



Suprema Corte
de Justicia de la Nación



DERECHOS
HUMANOS

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ACQUISITIVE PRESCRIPTION FOR INDIGENOUS COMMUNITIES
(PRESCRIPCIÓN ADQUISITIVA POR COMUNIDADES INDÍGENAS)

CASE: *Amparo Directo* 11/2015

REPORTING JUDGE: Jorge Mario Pardo Rebolledo

DECISION ISSUED BY: First Chamber of the Mexico's Supreme Court of Justice

DATE OF THE DECISION: February 22, 2017

KEY WORDS: right to property, indigenous peoples and communities, positive prescription, customs and traditions, possession, ancestral property, anthropological evidence, intercultural perspective.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo* 11/2015, First Chamber, Jorge Mario Pardo Rebolledo, J., decision of February 22, 2017, Mexico.

The full text of the decision may be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-10/AD%2011-2015.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo Directo* 11/2015, Mexico.

SUMMARY OF THE *AMPARO DIRECTO* 11/2015

BACKGROUND: On October 22, 2009, members of an indigenous community sued for the acquisitive prescription of a property located in Chihuahua and the creation of a right of way. They argued the possession as ancestral owners, based on their customs and tradition. The property belonged to a company [sociedad anónima] (S.A.). A Chihuahua judge denied the claim. They filed a *recurso de apelación*, which was heard by a civil chamber of the Supreme Court of Justice of the State of Chihuahua (the Chamber), which decided in their favor. The S.A. then filed an *amparo directo*. A collegiate court in Chihuahua requested Mexico's Supreme Court of Justice (this Court) to exercise its authority to assert jurisdiction, which it did in its session of February 11, 2015.

ISSUE PRESENTED TO THE COURT: Whether the S.A. disproves the legality of the probatory assessment by the Chamber that established that the positive prescription action filed by an indigenous community was valid.

HOLDING: The *amparo* was denied for essentially the following reasons. After the status of indigenous community was proven and an analysis was done of imparting justice with an intercultural perspective, it was determined that the S.A. failed to demonstrate: the invalidity of the commodatum agreements; the demonstrative effectiveness of its property titles; the lack of value and probatory effectiveness of the anthropological expert opinion, the probatory unviability of the testimonial evidence; or the probatory invalidity of the site location map and the testimonial evidence.

VOTE: The First Chamber decided this matter by a majority of four votes of the judges Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz and Alfredo Gutiérrez Ortiz Mena. Judge Jorge Mario Pardo Rebolledo voted against (reserved the right to issue a dissenting opinion).

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=178696>

EXTRACT OF THE *AMPARO DIRECTO* 11/2015

- p. 1 Mexico City. The First Chamber of the Mexico's Supreme Court of Justice (this Court), in session of February 22, 2017, issues the following decision.

BACKGROUND

- p. 2 On October 22, 2009, members of an indigenous community (the community), in their own right and as indigenous peoples, in an ordinary civil proceeding sued a company [*sociedad anónima de variable capital*] (S.A.) and two people for the acquisitive prescription of a portion of a property located in Chihuahua, and the creation of a right of way to the interior of said property.

They essentially stated that they belong to a Tarahumara ethnic group and that they are members of an indigenous community; that they have exercised possession as owners, ancestrally, since before the State existed, as an original people, on the basis of their customs and traditions, which possession had been passed on to them from generation to generation through inheritance or marriage, and that they met the various requirements for that right of ownership to be recognized through a positive prescription.

- p. 5 Specifically, the S.A. claimed to be the owner of the disputed property; it argued that it was false that the community had had the original and uninterrupted possession of the property that had been transmitted to them under commodatum agreements.
- p. 7 On November 27, 2013, a general jurisdiction judge in Chihuahua handed down a decision, declaring the action unproven and acquitting S.A. The community appealed. On February 25, 2014, a civil chamber of the Supreme Court of Justice of the State of Chihuahua (the Chamber) issued a decision in which it revoked the lower court decision and considered the acquisitive prescription action proven, declaring that the people of the community had become legitimate owners, and that on a different portion of said property a right of way should be created in favor of the indigenous community.

p. 8-9 On March 21, 2014, the representative of the S.A. filed an *amparo directo*. A collegiate court of Chihuahua decided to ask this Court to exercise its authority to assert jurisdiction. In its session of February 11, 2015, it decided to exercise it.

STUDY OF THE MERITS

I. Proof of being indigenous and members of the indigenous community

p. 42-43 The S.A. argues that the plaintiffs did not prove, in accordance with the procedural burden that corresponded to them at the trial level, they have the status of indigenous people and belong to the indigenous community because they did not exhibit any document in this regard. This argument must be rejected.

p. 44-45 Article 2 of the Federal Constitution establishes that the Nation has a multicultural composition originally based on its indigenous peoples, and that they are those who descend from populations that inhabited the current territory of the country at the beginning of colonization and that retain their own social, economic, cultural and political institutions, or part of them.

p. 45-46 Thus, it recognizes the right of indigenous peoples and communities to self-determination, so they may exercise their autonomy within a constitutional framework that guarantees national unity; to this end, it indicates that the constitutions and laws of the states will recognize indigenous peoples and communities and their rights, and that in those constitutions, such recognition must take into account the awareness of indigenous identity and ethnolinguistic and human settlement criteria, as well as the other principles established in the constitutional norm itself.

p. 146 Article 2 of the Federal Constitution includes the definition of indigenous peoples and communities established by Convention 169 of the International Labour Organization; a conventional norm that also defines them on the basis of the fundamental criterion of awareness of belonging to an indigenous people or community.

p. 46-47 This Court has held that self-awareness or self-classification is the determining criterion for establishing the subjective scope of application of Article 2 of the Federal Constitution.

p. 50 The Rights of Indigenous Peoples Law of the State of Chihuahua adopts the subjective criterion of indigenous identity awareness to determine to which individuals, peoples and communities the provisions on indigenous rights apply.

Thus, this Court notes, from the outset, that the self-classification expressed in the claim of the original trial, constituted a sufficient element to justify the status of indigenous people and community.

p. 50-51 This is on the understanding that, in this case, neither the existence of the plaintiff community nor its indigenous nature was undermined in the trial with any evidence, so the assertion of the S.A. is unsubstantiated, in so far as it argues that it was unable to defend itself because it was prevented from raising a dispute as to whether the plaintiffs actually belong to the indigenous race and form part of the community they refer to, since it was the S.A. itself that did not direct its defense in that regard.

II. The application of the “Protocol of action for those who impart justice in cases involving indigenous individuals, communities and peoples”

p. 55 Recognizing indigenous people individually and collectively as a community, and in accordance with this status establishing the application of the "Protocol of action for those who impart justice in cases involving indigenous individuals, communities and peoples", implied establishing the conventional and constitutional rules that would govern the resolution of the dispute, and which this instrument picks up.

p. 56 If indigenous persons and an indigenous community as a collective entity are involved in a dispute, it should be borne in mind that, in accordance with article 2 and 17 of the Constitution, the right of access to jurisdiction entails for the court the duty to observe certain parameters that guarantee this right in a real and effective manner when resolving disputes, respecting the provisions of the Constitution itself.

p. 56-57 This implies that the judges are obligated to investigate and take into account the traditions, customs and cultural specificities of the community and indigenous persons, in order to assess the facts submitted to their power and to assess the mass of evidence, in accordance with their particularities, respecting their normative systems to the extent

relevant, which may lead to a decrease in the rigor of the evidence of the processes of strict law, as far as the indigenous party is concerned, when this derives from those specificities of their condition.

- p. 57 Thus, the standard for analyzing whether there was full access to the jurisdiction of the State is not the same as in any judicial process, because in these cases, in addition to the accumulation of rights and guarantees that the right of access to justice entails, there is also the requirement that the judicial authority be linked to protecting the rights of indigenous people in a special way, taking into account their particularities, i.e. their social, economic, cultural, regulatory context, etc., in order to prevent any resulting situation of vulnerability from preventing the recognition of their rights.

III. The name of the indigenous community

- p. 63 The S.A. argues that there are various communities with the same name and their standing should not be recognized.
- p. 75 This Court concludes that there is no doubt as to the identity of the indigenous community, regardless of the name used in the civil trial to identify it. This is because there are sufficient elements to establish its full identification.
- p. 76-77 Moreover, this Court states that it would be possible to admit as an explanation of the indistinct use of words to designate the indigenous community and the territory in which it is settled, that in the case of ethnonyms (inasmuch as it is used to name the community as an entity) or place names (when it is used to refer to the territory in which the community is settled), these words come from a process of Castilianization of the Rarámuri language resulting in several variants of it, since according to the specialized literature it is common to find an exchange of the vowels "e" and "i" when they are written in Spanish. It is therefore valid to admit the diverse spelling composition of the words used to refer to the community, and still conclude that they are the same indigenous group.

IV. The control of informal conventionality that the responsible Chamber referred to

- p. 78 The S.A. argues that the control of conventionality exercised by the Chamber was improper, since the authority alluded to several rules of the Civil Code of the State of Chihuahua (CCEC), which it interpreted with respect to the concepts of ownership, possession and ways of acquiring it, but did not find whether those rules were contrary to any human right or whether they admitted any interpretation that is contrary to any human right and therefore could not be applied in this case, as would correspond to an informal control of conventionality.
- p. 79 This approach is inoperative. Although the Chamber alluded in its considerations to the exercise of informal conventional control and invoked the criteria of this Court, in fact, it did not do so for the purpose of noting the conventional irregularity of any provision of the CCEC because it considered it contrary to some human right recognized by Mexico in some international treaty, in order to not apply it in the resolution of the original dispute; in other words, the Chamber did not apply conventional control of inferior general rules to exclude their application and prefer the application of higher-ranking provisions.
- p. 79-80 Strictly speaking, the purpose of the Chamber in invoking the duty of the court to carry out the "ex officio control of conventionality", was only to ground its decision in law and fact, regarding the obligation of the judge to observe the duties to ensure the human rights recognized in the Federal Constitution itself and in International Treaties with respect to the special protection of the rights of indigenous peoples, communities and persons, applying the pro persona principle in the interpretation of norms, to verify when an act may be in violation of human rights.

V. The evaluation of evidence to consider acquisitive prescription as proven

- p. 85 This Court will examine the arguments with respect to proving the action of prescriptive acquisition, assuming that the satisfaction in the case of the validity of the ordinary civil route is not in question and, in particular, that the usucaption was considered by the authorities of the court as a viable and suitable action to settle the claim of the community.
- p. 85-86 In this case, the facts of the dispute obviously have an additional and extraordinary component, which is not commonly present in an ordinary civil action of positive

prescription, which is the fact that the community based its claim that the acquisition of the property of the land they argue should be recognized by prescription, on the assertion of an ancestral and original possession, transmitted from generation to generation by inheritance or by marriage, according to their traditions and customs, as a cause generating possession as owners, which is to say under the premise that their "fair title" is not properly a written document or some other material element that consigns or documents the existence of a legal act governed by civil law, by virtue of which the land claimed as owned is possessed, as usually happens in the actions of usucation; rather, in this case, the following is postulated as "fair title" generating the possession: a positive fact in the context of the indigenous culture, the ancestral possession, without a written or tangible element that corroborates it, which according to its conception, makes them owner, which implies admitting an adjustment of the civil action to the specific case.

p. 86-87 The evidence provided was assessed by the Chamber under a less rigorous probatory standard, in order to take into account their cultural traditions, customs and specificities; this in accordance with the intercultural perspective, which is to say, by making use of a method of analysis that studies the power relations between people who are part of different cultures as something desirable and possible, and identifies the demand for rights and the conditions that prevent their full fulfillment in contexts of multiculturalism.

a) The commodatum agreements

P. 87-88 In accordance with Article 1153 of the CCEC, the first of the basic elements of an action for acquisitive prescription in respect of immovable property, is to prove possession as owner; that the plaintiff demonstrates the cause generating its possession, the "title" by virtue of which it is owner, which is appropriate to establish that an original possession is exercised, it being considered fundamentally owner of the property, even when that title may suffer from defects that affect its validity and that, therefore, make necessary a judicial declaration of prescription of the property, which perfects the ownership in favor of the one who seeks to assert usucaption and to the detriment of the one who appears in the Public Registry of Property (RPP) as the owner of the property.

- p. 96 The decision of the Chamber regarding the commodatum agreements was not based specifically on a generic presumption that every indigenous person is not in a position to understand the scope of the legal acts he or she enters into, and therefore must be assisted by an interpreter to explain such scope to him; rather the decision is based on the objective fact that, in this case, it was established that the specific situation of the plaintiffs, due to their high degree of marginalization, led to the view that those who signed the commodatum contracts could not have fully understood their implications, which lessened their validity. Therefore, it is this consideration that would have to be disproved by the S.A. in its reason for appeal, which it does not achieve.
- p. 97 Furthermore, to corroborate the above, this Court notes that during the trial, with a motion filed by the S.A. based on the aforementioned commodatum agreements, the persons of the community objected to those documents and offered anthropological expert evidence to demonstrate, inter alia, that due to their degree of marginalization, they could not understand the content and legal scope of any type of contract or legal act they had concluded. So the issue of the validity of the commodatum agreements was introduced to the dispute through that motion, which had to be proven.
- p. 98 In view of the above, it is shown that the S.A. does not disprove the Chamber's rejection of its only peremptory motion, aimed at demonstrating that the possession of the plaintiffs was derived and unfit for prescription, on the grounds that it was obtained by means of commodatum agreements.

b) The demonstrated effectiveness of the property titles

- p. 104 From the position of the S.A. in relation to the documentary evidence, this Court notes that its cause of action is framed in two aspects: a) to argue that such evidence, in itself, by its nature as titles justifying the right to ownership, fully demonstrated that the disputed property, in its entirety, has been under its original possession and that, in any event, the latter would have to be disproved with reliable evidence; and b), to assert that from these documents evidence was derived that proved that the material possession of the property,

also in its entirety, has only been held by those who have been its registered owners and not by the indigenous community involved.

- p. 117 With respect to the two positions, it is concluded that they do not prove the illegality of the challenged decision.

On the understanding that the fact that two pieces of evidence (administrative file and public deeds) are public documents that are full proof because they have been prepared by a person having certifying authority, such as the administrative authorities or the notary public, respectively, does not lead to a conclusion different from the one noted above; since that status of public documents, as S.A. itself admits in its presentation, does not prevent the community from disproving in the acquisitive prescription proceeding the presumption that the registered owner has of possession, which as a question of fact, is precisely the disputed matter in said civil action.

- p. 118 The demonstrative effectiveness that a public document may have in the process in terms of the facts in dispute, notwithstanding its full evidentiary value, is determined by its ability to prove the disputed fact, according to its nature and circumstances, and in this case, the administrative file and the public deeds in question are insufficient to consider the non-existence of material possession by the plaintiffs of the land claimed to have been evidenced as a negative fact, at the time when these public documents were formed, from data that those instruments do not reveal and that would not necessarily have to reveal.

- p. 120 Next we analyze the arguments of the grounds for violation questioning the demonstrative effectiveness of the evidence that the responsible Chamber collected and corroborated in order to consider the action of positive prescription as proven, since it must be said that the challenged decision is clearly constructed from the weighing of a series of elements, which led the responsible court to come to a conclusion on the facts at issue, with the solidity that it considered sufficient to support its conclusion; it must be stressed that, in the assessment of the evidence, the premise from which the Chamber started, concerning taking account of cultural traditions, customs and specificities, will be taken into account and is considered firm in this constitutional instance.

c) The expert anthropological evidence

- p. 126 The expert witness in anthropology evidence has the purpose of informing the deciding judge regarding the social practices and institutions that he does not know about or at least cannot be presumed to know about.
- p. 127-128 The legal-anthropological expert gives an account of the existing institutions in a community and what functions they fulfill. This task, in a system based on orality and conflict resolution based on precedents, can lead to partial results, hence the identification of standards must be verified by observing the actual behavior of the community.
- p. 128 Based on the nature and purpose of this evidence, this Court is convinced that the S.A. is not right, in so far as it argues generically that the expert witness evidence lacks value and evidentiary effectiveness, due to the fact that one of the sources of information on which both experts relied for the preparation of their opinions was the community itself, through interviews with its members, and because the expert had relied on information from a civil association giving advice in the proceeding.
- p. 130,133 On the contrary, the analysis of the opinions and the specialized bibliographic sources shows that the experts used methods and techniques typical of social anthropology to support their conclusions. Furthermore, the impartiality of the experts could not be considered since the S.A. also does not submit this as evidence.
- p. 135 On the other hand, taking into account the nature and methodology of the expert evidence in anthropology, it is observed that the opinions delivered in the trial contain information concerning the identity of the members of the plaintiff community as indigenous, as well as their economic, social and cultural conditions, and of course on the territory in which the indigenous community is settled.
- p. 157 The reasoning put forward by the Chamber to establish the cause of possession as owners held out by the plaintiffs, in the conception and connection that they have with respect to the territory as an element of their ethnic identity according to their culture, and the form of its appropriation by virtue of occupation derived from acts of mere tradition by inheritance or marriage, according to the information provided by the experts in their

opinions; in fact, they are not challenged with specific reasoning, since at most, generic statements are made calling them illegal but without argument; and, in that circumstance, it must be considered that the determination of the Chamber to take into account in the evidentiary assessment the traditions, customs and cultural specificities, due to their status as indigenous, is firm in the proceeding; hence, this Court does not find illegality in the assessment of expert evidence.

d) The dismissal of the declaration of confession of indigenous persons

p. 173 This Court considers that the Chamber's assessment that it was not appropriate to declare that the members of the community had confessed in the first instance decision to be correct, since there was a justified reason for their failure to appear to respond to interrogatories.

p. 177-178 In this case, the justification was clear, not only because of the lack of financial resources, manifested by them, corroborated by the proceeding documentation and recognized by the judge himself; but also because a procedural context prevailed in which they hoped to receive help for their transfer, which was not defined before the presentation of the evidence; hence the conclusion to dismiss this declaration of confession is considered correct.

e) The probatory value and effectiveness of the testimonial evidence

p. 184 Article 389 of the Code of Civil Procedure of the State of Chihuahua establishes a system of free assessment with respect to testimonial evidence, which leaves the assessment of evidence to the prudent discretion of the judge.

p. 184-185 Witness disqualifications occur under circumstances that validly and objectively affect the credibility of their testimony; the law indicates some circumstances that could bring into question the impartiality of their statements, which include the bond of kinship by consanguinity or affinity with any of the parties.

p. 185 However, the mere circumstance of the existence of a relationship of kinship of the witness with one of the parties does not in itself exclude the testimony, since it will depend on

whether the circumstance that could affect the credibility of the testimony has been concealed; in other words, that it has not been indicated to the judge in the proceeding, and of course, that the content of the statements generates doubt for the judge about their plausibility, depending on the nature of the facts declared, because when the condition of the witness is explained openly and clearly to the judge, the latter can analyze with objectivity and full knowledge whether the statement of the witness is affected.

- p. 186 However, the S.A. it does not state any specific reason or fact why it considers that three witnesses who were questioned about the validity of their testimony could fall under any of the circumstances set forth by law as those that could affect their testimony; nor is it seen from the proceeding documentation that the S.A. has raised a disqualification incident to show that any of those deponents are unable to render a statement. Therefore, its generic assertions in this regard are inoperative.
- p. 187 The S.A.'s argument indicating that the statements of a witness should not have been recognized because she does not know the facts for herself, since she said that her grandfather told her about the customs of the community, is also dismissed. It is clear that this statement does not affect her testimony, since it does not mean that the person making the statement does not know the traditions and customs of the community from her own life experience, if she also belongs to an indigenous family, despite currently residing in another locality, so it is possible to admit as truthful that she knows personally both the territory and the members of the indigenous community and can describe its main activities.
- p. 188 These assertions cannot be accepted, since the S.A. loses sight of the fact that the only purpose of the testimonial evidence is for those who may have some knowledge of the facts that are in dispute, or of facts related to the litigants, to inform the judge what they have seen or heard, which is to say what they learned through their senses, in order to contribute to the discovery of historical truth.
- p. 189 In sum, it is considered that the assessment of the Chamber that the witnesses presented by the community were consistent in their statements was correct, making use of this

evidence to consider as proven that they have occupied a part of the property in dispute for generations, and that they had not been affected until now when they had to file a proceeding to prove their ownership right.

f) Identification of the property

- p. 197 The S.A.'s assertion cannot be accepted that the location map is only a photograph "quite far away" that does not achieve full identification of the property, since it is a satellite image with cartographic parameters commonly used to locate a point on the earth's surface, in which the coordinates of the represented area are specified and the most relevant geographical or geomorphological features are indicated, so there is no doubt of its suitability.
- p. 198 Furthermore, the arguments of the S.A. that the statements of the witnesses in relation to the identification of the property did not constitute suitable evidence that the Chamber could take into consideration in order to consider that point to be proven, must also be rejected.
- p. 198-200 It is true that the testimonial is not evidence that is appropriate, by itself, to prove the full formal identification of a property; however, this does not render this evidence completely useless when the witness provides objective data on his knowledge of the place to corroborate these statements as indicative, with other evidence that could be of greater precision and suitability for that purpose, as happened in this case, since taking into view the referenced location map (which as has been said, essentially coincides with those in the file), the testifiers gave objective references about the place in which the community is settled when responding to the evidentiary questions, as is seen from their statements, specifying where it is accessed from, some names of the ranches that exist in the area, and as residents of the place, their expressions about their knowledge of the area (location, geographical features and boundaries) should not be questioned, even if they are not surveying experts as pointed out by the S.A., because in that sense, the Chamber took into account precisely the particularities of the case, and that the witnesses, in

addition to being consistent in their statements, as residents of the place, have knowledge of its particularities and can give reasons for their statements.

p. 200 Therefore, contrary to what the S.A. postulates, this Court does not find that the assessment by the Chamber is illegal when attributing indicative value to both evidentiary elements -location map and testimonial-, to consider the identification of the claimed property as evidenced.

g) The creation of the right of way.

p. 202 The S.A. is incorrect when it posits that it was left defenseless when in the original trial it was not specified which of the defendants claimed the creation of the right of way, nor the technical and legal circumstances that supported that claim.

p. 203 The above is so, since it was made clear that the claims of the initial lawsuit (acquisitive prescription and creation of legal right of way), were also claimed from the S.A., since it was the one that appeared as the last owner of the property in the respective RPP, hence it cannot be considered that it was not clear to the S.A. that this claim was made against it.

DECISION

p. 206 The Justice of the Union does not cover or protect the S.A. from the decision of February 25, 2014, issued by the Chamber.