

TOPIC : ADVERSE POSSESSION

INTRODUCTION:

(1) In society everything cannot be covered under the umbrella of governance, disciplines and order. Some things must be preceded by spirituality which is higher, lofty, pure and divine thinking. It is just like Directive principles of state policy prescribed in Part IV of the constitution. The Articles in this part of the constitution are crucial, important and significant. But the articles are not justifiable. The law of adverse possession has to be viewed from the angle of welfare and charity.

(2) In recent judgment Hon'ble Supreme Court has shown repulsion to the adverse possession of law just because India has spirituality, charity and philanthropy. Basically these ideas given to us by Verse 1.4.14 of Briahadaranyak Upnishad reads in Sanskrit as “Sarve Bhavantu Sukhina : Sarve santu Niramaya: Sarve Bhadrani Pashyantu : ma kaschit dukh bhagbhavet”. It means “May happiness, prosperity shower on all, may good health inform all, may all see auspiciousness, No human being may suffer. The lofty altruism is uttered by sages wishing banishment of all sorrows, all human sufferings and deficiencies and uplifting of all souls spiritually. These thoughts wished by sages may become a reality if no one of us natches wealth from others, if no one dispossesses another of his rightfully owned land and no one evicts a rightful owner from his house. But unfortunately humans are greedy, cruel and sadist and that is the cause of all civil litigation. If spirituality envelopes each of us then greed, cruelty and sadism will vanish from our minds. On the other hand there should be

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control on the persons who are irresponsible and senseless regarding their rights, claims and interest in property. On this back ground the right of adverse possession is to be viewed.

(3) Law is nothing but an abacus which contains all rules, regulations, rights and liabilities. Limitation Act is one of the important laws which prescribes the limitation period in which the things should have been done. Object of law of limitation is to make people sensible about their right to claim interest in the property within stipulated and prescribed period. One should not sleep over his right for years together. If Law does not fix time limit for claiming rights or interest in property then there may be a chaos.

(4) The rationale for adverse possession rests broadly on the consideration that title to land should not long be in doubt, the society will benefit from some one making use of land the owner leaves idle and that that person who come to regard the occupant as owner may be protected. The maxim that law and equality does not help those who sleep over their rights is invoked in support of prescription of title by adverse possession. In other words, the original title holder who neglected to enforce his right over the land cannot be permitted to re-enter the land after a long passage of time. A situation lasting for a long period creates certain expectations and it would be unjust to disappoint those who trust on them.

(5) The concept of adverse possession contemplates a hostile possession i.e. The possession which is expressly or impliedly in denial of the title of the true owner to the knowledge of the true owner and claiming the title as

an owner in himself by the person claiming to be in adverse possession. In other words such hostile possession shall not be secret and person in adverse possession must not acknowledge the title of the true owner but has to deny the title of the true owner. The adverse possession must be capable of being known by the parties interested in the property, though it is not necessary that there should be evidence of the adverse possessor actually informing the real owner of the former's hostile action. This shows that the possession must be **nec vi nec clam nec precario i.e. In continuity, in publicity and in extent. This shows that permissive possession is not hostile possession. So also mere long possession even for 100 years is not adverse possession.**

Concept and relevant provisions of Adverse possession in reference to the Law of Limitation :

(6) Section 3 of the Limitation Act says that Court will not take cognizance of any suit, which is barred by limitation even if issue of limitation is not taken as a defence. Thus, the law of limitation bars remedy but not the right. But section 27 of Limitation Act is an exception to the general principle of law of limitation and origin of concept of Adverse possession. It reads as, if a person fails to file suit for recovery of possession, within a period of limitation, his right to recover the possession of that property also extinguishes. If such situation occurs, a true owner extinguishes his ownership over the property. But at the same time property can not left owner less. It must be in name of any other person or any other person must be entitled to have right over it. This situation gives origin to the concept of adverse possession. If any person possesses any property in

adverse to the interest of true owner and true owner fails to file a suit for recovery of possession within a period of limitation, then the person in possession becomes owner of property by way of adverse possession.

(7) In the case of *Karnataka Board of Wakf- Vs.- GOI (2004) 10 SCC 779*, it has been observed by Hon'ble Apex Court that, in the eye of 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 rights over it and the person having title omits or neglects to take legal action against such person for years together. In the case of *Amrendra Pratap Singh vs. Tej Bahadur Prajapati,(2004) 10 SCC 65*, it has been held that, the process of acquisition of title by adverse possession springs into action essentially by default or inaction of the owner. Thus, a method of gaining legal title to real property by the actual, open, hostile, and continuous possession of it to the exclusion of its true owner for the period prescribed by law is a adverse possession. In order to elucidate the concept of adverse possession, we have to consider Art 64 and 65 of the limitation Act.

(8) The law on adverse possession is contained in the Indian Limitation Act. Article 65, Schedule I of The Limitation Act prescribes a limitation of 12 years for a suit for possession of immovable property or any interest therein based on title. It is important to note that the starting point of limitation of 12 years is counted from the point of time "when the possession of the defendants becomes adverse to the plaintiff". Article 65 is

an independent Article applicable to all suits for possession of immovable property based on title i.e., proprietary title as distinct from possessory title. Article 64 governs suits for possession based on possessory right. Twelve years from the date of dispossession is the starting point of limitation under Article 64. Article 65 as well as Article 64 shall be read with Section 27.

Necessary elements to constitute adverse possession.

(9) The necessary elements of adverse possession are discussed in detail as infra -

1. **Property** :- There must be certain property, which may be movable or immovable.

2. **Nature of possession required over the property to constitute adverse possession** :- In order to constitute adverse possession, there must be actual possession of a person claiming as of right by himself or by persons deriving title from him. It is not sufficient to show that some acts of possession have been done. The possession required must be adequate in continuity, in publicity and in extent to show that it is adverse to the owner. In other words the possession must be actual, visible, exclusive, hostile and continued during the time necessary to create a bar under the statute of limitation.

3. **Possession must be continuous**:- To constitute adverse possession, possession must be continuous. But it is not necessary to establish possession of every moment of the requisite period.

4. Possession must be with intention of ouster of the real owner :-

Animus possidendi necessary. Possession does not become adverse when the intention to hold adversely is wanting. Person holding property by way of adverse possession must publish his intention to deny right of the real owner. His intention of adverse possession must be within notice, knowledge of the real owner. If there are circumstances showing open and notorious act of taking possession, knowledge may be presumed. Where the assertion of right is secret and not open, the possession can not be held to be adverse. In the case of ***Bhimrao Dnyanoba Patil Vs State of Maharashtra, 2003 (1) Bom. L.R. 322; 2003(1) All MR 565 ; 2003 (2) LJSoft 131***, it has been held that, unless enjoyment of the property is accompanied by adverse animus, mere possession for a long period even over a statutory period, would not be sufficient to mature the title to the property by adverse possession.

5. Dispossession of the true owner :- In reference to this point the term dispossession and discontinuance of possession are relevant. In dispossession a person comes in, and drives out another from possession. In discontinuance of possession, the person in possession goes out and is followed into possession by others. To constitute discontinuance of possession, there must be dereliction by the person who has right and actual possession by another, whether adverse or not.

6. Possession of another essential for dispossession :- “Dispossession” implies the coming in of a person and driving out of another person from possession. “Dispossession” implies ouster and the essence of ouster is that

the person ousting is in actual possession of the property. The mere finding that the persons are not in possession of the disputed property does not decide the question, whether there was dispossession. Dispossession occurs only when a person comes in and drives out another from possession.

What acts do not amount to dispossession :-

(10) To constitute dispossession, the other side must take and keep possession with the intention to acquire the property for himself. Acts between neighbours, occasional acts of interference which are naturally explained by the desire of the person doing them to protect their own property do not amount to dispossession.

1. Permissive possession does not amount to dispossession :- A true owner is neither dispossessed nor does he discontinued his possession, if a third person takes possession with his permission. It is however true that, if the person in permissive possession changes his animus and continues to hold with an open and continuous assertion of a hostile title, his possession becomes adverse to the owner. A person put into the occupation of property, or person put into permissive possession of that property, does not occupy it as of right. In such cases, the owner of the property is properly considered to be in possession. An owner who accommodates a poor relation in his premises, does not necessarily part with the possession of his property occupies by such poor relation. The possession of such poor relation is the constructive possession of the owner and the later may retain and continue to exercise his proprietary and possessory rights so as to rebut the presumption that he has parted with the possession of the property and prevent the operation of the statute of limitation. If an owner allows his

gardener, or servant, or work man employed upon his estate, to live in a cottage thereon, rent-free, their possession is his possession, however long it may be continued. If an owner, for motives of kindness or charity, allows a relative or friend to occupy a cottage and land upon his estate, and the owner, during such occupation, continues to exercise acts of ownership over the land so occupied, e.g., he repairs the building, or cuts down plants, trees, or causes drains to be made through the land or quarries away stone, all such acts of dominion do not show that he had ever parted with the possession of his property, although he had allowed another person to occupy it.

2. **Mere non-user by the owner is not dispossession** :- The meaning of the word “dispossession” is well settled. A man may cease to use his land because he cannot use it, since it is under water. He does not, thereby, discontinue his possession. Constructively his possession continues until he is dispossessed and upon the cessation of the dispossession before the lapse of the statutory period, constructively it revives.

Dispossession must be actual and the person dispossessing must have physical control and exercise acts of ownership, which would mark him as occupier. He must possess the desire to possess. Acts of dispossession must be such as are inconsistent the character of the property possessed and the purpose for which it is used by the owner. Only slight acts of user on the part of the owner may, in certain circumstances be sufficient to preserve his possession unless such acts are inconsistent with the positive acts of exclusive ownership exercised by the trespasser. There is no dispossession until someone else takes possession.

(11) It be remembered that the plea of Adverse Possession is always based on facts which must be ascertained and proved. A person who claims Adverse Possession must show on what date he came into possession ? What was the nature of the Adverse Possession ? Whether the factum of his possession was known to the then claimant ? And how long his possession continued ? He must also show that his possession was open and undisturbed. Unless plea of Adverse Possession has been specifically raised in the pleadings, put in issue and then cogent and convincing evidence led on the multitude on the points and opportunity to refute, the case made out by the plaintiff availed of by the defendant, plea of Adverse Possession cannot be allowed to be flung all of a sudden as a surprise for the first time in appeal.

PRINCIPLE OF TACKING

(12) To tack means “to fasten”, “to stitch together”, “to annex” or “to append”. In view of the principle of tacking if someone derives a title from a person in adverse possession he can tack the period of adverse possession enjoyed by earlier person so as to complete his title as an owner by adverse possession for a total period of 12 years. **Thus, a person can usefully claim for the purpose of his adverse possession even the adverse possession of his predecessor from whom he derives right.** However, a trespasser cannot tack adverse possession of earlier trespasser, since second trespasser does not derive possession from earlier trespasser. Accordingly, Five Judge Constitution Bench of the Supreme Court has held in the case of **Gurbinder Singh & another Vs. Lal Singh & another (AIR 1965 SC 1553)**.

Incidents in respect of adverse possession/no adverse possession.

(13) Where the owner revoked the licensee by issue of notice, but did not take steps to evict him, mere service of notice does not create any cloud on the title of the owner and no inference can be drawn that the owner intended to abandon his title in the absence of any evidence to show that the licensee claimed to be in possession in his own right or against the wishes of the owner (AIR 1979 All.54).

(14) As per Law of Pleadings by Mogha the adverse possession is one of the defence. The period limitation is 12 years against private land and 30 years against Government land and starts from the date when the possession of the defendant becomes adverse to the plaintiff. For adverse possession it is necessary for the person to admit the title of the real owner and to establish his open and hostile possession without any interruption. It is not sufficient to plead that a party has been in adverse possession for 12 years, it should be definitely alleged how and when adverse possession commenced. Such as the defendant has dispossessed the plaintiff and has been in possession continuously ever since, or the defendant has been open and continuously in possession for more than 12 years to the knowledge of the plaintiff, or the defendant has been in possession continuously for more than 12 years so openly that either the plaintiff was aware of his possession or ought to have been aware had he exercise due diligence.

(15) The legal position as regards the acquisition of title to land by adverse possession has been succinctly stated by the Judicial Committee of

the Privy Council in *Perry vs. Clissold* (1907) AC 73, at 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 Limitation applicable to the case, his right is for ever extinguished and the possessory owner acquires an absolute title.”

(16) Adverse possession of the land is the process by which title to another’s land is acquired without his permission. Adverse Possession is a possession which is opposed to once interest of the real owner of the property. It is possession in denial of the title of the true owner.

(a) Actual :- Adverse possession consists of actual occupation of the land with the intent to keep it solely for oneself. Merely claiming the land or paying taxes on it, without actually possessing it, is insufficient. Entry on the land, whether legal or not, is essential. A trespass may commence adverse possession, but there must be more than temporary use of the property by a trespasser for adverse possession to be established. Physical acts must show that the possessor is exercising the dominion over the land that an average owner of similar property would exercise. Ordinary use of the property—for example, planting and harvesting crops or cutting and selling timber—indicates actual possession. In some states acts that constitute actual possession are found in statute.

(b) Open and Notorious :- An adverse possessor must possess land openly for the entire world to see, as a true owner would. Secretly occupying another’s lands does not give the occupant any legal rights.

Clearing, fencing, cultivating, or improving the land demonstrates open and notorious possession, while actual residence on the land is the most open and notorious possession of all. The owner must have actual knowledge of the adverse use, or the claimant's possession must be so notorious that it is generally known by the public or the people in the neighborhood. The notoriety of the possession puts the owner on notice that the land will be lost unless he or she seeks to recover possession of it within a certain time.

(c) Exclusive :- Adverse possession will not ripen into title unless the claimant has had exclusive possession of the land. Exclusive possession means sole physical occupancy. The claimant must hold the property as his or her own, in opposition to the claims of all others. Physical improvement of the land, as by the construction of fences or houses, is evidence of exclusive possession.

(d) Hostile :- Possession must be hostile, sometimes called adverse, if title is to mature from adverse possession. Hostile possession means that the claimant must occupy the land in opposition to the true owner's rights. One type of hostile possession occurs when the claimant enters and remains on land under color of title. Color of title is the appearance of title as a result of a deed that seems by its language to give the claimant valid title but, in fact, does not because some aspect of it is defective. If a person, for example, was suffering from a legal disability at the time he or she executed a deed, the grantee-claimant does not receive actual title. But the grantee-claimant does have color of title because it would appear to anyone reading the deed that good title had been conveyed. If a claimant possesses the land in the manner required by law for the full statutory period, his or her color of title will become actual title as a result of adverse possession.

(e) Continuous & Uninterrupted :- All elements of adverse possession must be met at all times through the statutory period in order for a claim to be successful. The statutory period, or “statute of limitations”, is the amount of time the claimant must hold the land in order to successfully claim “adverse possession”.

What is adverse possession?

(17) Adverse possession is a method, rooted in common law, of obtaining title to land through use. The common law rules for adverse possession have been codified under both federal and state statutes. A typical statute allows a person to obtain title to land from the actual owner simply by using the land. The use must be open for all to see. An example of openly using land for the purposes of adverse possession would be if your neighbor built a fence on your land with the intention of taking the property, paid your property taxes, and though you knew about it you did nothing. If this continued for a period of time set by state law, your neighbor may be able to claim this property as his/her own. The theory is that by not disputing your neighbor’s use of your property through a lawsuit, you, as the actual owner have abandoned your rights to the property. Gaining title to land through adverse possession requires strict compliance with the law, and can have dramatic impact upon land ownership rights. The plea of adverse possession is mixed question of law and fact. It is well settled law that before a party can succeed in establishing title on the basis of adverse possession, a plea to that effect must be specifically raised. It is observed by Hon'ble Apex court that, “ It would be imperative that one who claims possession must give all such details as enumerated hereunder. They are only illustrative and

not exhaustive.

- a) *who is or are the owner or owners of the property;*
- b) *title of the property;*
- c) *who is in possession of the title documents*
- d) *identity of the claimant or claimants to possession;*
- e) *the date of entry into possession;*
- f) *how he came into possession - whether he purchased the property or inherited or got the same in gift or by any other method;*
- g) *in case he purchased the property, what is the consideration; if he has taken it on rent, how much is the rent, license fee or lease amount;*
- h) *if taken on rent, license fee or lease - then insist on rent deed, license deed or lease deed;*
- i) *who are the persons in possession/occupation or otherwise living with him, in what capacity; as family members, friends or servants etc.;*
- j) *subsequent conduct, i.e., any event which might have extinguished his entitlement to possession or caused shift therein; and*
- k) *basis of his claim that not to deliver possession but continue in possession.”*

(22) Mere long possession of defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to latter's knowledge cannot result in acquisition of title by the defendant to the encroached suit land. A possession is adverse only if in fact one holds possession by denying title of the lessor or by showing hostility

by act or words or in cases of trespassers as the case may be as against lessor or other owner of the property in question.

(23) Recently, in the case of Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan and others, Hon'ble Supreme Court observed thus: "Before parting with this case, we deem it appropriate to observe that the law of adverse possession which ousts an owner on the basis of inaction within limitation is irrational, illogical and wholly disproportionate. The law as it exists is extremely harsh for the true owner and a windfall for a dishonest person who had illegally taken possession of the property of the true owner. The law ought not to benefit a person who in a clandestine manner takes possession of the property of the owner in contravention of law. This in substance would mean that the law gives seal of approval to the illegal action or activities of a rank trespasser or who had wrongfully taken possession of the property of the true owner. We fail to comprehend why the law should place premium on dishonesty by legitimizing possession of a rank trespasser and compelling the owner to loose its possession only because of his inaction in taking back the possession within limitation. The same view was expressed by Hon'ble Apex Court in the case of State of Haryana Vs. Mukesh Kumar and others decided on 30.09.2011.

Conclusion :-

(24) Adverse possession is a one of the meethod for acquiring title to the real property by possession for a statutoy period under certain conditions. The said period is governed by statute. Under this doctrine the person may establish his ownership against the true owner after the fulfillment of all

legal requirements. The owner of the property must have actual knowledge of adverse possession. The word continuity means regular uninterrupted of the occupancy land. As per the Article 6 and 65 of the Limitation Act, the prescribed period is 12 years and the prescribed period in case of Government is 30 years. The starting point of limitation begins from the expression of hostile animous amounting to denial of title of the real owner to his knowledge. The onus is lies on the party to set up the title on the basis of adverse possession. Presumption and probabilities cannot be substituted for the evidence.

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BURDEN OF PROOF

(1) Part III and chapter VII to IX of the Indian Evidence Act deal with the burden of proof. Section 2 defines “proved” by stating that a fact is said to be proved when after considering the matter before it the court either believes it to exist or considers its existence so probable that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it exists. Therefore the Proof means that “matter” from which the court either believes the existence of a fact or considers its existence so probable that a prudent man should act upon the supposition that it exists. Burden to prove a fact is on the person who asserts it .

(2) The responsibility of producing the evidence in court is called burden of proof. Section 101 to 114 of Evidence Act deal with burden of proof. The burden of proof play very important role in parties. In the Indian Evidence Act, there are 5 rules which decides the burden of proof. They are provided in Section 101 to 105 of Evidence Act as under :

1. *He who pleads must prove (S.101)*
2. *He who files must prove (S.102)*
3. *He who wish to prove a particular fact must prove (S.103)*
4. *He who wish to prove the main fact has to prove (S.104)*
5. *He who claims exceptions has to prove (S.105)*

(3) Section 101 attempts to define burden of proof. This provision proceeds to say in positive terms as to the person on whom burden of proof lies whereas section 102 puts it in negative terms. These two provisions

deal with a general situation and lay down general propositions, whereas section 103 to section 113-B deals with specific situations and can be viewed as exceptions to the general rule. While dealing with the specific situations, the provisions also mention about the presumptions which the court may or shall presume as well as what would be conclusive proof.

(4) General rule that a party who desires to move to the Court must prove all the fact necessary for that purpose (Ss. 101-105) is subject to two exceptions:-

[a] He will not be required to prove such facts as are specifically within the knowledge of the other party (S. 106); and

[b] He will not be required to prove so much of his allegations in respect of which there is any presumption of law (S. 107-113), or in some cases, all fact (S. 114) in his favour.

(5) The burden of proof lies on the party who substantially asserts the affirmative of the issue and not upon the party who denies it. This rule of convenience has been adopted in practice, not because it is impossible to prove a negative, but because of negative does not admit of the direct and simple proof of which the affirmative is capable. Moreover, it is but reasonable and just that the suitor who relies upon the existence of a fact, should be called upon to prove his own case. In the application of this rule, regard must be had to the substance and effect of the issue, and to its grammatical form, for in many cases the party, by making a slight alteration in the drawing of his pleading, may give the issue a negative or affirmative form, at his pleasure.

(6) The strict meaning of the term burden of proof (onus probandi) is this, that if no evidence is given by the party on whom the burden is passed the issue must be found against him. The expression burden of proof really means two different things. It means (1) some times that the party is required to prove an allegations before judgment is given in its favour. (2) It also means that on a contested issue one of the two contending parties has to introduce evidence. In criminal cases it is accepted principle of Criminal Jurisprudence that Burden of proof is always on prosecution, it never changes. This conclusion is derived from fundamental principle that, the accused should be presumed to be innocent till he is proved guilty beyond reasonable doubt and accused has got right to take benefit of some reasonable doubt. If the accused succeeds in creating reasonable doubts or shows preponderance of probability in favour of plea, the obligation on his part gets discharge and would be entitled to be acquitted. There are many cases in which the party on whom the burden of proof in the first instance lies may shift the burden to the other side by proving facts giving rise to a presumption in his favour.

(7) There are two sense in which the word burden of proof is used (a) Burden of proof arising as matter of pleading i.e. called the legal burden and it never shift. (b) Burden of proof which deals with the question as to who has first to prove a particular fact and is called the evidential burden and it is shift from one side to other. It is well settled that (1) Permissive presumption i.e. presumption of fact (Natural) (2) Compelling presumption i.e. presumption of law (Rebuttable/Artificial) (3) Irrebuttable presumption of law i.e. conclusive proof (Mixed law and fact).

(8) The evidence in Civil litigation can be very well divided into documentary and oral evidence and, therefore, the oral evidence which is nearer to documents is acceptable in deciding the case. Many factors such as “Character” (Section 52 of the Evidence Act) is irrelevant in Civil case except in cases of damages which affect the amount to be granted. However, opinion (Section 49) is relevant to prove the usage while as (Section 47) opinion of the handwriting expert become relevant in Civil cases. Section 40 of the Evidence Act read with the Section 11 of the C.P.C. makes the previous Judgment relevant as it amounts to resjudicata. Then entries in the public record made in performance of duty (Section 35) and entries made in books of account made during the transactions or kept regularly in the course of business (Section 34 of the Evidence Act) are some of the provisions which are important in the determination of Civil cases. In the same way the statement in maps, charts made by authorities are also relevant.

(9) What is called burden of proof on the pleadings should not be confused with the burden of adducing evidence which is described as shifting. The burden of proof on the pleadings never shifts, it always remains constant. The initial burden of proving a prima facie case in his favour is cast on the plaintiff; when he gives such evidence as will support a prima facie case, the onus shifts on to the defendant to adduce rebutting evidence to meet the case made out by the plaintiff. As the case continues to develop, the onus may shift back again to the plaintiff. It is not easy to decide at what particular stage in the course of the evidence the onus shifts from one side to the other.

(10) Where both parties have already produced whatever evidence they had, the question of burden of proof ceases to be of any importance; but while appreciating the question of burden of proof, misplacing of burden of proof on a particular party and recording findings in a particular way will definitely vitiate the judgment.

(11) Evidentiary admissions are not conclusive proof of the facts admitted and they may be explained or shown to be wrong but they do raise an estoppel and shift the burden of proof to the person making them or his representative-in-interest.

(12) Where there is an admission by a party the burden of proof shifts and it is for the party making the admission to explain it away.

Burden of Proof and Onus of Proof – Distinction.

(13) There is an essential distinction between burden of proof and onus of proof; burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence.

(14) The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is “**Ei qui affirmat non ei qui negat incumbit probatio.**” It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.

(15) This rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case; and party because in the nature of things, a negative is more difficult to establish than an affirmative.

(16) Burden of proof means two different things. It means sometimes that a party is required to prove an allegation before Judgment can be given in its favour; it also means that on a contested issue one of the two contending parties has to introduce evidence. The burden of proof is of importance where by reason of not discharging the burden which was put upon it, a party must eventually fail. This burden will, at the beginning of a trial, lie on one party, but during the course of the trial it may shift from one side to the other. At the end of a case when both the parties have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic.

(17) The term *onus probandi*, in its proper use, merely means that, if a fact has to be proved, the person whose interest it is to prove it, should adduce some evidence, however slight, upon which a Court could find the fact he desires the Court to find. It does not mean that he shall call all conceivable or available evidence. It merely means that the evidence he lays before the Court should be sufficient, if not contradicted to form the basis of a judgment and decree upon that point in his favour.

(18) In criminal cases usually the burden of proof is on the prosecutor (expressed in the *Latin brocard ei incumbit probatio qui dicit, non qui negat*, "the burden of proof rests on who asserts, not on who denies"). This principle is known as the presumption of innocence, and is summed up with "innocent until proven guilty,"

(19) The accused has to bring merely this defence in the precincts of preponderance of probabilities. This difference is because of the fact that it is very difficult to bring the negative evidence. Regarding the shifting of the legal burden, it is a fundamental principle of criminal jurisprudence that an accused is presumed to be innocent and the burden lies on the prosecution to prove the guilt of the accused beyond reasonable doubt. And that burden never shifts but when the accused pleads insanity under Section 84, I.P.C., or any of the exceptions contained in I.P.C., like right of private defence etc., it is the accused that has to prove the same, though the degree of proof on the accused is not as high on the prosecution and it would be sufficient for him to satisfy the test of a standard of a prudent man. In criminal trial burden of proof never shifts to the accused. If a reasonable explanation is given by the accused it would be upto the court to acquit the accused.

(20) When it is the question of an alibi, it is not a case, of proving the existence of circumstances bringing the case within any of the general exceptions or special exceptions of the Indian Penal Code, and therefore, Section 105 of the Indian Evidence Act, does not apply. The section applicable is Section 103 illustration of which specially mentions the case of plea of alibi and provides that it is for the accused who pleads alibi to

prove it. Burden to prove plea of alibi is on accused pleading it. Burden is on the accused who is setting up defence of alibi to prove it but even so, the burden of proving the case against the accused is on the prosecution irrespective of whether or not the accused have made out plausible defence. Onus is on accused to substantiate plea of alibi and make it reasonably probable.

(21) Presumption is an inference of fact, drawn from other known or proved facts. There are two classes of presumptions, namely, 1) Presumptions of fact and 2) Presumptions of law. Presumptions of fact are inferences which the human mind naturally and logically draws from facts and they are generally rebuttable, unless they are conclusive. Sections 86 to 88, 90, 113A and 114 of the Evidence Act relate to presumptions of fact. Presumptions of law are arbitrary consequences expressly annexed by law to particular facts and may either be conclusive or rebuttable. Sections 41, 79 to 85, 89, 105, 107 to 113, 113B and 114A of the Evidence Act relate to presumptions of law. Presumptions other than conclusive presumptions are merely rules of evidence. Section 114 of the Evidence Act is of crucial importance to Courts and the Court may presume the existence of any fact which it thinks likely to have happened, having regard to-

(a) *Common course of natural events,*

(b) *Human conduct, and*

(c) *Public and private business, --*

in their relation to the facts of the particular case. The illustrations to Section 114 of the Evidence Act are important, though they are not exhaustive. Section 114 plays a vital role in the matter of appreciation of evidence and arriving at conclusions.

(22) The **main rules of burden of proof** which are embodied in Section 101 to 104 could be stated as under :-

- [1] *One who asserts has to prove his assertions.*
- [2] *Assertions must be about positive fact and not of negative facts or events which did not happen.*
- [3] *If law gives presumptions in favour of one party, the burden of proof lies on other party to rebut the presumptions.*
- [4] *If one wants to prove that his evidence is admissible, he should prove the grounds or the circumstances about its admissibility.*
- [5] *This rule generally applies when evidence is admissible as an exception to the general rules, such as under section 32,65 etc.*
- [6] *Burden of proof never shifts.*
- [7] *What shifts is onus or proof. Though in common parlance burden and onus are synonymous words, they have somewhat different meaning in legal language.*

(23) General Principles regarding Burden of Proof

- [1] The law does not recognize the principle of giving the benefit of doubt to a party on whom the burden of proof lies.
- [2] The question of burden of proof at the end of the case when both parties have adduced their evidence is not of very great importance and the Court has to come to a decision on a consideration of all materials.
- [3] The doctrine of onus probandi applies to a situation in which the mind of the Judge determining the suit is left in doubt as to the point on which side the balance should fall in forming a conclusion.

- [4] It is not always necessary that the party who has the burden must himself lead evidence. He may sustain the onus cast upon him by the facts which he may have elicited by cross-examination of the other party's witnesses.
- [5] Where the relevant facts are before the Court and all that remains for decision is what inference is to be drawn from them, the question of burden of proof is not pertinent and this is more so at the appellate stage.
- [6] Where the notice to quit sent by registered post was received by Treasurer and secretary of tenant Company but register of letters received and issued maintained by tenant Company was not produced by tenant Company adverse inference could be drawn against tenant Company.
- [7] If the Court bases his finding only on determination of question of burden of proof when the parties have led evidence, when it bases its Judgment on error of principle governing the question of burden of proof, the Judgment is wrong and may be set aside.
- [8] A party accepting the burden of proof cannot be allowed to complain in appeal.
- [9] If it is not the grievance that the defective burden of proof has caused a prejudice in the matter of leading evidence, it would be duty of the Court even at the appellate stage to correct the error of wrongly thrown burden on the aggrieved party.
- [10] So far as the rule of burden of proof goes, no difference can be made between corporations and individuals.

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Latest Pronouncement on – Adverse Possession

(1) **Abraham Mathew and ors. -Vs.- Mariamma Yohannan AIR 2014 (557) (KER.)** where the Hon'ble Kerala High Court held that, the claim for adverse possession by the defendant is not tenable when defendant claims true ownership and right of adverse possession at same time. Mere possession without proof that same became hostile against true owner does not convert permissive possession into adverse possession.

(2) **Jogendra Panda -Vs.- Collector, Kalahandi and ors. AIR 2014 Orisa 167**, where the Hon'ble Orisa High Court held that, the non-tribe can not claim the title by adverse possession on land belonging to member of Schedule Tribe.

(3) **Sarat kumar Panda and another. -Vs.- Sashibhusan Tripathy and another AIR 2014 Orissa 182, Limitation Act (36 of 1963), Arti. 64, 65**, where the Hon'ble Orisa High Court held that, when a suit for declaration of right, title and interest over property on basis of adverse possession and plaintiff possessing property on basis of agreement for sale and there being no denial of title and rights of true owner. The possession was permissive in nature and plaintiff not entitled to relief claim.

(4) **Tikkamchand Ramvilas Gilda and another -Vs.- Sarlabai Nandalal Shrivastava and others 2014 (5) Mh.LJ 625**, where the Hon'ble Bombay High Court held that, when suit is not filed for delivery of possession of immovable property purchased in auction sale in execution of decree but suit is filed on the basis of title and for recovery of possession

from party who is illegal possession a suit is governed by Article-65 of the Indian Limitation Act and Article-134 could not apply.

(5) **Guruvayoor Devaswom Managing Committee, Thrissur -Vs- P.K.Varkey Son of Kunhippalu and others. AIR 2014 KERLA 152,** Transferee by life estate holder is not entitled to raise plea of adverse possession against full owner.

(6) **Saraswatibai w/o Ramkrishna Kshirsagar (legal representatives assister of deceased) V. Lila w/o Sampatrao Tarhekar 2014 (3) Mh. L.J. 597** Adverse possession – Not available to the defendant in a suit by plaintiff for recovery of possession, if he or his predecessor entered in pssession lawfully under an agreement and continued to remain in possession till the date of suit.

(7) **Shantibai wd/o Sonba Madavi V Nanibai w/o Udehan Uike 2014(2) Mh.L.J. 873.** Adverse possession – Stray act of trespass cannot ripen into adverse possession.

(8) **Balkrishna s/o. Bhagwanji Lohi and another V Prakash s/o Sheshrao Lohi and other. 2014(3) Mh.L.J. 453** Adverse possession Evidence and proof – No evidence produced to show that possession of defendants with animus possidendi began from particular date – No date or year has been stated by defendants to be point of time from which they started occupying property with requisite animus possidendi to knowledge of plaintiffs- It cannot be said that defendants have prove their title on basis of plea of adverse possession.

BURDEN OF PROOF

(9) Ramaiah @ Rama -Vs.- State of Karnataka AIR 2014 (SC) 3388, where Hon'ble Supreme Court of India in para 24 held that, when death of victim within six month occurred marriage and it is not established whether the death was accidental as claimed by defence or a suicide. No evidence showing that, soon before her death she had been subjected to cruelty or harassment for or in connection with any demand for dowry. The question of drawing any presumption by invoking provision of Section 113 (b) of Evidence Act would not arise.

(10) Paramsivam and others -Vs.- State through Inspector of Police AIR 2014 (SC) 2936, where the Hon'ble Supreme Court of India held that, evidence of eye witness that, accused person had abducted deceased no explanation by accused person as to how they dealt with abducted victim. The burden of proving fact within knowledge is with the accused. The presumption U/s 106 of Evidence Act can be drawn against accused that, accused persons have murdered deceased.

(11) Devi Singh and another -Vs.- Rafiq Ahemad and another AIR 2014 Rajasthan 562, where the Hon'ble Rajasthan High Court held that, in suit for erection when defendant has alleged that, document/rent note is forged and fabricated. The burden of proof lies on the plaintiff.

(12) Kunda Wd/o Mahadev Supare and others -Vs.- Haribhau S/o Dhusan Supare, where the Hon'ble Bombay High Court held that, the expression may presume U/s 114 of the Indian Evidence Act indicates judicial discretion to be used by a Presiding Officer of Trial Court in given facts and circumstances of the case.

(13) Bhanudas Yashwant Nagawade (deceased) through Lrs. -Vs- Dhondiba @ Bhimrao Bhanudas Nagawade, where the Hon'ble Bombay High Court held that, the presumption as to burden lies on party alleging that, child is illegitimate. No evidence produced to show basis on which school record was prepared. No value at all could be given to such record on basis of which defendant wanted to prove plaintiff was born in particular year and his father was particular person.

(14) State of Punjab -Vs- Gurmit Singh AIR 2014 SUPREME COURT 2561 Relative of husband for purpose of dowry death means such persons, who are related by blood, marriage or adoption.

(15) Anjani kumar Chaudhary – Vs- State of Bihar and others. AIR 2014 SUPREME COURT 2740 In order to attract S. 307 of Penal Code, injury need not be on vital part of body.

(16) Sau. Kamal w/o Anna Gaikwad -Vs- Anna s/o Balaji Gaikwad and others. AIR 2014 BOMBAY 130 Amend to Divorce Act by Act of 2001, deleted provision requiring confirmation of decree for dissolution passed by District Court is prospective in operation. Decree of dissolution of marriage passed prior to enforcement of amendment required confirmation.

(17) Union of India and others -Vs- Robert Zomawia Street AIR 2014 SUPREME COURT 2721 Entries made in Govt. Land Records maintained under cantonment Land Manual are conclusive proof of title.