But the law keeps changing every day and hopefully, gradual shifts in the Supreme Court's jurisprudence would yield the necessary results. Adverse possession, for now, is here to stay as a legitimate legal doctrine.

This is best reflected in the words of Oliver Wendell Holmes:

“It is in the nature of man's mind. A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.”⁴³

⁴³ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 477 (1897).

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