Course Name- B.A.LL.B 6th sem
Subject- Jurisprudence
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Concept- Ownership and Possession

Ownership

Jurists have defined ownership in different ways. All of them accept the right of ownership as the complete or supreme right that can be exercised over anything. Thus, according to Hibbert ownership includes four kinds of rights within itself.

- Right to use a thing
- Right to exclude others from using the thing
- Disposing of the thing
- Right to destroy it.

Austin's definition

Austin while defining ownership has focused on the three main attributes of ownership, namely, indefinite user, unrestricted disposition and unlimited duration.

- Indefinite User
- Unrestricted Disposition
- Unlimited Duration

The abolition of Zamindari system India , the abolition of privy purses, nationalization of Bank etc. are some example of the fact that the ownership can be cut short by the state for public purpose and its duration is not unlimited.

Austin's definition has been followed by Holland. He defines ownership as plenary control over an object. According to him an owner has three rights on the subject owned

1. Possession
2. Enjoyment
3. Disposition

Planetary control over an object implies complete control unrestricted by any law or fact. Thus, the criticism levelled against Austin's definition would apply to that given by Holland in so far as the implication of the term "plenary control" goes.

Salmond's Definition:

According to the Salmond ownership vests in the complex of rights which he exercises to the exclusive of all others. For Salmond what constitute ownership is a bundle of rights which in here resides in an individual. Salmond's definition thus point out two attributes of ownership:

- Ownership is a relation between a person and right that is vested in him
- Ownership is incorporeal body or form

MODERN LAW AND OWNERSHIP

Under modern law there are the following modes of acquiring ownership which may be broadly classed under two heads,viz,.

1. Original mode

2. Derivative mode

The original mode is the result of some independence personal act of the acquire himself. The mode of acquisition may be three kinds

Absolute when a ownership is acquired by over previously ownerless object

Extinctive, which is where there is extinctive of previous ownership by an independence adverse act on the part of the acquiring. This is how a right of easement is acquiring after passage of time prescribed by law.

Accessory that is when requisition of ownership is the result of accession. For example, if three fruits, the produce belongs to the owner unless he has parted with to the same. When ownership is derived from the previous version of law then it is called derivate acquisition. That is derived mode takes place from the title of s prior owner. It is derived either by purchase, exchange, will, gift etc.Indian Transferee Acts of property rules for the transfer of immovable property, Sale of goods Acts for the transfer of property of the firm and the companies Act for the transfer of company property.

SUBJECT MATTER OF OWNERSHIP

Normally ownership implies the following:

1. The right to manage
2. The right to posses
3. The right to manage
4. The right to capital
5. The right to the income

CHARACTERISTICS OF OWNERSHIP

An analysis of the concept of ownership, it would show that it has the following characteristics: Ownership ma either be absolute or restricted, that is, it may be exclusive or limited. Ownership can be limited by agreements or by operation of law.The right of ownership can be restricted in time of emergency. An owner is not allowed to use his land or property in a manner that it is injurious to others. His right of ownership is not unrestricted.

The owner has a right to posses the thing that he owns. It is immaterial whether he has actual possession of it or not. The most common example of this is that an owner leasing his house to a tenant. Law does not confer ownership on an unborn child or an insane person because they are incapable of conceiving the nature and consequences of their acts. Ownership is residuary in character. The right to ownership does not end with the death of the owner; instead it is transferred to his heirs. Restrictions may also be imposed by law on the owner's right of disposal of the thing owned. Any alienation of property made with the intent to defeat or delay the claims of creditors can be set aside.

KINDS OF OWNERSHIP

There are many kinds of ownership and some of them are corporeal and incorporeal ownership, sole ownership and co-ownership, legal and equitable ownership, vested and contingent ownership, trust and beneficial ownership, co- ownership and joint ownership and absolute and limited ownership.

Corporeal and Incorporeal Ownership

Corporeal ownership is the ownership of a material object and incorporeal ownership is the ownership of a right. Ownership of a house, a table or a machine is corporeal ownership. Ownership of a copyright, a patent or a trademark is incorporeal ownership. The distinction between corporeal and incorporeal ownership is connected with the distinction between corporeal and incorporeal things. Incorporeal ownership is described as ownership over tangible things. Corporeal things are those which can be perceived and felt by the senses and which are intangible. Incorporeal ownership includes ownership over intellectual objects and encumbrances.

Trust and Beneficial Ownership

Trust ownership is an instance of duplicate ownership. Trust property is that which is owned by two persons at the same time. The relation between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other. The ownership is called beneficial ownership. The ownership of a trustee is nominal and not real, but in the eye of law the trustee represents his beneficiary. In a trust, the relationship between the two owners is such that one of them is under an obligation to use his ownership for the benefit of the other. The former is called the trustee and his ownership is trust ownership. The latter is called the beneficiary and his ownership is called beneficial ownership.

Legal and Equitable Ownership

Legal ownership is that which has its origin in the rules of common law and equitable ownership is that which proceeds from the rules of equity. In many cases, equity recognizes ownership where law does not recognize ownership owing to some legal defect. Legal rights may be enforced in rem but equitable rights are enforced in personam as equity acts in personam. One person may be the legal owner and another person the equitable owner of the same thing or right at the same time.

The equitable ownership of a legal right is different from the ownership of an equitable right. The ownership of an equitable mortgage is different from the equitable ownership of a legal mortgage.

There is no distinction between legal and equitable estates in India. Under the Indian Trusts Act, a trustee is the legal owner of the trust property and the beneficiary has no direct interest in the trust property itself. However, he has a right against the trustees to compel them to carry out the provisions of the trust.

Vested and Contingent Ownership

Ownership is either vested or contingent. It is vested ownership when the title of the owner is already perfect. It is contingent ownership when the title of the owner is yet imperfect but is capable of becoming perfect on the fulfillment of some condition. In the case of vested ownership, ownership is absolute. In the case of contingent ownership it is conditional. For instance, a testator may leave property to his wife for her life and on her death to A, if he is then alive, but if A is dead to B. Here A and B are both owners of the property in question, but their ownership is merely contingent. It must, however, be stated that contingent ownership of a thing is something more than a simple chance or possibility of becoming an owner. It is more than a mere spes acquisitionis. A contingent ownership is based upon the mere possibility of future acquisition, but it is based upon the present existence of an inchoate or incomplete title.

Sole Ownership and Co-ownership
Ordinarily, a right is owned by one person only at a time. However, duplicate ownership is as much possible as sole ownership. When the ownership is vested in a single person, it is called sole ownership; when it is vested in two or more persons at the same time, it is called co-ownership, of which co-ownership is a species. For example, the members of a partnership firm are co-owners of the partnership property. Under the Indian law, a co-owner is entitled to three essential rights, namely

1. Right to possession
2. Right to enjoy the property
3. Right to dispose

Co-ownership and Joint Ownership
According to Salmond, "co-ownership may assume different forms. Its two chief kinds in English law are distinguished as ownership in common and joint ownership. The most important difference between these relates to the effect of death of one of the co-owners. If the ownership is common, the right of a dead man descends to his successors like other inheritable rights, but on the death of one of two joint owners, his ownership dies with him and the survivor becomes the sole owner by virtue of this right of survivorship.

Absolute and Limited Ownership
An absolute owner is the one in whom are vested all the rights over a thing to the exclusion of all. When all the rights of ownership, i.e. possession, enjoyment and disposal are vested in a person without any restriction, the ownership is absolute. But when there are restrictions as to user, duration or disposal, the ownership will be called a limited ownership. For example, prior to the enactment of the Hindu Succession Act, 1956, a woman had only a limited ownership over the estate because she held the property only for her life and after her death; the property passed on to the last heir or last holder of the property. Another example of limited ownership in English law is life tenancy when an estate is held only for life.

Possession

The Concept of Possession- its meaning, elements, kinds and modes of acquisition

The institution of property has a crucial relationship with mankind. There are two important rights related to property:

possession; and ownership.

Regarding possession, as Salmond says, it is the most basic relation between a man and a thing. Possession of material things is necessary because human life and human society would rather be impossible without the use and consumption of material things. As civilization began to progress, the straggle for existence was so bitter that people began to take possession of certain objects and considered them as their own.

They began to take pride in the possession of those things and were not prepared to allow outsiders to interfere with them. They were determined to exercise continuous control to the

exclusion of all others. And from a humble beginning, the concept began to grow and now much progress has been made in this connection.

From the legal point of view also it is a very important concept. Innumerable legal consequences flow from the acquisition and loss of possession and thus, it is said that there is no concept in the field of law as difficult as that of possession. Firstly, it the prima facie evidence of ownership, called as nine out of ten points of law, meaning that there is a presumption that the possessor of a thing is the owner of it and the other claimants in order to have that thing must prove their title or better possessory right.

The principle has also been incorporated under Section 110 of the Indian evidence Act,1872 also, as follows:

Burden of proof as to ownership- when the question is whether any person is the owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the persons who affirms that he is not the owner.

As Salmond also says, Possession is the objective realization of ownership, it is in fact what ownership is in right. It is the de facto exercise of a claim while ownership is the de jure recognition of that claim. Explaining the relation between possession and ownership the Supreme Court of India in the case of B. Gangadhar v. B.R. Rajalingam stated, possession is the external form in which claims normally manifest themselves. It is in fact, what ownership is in right enforceable at law to or over the thing.

Even a person who wrongfully possesses a property, like a thief, has a good possessory right over it against the world at large except the true owner. This means that a person cannot interfere with the possession of another person by setting up a defence of jus tertii, that is, the title of a third person. Also, dispossessing or ejecting a person from one's own land and re-entering forcibly is wrongful act even though the possession of the person turns out to be wrongful. Thus, simply, it can be said that law protects possession.

Meaning of the term possession
Several jurists have defined the term 'possession' differently, some of the notable definitions are as follows:

Salmond-
The possession of a material object is the continuing exercise of a claim to the exclusive use of it.
Thus, possession involves two things: (1) claim of exclusive user; and (2) conscious or actual exercise of this claim, that is, physical control over it. The former is the mental element called as animus possessionis and the later is the physical element called as corpus possidendi. [iii]

Federick Pollock-
He pointed out that in common parlance a man is said to possess or to be possession of anything of which he has apparent control, or from the use of which he has the apparent power of excluding others. So, he also talks about the two elements: corpus possidendi and animus possession is.

Savigny-
He in his theory of possession says, the pith of corporeal possession is to be found in the physical power of exclusion.

However, Salmond doesn't agree with this view of Savigny that the possessor must have the physical power to prohibit outside interference or obstruction. It is so firstly due to the fact that certain things cannot be physically possessed, like A may have the right of way over another person's land this doesn't mean that he has physical possession of the same. So, Savigny's theory wouldn't be applicable in case of incorporeal possession. Another reason as explained by Salmond through an example is: an infant has no physical capacity to exclude others from depriving him of his possession like a strong and healthy man, nevertheless, if he holds a coin with him, he would be deemed to have legal possession of it. So, the true test according to Salmond is not the physical power of exclusion but the improbability or unlikelihood of interference or obstruction by others.

Markby also says, physical power is rather the possibility of dealing with a thing as one like and of excluding others.

Ihering-
He takes a sociological view of the concept of possession and is of the opinion that the element of animus possidendi is not material and cannot serve as test of legal possession. But if the view of Ihering is accepted it would provide no answer to the question as to why a thief can claim possession of a thing which he has stolen but not a servant who is possession of his master's goods. Thus, simply, intention is also a material element of legal possession.

Justice Holmes-
He says, to gain possession a man must stand in certain physical relation to the object and to the rest of the world, and must have a certain intent. Thus, he also points out to the two elements of possessions.

Sir Henry Maine-
According to him, possession means that contact with an object which involves the exclusion of other persons from the enjoyment of it. Possession denotes physical contact resumable at will. In other words, it does not signify mere physical detention but physical detention coupled with the intention to hold the thing detained as one's own.

Elements of possession
It becomes sufficiently clear from the above-mentioned definitions that there are two elements of possessions, namely corpus and animus. They can be discussed as follows:

(a) Corpus of Possession (corpus possession is)-
Corpus implies two things:
Possessor's physical relation to the res, that is, the object; and
The relation of the possessor with the rest of the world

There must exist some physical contact or control of the possessor with the thing so as to give rise to a reasonable assumption that other people will not interfere with, or simply, with the possessor's right of use, enjoyment of that thing.

This non-interference can be secured in the following ways:

Physical power of the possessor- the person in possession generally uses walls, gates, doors, etc. to prevent others from interfering in his possession. For example, a person is in possession of the money which he locks up in a safe.

Personal presence of the possessor- the physical power of the possessor and his personal presence though commonly present together, but it is not necessary that they must coincide. For example, a coin in a child's hand implies possession even though he doesn't have the physical power to exclude interference with its possession.

However, possession is not lost by mere temporary absence of the possessor from it. For example, a person who goes for walk leaving his things in the house, doesn't lose possession over them. Another example is where a person enters a restaurant for dinner, takes off his coat and hangs it on the stand there, is still in possession of the coat. And someone who takes away the coat dishonestly will be guilty of theft. Similarly, when a person gives a dinner his silver forks while in the hands of the guests are still in his possession.

Secrecy- if the possessor keeps the thing in a hidden manner, it is also a way of keeping the thing secured from interference by others.

Protection afforded by the possession of other things- at times possession of an object tend to confer possession of certain other things which are connected with it or accessory to it. Thus, possession of land confers possession of things that are on or under it.

Manifestation of animus domini- the visibility of claim is another element in the de facto security of the enjoyment of a thing. a manifested intent is much more likely to obtain the security of general acquiescence than on which it has never assumed a visible form. Simply, open use of a thing carries with it a prima facie right mindedness of its possession.

Lastly, in social context, wrongful possession is not seen with favor, therefore, respect for rightful, legal claim prevents people from interfering with the legal possession of others.

(b) Animus Possidendi-

Mere physical contact or control over a thing is not enough, but it must be accompanied with a will or intention to exercise such control. This mental or subjective element in possession is called animus possidendi. To define, it is the conscious intention of the possessor to exclude others from interfering with his right of possession.

In the case of N.N. Majumdar v. State it was held that corpus without animus is ineffective. Following are a few important points in respect of animus:
It is not necessary that the animus must be rightful, and may be wrongful as well, like in case of a thief who is in possession of stolen goods.

The animus need not be absolute. For example, a person still has legal possession over a land even though others possess a right of way over that land. Similarly, it need not be specific also. It can be general like a fisherman has possession of all the fishes I his net, although he may not know their exact number, or that a person is said to be possession of all the books in his library even though he might have forgotten about the existence of some of them.

It is not necessary that the animus must be to hold the thing as an owner. thus, in case of a pledge, the pledgee has possession of the thing pledged, although he intends to retain it in

custody as a security to ensure repayment of his debt. The same applies in case of a tenant too. In other terms, the animus need not be of the possessor himself, a servant or agent does not keep a thing for his own use but on behalf of another person.

Distinction between possession in fact and possession in law
Possession in fact or de facto possession is the actual or physical possession. And possession in law or de jure possession is possession in the eye of law, that is, recognized and protected by law.

They both most often exist together must not always. For example, a servant holds a bicycle on behalf of his master, he has actual possession of it, but in the eye of law the possession is with the master. The Roman Law also recognizes the distinction between possession in fact and possession in law as possession naturalis and possession civilis.

A few illustrative cases are as follows:
R v. Chissers- A person went into a shop and took some cloth in his hand to see it and then ran away with it. He was held guilty of larceny because he had not obtained possession of the cloth only by taking it in his hand and the possession of the cloth was still with the shop-keeper.

Acona v. Rogers- Here, the owner of a house allowed a lady to keep her luggage in one of the rooms of the house. But the keys of that room were with the lady and not with the owner of the house. And thus, the court held that in the eye of law the lady was in possession of the luggage and nit the owner of the house.

Elwas v. Rogers- the plaintiff gave their land on lease to the defendant for erecting a gas plant. The defendant found a pre-historic boat below the land. The court held that the plaintiff had the right to possession over the boat.

South Staffordshire Waterworks Co. v. Sharman (gold rings case)- the plaintiff company employed the defendant to clean a pond owned by the company upon its land. While cleaning the pond the defendant found gold rings at its bottom. The court held that the company had the right of possession over the rings as the pond was owned by it upon its land.

Hannah v. Peel- the defendant purchased a house but never occupied it and thus, it was requisitioned by the government and a soldier was stationed in it. The soldier found a brooch in the house, from the top of a window frame and handed it over to the police. But the police without trying to find the owner of the brooch, sold it. Thus, the plaintiff (soldier) claimed the brooch or the value of it as its finder while the defendant maintained that he was entitled to the brooch as the house where it was found belonged to him.

The court held that the defendant was not entitled to the brooch as he never stayed in the house and so had neither the corpus nor animus as he had no knowledge of the brooch. And the plaintiff was entitled to it as the finder thereof, except against the true owner who could not be found.

Merry v. Green- a man purchased a chest of drawers at an auction and later found some money in a secret drawer. The court held him guilty of theft as he was not aware of the existence of the money at the time when he purchased the chest of drawers and thus had no animus of possession until he found the money. [xiii]

Thus, the simple principle, as explained by Justice Cave in R v. Ashwell, is: a man has no possession of that, of the existence of which he is unaware.

Kinds of Possession

Following are the various kinds of possession:

(a) Corporeal and Incorporeal Possession-

Corporeal possession is the possession of material or tangible objects both movable like books, cattle, watch and immovable like house, land, etc. And incorporeal possession means possession of immaterial or intangible objects like copyright, patent, goodwill, reputation, etc. Corporeal possession consists of both the elements, corpus and, but actual use of the thing is not necessary, for example, a person can keep his ring locked in a safe and never use it but still he will be said to be in possession of the ring. On the other hand, for incorporeal possession actual, continuous use is considered is necessary because physical control or contact, with the things, in possession is not visible as an objective fact.

Also, some jurists are of the opinion that there is no such thing as incorporeal possession because this concept falls short of requisites of real possession. It is for this reason that in Roman law it is called as 'quasi-possession'.

(b) Mediate and Immediate Possession-

Mediate or indirect possession is the possession of a thing through another person. For example, A purchases a watch through an agent or servant, he has mediate possession of it so long as the watch remains with the agent or servant. But if A goes to the market himself and buys the watch, he is in immediate possession of it.

Salmond has given three categories of mediate possession as follows:
Possession acquired through an agent or servant;
Possession held through a borrower or hirer to tenant, where the res, that is, the object can be demanded at will;

Possession is held through a person who is bound to return the object after a certain period or on the fulfillment of certain conditions, like, the pledgee is bound to return the goods pledged when the debt is paid."

This categorization has been criticized on many grounds. Firstly, has been pointed out that in case of an agent or servant, he does not possess the thing but merely has custody of it as here the animus is lacking. Secondly, it is said that two persons cannot be in possession of the same thing, at the same time as Salmond himself points out, exclusiveness is the essence of possession. And the situation is different in case of co-owners as none of them has the right to exclude the other. And it is worth noticing that the first category has been called as representative possession also, while some call it as a type of duplicate or concurrent possession and the other two as derivative possession. Lastly, English law doesn't recognize this distinction between mediate and immediate possession while the German law recognizes it.

(c) Concurrent or duplicate possession-

As mentioned above, exclusiveness is the essence of possession. It is not possible that two persons have an independent as well as adverse claim to possession of the same thing at one time. But it is possible that two persons have concurrent claims to the possession of the same thing at the same time, that is, their claims are not mutually adverse. And in such cases the possession is called as concurrent or duplicate possession.
The most important example of concurrent possession is what Salmond calls as mediate and immediate possession, like of landlord and tenant respectively or of bailee and bailor, etc.
The possession of co-owners is another example of concurrent possession and is called as compossessio in Roman Law.

Corporeal and incorporeal possession may also co-exist in respect of the same material object. For example, a person has corporeal possession over a piece of land while another has a right of way over it, which is incorporeal possession of it.

(d) Constructive Possession-
It simply means that though the person is not in actual physical contact or control over the thing but he has the power as well as the intention to deal with it at his will. An illustration is of constructive possession is when goods sold by one person to another are stored in a warehouse and the purchaser doesn't take the actual physical control over the goods but only the key of the warehouse is given to him by the seller. Here, the purchaser is in constructive possession of those goods. Similarly, a tenant may be occupying a house but the landlord has constructive possession of it. Further, Pollock has explained that constructive possession is possession in law and not possession in fact. However, Keeton has not recognized this type of possession at all.

(e) Adverse Possession-
It means that a person who doesn't have legal title to a property, usually a land, acquires ownership of it based on continuous possession or occupation of the land without the permission of its legal owner. If the adverse possession continues, undisturbed, for the prescribed period (which is 12 years in India) then the title of the real owner comes to an end and the possessor becomes the owner thereof. This effect of the lapse of the prescribed time on titles is called as 'prescription' and has two effects- positive or acquisitive for the person in whose favor the right of ownership is created, and negative or extinctive for the person whose right is extinguished. Lastly, the requisites of adverse possession can be mentioned as:

- Continuity of possession for the prescribed period
- Adequate publicity, that is, the possession must not be held in secrecy but openly,
- Peaceful or undisturbed possession for the prescribed period

Modes of Acquisition of Possession

There are three modes of acquiring possession as follows:
(a) By Taking-
it is the acquisition of possession without the consent of the previous owner and it may either be rightful or wrongful.

For example, as Keeton says, where an inn-keeper seizes the goods of his guest, who has failed to pay his bill, there is acquisition of possession by rightful taking. But where a thief steals something, he acquires possession wrongful taking. But it is not necessary for acquisition of

possession by taking that the thing must be already in the possession of some other person. For example, res nullis, that is, a thing belonging to no one, like, a wild animal or bird, etc. and acquiring possession of a res nullis is also by way of taking.

(b) By Delivery-
it is the acquisition of possession with the consent of the previous owner and is of two types, actual and constructive.

Actual delivery is the physical or actual transfer of a thing from the hands of one person to another. It is of two kinds, one in which the owner still has a mediate possession like when A lends his book to B, and the other in which the owner does not retain even the mediate possession like when A sells the book to B.

Further constructive delivery is one in which there is no direct or actual transfer of the possession of the thing. it is of three kinds:

Traditio Brevi Manu- it is the giving up of possession to someone who already has the immediate possession of the thing. For example, a person sells a book to the hirer thereof who is already in immediate possession of the book. So, in other words, it is only the animus that is transferred as the transferee already has the corpus.

Constitutum Possessorium- as opposed to tradition brevi manu, constitutum possessorium means that the mediate possession is transferred and the immediate possession remains with the transferee. For example, if A purchases a bicycle from someone who also does the work of giving bicycles on hire. So, A allows him to keep the bicycle and continue to use it for hiring purpose. Here, although the immediate possession is still with the other person, A has got its possession through constructive delivery.
Attornment- in this kind of delivery, there is transfer of mediate possession while immediate possession is in the hands of a third person. For example, A has goods in the warehouse of B and they are sold by A to C, then in this case A has constructively delivered the goods to C as soon as B agrees to hold them for C and no longer for A.

(c) Operation of law-
Possession can be acquired by the operation of law also like in case of adverse possession and of succession.

Conclusion
It can be safely concluded that possession is the most fundamental relation between a man and a thing, but one of the most difficult concepts of the field of law. It is a very vast concept consisting of various kinds and modes of acquisition which deal with the acquisition of res nullis too. It is the prima facie evidence of ownership and is protected by law through various possessory remedies like the doctrine of jus tertii and statutory remedies are also available like section 5 and 6 of the Specific Relief Act, 1963, section 145 of the Code of Criminal Procedure, 1973, section 47 and 48 of the Sale of Goods Act, as well as section 167 and 168 of the Indian Contract Act, 1872. Also, for de jure possession both the elements of corpus and are necessary, as opposed to de facto possession.