IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 10866-10867 OF 2010

IN THE MATTER OF: -

M. Siddiq (D) Thr. Lrs. ... Appellant

VERSUS

Mahant Suresh Das &Ors. etc. etc. ... Respondents

AND
OTHER CONNECTED CIVIL APPEALS

COMPILATION OF JUDGMENTS ON DOCTRINE OF LOST GRANT

BY DR. RAJEEV DHAVAN, SENIOR ADVOCATE

ADVOCATE ON RECORD:EJAZ MAQBOOL

had no knowledge of these offers, but Mr. Malay Banerjee, though I was informed that he was in Calcutta, has not been called on behalf of the defendants to contradict the suggestion which was made. But in addition to this statement, which was really only in the nature of a suggestion and was not evidence, Mr. Saha informed me that it was difficult to say whether his company was solvent in the year 1935, and further that it was in a "little financial difficulty" in 1936. I asked him whether all other claims had been paid by his company at or about this time, and he said that he thought that more than one claim, at any rate, had been paid during that year.

The "little financial difficulty" to which he referred arose apparently because the Government of India issued a notice on 21st April 1936 to the effect that it had been brought to the notice of the Governor-General in Council that continual default had been made by the Modern India Life Insurance Co., Ltd. in complying with the requirements of the Indian Life Assurance Companies Act, 1912, in particular in the failure although frequently called upon to do so, to deposit with the Controller of Currency Government securities as required by the provisions of the Act, and that by reason of such default the penalties and liabilities prescribed in S. 34 of the Act appeared to the Government of India to have been incurred by the company and by the officers of the company therein named. In view of these facts I am driven to think that the real reason for resisting the claim of these plaintiffs was that this company was in an embarrassed financial position at the time, and desired to put off as long as possible having to make any payment. The requirement that proof of age shall be given by an assured person is, of course, a reasonable requirement. The question is whether proof of age in this case had been given of such a character that the company ought to have been satisfied with it and ought to have considered it reasonable. With regard to that, I refer especially to the fact that the plaintiffs actually complied to the letter with the specific requirements made by the company. Even when that had been done, the company was not satisfied and put forward further enquiries.

Taking all these things into consideration I consider that the company ought to have been satisfied with the proof of age submitted on behalf of the plaintiffs. Owing to the fact that there is no general system of registration of births in this country and the consequent difficulties about proof of age, I should have thought that it would have been better policy on the part of insurance companies in India to refuse to issue policies without proof of age, or else to require that proof of age shall be given within a limited time after the issuing of any policy. By this means these difficulties about proving age in India would be got rid of. I am well aware that this is not the custom in England, but the conditions there are different, and, as everybody knows, there is a complete system of registration of births and there is generally no difficulty in proving the age of any person. In these circumstances I am satisfied that the plaintiffs have proved their claim and their right to this money, and there must be a decree for Rs. 3,000 with interest at 6 per cent. from 12th August 1935, and costs.

W.D./A.L. *Suit decreed.*

A. I. R. 1937 Calcutta 245

M. C. GHOSE AND B. K. MUKHERJEA, JJ.

Asrabulla and *others*—Appellants.

v.

Kiamatulla Haji Chaudhury and *others*—Respondents.

Appeal No. 1222 of 1934, Decided on 5th January 1937, from appellate decree of Sub-Judge, First Court, Sylhet, D/- 5th February 1934.

(a) Assam Land and Revenue Regulation (1 of 1886), S. 6—Scope—Regulation is merely Revenue Code—It does not purport to repeal all laws under which rights can be acquired nor abrogate all customs or customary rights as invalid—Acquisition of rights not covered by S. 6 is not prohibited—Right based on custom or presumed grant is derived from true owner either expressly or from acquiescence—Acquisition of right of pasturage based on custom is not prohibited under S. 6 or S. 6 (b).

The Assam Land and Revenue Regulation does not purport to repeal all laws, so far as the province of Assam is concerned under which various other kinds of rights over property could be acquired nor does it abrogate all customs or customary rights as invalid. It is to all intents and purposes a revenue Code. For purposes of settlement of land revenue, and for exercising the powers conferred by the Regulation, Government would not recognize any other pieces of right over land save and except those which are speci-

fied in S. 6. But that does not mean that as between any party, these rights could not be acquired under the provisions of the laws which are also in force in Assam, or that the rights already acquired would stand confiscated. A right based on custom or presumed grant, is in its ultimate analysis a right derived from the true owner either expressly or from acquiescence. Acquisition therefore of a right of pasturage based on custom is not prohibited by S. 6 or S. 6 (b) of the Regulation: *A I R 1921 Cal 162, Rel. on.* [P 247 C 2; P 248 C 1]

(b) Easement—Pasturage—Rights of pasturage claimed by whole body of villagers—Such rights are not easements or privileges of individuals in respect of their lands—Such rights are intermediate between public and private rights—Ordinarily such rights originate from custom.

Where rights of pasturage are claimed by a whole body of villagers, such rights are not easements in the proper sense of the word. They are not privileges attached to individuals in respect of their lands. These are rights claimed for a fluctuating class of persons in respect of a locality. They come under the description of class of rights intermediate between public and private rights and they attach to certain classes of persons or portions of the public and have their origin ordinarily in custom: *14 Cal 460 (F B), Rel. on.* [P 248 C 1]

(c) Easement—Pasturage — Lost grant — Long and quiet possession in absence of actual proof of title raises presumption of origin of lawful title—Presumption cannot be capriciously made—To raise such presumption grant should be valid at its inception—There must be capable grantor as well as capable grantee—Right of pasturage claimed by body of villagers on ground of lost grant—Body being fluctuating and unascertained, no presumption of lost grant can arise in favour of such body.

The presumption of origin in some lawful title to support possessory rights long and quietly enjoyed, where no actual proof of title is forthcoming, is not a mere branch of the Law of Evidence. It is resorted to because of the failure of actual evidence. It is not a presumption to be capriciously made and the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. In order that there may be a presumption of lawful origin, it is necessary to establish that there was no legal bar in the way of a valid grant at its inception, and that not only was there a capable grantor but there was a capable grantee also in whose favour the grant could have been made. If for any reason a voted grant could not have been made, no presumption of such a grant can arise. [P 248 C 1, 2]

Where the rights of pasturage are claimed by the whole body of villagers on the ground of the presumption of lost grant of such rights, no presumption of the lost grant by mere long user in case of such rights can be presumed in favour of villagers who constitute a fluctuating and unascertained body of persons: *Case law referred.* [P 249 C 2]

(d) Second Appeal — Question of law — Question as to reasonableness of custom is one of law.

A question as to the reasonableness or otherwise of a custom is a question of law, and so in second appeal the Court can look into facts for the purpose of deciding as to whether the custom alleged is reasonable or not: *A I R 1915 Cal 421, Rel. on.* [P 250 C 1]

(e) Custom — Essentials of — Validity — Reasonableness — 730 cattle in village — Available pasture land less than four hauls—Villagers suing for right of pasture in lands of adjacent village on ground of custom—Period for ascertaining reasonableness of custom is period of its inception—Custom is reasonable.

The period for ascertaining as to whether the custom is reasonable or not is the period of its inception: *Mercer* v. *Denne, (1904) 2 Ch 534* and *Mercer* v. *Denne, (1905) 2 Ch 538, Rel. on.* [P 250 C 1]

Where there were 730 head of cattle in a village and the available pasture land was even less than four hauls and the villagers sued for the establishment of their right of pasturage in the lands of an adjacent village on the ground of custom:

Held: that the custom was reasonable. [P 250 C 1, 2]

(f) Civil P. C. (1908), O. 1, R. 8—Notice under R. 8 served only three days before date of hearing of suit—Hearing of suit continuing for two months—Judgment delivered nine weeks after institution of suit—There was no prejudice done to defendants and case ought not to be remanded.

The plaintiffs brought a suit claiming right of pasturage on lands of adjacent village and the suit was brought by them on behalf of the residents of their village and against villagers of an adjacent village representing the said village, but a notice under O. 1, R. 8 was served in the village only three days before the hearing of the suit. The hearing of the suit continued for two months and the judgment was actually delivered nine weeks after the institution of the suit:

Held: there was no prejudice done to the defendants and the case ought not to be remanded on this ground only as the defendants had ample opportunities of coming up and defending themselves if they were so minded. [P 250 C 2]

Gunada Charan Sen and *Priyanath Dutt*—for Appellants.

S. C. Basak, Hemendra Kumar Das and *Benoyendra Nath Palit*—for Respondents.

B. K. Mukherjea, J.—This appeal is on behalf of some of the defendants in a suit commenced by the plaintiffs on their own behalf, as well as on behalf of the inhabitants of Kedupur village, for establishment of a right of pasturage over the lands in suit. The defendants are residents of an adjacent village named Daudpur where the lands in dispute are situated, and they too have been sued in a representative capacity, as representing all the villagers with requisite permission under O. 1, R. 8, Civil P. C. The case of

the plaintiffs in substance is that from time immemorial the inhabitants of village Kedupur having been grazing their cattle in the disputed land openly and uninterruptedly and thereby acquired a right of pasturage therein. The right is claimed on the basis of a custom, as well as on immemorial user giving rise to a presumption of lost grant. It is claimed also as an easement of necessity. The suit was contested by some of the defendants, who traversed the material allegations in the plaint, and contended inter alia that the plaintiffs had not acquired any right either as an easement of necessity or by way of custom or implied grant.

The trial Court decreed the suit, holding that the plaintiffs had acquired a right of pasturage, on all the three grounds set out in the plaint, over plots Nos. 1 and 2 of the Commissioner's map, excluding certain portions which were specified in the decree. This decree was affirmed on appeal though the lower appellate Court negatived the claim of the plaintiffs, so far as it rested on the ground of its being an easement of necessity. It is against this decision that a second appeal has been taken to this Court and Mr. Gunada Charan Sen who has appeared in support of the appeal has pressed the following points on behalf of his clients. It has been contended in the first place, that no right of pasturage based on custom or otherwise could be claimed by the plaintiffs in view of the provisions of S. 6, Assam Land and Revenue Regulation, which prevent the acquisition of any such rights in the province of Assam. It is next argued that even if such rights could be acquired in law there could not be a grant, either actual or presumed, in favour of an indeterminate body of persons as the inhabitants of a village. The third contention is that the custom alleged by the plaintiffs and found by the Courts below is unreasonable; and lastly it is urged that there has been an irregularity in the procedure, which resulted in miscarriage of justice inasmuch as the notice under O. 1, R. 8, Civil P. C., was actually served in the village, only three days before the hearing of the suit commenced, and the villagers in general who are bound by the decree had no opportunity of coming up and contesting the suit properly. As regards the first point, it is not disputed that the properties in suit are situated in the district of Sylhet, where the Assam Land and Revenue Regulation is in force. S. 6 of the regulation stands as follows:

> No right of any description shall be deemed to have been or shall be acquired by any person over any land to which this statute applies, except the following: (a) right of proprietors, landholders, and settlement holders other than landholders, as defined in this regulation and other rights acquired in manner provided by this regulation; (b) rights legally derived from any rights mentioned in Cl. (a); (c) rights acquired under Ss. 26 and 27 Lim. Act, 1877; (d) rights acquired by any person as tenant under the rent law for the time being in force.

If this section be taken to lay down exhaustively as to what kinds of rights over property one could acquire in the province of Assam, and if the acquisition of any other kind of right is distinctly prohibited, undoubtedly it favours the contention of the appellants, for the rights of pasturage claimed by the plaintiffs, do not come within Ss. 26 and 27, Lim. Act, and it is not without doing violence to the language that one can speak of customary rights as coming within the provision of Cl. (b) of the section. In our opinion, however, this wide interpretation would not be proper having regard to the scope and object of the regulation itself. The regulation does not purport to repeal all laws, so far as the province of Assam is concerned under which various other kinds of rights over property could be acquired, nor does it abrogate all customs or customary rights as invalid. It is to all intents and purposes a revenue Code and it provides for a variety of things including settlement of land revenue, preparation of record of rights, registration of transfers, partition of estates and the procedure to be followed in realising arrears of revenue. Ch. 2 of the regulation defines in the first place the rights of the different classes of owners of land in the provinces which are described under three heads as (1) proprietor, (2) landholder and (3) settlement holder, and Cls. (b), (c) and (d), S. 6 of the chapter enumerate the other rights over land, besides the three mentioned above, which are also recognized for purposes of this regulation.

In our opinion for purposes of settlement of land revenue, and for exercising the powers conferred by the regulation, Government would not recognize any other pieces of right over land save and except those which are specified in S. 6. But that does not mean that as between any party, these rights could not be acquired under the provision of laws

which are also in force in Assam, or that the rights already acquired would stand confiscated. We may take by way of illustration the case of acquisition of rights over land by adverse possession. Certainly a man could acquire right by adverse possession in Assam, and we are unable to hold that the disseisor gets title derivatively from the true owner which alone could bring him within the purview of Cl. (b) of S. 6. Rights of pre-emption on the footing of customs have been enforced even among Hindus in the province of Assam, and have been judicially recognized in many cases : *vide* the case in 25 C W N 901,[1] although they would not come under any of the clauses attached to S. 6. Mr. Sen seems to suggest that all these may be said to be derivative rights as contemplated by Cl. (b). It is difficult, as we have said already, to accept this suggestion, as the plain language of Cl. (b) would repel such construction. But even if this construction is accepted then in the present case also, the rights claimed by the plaintiffs can be said to be in a sense derived from the proprietors or settlement holders, for a right based on custom or presumed grant, is in its ultimate analysis a right derived from the true owner either expressly or from acquiescence. We overrule therefore the first contention of Mr. Sen.

The second contention of Mr. Sen raises an interesting point as to whether the rights of pasturage, claimed by a whole body of villagers, can be acquired by grant either express or presumed. We may say at once that the rights claimed by the plaintiffs are certainly not easements in the proper sense of the word. They are not privileges attached to individuals in respect of their lands. These are rights claimed for a fluctuating class of persons in respect of a locality. They come under the description of the second class of rights intermediate between public and private rights, as enunciated in the well known case in 15 Cal 460[2] and they attach to certain classes of persons or portions of the public and have their origin ordinarily in custom. But can there be a presumption of lost grant in cases of such rights when long user is proved? As the Judicial Committee explained in 57 I A 125[3] the presumption of an origin in some lawful title to support possessory rights long and quietly enjoyed, where no actual proof of title is forthcoming, is not a mere branch of the Law of Evidence. It is resorted to because of the failure of actual evidence. It is not a presumption to be capriciously made and the Court must be satisfied that such a title was in its nature practicable and reasonably capable of being presumed without doing violence to the probabilities of the case. "It is a principle, which," says Lord Loreburn, L. C. in (1911) A C 623,[4]

> is based on good sense. The lapse of time gradually effaces records of past transactions and it would be intolerable if any body of men should be dispossessed of property which they and their predecessors have enjoyed during all human memory, merely upon the ground that they cannot show how it was originally acquired. That is the reason why the law infers that the original acquisition was lawful unless the property claimed is such that no such body of men could lawfully acquire it, or the facts show that it could not have been acquired in the only ways which the law allows.

Thus in order that there may be a presumption of lawful origin, it is necessary to establish that there was no legal bar in the way of valid grant at its inception, and that not only there was a capable grantor but there was a capable grantee also in whose favour the grant could have been made. If for any reason a valid grant could not have been made no presumption of such a grant can arise. Now it has been held in England, as early as in the year 1590, that the inhabitants of a village could not *eo nomine* acquire by prescription a right of way, the inhabitants not being capable grantees : *vide* (1590) Cro Eliz 180.[5] In 34 L J Ex 52[6] the citizens of Carlisle for themselves and their neighbours claimed a right by custom to hold horse races on a certain day every year in the land in suit in respect of which an action for trespass was brought by the plaintiff. Martin B. in giving judgment for the plaintiff held inter alia that :

1. Nabin Chandra Sarma v. Rajani Chandra Chakravarti, A I R 1921 Cal 162=63 I C 196 =25 C W N 901.
2. Chunilal v. Ram Kissen, (1888) 15 Cal 460 (F B).
3. Mahommad Muzafferal Musavi v. Jabeda Khatun, A I R 1930 P C 103=123 I C 722= 57 I A 125=57 Cal 1293 (P C).
4. Harris v. Earl of Chesterfield, (1911) A C 623 =80 L J Ch 626 = 105 L T 453 = 55 S J 686=27 T L R 548.
5. Foxall v. Venables, (1590) Cro Eliz 180.
6. Mounsey v. Ismay, (1865) 34 L J Ex 52 = 3 H & C 486 = 11 Jur (N S) 141 = 12 L T (N S) 27=13 W R 521.

Such a right as was set up by the defendants could only exist by custom, a grant of such right to the freemen of Carlisle, or the citizens of Carlisle would be void. Such indeterminate bodies as the freemen of a city not being themselves a corporation are incapable of being grantees.

This view was reiterated in (1911) A C 623[4] where the free holders of five parishes adjoining the river Wye claimed a fishery right with reference to a non-tidal portion of the river. The right was exercised admittedly for several centuries openly, uninterruptedly and as of right, and the question was whether a presumption of lost grant could be made. The House of Lords decided by a majority that no presumption of lost grant was available in the case, inasmuch as the free holders of several parishes who were an indefinite and fluctuating body of persons could not be proper grantees in law. Lord Ashbourne, whose was one of the dissenting judgments, made a suggestion that the King might have made a grant to the free holders of the area of fishing in gross, and this may have made them a corporation or the King may have made a grant to an existing corporation upon trust for the free holders. It was pointed out on the other hand by Lord Gorell, who sided with the majority, that there was no trace of any corporation existing at any time; and the right was asserted by individual free-holders as appurtenant to their respective free holders. There was no foundation for the case, that the presumed grant from the King would incorporate the free holders quoad the grant. In this Court the point came up for decision in 9 Cal 698[7] which arose out of a suit instituted by the plaintiff for restraining the defendants from fishing in certain waters within the ambit of the plaintiff's zemindary. The defendants contended that they had acquired a prescriptive right of fishing in the beels under a custom according to which all the inhabitants of the zemindary had the right of fishing. On the point as to whether there could be a presumed grant from long user the learned Judges observed as follows :

Then again from the length of user it cannot be presumed that there was a grant by the Sovereign power. It seems to us that the presumption of a grant is impossible ; because it cannot be shown that there was some ascertained grantee or grantees. The Subordinate Judge was of opinion that the tenants of the several parganas in whose favour the right in question is claimed must be considered to constitute a unit, that is to say he considers that they form a corporate body. We fail to see any tangible ground for the assumption. For instance it may be that such a grant may be presumed in favour of a village community if such community be shown to possess all the essentials of a corporate body ; but we do not see any reason suggested by any evidence on the record which can support the conclusion that the tenants of the different parganas in whose favour the right in question is claimed form anything like a corporate body.

This reasoning applies fully to the facts of the present case, and we are of opinion that no lost grant could be presumed in favour of a fluctuating and unascertained body of persons who constitute the inhabitants of a particular village. Our attention has been drawn to a decision of the Judicial Committee reported in 31 I A 75,[8] where the plaintiffs claimed a right of pasturage over the waste lands of the village which belonged to the defendants on ground of immemorial user. Their Lordships observed in the course of their judgment in this case that:

On proof of the fact of enjoyment from time immemorial there could be no difficulty in the way of the Court finding a legal origin for the right claimed.

It must be remembered however that there were seven suits commenced by different sets of plaintiffs out of which this appeal arose, and they were subsequently consolidated for purposes of hearing. The right of pasturage was claimed as an easement by each individual villager as appurtenant to his tenancy, and the allegation was that the plaintiffs and their predecessors had been enjoying the right of pasturage over the waste lands of the village from time immemorial. The trial Court held that the right was established under S. 26, Lim. Act, and their Lordships of the Judicial Committee restored this judgment with a direction that the defendants would be competent to improve these waste lands, provided sufficient lands were left for pasturage. It would be clear from the judgment, that this was not a right claimed in gross by the villagers in general in respect of a particular locality, and as such the observation of their Lordships do not in any way militate against the view we have taken, viz. that there could be no presumption of a lost grant in favour of the inhabitants of a particular village. In our opinion therefore the

7. Lutchmeeput Singh v. Sadaulla Nushyo, (1883) 9 Cal 698—12 C L R 222.

8. Bholanath Nundy v. Midnapur Zemindary Co., (1904) 31 Cal 508—31 I A 75.

second ground urged by Mr. Sen is sound and must prevail. But we cannot, on this ground alone, reverse the decision of the Court below, inasmuch as it has found in favour of the plaintiffs on the ground of custom also.

Mr. Sen attempts to assail this finding on custom, substantially on the ground, that the custom is unreasonable and hence invalid. It may be taken as fairly settled that a question as to the reasonableness or otherwise of a custom is a question of law and it is open to us in second appeal to look into the facts found by the lower appellate Court, for the purpose of deciding as to whether the custom alleged is reasonable or not : *see* the case in 19 C W N 1108.[9] The period for ascertaining as to whether the custom is reasonable or not is certainly the period of its inception : (1904) 2 Ch 534[10] at p. 557, (1905) 2 Ch 538,[11] and Mr. Sen has contended before us that the Thak records which were prepared between 1860-66 would show that village Kedupur had 400 bighas of patit land within its ambit, which could be used as grazing ground, and it was most unreasonable for the villagers, who had only 40 cultivators amongst them at the time to invade the lands of another village for the purpose of extending their rights of pasturage. We may say in the first place that there is no definite finding that the custom originated near about the time of the preparation of the Thak records, and from the evidence discussed in the judgment of the lower appellate Court it is more probable that its origin was much later.

In the second place, we have looked into the Thak papers ourselves, and it seems to us that the description of the lands and the acreage as given there are palpably wrong. In the third place we do not know the number of cattle that existed at the time of the Thak Survey, and the 400 bighas of patit land might not have been available for pasturage at all. The Commissioner who went into the locality for local inspection found 730 head of cattle in the plaintiffs' village and the available pasture land was even less than four hauls. As we cannot rely on the Thak records, the materials, that we have actually got, lead to the only inference, that the custom alleged by the plaintiff is under the circumstances of the case perfectly reasonable. This contention of Mr. Sen, therefore, would fail. The last ground urged by Mr. Sen relates to the irregularity in the service of notice under O. 1, R. 8, Civil P. C. It is not disputed that the notice was actually served in the village on 8th May 1933, and the hearing of the suit commenced on 11th May following. The time certainly was very short. But as the lower appellate Court has pointed out, the hearing continued for two months, and the judgment was actually delivered on 19th July 1933. All the villagers knew of the progress of the suit, and they had ample opportunities of coming up and defending it if they were so minded. As there was no prejudice we are not prepared to send the case back on this ground alone. The result is that although we do not agree with all the findings of the lower appellate Court, we affirm the decree on the ground that the plaintiffs have established a right of pasturage by custom over the lands specified in the decree of the trial Court. The appeal is thus dismissed. No order as to costs in this Court.

M. C. Ghose, J.—I agree.

W.D./A.L. *Appeal dismissed.*

9. Mokshadayini Dassi v. Karnadhar Mandal, A I R 1915 Cal 421=31 I C 702=19 C W N 1108.
10. Mercer v. Denne, (1904) 2 Ch 534=74 L J Ch 71=91 L T 513=53 W R 55=68 J P 479=3 L G R 385=20 T L R 609.
11. Mercer v. Denne, (1905) 2 Ch 538=74 L J Ch 723=93 L T 412=54 W R 303=21 T L R 760=3 L G R 1293.

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CUNLIFFE AND HENDERSON, JJ.

Jatindra Mohan Das—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 774 of 1936, Decided on 26th January 1937.

(a) Penal Code (1860), Ss. 372 and 373—Construction—Sections are correlative of each other—'Sells' in S. 372 corresponds with 'buys' in S. 373—Similarly expressions 'lets to hire' and 'otherwise disposes of' in S. 372 correspond with 'hires' and 'otherwise obtains possession' in S. 373.

Section 373 is not to be read as a self-contained whole without reference to S. 372. Both sections are correlative of each other being aimed against what may be broadly described as trafficking in girls under the age of eighteen. The expressions 'sells', 'lets to hire' and 'otherwise disposes of' in S. 372 correspond with the words 'buys', 'hires' and 'otherwise obtains possession' in S. 373 respectively. The words 'otherwise obtains pos-

J. C.

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SRIMATI SAVITRI DEBI v. MAHARAJ BAHADUR RAM RAN BIJOY PROSAD SINGH.

the position of the Court of Wards was analogous to that of a solicitor who advises his client to accept a compromise one term of which is that the costs of the solicitor shall be paid by the opposite party. It has never been suggested that the inclusion of such a term would enable the client to repudiate the compromise.

In the opinion of their Lordships the appeal fails on every point. Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellants must pay the costs of respondents 1 (A.) and 1 (B.).

Solicitors for appellants: *Douglas Grant & Co.*

Solicitors for respondents 1 (A.) and 1 (B.): *Hy. S. L. Polak & Co.*

J. C.*

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Oct. 20.

LAKSHMIDHAR MISRA AND OTHERS . APPELLANTS;

AND

RANGALAL AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT AT PATNA.

Land—Whether cremation ground—Issue of mixed fact and law—Reservation by custom—Immemorial, certain and continuous—Doctrines of dedication and lost grant inapplicable—Code of Civil Procedure (V of 1908), s. 100.

On a claim by the appellants, in a representative capacity on behalf of the villagers, that a defined area of land in the village of Byree, in Orissa, must be recognized in law as a Sarbasadharan cremation ground of the village and not available, as alleged by the respondents, for the purposes of private industry, the appellants pleaded that the land in question had been reserved as a cremation ground from time immemorial, and that the people of the locality had so used it from generation to generation. The Subordinate Judge, to whom the case went on first appeal from the decision of the Munsiff, held that "the reservation of the lands . . . . "amounts to dedication or a regrant by the landlord." On second appeal the High Court held that it was impossible to say that anything amounting to a dedication of the land had occurred, and, reversing the judgment of the Subordinate Judge, dismissed the appellants' suit. It was contended for the appellants before the Board, inter alia, that by reason of s. 100 of the Civil Procedure

**Present:* LORD SIMONDS, LORD RADCLIFFE and SIR MALCOLM MACNAGHTEN.

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Code, which prohibits a second appeal on questions of fact, the finding of the Subordinate Judge on the first appeal that there had been a dedication or lost grant of the disputed area for the purposes claimed was a finding of fact which could not be disturbed by the High Court on second appeal.

Held, first, that the issue whether the land was a Sarbasadharan cremation ground was essentially a mixed question of fact and law, and that the actual conclusion of the Subordinate Judge that there had been a dedication or lost grant was more properly regarded as a proposition of law derived from the facts he had found than as a finding of fact itself.

Ram Gopal v. *Shamskhaton* (1892) L. R. 19 I. A. 228, at 232, and *Nafar Chandra Pal* v. *Shukur* (1918) L. R. 45 I. A. 183, at 187, referred to.

If the legal doctrines of English law on which dedication and lost grant depended were to be resorted to for the present purpose then the conclusion at which the Subordinate Judge arrived with his finding that there had been dedication or lost grant was on the face of it defective in law. Dedication is only known to English law as something equivalent to an irrevocable licence granted by the owner of the soil to the use of the public. Dedication of a piece of land to a limited section of the public, such as the inhabitants of a village, was a claim unknown in law, and evidence limited to such special user would not justify a finding of dedication: *Poole* v. *Huskinson* (1843) 11 M. & W. 827; *Hildreth* v. *Adamson* (1860) 8 C. B. (N. S.) 587; *Vestry of Bermondsey* v. *Brown* (1865) L. R. 1 Eq. 204. Further, the doctrine of lost grant had no application to such rights as those of the inhabitants of a particular locality to continue an ancient and established user of some piece of land.

The true legal basis of such rights lay in custom, and that was as much the case in India as in England, and what was required for a custom to be upheld was that it should be immemorial in origin, certain and reasonable in nature and continuous in use. From the findings of fact by the Subordinate Judge—which governed consideration of the question before the Board—it would seem reasonable to infer the existence of a village custom as claimed to which the law could attach legal sanction, and accordingly the appellants had made out their case that the disputed area was bound by custom to be reserved as the village crémation ground.

Asrabulla v. *Kiamatulla* (1937) A. I. R. (Cal.) 245, and *Fitch* v. *Rawling* (1795) 2 H. Bl. 393, referred to.

Decree of the High Court reversed.

APPEAL (No. 77 of 1947), by special leave, from a judgment and decree of the High Court (September 24, 1943) which reversed a judgment and decree of the Additional Subordinate Judge of Cuttack (September 12, 1939) which had reversed a judgment and order of the Munsiff of Jaipur (May 19, 1937).

The main question in this appeal was whether the villagers of Byree, Killa Darpan, district Cuttack, Orissa, had acquired a right to the common use of two parcels of land of a total of 3·90 acres as a cremation ground.

The facts appear from the judgment of the Judicial Committee.

The Munsiff, before whom the case first came, treated the claim of the appellants as one of an alleged customary right, but held that the evidence was insufficient to establish the alleged right.

The Additional Subordinate Judge, on first appeal, held that on the evidence there had been a "dedication" of the land for use as a cremation ground, but on second appeal the High Court (Shearer J.) was of opinion that it could not be said that anything amounting to dedication of the land had occurred, and he reversed the decision of the Subordinate Judge.

1949. July 13, 14. *Bagram* for the appellants.

Sir Thomas Strangman K.C. and *Pullan* for the first respondent, Rangalal.

Oct. 20. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal is concerned with the legal status of two parcels of land, comprising 3·90 acres in all, in the village of Byree, Killa Darpan, district Cuttack, Orissa. These two parcels, which may conveniently be referred to as "the disputed area," are themselves part of a plot, No. 1990–2401, in the same village, the plot lying to the west of the Bengal–Nagpur railway line which intersects the village. The documents in this case, not excluding the judgments, do not make it always an easy task to determine whether the whole plot No. 1990–2401 is not more properly the subject of dispute than that portion of it which is described as the disputed area. In fact, all the relevant evidence bears as much on the status of the larger as of the smaller area. However that may be, the appellants' case is that the disputed area must be recognized in law as a cremation ground of the village and that, it being so, no part of the site can be made available for the purposes of private industry. The respondents Rangalal, Lachminarayan and Balu Ram, on the other hand, maintain that the disputed area has been validly granted to them, or some of them, by the Zamindar of the Killa Darpan

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estate and that they are entitled to occupy the site for the purposes of a rice mill which, at the date of the institution of the suit, they were proceeding to erect on it.

In the first court, the Court of the Munsiff of Jajpur, questions were raised as to the form of the suit and whether the necessary parties were before the court. Issues were framed with regard to these points. The learned Munsiff decided these issues in favour of the appellants, who were plaintiffs in the suit. Neither of the intervening courts expressed any disagreement with his holding on these issues, and no point with regard to them was pressed in argument before their Lordships. It may be taken, therefore, that the appellants, of whom the third is in fact the owner of an existing rice mill in the same village, are entitled to maintain the suit in a representative capacity on behalf of the villagers and that the suit is not defective in form by reason of the nonjoinder of the Zamindar or of the collector.

The important issue for the purposes of the appeal, therefore, is that which was No. 5 of the issues framed by the trial judge. It was expressed as follows: "Is the disputed land "a Sarbasadharan cremation ground?" This question, which can hardly be regarded as other than a mixed question of law and fact, received a diversity of answers in the courts below. The appellants, as they were entitled to, confined their plaint to the allegation of fact that "the said plot has "been reserved from time immemorial and the people of the "locality are using it for the said purpose from generation "to generation," without pleading any special legal conclusion from these facts. At the trial their advocate disclaimed any intention of basing his case on an easement or prescriptive right, and the Munsiff, treating the claim as one of an alleged customary right, held that the evidence was insufficient to establish the existence of such a right. He further held that a claim based on a presumption of lost grant must necessarily fail, since no such presumption could be made in favour of villagers "who constitute a fluctuating and unascertained "body of persons." The Additional Subordinate Judge before whom the case went on first appeal, while noting that the appellants did not depend on any right of easement, held that on the evidence there had been a "dedication" of the land for use as cremation or burial ground. He rejected the view that the appellants' case was based on "any customary "right of user" and expressed his final conclusion on a review

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of the evidence with the words " In my opinion the reservation " of the lands . . . . amounts to dedication or a regrant by " the landlord." On second appeal in the High Court of Patna the judge, Shearer J., held that it was impossible to say that anything amounting to a dedication of the land had occurred in this case and, so holding, reversed the judgment of the Additional Subordinate Judge on first appeal and dismissed the appellants' suit. It will be seen that in the course of these various hearings the original basis of the claim, that of customary right, appears to have become obscured by other and more complicated legal conceptions. The words of Lord Macnaghten, when delivering the judgment of this Board in *Bholanath Nundi* v. *Midnapore Zemindary Co. Ld.* (1) are singularly apposite to the present case. " It appears to their " Lordships that on proof of the fact of enjoyment from time " immemorial there could be no difficulty in the way of the " court finding a legal origin for the right claimed. " Unfortunately, however, [in the lower courts] the question " was overlaid, and in some measure obscured, by copious " references to English authorities, and by the application " of principles or doctrines, more or less refined, founded on " legal conceptions not altogether in harmony with Eastern " notions."

It is necessary at this stage to notice the primary submission that was made to their Lordships on behalf of the appellants. This was founded on the well known s. 100 of the Civil Procedure Code, which prohibits a second appeal on questions of fact. The Subordinate Judge on first appeal had found that there had been a dedication or lost grant of the disputed area for the purposes claimed and this, it was said, was a finding of fact that could not be disturbed on second appeal. Therefore the judgment of the Subordinate Judge had been wrongly reversed and ought now to be restored. Their Lordships regard it as impossible to treat this appeal in this way. There is more than one objection to doing so. Issue No. 5 is essentially a mixed question of law and fact. There are findings of fact by the Subordinate Judge which must indeed be accepted as binding in any consideration of this matter on further appeal; but his actual conclusion that there had been a dedication or lost grant, is more properly regarded as a proposition of law derived from those facts than as a finding of fact itself. There is an abundance of reported

(1) (1904) L. R. 31 I. A. 75, 81.

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authority on the application of s. 100 of the Code of Civil Procedure, though it would be too much to say that there are not some decisions that are difficult to reconcile with the main line of authority. It is unnecessary to review them for the purposes of this appeal. It is enough to quote two passages from past decisions of this Board. "The facts found need not "be questioned. It is the soundness of the conclusions from "them that is in question, and this is a matter of law" (see *Ram Gopal* v. *Shamskhaton* (1). "The proper legal effect of "a proved fact is essentially a question of law" (see *Nafar Chandra Pal* v. *Shukur* (2)).

But, apart from this, the conclusion at which the learned Subordinate Judge arrived with his finding that there had been dedication or lost grant is on the face of it defective in law. These are words of art in English law and the learned judge does not explain how they can be invoked to determine rights in India and yet released from their essential terms. He may have been right in the result in thinking that the respondents were in the wrong. That must be considerd later. But if the legal doctrines of English law, on which dedication and lost grant depend, are to be resorted to for the purpose of settling the disputes of this Indian village then the learned judge was wrong in decreeing the appellants' suit. It is essentially a suit to establish the rights of the villagers in the disputed area. No one claimed or spoke of the land as subject to the rights of the general public, nor, indeed, would it be easy to give a meaning to such a conception as applied to a cremation ground in a particular village. But dedication is only known to English law as something equivalent to an irrevocable licence granted by the owner of soil to the use of the public. Dedication of a piece of land to a limited section of the public, such as the inhabitants of a village, is a claim unknown in law, and evidence limited to such special user would not justify a finding of dedication (see *Poole* v. *Huskinson* (3), *Hildreth* v. *Adamson* (4), *Vestry of Bermondsey* v. *Brown* (5). Much the same result might well be achieved by the creation of a charitable trust binding the land, but that is not dedication, nor is it in question here. At no stage of the hearing is there any record of a claim that the village community constitutes

(1) (1892) L. R. 19 I. A. 228, 232.
(2) (1918) L. R. 45 I. A. 183, 187.
(3) (1843) 11 M. & W. 827.
(4) (1860) 8 C. B. (N. S.) 587.
(5) (1865) L. R. 1 Eq. 204.

a corporation administering a trust for some classes of its inhabitants, nor was any such argument advanced before their Lordships.

The doctrine of lost grant gives no firmer basis for the appellants' case. This doctrine originated as a technical device to enable title to be made by prescription despite the impossibility of proving "immemorial user." By English common law prescription had to run from time immemorial which, by convention, began in the year 1189. If it was possible to demonstrate that the user in question, though ancient, originated since 1189 the proof of title by the prescription of immemorial user failed. To get round this difficulty judges allowed, or even encouraged, juries to find that the right in question, though less ancient than 1189, originated in a lost grant since that date. Thus the right acquired the necessary legal origin. But such a right, just as much as an easement, had to be attached to and to descend with an estate: moreover, since it originated in grant, its owners, whether original or by devolution, had to be such persons as were capable of being the recipients of a grant under English law. A right exercisable by the inhabitants of a village from time to time is neither attached to any estate in land nor is it such a right as is capable of being made the subject of a grant. There are no admissible grantees. In fact, the doctrine of lost grant has no application to such rights as those of the inhabitants of a particular locality to continue an ancient and established user of some piece of land.

In their Lordships' view the true legal basis of such rights lies in custom. This is as much the case in India as it would be in England. Indeed, this is the view which is fully set out in the judgment of Mukherjea J. in *Asrabulla* v. *Kiamatulla* (1). A customary right can exist only in relation to the inhabitants of a district and it cannot be claimed in respect of the public at large (*Fitch* v. *Rawling* (2)). The custom, if established, makes the local law of the district and it creates a right in each of the inhabitants irrespective of his estate or interest in any particular property. The courts of England have upheld many customs in different parts of the countryside which have had the effect of binding some piece of land to the perpetual service of the village or district. The claims so upheld are not different in any essential respect from the claim to the cremation ground in the village of Byree which is in question here.

(1) (1937) A. I. R. (Cal.) 245. (2) (1795) 2 H. Bl. 393.

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A custom for the inhabitants to dance on a piece of ground for their recreation (*Abbot* v. *Weekly* (1)) : a custom to use a close for exercise and play at all kinds of lawful games, sports and pastimes (*Fitch* v. *Rawling* (2)) : a custom to enter on certain land, erect a maypole thereon and dance round and about it (*Hall* v. *Nottingham* (3)). What the courts have required of a custom, if the law is to uphold it as a right, is that it should be immemorial in origin, certain and reasonable in nature and continuous in use. It is by these tests that the appellants' claim in this case must be tried.

The evidence adduced at the trial was in some respects conflicting. But any appeal in a court above the first appellate court must necessarily proceed on the basis of such relevant findings of fact as were made by the Additional Subordinate Judge in his review of the evidence. These findings may be summarized in three points. Firstly, he was satisfied that " the suit lands are used for generations as cremation or burial " ground." Secondly, he held that their appropriation for this purpose did not originate with the Provincial Settlement of 1901, at which date the Plot 1990-2401 was entered in the published record as Smasan ground, with the added note " These numbers are kept in reserve for cremation of dead " bodies by the Sarbasadharan (public)." His finding was that, while this entry supported the villagers' claim to rights in the land, it was absurd to suggest that it was only at that time that the user of it as a cremation ground began. The villagers, he said, have been there from time immemorial : no settlement papers had been produced to show that other plots were previously in use as cremation grounds : and the necessity for cremation ground could hardly have been felt for the first time at the date of the settlement. Thirdly, he did not accept the view that the user had been abandoned.

From these findings it would seem reasonable to infer the existence of a village custom to which the law could attach legal sanction. It seems beyond dispute that it is a question of law whether such a custom is to be recognized or not, although the facts on which the question is to be decided cannot be a matter of appeal beyond the first appellate court (see *Ram Bilas* v. *Lal Bahadur* (4) ; *Tajammul Husain* v. *Banwari Lal* (5) ; *Kumarappa Reddi* v. *Manavala Goundan* (6) ; *Kailash*

(1) (1666) 1 Levinz 176.
(2) 2 H. Bl. 393.
(3) (1875) 1 Ex. D. 1.
(4) (1908) I. L. R. 30 A. 311.
(5) (1925) I. L. R. 48 A. 77.
(6) (1917) I. L. R. 41 M. 374.

Chandra Datta v. *Padmakisore Roy* (1)). At this point it is necessary to notice the reasons which led the Munsiff in the first court and Shearer J. on second appeal to regard the appellants' claim as unmaintainable. They have been referred to already. The Munsiff, who did treat the claim as one based primarily on customary right, dismissed the suit because he thought that the evidence was insufficient to establish such a right. But his view of the effect of the evidence as a whole was materially different from that which was adopted by the Additional Subordinate Judge on first appeal, and it is the latter which must govern the consideration of the question before this Board. In particular, he seems to have found that the disputed area had fallen into disuse as cremation ground and that the villagers had given up the use of it for this purpose within living memory. This finding was clearly not adopted on first appeal. Shearer J. on the other hand, concentrated his consideration of the appeal before him on two issues, firstly, whether the court below had misdirected itself, as he held that it had, in deciding the present case by reference to reported decisions relating to Muslim graveyards, and secondly, whether the evidence, in particular the entries in the record-of-rights at the time of the 1901 Settlement, ought to be treated as amounting to a legal dedication of the land for this purpose. No doubt he was led to take this course by the form of the judgment in the court appealed from, but the result was unfortunate, since no consideration was given to what was the original, and what is in their Lordships' view the natural, basis of the appellants' claim—customary right. The learned judge was very definitely of the opinion that it would be to misunderstand the position to hold that any entry made in the record-of-rights at the time of the settlement operations ought to be construed as evidence of a contemporaneous dedication. That may be so : though even on this point the judge's observations seem to apply more to settlement operations in general than to what is recorded as having taken place in connexion with this particular Killa Darpan estate, which was a permanently settled one. It must be remembered that contemporaneously with the entries in the record-of-rights the officer who carried out the settlement of this estate stated in his published report with regard to the settlement " Areas " reserved for public use. These have been reserved after " careful enquiry and with the agreement of both landlords

(1) (1917) I. L. R. 45 C. 285.

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"and tenants (1.) for pasturage and cremation, and (2.) for "public uses. The proprietor took care to exclude culturable "areas from these." But, however this may be, the question whether there was a dedication in connexion with the 1901 settlement is not really the question at issue. Despite some inconsistency of statement the Subordinate Judge had clearly held that what he called the dedication had taken place at a date long anterior to the settlement operations and that what was recorded at that time, though important confirmatory evidence, as indeed it is, was merely part of the evidence that established the "dedication." As a consequence of this the judgment which is now under appeal before their Lordships' Board can hardly be regarded as a fully satisfactory treatment of the issues involved in the present case.

Their Lordships consider that the appellants have made out their case that the disputed area is bound by custom to be reserved as the village cremation ground. The respondents did not maintain that such a right could not legally exist in India. They stressed—and there is, of course, force in the distinction—that a piece of land covering several acres used for Hindu cremation is something very different from a Christian or Muslim burial ground. And there are substantial differences between it and the burning ghat which came under consideration in *Chairman of the Howrah Municipality* v. *Khetra Krishna Mitra* (1). But these differences bear on the probability of any defined area of land being permanently reserved for cremation in a village; they do not destroy the legal possibility of such a reservation if the evidence supports it. The respondents' main argument turned on the proposition that the obligations of the proprietor of the estate towards the villagers was limited to providing them with a satisfactory area for cremation purposes. So long as at any given time adequate land was made available for the purpose no particular piece of his land was bound to be reserved by him. Their Lordships have found it impossible to accept this view of the legal relationship between the proprietor and the villagers. It must be founded either on law or fact or a combination of the two. If on fact, there seems no satisfactory evidence in the case to support it, and the argument really amounts to no more than saying that the findings of fact which were made on first appeal misconceived the position. If on law, no authority was cited to suggest that the

(1) (1906) 4 Cal. L. J. 343.

legal relationship of proprietor and villagers, even if it be such as the respondents contend, is so unalterable that it cannot be modified by such immemorial user as is spoken to in this case.

The appeal therefore must be allowed, the decree of September 24th, 1943, of the Patna High Court set aside and the decree dated September 12, 1939, of the Additional Subordinate Judge at Cuttack restored with one modification. It contained an order on defendants two and three in the suit to remove their mills, buildings, machinery and other structures from the land within one month, so as to restore the land to its original condition and render it useful as cremation or burial ground. The respondents have pointed out there was no issue in this case as to a burial ground and that the judge ought not therefore to have allowed any right in respect of it. Their Lordships agree with this, and the words " or burial ground " should be struck out of the order accordingly. Any sums which the appellants have paid to the respondents under orders of the courts below must be repaid to them, and the respondent Rangalal must pay to the appellants their costs of the appeal in the High Court. Their Lordships will humbly advise His Majesty to this effect. The respondents Rangalal, Lachminarayan and Balu Ram must pay the appellants' costs of the appeal before this Board.

Solicitors for appellants : *W. W. Box & Co.*
Solicitors for respondents : *Douglas, Grant & Co.*

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March 27,

RAJA BRAJA SUNDAR DEB

v.

MONI BEHARA AND OTHERS

[MEHAR CHAND MAHAJAN, MUKHERJEA and CHANDRASEKHARA AIYAR JJ.]

Fisheries—Fishermen of particular villages allowed to fish for several years by zemindar—Acquistion of right to fish—Presumption of lost grant—Prescription—Adverse possession—Proceedings under s. 145, Cr. P. C., effect of.

A right exercisable by the inhabitants of a village from time to time is neither attached to any estate in land nor is it such a right as is capable of being made the subject of a grant, there being no ascretainable grantees.

The doctrine of lost grant originated as a technical device to enable title to be made by prescription despite the impossibility of proving immemorial user and since it originated in grant, its owners, whether original or by devolution, had to be such persons as were capable of being the recipients of a grant.

Where all that appeared from the evidence was that the fishermen who were residents of certain villages had been for a long time exercising the right of fishing in certain rivers which flowed through a zemindari with the consent of some of the zemindars: *Held,* that the fishermen residing in these villages cannot be treated as a corporate body or a kind of unit in whose favour a lost grant could be presumed or who could acquire a right to fish either by adverse possession or by prescription.

Where, however, there were proceedings under section 145 of the Criminal Procedure Code between the zemindars and certain fishermen and the Magistrate found that the fishermen were in possession of the disputed fishery and he directed the issue of an order declaring their possession until evicted therefrom in due course of law and forbidding all disturbance of such possession until such eviction, and no steps were taken by the zemindars to set aside the order of the Magistrate within three years as required by article 47 of the Limitation Act: *Held,* that so far as the fishermen who were parties to the proceedings under section145, the order of the Magistrate had become final and they were entitled to remain in possession of the fishery.

An exclusive right of fishing in a given place means that no other person has a co-extensive right with the claimant of the right. The mere fact that some other person has a right to a particular class of fish in the fishery or that another person is

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entitled to fish at a certain time of the year does not destroy the right of exclusive fishing in any manner

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 42 of 1948.

Appeal against the judgment and decree dated the 21st April, 1943, of the High Court of Judicature at Patna (Fazl Ali C. J. and S. C. Chatterji J.) in First Appeal No. 17 of 1939 arising out of decree dated the 19th July, 1939, of the Subordinate Judge at Puri in Original Suit No. 62 of 1936.

Manohar Lal (*G. P. Das,* with him) for the appellant.

B. N. Das (*Sir Kant Mahanti,* with him) for the respondents.

1951, March 27. The Judgment of the Court was delivered by

Mahajan J.

MAHAJAN J.—The dispute in this appeal is between the fishermen residing in nine villages of Killa Marichpur, a permanently settled zamindari in the Puri Collectorate (Orissa State) and the Raja of Aul, the owner of seven annas, seven pies, and ten karants share in the zamindari. The other shares in the zamindari are defendants 19 to 29. Within the ambit of the estate flows "Devi Nadi," with its several branches and tributaries. Three fisheries "Madhurdia," "Marichpurdia" and "Maladia" appertain to this estate. The controversy in this appeal concerns the fishery known as the "Madhurdia" fishery.

In the year 1936, three suits, Nos. 62, 63 and 64, were brought by the Raja of Aul against defendants 1 to 18 on behalf of themselves and other fishermen residing in the nine villages of Killa Marichpur for a declaration in respect of his rights in the three above mentioned fisheries. All these suits were decided in his favour by the trial court. The defendants, preferred no appeal in suits 63 and 64, with the result that the controversy regarding the two fisheries involved in these two suits stands concluded by the decision of the trial court. In suit No. 62 of 1936, however, the

defendants preferred an appeal to the High Court and it was partially allowed. The decree of the trial Judge in favour of the plaintiff was modified and it was held that the defendants had exclusive rights as tenants at will to fish in this fishery during the Hilsa season (Margasir to Baisakh) and that the plaintiff was not entitled to a declaration or an injunction in respect of that period. The plaintiff thereupon obtained leave to appeal to His Majesty in Council and that appeal is now before us for decision.

It was alleged in the plaint that the proprietors of Marichpur zamindari are the exclusive owners of the fishery in question and have all along been exercising their right of catching fish in the same sometimes by employing fishermen and sometimes by letting out the fishery to them, that the plaintiff has ever since his acquisition of the zamindari interest been the owner in khas possession of the fishery right according to his share in the zamindari, that the defendants-fishermen were never in possession of the said fishery, nor have they any right to it, that in the year 1918 they started proceedings under section 145, Criminal Procedure Code, to create evidence of their possession but in spite of those proceedings the plaintiff continued to be in possession of the fishery and has been catching fish by employing fishermen, that by taking advantage of the fact that there are several co-sharers in the zamindari and there is mismanagement of the estate, the defendants wrongfully and unlawfully trespassed on the fishery from time to time between May, 1933, and November, 1933, and disturbed the plaintiff in the enjoyment of his right and have caused loss to him and his co-sharers by catching large quantity of fish without any leave or licence. On these allegations, the plaintiff claimed a declaration to the effect that defendants 1 to 18 in their personal and representative capacity have no right or title in the fishery known as "Madhurdia" fishery or to the fishery in the southern portion of the area recorded as the river block, Risilo and Husgarh. Prayer was also made for the grant of a perpetual injunction restraining the defendants from

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fishing in the above fishery and in the above mentioned blocks and for the award of a sum of money by way of damages and on account of price of fish.

The defendants contested the allegations made in the plaint and asserted that the fishermen of Killa Marichpur including the principal defendants and their ancestors, about 846 persons in all, have all along remained in undisturbed actual physical possession of the fishery known as "Charkhatia" alias "Madhurdia" fishery on a fixed annual rental of Rs. 135-7-0, and have a right to remain in possession in perpetuity on payment of that rent; that they have acquired this right in all possible ways, *i.e.*, by grant, custom, adverse possession and easement.

On these pleadings of the parties the trial Judge framed as many as nine issues, the material ones being issues 6 and 7, which are in these terms :—

"6. Has the plaintiff any title to the disputed fishery ?

7. Have the defendants Nos. 1 to 18 acquired any right, by adverse possession, prescription or custom" ?

The trial Judge on these issues held that the defendants neither in their personal nor in their representative capacity had any right or title in the fishery in question and issued a permanent injunction against them from fishing in it. The claim for damages was disallowed. It was observed by the learned Judge that the defendants did not claim the right to catch all the fish found in the fishery but that they had confined their claim in respect to Hilsa fish only during the Hilsa season between the months of Margasir and Baisakh (November to April) and that as regards the other varieties of fish found in these waters during the rest of the year they did not assert any right to catch fish. He also observed that the defendants did not deny that the plaintiff was the owner of the zamindari and as such owner of the soil and of the waters of the fishery, but that they claimed a subordinate right, *i.e.*, the right of fishing in the

waters belonging to the plaintiff and his co-sharers during the Hilsa season to the exclusion of the plaintiff and his co-sharers. In view of these contentions the onus was laid on the defendants to prove their permanent right of fishing in these waters by grant, custom, prescription or adverse possession and it was held that the defendants failed to discharge the onus that rested on them. Acquisition of the right by grant, prescription and adverse possession was held not provable in law in favour of an indeterminate and fluctuating body of persons. The claim for permanent tenancy in the fishery was negatived on the ground that there was no evidence to show that the tenancy came by descent to these 846 persons from the persons who actually took it in the year 1842, or that it was obtained from all the sixteen anna landlords, or that there was any fixity of rent. It was further said that there was no certainty as to who were the owners of the right, as to the local area over which the right was to be exercised, as to the measure of the right and of the periods during which the right could be exercised and that in these circumstances the defendants' claim could not be upheld. The defendants' contention that under article 47 of the Indian Limitation Act the plaintiff had lost his right was held unsustainable and the plea of custom was ruled out on the ground that the custom alleged would be of an unreasonable kind.

All the questions raised in the trial court excepting the question of custom were canvassed by the defendants before the High Court. The High Court in a judgment, by no means clear or satisfactory, reached the conclusion that the defendants since the time of their predecessors had all along been fishing in the disputed fishery as of right under a lost grant and that the plaintiff's story that he had been in enjoyment of the fishery was not true and that the defendants' right to fish in the disputed fishery was established. One would have thought that in view of this finding the plaintiff's suit would have been dismissed

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but this did not happen. The High Court proceeded to find that though from the evidence it appeared that the right was being exercised by the defendants or their predecessors from a very long time, that is to say, from the year 1842, yet there was no evidence to jutisfy the inference that they had got a permanent right. The defendants' plea, therefore, that they were permanent tenants of the fishery in dispute was not upheld. As regards the defendants' contention that the plaintiff was bound by the order passed in proceedings under section 145, Criminal Procedure Code, it was found that he not having challenged that order within the prescribed period, his right to khas possession of the disputed fishery except to the extent of five pice share was extinguished under section 28 of the Limitation Act but that his proprietary right subsisted as it was never denied. It was further held that the plaintiff's right to khas possession of this fishery was also extinguished by operation of article 144 of the Indian Limitation Act. Plaintiff's evidence that he had been catching fish during the Hilsa season by employing other fishermen was disbelieved and it was held that the defendants had been exercising exclusive right to fish in the disputed fishery during the Hilsa season adversely to the plaintiff and the other co-sharers for more than twelve years. In spite of these findings the High Court reached the somewhat strange conclusion that the defendants acquired by adverse possession a mere tenancy at will and that it could be determined by the entire body of landlords and the plaintiff being only a co-sharer could not bring the present suit in his own behalf and it had not the effect of determining the tenancy and hence the plaintiff could not be granted the declaration and the injunction restraining the defendants from fishing during the Hilsa season. As regards the point raised by the plaintiff that by reason of the change in the course of the river the fishery in dispute was not the same regarding which an order was made under section 145 proceedings or in which the defendants have been exercising their right, it was held that this contention was without force because

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the river was identical and the channels, whether old or new, which comprise the Madhurdia or Charikhati fishery, have always formed one connected sheet of water and that fishing in different parts of such a connected sheet of water comprised in the same fishery can hardly be said to be a separate act of aggression so as to disturb the continuity or extent of adverse possession and that the fishermen though a fluctuating body, have unity of interest and possession and could not be described as several independent trespassers. As a result of these findings the decree of the trial Judge was modified and the plaintiff was given a permanent injunction restraining the principal defendants from fishing in the disputed fishery except during the Hilsa season (Margasir to Baisakh) during which the defendants were declared to have exclusive right of fishing.

Against the decision of the High Court no appeal was preferred by the defendants though they had only been found to be in possession of the fishery in the status of mere tenants at will. The plaintiff challenged this decision and contested the finding that the defendants were lawfully in possession of the fishery and could exercise their right of fishing during the Hilsa season exclusively. The real grievance of the plaintiff seems to be that by the decision under appeal the High Court has declared a fluctuating body of persons tenants at will, and that such a tenancy cannot be determined as its constitution is liable to vary with each birth and death and with influx or efflux of fishermen to and from these villages. It was argued that the High Court has erroneously found that the defendants were in possession of the fishery and were in enjoyment of the fishing right under a lost grant and that the plaintiff's right to khas possession of the fishery had been extinguished by operation of articles 47 and 144 of the Limitation Act read with section 28 of the Act. It was contended that from the evidence placed on the record the only correct conclusion to draw was that from time to time some fishermen were allowed to fish in these waters by a number of landlords

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on payment of rent but that the present defendants were not the descendants of those fishermen who were occasionally granted leave to fish and that those isolated acts of letting the fishery were not connected with one another and from these it could not be inferred that the defendants or their predecessors were in continuous possession of the fishery on payment of a fixed rent and that the present defendants were mere trespassers and had no right to fish in the disputed fishery. It was further contended that no title of any kind could be presumed to exist in the defendants to the fishery in suit and on the basis of a lost grant as in this case there was no capable grantee and that even title by adverse possession or prescription could not be acquired by them as they form an indeterminate and fluctuating body of persons. As regards the finding of the High Court that the plaintiff's suit was barred by article 47 of the Limitation Act and his title to khas possession was extinguished by operation of the provisions of section 28 of the Indian Limitation Act, it was contended that the proceedings that took place in the year 1918 were wrongly labelled under section 145, Criminal Procedure Code, and that in substance the order made in those proceedings fell within the ambit of section 147 of the Code and therefore article 47 had no application to the case and the plaintiff was not bound to bring his suit within three years of that order to enforce his right. It was further contended that the order could only benefit the parties impleaded in those proceedings and the other defendants could not derive any assistance from it, that in any case the order could not bind the plaintiff to the extent of the share purchased by him from co-sharers not made parties in those proceedings and that the river having changed its course in the year 1925, the fishery as it stood in 1918 was no longer in existence and in the substituted fishery the plaintiff's right could not be held to have been extinguished by the effect of the order made in section 145, Criminal Procedure Code proceedings. The learned counsel for the respondents contended that the defendants had in the status of

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tenants an exclusive right to fish in the fishery and were entitled to remain in enjoyment of it on payment of a fixed rent of Rs. 135-7-0 in perpetuity, that the plaintiff's right of fishing in the fishery during Hilsa season had become extinguished by operation of article 47 and article 144 of the Indian Limitation Act. It was denied that by a change in the course of the river, if any, the defendants' right had in any way been affected. In order to appreciate the respective contentions of the parties it is necessary to state a few facts which emerge from the documentary evidence produced in the case.

The State of Orissa came under the British rule in the year 1803. A revenue settlement of the State was made in 1904-05. From the village note prepared during the settlement, it appears that Killa Marichpur was originally owned by one Padmalav Mangaraj and that during the time of his great grandson Balabhadra Mangaraj the estate was sold in auction for satisfaction of debts incurred by him and was purchased by (1) Mohan Bhagat, (2) Chakradhar Mahapatra, and (3) the ancestors of one Haziran Nisa Bibi in equal shares. From the jamabandi of the year 1842 (Exhibit C) it appears that the jalkor income of Killa Marichpur zamindari at that time was Rs. 135-7-0, and this was being realised from Hari Behera and Brundu Anukul Singh, two fishermen. It is not clear from this document in what status they were paying this amount and what was the nature of their tenancy. Exhibit A is a kabuliyat of the year 1845 by Brundu Anukul Singh and Hari Behera in favour of Babu Mohan Bhagat and Bibi Mobarak Nisa, and it shows that these two fishermen took a lease of the fishing right in Devi river on payment of Rs. 135 as rent, from the landlords. It was stated therein that these fishermen will catch fish from these waters according to former custom and will pay "machidia sarbara" of Rs. 135 in accordance with the instalments. There is no indication in the kabuliyat that these two persons were executing it in a representative capacity or that the lease taken by them was of a permanent character or

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that the rent payable was not liable to enhancement in the future. It was contended on behalf of the defendants that these two persons executed the kabuliyat in a representative capacity and on behalf of all the fishermen who originally resided in four villages of Killa Marichpur and who subsequently came to reside in the nine villages mentioned in the plaint. The only evidence placed on the record in support of the suggestion and relied upon by the High Court is the statement of D. W. 11 who was born some time in the year 1873, about 28 years after the execution of the kabuliyat, and who has no special means of knowledge to depose as to the relationship of persons mentioned in the kabuliyat with the defendants in the present case or to know the capacity of persons who executed the kabuliyat. It is not possible, therefore, to hold that the kabuliyat was executed in a representative capacity by these two persons and on behalf of all the persons interested in the present controversy. There is no evidence on the record to prove the state of affairs of this fishery between the years 1845 and 1873. Reliance was placed by the defendants on a number of rent receipts produced by them in evidence. The first of these is dated 30th March, 1873, and was executed by one of the Mahapatra co-sharers on account of the instalment of fishery rent of "Charkhati" paid through Hari Behera and Rama Behera in the sum of Rs. 8-12-0. All the co-sharers were not parties to this receipt and it is not stated what was the total rent payable for the whole fishery. On the 11th May, 1875, another receipt was executed by Bibi Masudannisa and others, co-sharers of five anna four pies in the zamindari in favour of Hari Behera and Ananta Behera and others for a sum of Rs. 18. It seems that different co-sharers were giving permission to different persons to fish in the fishery on payment of certain sums of money. There is no evidence whatsoever connecting the receipt of 1873 given by two co-sharers to two persons with the receipt given by another set of co-sharers to these two persons and it is not possible to say that these payments were made towards a fixed

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rent of Rs. 135-7-0 payable for the whole fishery. The state of affairs of this fishery between 1876 to 1893 remains shrouded in mystery as no evidence for that period has been filed on the record. On the 1st May, 1894, Mohan Bhagat's descendant gave a receipt to Pandab Behera and Phagu Behera for Rs. 10, which was to be set off against fishery rent. It is difficult to connect this receipt with the other receipts or to treat it as evidence in support of the defendants' case of a permanent tenancy. Similar receipts by different co-sharers in favour of different persons were executed on the 1st May, 1895, 5th May, 1896, 9th May, 1897, and 22nd October, 1899; but in none of those receipts is any mention made of any fixed rental of Rs. 135-7-0 for the fishery in respect of the whole year and payable to all the landlords. A printed rent receipt on behalf of one of the proprietors to Hurshi Behera and Agani Behera of village Alsahi was given on the 22nd October, 1899. The receipt relates to payment of twelve annas as arrears of fishery rent and in the receipt it is stated that the cash rent payable was Rs. 150. This receipt, if it relates to the rent payable to all the co-sharers, is inconsistent with the defendants' case that the fishery had been leased out from time immemorial on a fixed rent of Rs. 135-7-0. On the 23rd August, 1902, a receipt was given on behalf of nine anna seven pie co-sharers in the zamindari to Maguni Behera and Ram Behera of Kalia Kona and to Sapani Behera of some other village in the sum of Rs. 83-12-11 stating that the amount of total rent of which Rs. 83-12-11 was the fractional share of these landlords was a sum of Rs. 135-7-0. It was contended on behalf of the defendants that the sum of Rs. 135-7-0 mentioned in this receipt was the identical amount that was mentioned in the jamabandi of 1842 as payable to the zamindars as income of the jalker and from this entry an inference should be drawn that the fishery had been continuously leased for this sum from 1842 to the date of this receipt. The coincidence relied upon undoubtedly exists, but on that basis it is not possible to draw the inference suggested as such an inference would be

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of a conjectural nature. All these receipts are consistent with the contention of the plaintiff that from time to time different co-sharers permitted different fishermen to fish in the fishery on payment of a certain rental. A receipt similar to the one above mentioned was also executed on the 5th March, 1906, by certain co-sharers owning eight pies in the zamindari in favour of some fishermen, the annual rent being Rs. 135-7-0. The "Remarks Column" states that if the rent is more than mentioned therein, the further amount due would be made good. Same remarks are applicable to this receipt as to the previous one. The next rent receipt is dated 19th April, 1907, and is for a sum of Rs. 168-6-0. No inference either way can be drawn from this receipt. On the 21st June, 1912, a receipt was given in favour of twelve persons in respect of rent for the year 1317. The receipt was given by the nine anna seven pie co-sharer in the zamindari but it is not clear how this amount was made up. On the 4th February, 1914, a receipt was given by an eight pie co-sharer in the zamindari to 174 persons, described as tenants and residing in different villages of the zamindari for a sum of Rs. 5-13-6 as rent for the year 1319. The entry in the "Remarks" column is similar to the receipt above mentioned. The amount of annual rent is mentioned as Rs. 135-7-0 and it is stated that it is being paid in accordance with a decree of court No. 181. It is difficult to connect this receipt with the other documents previously discussed. Another receipt dated 30th March, 1914, was given by nine anna seven pie co-sharers in the fishery to twelve persons for the year 1320. It seems to us that these occasional receipts given to different persons by different sets of co-sharers can lead to no definite conclusion in regard to the rights of the parties. They are consistent with the case argued on behalf of the plaintiff that by leave and licence a number of fishermen used to fish in the waters from time to time and they do not necessarily lead to the inference of the existence of a permanent tenancy of the fishery in favour of the defendants on a fixed rent of Rs. 135-7-0.

By a registered deed dated 24th May, 1914, the plaintiff for the first time acquired an eight pie interest in the zamindari in the name of Smt. Mahisthali Patamahadei, his wife, from one Balaram Das Bhagat, a descendant of Mohan Bhagat. Subsequently he in his own name and sometimes in the name of the Rani purchased some further shares in the zamindari and eventually became the owner of seven anna seven pie and ten kranth share in it. The acquisition of interest by the plaintiff (Raja of Aul) in the zamindari coincides with the period of the first world war, the aftermath of which was a rise in prices. Fish which was a cheap commodity and brought no appreciable income to the fishermen or to the owners became a source of considerable income and this circumstance led to disputes between the owners of the fishery and the fishermen. A number of letters of the years 1914 to 1918 have been proved on behalf of the plaintiff showing that he was deriving income from this fishery. Similar letters for subsequent periods have also been proved but no regular accounts of the income so realized were produced in the case. The enhanced income of the fishery created a scramble for its possession between the landlords and the fishermen and there was an apprehension of a breach of peace which resulted in proceedings under section 145, Criminal Procedure Code. A report was made to the police on the 11th February, 1918, that a dispute had arisen which was likely to cause a breach of the peace between the landlords of Killa Marichpur and twelve fishermen in regard to the possession of Charikhati fisheries in Debi river. The Magistrate on receipt of the police report issued notice to the parties for the 19th February, 1918, and decided the case on the 10th June, 1918. From his order it appears that notice was given to all concerned and they were invited to put their respective claims as regards the facts of the actual possession of the fishery in dispute before him. On behalf of certain co-sharers evidence was led to prove that they were in possession of the fishery through one Sundari Behera and other fishermen numbering about 100. The Rani

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of Aul who had then eight pie interest in the zamindari as benamidar of her husband led evidence to establish that she was in possession of the fishery through fishermen employed by her agent. Ram Behera, Hrushi Behera and other fishermen of the second party, twelve in number, led evidence to show that they were in possession of the fishery on payment of rent and that the owners of the zamindari had never been in actual possession of the fishery. The Magistrate found that this contention was true. He disbelieved the story of the witnesses produced by the Rani of Aul, and also rejected the testimony of the witnesses produced by other owners. Some Aul fishermen were produced on behalf of the Rani but their evidence was also not accepted. The same kind of documentary evidence that has been placed on this record on behalf of the plaintiff was also placed before the Magistrate but it was not accepted by him. From these proceedings, it further appears that all the sixteen anna owners of Killa Marichpur issued a notice to the second party, the fishermen, for surrendering possession of the fishery with effect from September, 1917, but after service of notice they took no legal steps to eject them from possession of the fishery; on the other hand, they took the law into their own hands and made attempts to take forcible possession of the fishery. These attempts, however, were unsuccessful. The result of these proceedings was that the Magistarte found that the fishermen (the second party) were in possession of the disputed fishery and he directed the issue of an order declaring their possession until evicted therefrom in due course of law and forbidding all disturbance of such possession until such eviction. This order indicates that though all the landlords were not named as parties in the case, yet all of them had notice of the proceedings and all of them were actually interested in turning out the fishermen from possession by forcible means, and notice had been given to them on behalf of all of them. It also appears from those proceedings that though one dozen people were named as second party in the case there were certain other persons also interested in the

fishery along with them, but it is difficult to ascertain their number, names and addresses from these proceedings. Evidence has been led on behalf of the plaintiff to prove that after the determination of these proceedings the plaintiff has been deriving income from this fishery by leasing his right through the agency of fishermen of Aul. The High Court has not placed any reliance on this evidence and, in our opinion, rightly. It is not possible to believe that after a successful fight in the criminal court, the fishermen would have allowed the men of the Raja or of the Rani to fish in these waters during the Hilsa season. Both parties led oral evidence to prove that each party exercised exclusive right of fishing during Hilsa season in the fishery. We have been taken through the evidence and after examining it, have reached the conclusion that it is of an unsatisfactory character and valuable rights cannot be decided on its footing. No steps were taken by the landlords to question the order of the Magistrate within three years from its date as required by article 47 of the Limitation Act. The landlords, however, refused to receive any rent from these persons after the termination of the proceedings and they have been depositing it in court under the provisions of the Orissa Tenancy Act.

The last purchase by the Raja of Aul of some interest in the zamindari was made in the year 1935 and having acquired by this date a substantial interest in it and having discovered that the fishery was a paying proposition, he brought this suit in the year 1936 on the allegations set out above and asserted that since about three years the defendants had started disturbing his possession of the fishery in dispute. In the circumstances mentioned above this assertion cannot be taken seriously. In order to get out of the effects of the proceedings under section 145, Criminal Procedure Code, he alleged that he had been in possession of the fishery in spite of the proceedings taken under that section and that his possession had only been disturbed recently. The evidence on this point was

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rejected by the High Court and we see no reason to disagree with that finding.

It is now convenient to consider the different points canvassed before us by the learned counsel appearing on behalf of the parties. We find it difficult to uphold the view of the High Court that the defendants were in possession of the disputed fishery under a lost grant. This doctrine has no application to the case of inhabitants of particular localities seeking to establish rights of user to some piece of land or water. As pointed out by Lord Radcliffe in *Lakshmidhar Misra V. Rangalal* (1) the doctrine of lost grant originated as a technical device to enable title to be made by prescription despite the impossibility of proving immemorial user and that since it originated in grant, its owners, whether original or by devolution, had to be such persons as were capable of being the recipients of a grant, and that a right exercisable by the inhabitants of a village from time to time is neither attached to any estate in land nor is it such a right as is capable of being made the subject of a grant, there being no admissible grantees. Reference in this connection may be made to a Bench decision of the Calcutta High Court in *Asrabulla V. Kiamatulla*(2) wherein the law on this subject has been examined in some detail. In that case the question arose whether the right of pasturage claimed by a whole body of villagers could be acquired by grant, express or presumed. After an examination of a number of English and Indian cases it was held that no lost grant could be presumed in favour of a fluctuating and unascertained body of persons who constitute the inhabitants of a village and that such a right could only be acquired by custom. The defendants in this case are a fluctuating body of persons and their number increases or decreases by each birth or death or by influx or efflux of fishermen to or from these villages. From the evidence of D. W. 11 it appears that formerly the Kouts (fishermen) claiming the right to fish were residents of four villages, then some of them shifted to other villages on account of their

(1) A.I.R. 1950 P.C. 56. (2) A.I.R. 1937 Cal. 245.

houses being washed away, and settled themselves in other villages. At the time of the suit they were residing in nine villages. He further deposed that during the last ten or twelve years there were 600 bohanias and that their families increased, their present number being 846. It is in evidence that since this evidence was given their number has gone up to 1500. From the documentary evidence it appears that up to the year 1918 their number was not very large. Only twelve persons were impleaded in the section 145, Criminal Procedure Code, proceedings and it was said that there were some more interested. The maximum number given in one or two receipts is 174.

It is again not possible to hold that the fishermen residing in these villages are a corporate body and that being fishermen by profession it has the effect of incorporating them. We find ourselves unable to subscribe to the view of the High Court that the defendants constitute some kind of a unit simply because they are a body having a common interest to fish in this fishery; unless the defendants-fishermen form a corporate body, or it is found that a trust was created for their benefit, such a body of persons could acquire no right by the doctrine of lost grant. A right to fish from the fishery based on mere inhabitancy is capable of an increase almost indefinite and if the right exists in a body which might increase in number it would necessarily lead to the destruction of the subject matter of the grant. Moreover, there could not be a valid grant to a body so incapable of succession in any reasonable sense of the word, so as to confer a right upon each succeeding inhabitant.

For the reasons given above, the defendants' right to remain in possession of the fishery on the basis of a lost grant or on the basis of prescription or adverse possession stands negatived. All that appears from the evidence is that a number of fishermen from time to time have been exercising the right of fishing with the leave and licence of some of the owners. This is not sufficient for the acquisition of the right either by

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adverse possession or by prescription. Further, no finding can be given in their favour as the evidence does not establish that they have been paying uniformly the same amount of rent.

The next finding of the High Court that the landlords have lost their right to khas possession of the fishery in dispute by reason of the operation of article 47 of the Indian Limitation Act is, in our opinion, sound. The High Court, however, was not right in holding that the order made in the section 145, Criminal Procedure Code, proceedings was not binding on the plaintiff to the extent of five pies share. Its true scope and effect do not seem to have been fully appreciated. The order appears to have been made after notice to all the landlords and was brought about by reason of the action of all of them and binds the full sixteen anna interest in the zamindari. In clear and unambiguous terms the Magistrate declared that the second party were in exclusive possession of the disputed fishery and that the landlords had no right to disturb their possession and they were directed to being a suit to establish their right to possession. This they failed to do with the result that the order became final and the right of the landlords to get into possession of the fishery became extinguished. This order therefore affirmed the defendants' possession of the fishery on payment of a certain rental. This right, however, can only be exercised by those who were parties to the section 145, Criminal Procedure Code, proceedings or their successors in interest. It was argued by the learned counsel for the appellant that the proceedings that took place in the year 1918 were in substance under section 147, Criminal Procedure Code, and were wrongly labelled under section 145 of the Code. We are not able to accede to this contention because the dispute raised in the year 1918 related to possession of the fishery itself and was a dispute concerning any water or the boundaries thereof in the language of section 145, Criminal Procedure Code. Sub-section 2 of section 145 provides that for the purpose of the section the expression "land or water" includes fisheries. It

was then argued that in any case the benefit of the order made under section 145, Criminal Procedure Code, could only be taken by the persons in whose favour that order was made and that it could not operate for the benefit of all the 846 fishermen represented by the eighteen defendants or in favour of all fishermen who would come to reside in these nine villages in times to come. In our opinion, this contention has force and the High Court was in error in holding otherwise. There is no evidence whatsoever to show that besides the twelve persons mentioned as second party in the section 145, Criminal Procedure Code, proceedings who else was represented by them and we are therefore bound to hold that the benefit of that order can only be given to those defendants who are represented by those twelve persons. The learned counsel for the appellant gave us a list of the persons who were parties in Section 145 proceedings and of those out of the defendants who stand in their shoes. According to this list, defendants 1, 2, 3, 5, 6 7, 9 and 12 are the persons who themselves or through their predecessors in interest were parties in the former case and are entitled to the benefit of the result of those proceedings. All the other defendants, whether impleaded personally in this suit or in a representative capacity, or those whom they represent, are not entitled to take advantage of those proceedings. The result therefore is that the defendants above mentioned only are entitled to remain in possession of the fishery on payment of a rent of Rs. 135-7-0 per annum till it is enhanced in due course of law or for good cause they lose their right to remain in possession of the fishery. In an earlier litigation it has been decided that the right to possession of the fishery for fishing during Hilsa season is not assignable or transferable, it however can be enjoyed by the heirs and successors.

The contention that there has been a change in the course of the river and that the fishery now in dispute is not the same fishery which was in dispute on the proceedings of 1918 cannot be sustained. We see no reason to differ from the view of the High Court,

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that the change in the course of the river has not in any way affected the defendants' possession as the channels whether old or new, which comprise the Madhurdia or Charkhati fishery form one connected sheet of water. It is well settled that the fish follow the course of the river and the fishermen follow the fish.

It was then argued that an exclusive right of fishing could not be acquired in respect of a particular kind of fish and during any particular season. This argument is not tenable in view of section 145, Criminal Procedure Code, proceedings. Moreover an exclusive right of fishing in a given place means that no other person has a coextensive right with the claimant of the right. The mere fact that some other person has a right to a particular class of fish in the fishery or that another person is entitled to fish at a certain time of the year does not destroy the right of exclusive fishing in any manner (Vide Halsbury's Laws of England, Hailsham Edn., Vol. 15, para. 59).

The result is that the appeal is allowed partially, the decree of the High Court is modified and the plaintiff's suit for a declaration and injunction is decreed as follows :—

(i) It is declared that the plaintiff is entitled to fish in the disputed fishery except during the Hilsa season (Margasir to Baisakh) during which season defendants 1, 2, 3, 5, 6, 7, 9 and 12 have an exclusive right of fishing in the fishery in respect to Hilsa fish which right they can exercise either personally or with the help of other fishermen, on payment of a rent of Rs. 135-7-0 per year till it is enhanced in due course of law or for good cause they lose their right to remain in possession of the fishery ;

(ii) The defendants are restrained from interfering with his right of fishing during the months during which the defendants named above have not the exclusive right of fishing;

(iii) That defendants other than defendants 1, 2, 3, 5, 6, 7, 9 and 12 have no right of any kind whatsoever

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in this fishery and cannot interfere with the plaintiff's right. In the cricumstances of the case we will make no order as to costs of the appeal.

Appeal allowed in part.

Agent for the appellant: *S. P. Varma.*

Agent for the respondents: *Rs. C. Prasad.*

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April, 6.

BALRAJ KHANNA

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RAM NATH KALIA

v.

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[SHRI HARILAL KANIA C. J., PATANJALI SASTRI, MEHR CHAND MAHAJAN, S. R. DAS and VIVIAN BOSE JJ.]

Constitution of India, Arts. 19(1) & (2), 22 (5)—Freedom of speech—Preventive detention to prevent speeches with a view to maintain public order—Omission to state objectionable passages in grounds supplied—Legality of detention.

The District Magistrate of Delhi, "being satisfied that with a view to the maintenance of public order in Delhi it is necessary to do so" ordered the detention of the petitioners under s. 3 of the Preventive Detention Act, 1950. The grounds of detention communicated to the petitioners were "that your speeches generally in the past and particularly on the 13th and 15th August, 1950, at public meetings in Delhi has been such as to excite disaffection between Hindus and Mussalmans and thereby prejudice the maintenance of public order in Delhi and that in order to prevent you from making such speeches it is necessary to make the said order." The petitioners contended that under the Constitution the maintenance of public order was not a purpose for which restriction can be imposed on the freedom of

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against the order of the High Court refusing to grant stay of the proceedings then pending, it is sufficient to dismiss this appeal with the observation that it will be open to the appellants to raise the objections before the Special Judge.

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December 20

SRI MONOHAR DAS MOHANTA

v.

CHARU CHANDRA PAL AND OTHERS.

[MEHAR CHAND MAHAJAN C.J., BHAGWATI, JAGANNADHADAS, VENKATARAMA AYYAR and B. P. SINHA JJ.]

Lost Grant—Presumption of—When such presumption does or does not arise—Legality of lost grant of Niskar from Mohunt—Pleading and proof—Findings of fact.

A presumption of a lost grant arises in favour of a person who does not claim adversely to the owner but who on the other hand proves ancient and continued possession in assertion of a title derived from the owner without any challenge and such possession and assertion cannot be accounted for except by referring to a legal origin of the grant claimed.

But the presumption of a lost grant is not an irrebuttable presumption of law and the court cannot presume a grant where it is convinced of its non-existence by reason of a legal impediment, as where the presumption of a lost grant is claimed by a fluctuating body of persons. Similarly a presumption of a lost grant cannot arise when there is no person capable of making such a grant or if the grant pleaded is illegal or beyond the powers of the grantor.

A presumption of a lost grant by way of Niskar cannot be imputed to the Mohunt of an Asthal inasmuch as he is legally incompetent to make any Niskar grant.

When a defendant who denies the title of the plaintiff in respect of any land, fails in that plea, he cannot fall back on the presumption of a lost grant from the very person whose title he has denied.

Findings of fact arrived at by courts should not be vague.

Attorney-General v. *Simpson* ([1901] 2 Ch. D. 671), *Raja Braja Sunder Deb* v. *Moni Behara and others* ([1951] S.C.R. 431), *Barker* v. *Richardson* ([1821] 4 B. & Ald. 579), *The Rochdale Canal Com-*

pany v. *Radcliffe* ([1852] 18 Q.B. 287), and *Palaniappa Chetty* v. *Sreenath Devasikamony* ([1917] L.R. 44 I.A. 147), referred to.

CIVIL APPELLATE JURISDICTION: CIVIL Appeal Nos. 109 to 115 of 1952.

Appeals from the Judgment and Decree dated the 9th day of March 1950 of the High Court of Judicature at Calcutta in Appeal from Appellate Decree Nos. 1841-1847 of 1945 arising out of the Decrees dated the 16th day of September 1944 of Munsiff 3rd Court, Burdwan.

P. K. Chatterjee, for the appellant.

S. C. Das Gupta, (*Sukumar Ghose,* with him), for the respondents in Civil Appeals Nos. 109 to 112 of 1952 and respondents 1, 2(a), 3 and 4 in Civil Appeal No. 113 of 1952 and respondents 1 and 3 in Civil Appeals Nos. 114 and 115 of 1952.

1954. December 20. The Judgment of the Court was delivered by

VENKATARAMA AYYAR J.—The appellant is the Mahant of a religious institution known as Rajgunj Asthal in Burdwan, and the suits out of which the present appeals arise, were instituted by him to recover possession of various plots of land in the occupation of the defendants, or in the alternative, for assessment of fair and equitable rent. It was alleged in the plaints that the suit lands were comprised in Mouza Nala forming part of the permanently settled estate of Burdwan, and were Mal lands assessed to revenue, and that more than 200 years previously there had been a permanent Mokarrari grant of those lands by the Maharaja of Burdwan to the Rajgunj Asthal; that in the record of rights published during the settlement in 1931 they were erroneously described as rent-free, and that on the strength of that entry the defendants were refusing to surrender possession of the lands to the plaintiff. It was accordingly prayed that a decree might be passed for ejectment of the defendants, or in the alternative, for assessment of a fair and equitable rent.

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The defendants contested the suits, and pleaded that the lands were not Mal lands comprised within Mouza Nala, that they did not form part of the zamindari of Burdwan but had been granted as Lakheraj to their predecessors-in-title long prior to the permanent settlement, that neither the Maharaja of Burdwan nor the plaintiff claiming under him had any title to them, and that the entry in the record of rights in 1931 was correct. The defendants also pleaded that as they and their predecessors had been in possession of the lands for over 200 years under assertion of an adverse title, the claim of the plaintiff was barred by limitation.

The District Munsif of Burdwan who tried the suits held that the lands were included in Mouza Nala in Thouzi No. 1, which was comprised in the permanently settled estate of Burdwan, that their income was taken into account in fixing the revenue payable by the estate, that they had been granted in permanent Mokarrari by the then Maharaja of Burdwan to the Rajgunj Asthal, and that the plea of the defendants that they held them under a Lakheraj grant made prior to the permanent settlement was not true. He also held that the documents on which the defendants claimed to have dealt with the properties as owners under assertion of an adverse title were not proved to relate to the suit lands, that the relationship subsisting between the parties was one of landlord and tenant, that as there had been no determination of tenancy, no decree in ejectment could be passed but that the plaintiff was entitled to fair rent, and that the claim was not barred by reason of article 131 of the Limitation Act. In the result, he granted decrees for rent.

The defendants appealed against this decision to the Court of the District Judge of Burdwan, who agreed with the District Munsif that the suit lands were Mal lands within the zamindari of Burdwan, and that they had been settled on the plaintiff by the Maharaja of Burdwan. But he held that as the defendants and their predecessors had been in possession of the lands for a very long time without

payment of rent, a presumption of a lost grant could be made in their favour. He accordingly dismissed the suits. Against this decision, the plaintiff appealed to the High Court, which agreeing with the District Judge on both the points dismissed the appeals, but granted a certificate under article 133(1) (c), as it was of the opinion that the question of lost grant raised an issue of great importance.

The substantial question that arises for our decision is whether on the materials on record the Courts below were right in presuming a lost grant in favour of the defendants. The grounds on which the District Judge made that presumption are that the defendants, and their predecessors had been in possession of the lands for a long time without payment of rent, that they had been asserting continuously that they were holding under a Lakheraj grant, and that they did so to the knowledge of the plaintiff. It must be mentioned that in dealing with this question the District Munsif held that the documents put forward by the defendants as containing assertions by them that they held under a Lakheraj grant were not shown to relate to the suit lands. The District Judge differed from this finding, and observed :

".....there are some unmistakable names of tanks, etc., by which some of the lands of these documents at least can be connected with the suit lands .....These documents relating to these holdings cannot, therefore, be discarded as unconnected with the suit lands".

These observations are vague, and do not lead anywhere, and cannot be taken as a finding on the question. No attempt was made before us on behalf of the respondents to connect any of the documents with the lands held by them. In the circumstances, the finding of the District Munsif on the point must be accepted.

On the further question whether the plaintiff had knowledge of the assertion of any hostile title by the defendants, the learned District Judge answered it in the affirmative relying on Exhibits A to A-24,

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which are receipts for realisations of cesses from the defendants. But the High Court held—and its finding has not been attacked before us—that there was no proof of the contents of these documents, and that they must therefore be excluded. The position thus is that there is no proof that the respondents set up any adverse title prior to 1931, much less that the plaintiff had knowledge of the same. We are therefore left with a bare finding that the defendants and their predecessors in title had been in possession for a long period without payment of rent; but here again, there is no finding as to the precise length of time during which they held possession. The question is whether in this situation a presumption of lost grant could be made.

The circumstances and conditions under which a presumption of lost grant could be made are well settled. When a person was found in possession and enjoyment of land for a considerable period of time under an assertion of title without challenge, Courts in England were inclined to ascribe a legal origin to such possession, and when on the facts a title by prescription could not be sustained, it was held that a presumption could be made that the possession was referable to a grant by the owner entitled to the land, but that such grant had been lost. It was a presumption made for securing ancient and continued possession, which could not otherwise be reasonably accounted for. But it was not a *presumptio juris et de jure,* and the Courts were not bound to raise it, if the facts in evidence went against it. "It cannot be the duty of a Judge to presume a grant of the non-existence of which he is convinced" observed Farwell, J. in *Attorney-General* v. *Simpson*(1). So also the presumption was not made if there was any legal impediment to the making of it. Thus, it has been held that it could not be made, if there was no person competent to be the recipient of such a grant, as where the right is claimed by a fluctuating body of persons. That was held in *Raja Braja Sundar Deb* v. *Moni Behara and others*(2). There will likewise be no scope for this

(1) [1901] 2 Ch. D. 671. 698. (2) [1951] S.C.R. 431, 446.

presumption, if there is no person capable of making a grant: (Vide Halsbury's Laws of England, Vol. IV, page 574, para 1074); or if the grant would have been illegal and beyond the powers of the grantor. [Vide *Barker* v. *Richardson*(1) and *The Rochdale Canal Company* v. *Radcliffe*(2)].

In the light of these principles, it has now to be seen whether on the facts found a lost grant could be presumed in favour of the defendants. The finding is, as already stated, that they were in possession without payment of rent for a considerable length of time, but it has not been established precisely for how long. In their written statements they pleaded that they had been holding under a Lakheraj grant made prior to the permanent settlement, and had been in possession by virtue of that title for over 200 years. On this plea, the grant to be presumed should have been made 200 years prior to the suit. There is an obvious difficulty in the way of presuming such a grant on the facts of this case. There was a permanent settlement of the zamindari of Burdwan in 1793, and it has been found by all the Courts that in that settlement the suit lands were included as part of the Mal or assessed lands of the estate. Now, the scheme of the settlement of the estates was to fix the revenue payable thereon on the basis of the income which the properties were estimated to yield, and Regulation No. 8 of 1793 contains elaborate provisions as to how the several kinds of property are to be dealt with. Section 36 of the Regulation provides that "the assessment is also to be fixed exclusive and independent of all existing lakheraje lands, whether exempted from the kheraje (or public revenue) with or without due authority". Therefore, when it is shown that lands in an estate are assessed, it must follow that they could not have been held on the date of the permanent settlement as Lakheraj. It would be inconsistent with the scheme of the settlement and section 36 of Regulation No. 8 of 1793 to hold that the assessed or Mal lands in an estate could have been held on an anterior Lakheraj grant. It was for this

(1) [1821] 4 B. & Ald. 579. (2) [1852] 18 Q. B. 287.

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reason that the defendants pleaded that the suit lands were not comprised in the Mal lands of the zamindari of Burdwan. But that plea has been negatived, and it has been found that they are part of the Mal lands within the zamindari assessed to revenue, and in view of that finding there is no scope for the presumption of a lost grant.

Learned counsel for the respondents relied strongly on the record of rights made in 1931 with reference to the suit lands as supporting his contention. The entry in question describes the lands as "Bhog Dakhal Sutre Niskar", and has been translated as "without rent by virtue of possession and enjoyment". The plaintiff attacked this entry as made at the instance of the defendants acting in collusion with one of his agents. The Courts below, however, have held that that had not been established, and therefore the entry must be taken as properly made. The respondents contended that a strong presumption should be made in favour of the correctness of the entry, because it was made in the ordinary course of business, and that it was sufficient to sustain a presumption of lost grant. Giving the entry its full value, does the word "Niskar" import a rent-free grant? Rule 37 of the Technical Rules and Instructions issued by the Settlement Department for observance by the settlement authorities provides that if property is found in the possession of a person who is not actually paying rent for it, it should be described as "Niskar", and if no sanad or title deed is produced by the occupant showing a rent-free title, the words "Bhog Dakhal Sutre" (by virtue of enjoyment and possession) should be added. In the written statement it was stated that "as the defendants could not produce any 'revenue-free grant', they (Settlement Officers) recorded Niskar Raiyati right in a general way". Reading Rule 37 along with the written statement it is clear that the entry in the record of rights in 1931 was made in compliance with that Rule, and that what it imports is not that there was a rent-free grant, but that the person in possession was not actually paying rent. Whatever weight might attach to the word "Niskar" in a

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record of rights in other context, where the question is whether a presumption of a lost pre-settlement Lakheraj grant could be made, the inference to be drawn from that word cannot outweigh the effect of the non-exclusion of the lands from the Mal or the regularly assessed estate. We are therefore of opinion that a presumption of lost grant cannot be founded on the entry in the record of rights.

There are also other difficulties in the way of presuming a lost grant in favour of the predecessors of the defendants. The suit properties formed part of Mauza Nala within the zamindari of Burdwan, and if a grant had been made in favour of the predecessors of the defendants, it must have been made by the Maharaja of Burdwan or by the Rajgunj Asthal. But the defendants have in their written statements denied the title of both the Maharaja and the Asthal, and having failed in that plea, cannot fall back on a presumption of lost grant by the very persons, whose title they have repudiated.

This does not exhaust all the difficulties of the defendants. According to the District Judge, the suit properties had been settled on the Rajgunj Asthal more than 200 years ago. Therefore, the grant to be presumed must have been made by the Mahant of Asthal in favour of the predecessors of the defendants. But before raising such a presumption, it must be established that the grant was one which could have legally been made by him. It is well settled that it is beyond the powers of a manager of a religious institution to grant perpetual lease binding the institution for all times to a fixed rent, unless there is a compelling necessity or benefit therefor. Vide *Palaniappa Chetty* v. *Sreenath Devasikamony*(1). And what is pleaded in the present case is not even so much as a permanent lease, because there is neither premium paid nor rent reserved but a Lakheraj grant unsupported by any consideration. That would clearly be beyond the powers of a Mahant, and no presumption of a lost grant could be made in respect thereto. In *Barker* v. *Richardson*(2), an easement was claimed

(1) [1917] L.R. 44 I.A. 147.

(2) [1821] 4 B. & Ald. 579.

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both on the ground of prescription and presumption of a lost grant by a rector. In negativing this claim, Abbot, C. J. observed that a grant could not be presumed, because the rector had no right to bind his successor by it, and it would therefore be invalid. In *The Rochdale Canal Company* v. *Radcliffe*(1), where the Court was asked to presume that a company had made a grant of its surplus waters for use by the Duke of Bridgewater, Lord Campbell, C. J. observed that "if they had made a grant of the water in the terms of this plea, such a grant would have been *ultra vires* and bad", and on that ground, he refused to raise the presumption.

We are accordingly of opinion that on the facts found, no presumption of a lost grant could be made in favour of the defendants, and that the plaintiff was entitled to assessment of fair and equitable rent on the holdings in their possession.

Learned counsel for the respondents also raised the plea of limitation. The Courts below have held that the suits were within time under article 131 of the Limitation Act, as the final settlement of records was published on 16-6-1931, and the present suits were filed within 12 years thereof for establishing the right of the institution to assessment of rent. It was observed by the learned Judges of the High Court who heard the application for leave to appeal to this Court that it was not suggested before them that the decision on the question of limitation was erroneous. The contention that is now pressed before us is that in the view that there was no rent-free grant in favour of the predecessors of the defendants they were all trespassers, and that the title of the Asthal had become extinguished by adverse possession for long over the statutory period. But the question of adverse possession was not made the subject of an issue, and there is no discussion of it in the judgments of the Courts below. We have already held that the documents relied on by the defendants as containing assertions that they held under a Lakheraj grant are not shown to relate to the suit lands. We

(1) [1852] 18 Q.B. 287.

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have also held that there is no proof that the defendants claimed to hold under a rent-free grant to the knowledge of the plaintiff prior to 1931, and that what all has been established by them is non-payment of rent for a considerable but unascertained period of time. That, in itself, is not sufficient to make their possession adverse. It was only in 1931 that the defendants could be said clearly to have asserted a hostile title, and the suits are within time from that date. There is no substance in this plea, which is accordingly rejected.

In the result, the appeals are allowed, the decrees of the District Court and of the High Court are set aside, and those of the District Munsif restored with costs in this Court and in the two Courts below. The decrees of the District Munsif will stand as regards costs in that Court.

Appeals allowed.

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v.

THE STATE OF BOMBAY
(With Connected Appeal)

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December 22

[MUKHERJEA, S. R. DAS and VIVIAN BOSE, JJ.]

Criminal Procedure Code, (Act V of 1898), s. 197—Prevention of Corruption Act, 1947 (II of 1947), s. 5(2)—Charge thereunder and charge under s. 409 of the Indian Penal Code (Act XLV of 1860—Separated from each other—Sanction granted under s. 5(2) of the Prevention of Corruption Act—Whether could be extended as to cover prosecution under s. 409 of the Indian Penal Code—S. 197 of the Code of Criminal Procedure—Scope and construction of—Indian Penal Code, s. 34—Essence of—Whether the person must be physically present at the actual commission of the crime.

The three accused—Government servants—were jointly charged with an offence punishable under s. 5(2) of the Prevention of Corruption Act, 1947 and all three were further jointly charged with having committed breach of trust in furtherance of the common intention of all under s. 409 of the Indian Penal Code read with s. 34. Then followed a number of alternative charges in which each was separately charged with having committed criminal breach of trust personally under s. 409. As a further alternative, all three were

passed in favour of the appellant but the impugned judgment is modified to the extent that instead of Section 302 IPC, the appellant is convicted for the commission of offence under Section 304 (Part I). Upon his conviction for the aforesaid offence, the appellant is sentenced to undergo imprisonment for 10 years and to pay a fine of Rs 1000. In default of payment of fine, he shall undergo a further rigorous imprisonment of one year.

(2002) 3 Supreme Court Cases 258

(BEFORE SYED SHAH MOHAMMED QUADRI AND S.N. PHUKAN, JJ.)

KONDA LAKSHMANA BAPUJI .. Appellant;

Versus

GOVT. OF A.P. AND OTHERS .. Respondents.

Civil Appeal No. 2063 of 1999†, decided on January 29, 2002

A. Tenancy and Land Laws — Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (12 of 1982) — S. 2(d) & (e) — "Land grabber" and "land grabbing" — "Grabbing" — Meaning — Ingredients of the definitions — Only a person having a lawful entitlement to the land alleged to be grabbed and not a mere prima facie bona fide claim to the land can exclude him from the purview of the definition of "land grabber" — Having regard to the pleadings and oral and documentary evidence, held, Special Court was justified in taking the view that appellant had no lawful entitlement to the land which was a govt. land belonging to respondent State and as such appellant was covered by the definition of "land grabber" — Words and Phrases — "Grab"

B. Tenancy and Land Laws — Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (12 of 1982) — Ss. 7(1) & 8(1) — "Any alleged act of land grabbing" — Mere allegation of an act of land grabbing is sufficient to invoke the jurisdiction of Special Court

C. Constitution of India — Arts. 226 & 136 — Interference with findings of Special Court — Neither any relevant material excluded from consideration nor any irrelevant material taken into consideration by the Special Court — Held, neither interference of High Court under Art. 226 with the findings of the Special Court nor interference of Supreme Court under Art. 136 called for

It was the case of the respondent (Govt. of A.P.) that the land in dispute situated at Khairathabad village, Hyderabad was shown as Maqta land belonging to one Naimatullah Shah for some time and thereafter, as Inam. The appellant claimed to be the lessee of one of the successors to the said Maqta and he occupied the land in the year 1958 or so and raised a building thereon. However, the respondent Govt. was the true owner of the land and there were wrong entries in the record of rights which were corrected by the Collector in 1959. Alternatively it was stated that even if the land formed part of the Inam land, the same had vested in the respondent with effect from 20-7-1955, the date of vesting as per Section 3 of the A.P. (Telangana Area) Abolition of Inams Act,

† From the Judgment and Order dated 27-10-1998 of the A.P. High Court in WP No. 5332 of 1993

1955. None of the heirs of the alleged Inamdar appeared before the Collector, for claiming registration as occupants under Section 10 of the Act. It was alleged that the claim of the appellant was not proper, valid and legal because the land never belonged to the said Maqta; even otherwise it vested in the Government with effect from the said date and the order of the Collector, correcting entries in the record of rights, had become final. The plaint also referred to the fact that the land was the subject-matter of suit filed before the City Civil Court, Hyderabad which was dismissed holding that the land was a govt. land. On giving an undertaking in the said suit, the appellant with the permission of the court constructed the building. After the dismissal of the suit the first respondent issued notice of eviction to the appellant under Section 6 of the Land Encroachment Act, on the ground that he was in unauthorised occupation of land in dispute, but the notice was quashed in the writ petition filed by the appellant and that order was upheld in writ appeal giving liberty to the first respondent to establish its title in a civil court. The first respondent filed a suit in the City Civil Court for declaration of title and recovery of possession of the land in dispute. In view of Section 8(8) of the A.P. Land Grabbing (Prohibition) Act, the respondent's suit was transferred to the Special Court. The first respondent sought from the Special Court the following reliefs: to declare the appellant a land grabber and to restore possession of the land grabbed by him. The Special Court determined that the occupation of the land in dispute by the appellant was without any lawful entitlement and decided the question of the ownership and title to and lawful possession of the land in dispute on appreciating the evidence on record. It held, inter alia, that the land in dispute was not part of Inam and that even if it was so there was no valid confirmation of grant of the land in dispute by the civil administrator and consequently no title was obtained by the appellant. Thus the Special Court recorded the finding of fact of absence of lawful entitlement of the appellant to the land and upheld the title of the respondent that it was a govt. land. The High Court in writ petition did not interfere with the findings of the Special Court. Dismissing the appeal, the Supreme Court

Held :

The term "grab" has a broad meaning — to take unauthorisedly, greedily or unfairly — and a narrow meaning of snatching forcibly or violently or by unscrupulous means. The term "grab" is used in the Act in both its narrow as well as broad meanings. A combined reading of clauses (*d*) and (*e*) would suggest that to bring a person within the meaning of the expression "land grabber" it must be shown that: (*i*)(*a*) he has taken unauthorisedly, unfairly, greedily, snatched forcibly, violently or unscrupulously any land belonging to the Government or a local authority, a religious or charitable institution or endowment, including a wakf, or any other private person; (*b*) without any lawful entitlement; and (*c*) with a view to illegally taking possession of such lands, or enter or create illegal tenancies or lease and licence agreements or any other illegal agreements in respect of such lands or to construct unauthorised structures thereon for sale or hire, or give such lands to any person on rental or lease and licence basis for construction, or use and occupation of unauthorised structures; or (*ii*) he has given financial aid to any person for taking illegal possession of lands or for construction of unauthorised structures thereon; or (*iii*) he is collecting or attempting to collect from any occupiers of such lands rent, compensation and other charges by criminal intimidation; or (*iv*) he is abetting

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the doing of any of the abovementioned acts; or (*v*) that he is the successor-in-interest of any such person(s). (Paras 37 and 38)

New International Webster's Comprehensive Dictionary of the English Language; *Words and Phrases*, Permanent Edn., Vol. 18; *Corpus Juris Secundum*, Vol. 38; *Concise Oxford Dictionary*, *relied on*

Smith v. *Pure Oil Co.*, 128 SW 2d 931, 933, 278 Ky 430, *cited*

It is only when a person has lawful entitlement to the land alleged to be grabbed that he cannot be brought within the mischief of the said expression. A mere prima facie bona fide claim to the land alleged to be grabbed by such a person, cannot avert being roped in within the ambit of the expression "land grabber". What is germane is lawful entitlement to and not a mere prima facie bona fide claim to the land alleged to be grabbed. (Para 45)

In both Sections 7(1) and 8(1) of the Act the phrase "any alleged act of land grabbing" is employed and not "act of land grabbing". It is designedly done by the legislature to obviate the difficulty of duplication of trial once in the courts under the Act and over again in the ordinary civil court. Thus for purposes of taking cognizance of a case under the Act, existence of an allegation of any act of land grabbing is the *sine qua non* and not the truth or otherwise of such an allegation. But to hold that a person is a land grabber it is necessary to find that the allegations satisfying the requirements of land grabbing are proved. (Paras 17 and 39)

To make out a case in a civil court that the appellant is a land grabber the first respondent must aver and prove both the ingredients — the factum as well as the intention — that the appellant falls in the categories of the persons, mentioned above [clause (*d*) of Section 2 of the Act], has occupied the land in dispute, which belonged to the first respondent, without any lawful entitlement and with a view to or with the intention of illegally taking possession of such land or entering into the land for any of the purposes mentioned in clause (*e*) of Section 2 of the Act. What needs to be looked into in the present controversy is: whether the appellant has any lawful entitlement (proprietary or possessory) to the land in dispute and had come into possession of the land in dispute unauthorisedly. (Paras 40 and 41)

On a careful perusal of the judgment of the Special Court on the question of title of the first respondent and that of the appellant and his lessor Inamdar it must be held that neither was any relevant material excluded from consideration nor was any irrelevant material relied upon by the Special Court in recording its finding. There was, therefore, no scope for the High Court to interfere with those findings. No interference is also warranted by the Supreme Court in this appeal filed under Article 136. (Para 49)

Omar Salay Mohamed Sait v. *CIT*, AIR 1959 SC 1238 : (1959) 37 ITR 151; *Mehar Singh* v. *Shiromani Gurudwara Prabandhak Committee*, (2000) 2 SCC 97, *relied on*

D. **Tenancy and Land Laws — Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (12 of 1982) — Ss. 2(e), (d), 7(1) & 8(1) — Land grabbing — Petition invoking jurisdiction of Special Court/Tribunal under Ss. 7(1) and 8(1) need not use the actual language of S. 2(e) or (d) — What is required is that the allegations in the petition should make out the ingredients of land grabbing — If, however, parties understand the pleadings of each other correctly, issues framed by court and evidence adduced by the parties, then absence of specific plea would be inconsequential — Civil Procedure Code, 1908, Or. 6 Rr. 3 and 4 — Actual language of the provision not required to be used**

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Held :

Though it may be apt yet it is not necessary for any petitioner who invokes the jurisdiction of the Special Court/Special Tribunal to use in his petition under Sections 7(1) and 8(1) of the Act, the actual words employed in the relevant provisions of the Act. Prima facie it will satisfy the requirements of the Act if the petitioner alleges that the respondent is a land grabber or that he has grabbed the land. What is pertinent is that the allegations in the petition/plaint, in whatever language made, should make out the ingredients of land grabbing against such a person or his being a land grabber within the meaning of those expressions under the Act. It is only when the allegations made in the petition/plaint are proved the activity of taking possession of the land will fall within the meaning of land grabbing that such a possessor can be termed as a "land grabber" within the meaning of that expression under the Act. It is generally true that in the absence of necessary pleadings in regard to the ingredients of the definition of "land grabbing" no finding can validly be recorded on the basis of the evidence even if such evidence is brought on record. However, if the parties have understood the pleadings of each other correctly, an issue was also framed by the Court, the parties led evidence in support of their respective cases, then the absence of a specific plea would make no difference. (Paras 72 and 73)

Venkataramana Devaru v. *State of Mysore*, AIR 1958 SC 255 : 1958 SCR 895; *Nedunuri Kameswaramma* v. *Sampati Subba Rao*, AIR 1963 SC 884 : (1963) 2 SCR 208; *Kali Prasad Agarwalla* v. *Bharat Coking Coal Ltd.*, 1989 Supp (1) SCC 628; *Sardul Singh* v. *Pritam Singh*, (1999) 3 SCC 522 : 1999 SCC (Cri) 445, *relied on*

In the instant case the appellant has never pleaded before the Special Court that necessary pleading in regard to the requirements of land grabbing is lacking in the case. On the other hand, he understood the averments in the petition read with the plaint correctly as allegations of land grabbing. On the pleading the Special Court framed an issue and the parties adduced evidence, oral and documentary, on that issue. One of the witnesses in his statement categorically stated that the appellant was a land grabber. But there was no cross-examination on that aspect and in his deposition he did not even state that he was not a land grabber and the land in dispute was not a grabbed land. This has not been taken as his admission but only an aspect in appreciation of oral evidence. The Special Court is, therefore, correct in discussing the evidence on record under the caption "design" in view of the pleading on that aspect, adverted to above and the High Court rightly upheld the same. The activity of grabbing of any land should not only be without any lawful entitlement but should also be, inter alia, with a view to illegally taking possession of such lands. These two ingredients are found against the appellant. There is, therefore, no option but to sustain the view of the High Court in approving the finding of the Special Court on the issue that the appellant falls within the mischief of the definition of the expression "land grabber" under the Act. (Paras 74, 75 and 77)

E. **Adverse Possession — Onus of proof is on the party claiming title by adverse possession (Para 49)**

F. **Adverse Possession — A mixed question of law and fact — Existence of possession as well as animus possidendi are essential conditions — Clean and unequivocal assertion of title to the land by the possessor indicative of animus possidendi — Period for the purpose of reckoning adverse possession commences from the date both actual possession and assertion of title are shown to exist — Mere fact that a building was constructed by the**

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possessor of the land with the permission of court does not make the possession a permissive possession — Lessee of an Inamdar cannot acquire title to the land by adverse possession — Although neither passing of an order against the possessor, nor filing of application before statutory authority under Inams Abolition Act for occupancy rights would cause interruption in continuity of his possession but it would abrogate his animus to hold the land in derogation of the title of the owner (State in this case) and would break the chain of continuity of the animus — Limitation Act, 1963, Arts. 64 and 65

Held :

The question of a person perfecting title by adverse possession is a mixed question of law and fact. It must be shown by the person claiming title by prescription that he has been in possession of the land for the statutory period which is adequate in continuity, in publicity and in extent with the animus of holding the land adverse to the true owner. Mere possession of the land, however long it may be, would not ripen into possessory title unless the possessor has *animus possidendi* to hold the land adverse to the title of the true owner. It is true that assertion of title to the land in dispute by the possessor would, in an appropriate case, be sufficient indication of the *animus possidendi* to hold adverse to the title of the true owner. But such an assertion of title must be clear and unequivocal though it need not be addressed to the real owner. For reckoning the statutory period to perfect title by prescription both the possession as well as the *animus possidendi* must be shown to exist. Where, however, at the commencement of the possession there is no *animus possidendi*, the period for the purpose of reckoning adverse possession will commence from the date when both the actual possession and assertion of title by the possessor are shown to exist. The length of possession to perfect title by adverse possession as against the Government is 30 years. (Paras 53 and 61)

A building constructed by the appellant on the land in dispute with the permission of the court can be said to be not unauthorised. But certainly the appellant's possession of the land in dispute, if otherwise adverse to the title of the first respondent, does not acquire the character of permissive possession on the ground the appellant sought permission of the court to erect a building thereon. (Para 56)

The lessee of a Maqtedar (the Inamdar) cannot acquire title to the demised land by adverse possession either as against the State or the Maqtedar (Inamdar) so long as his possession under the lease continues. (Para 65)

Regarding the animus of the appellant, admittedly he claimed as a lessee under the Inamdar. The possession of the land from 1954 under an alleged lease agreement till the date of filing of written statement in the present suit in 1987, when he pleaded adverse possession for the first time, cannot be treated as adverse because there was no animus possidendi during the said period. Before the date of filing the written statement he never claimed title to the land in dispute adverse to the State. On the other hand, he paid Siwaijamabandi and applied for occupation of rights. (Para 63)

Thakur Kishan Singh v. *Arvind Kumar*, (1994) 6 SCC 591, *distinguished*

Ram Saran Lall v. *Domini Kuer*, AIR 1961 SC 1747 : (1962) 2 SCR 474; *Nanda Ballabh Gururani* v. *Maqbool Begum*, (1980) 3 SCC 346, *cited*

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Further, there was nothing on record to show that the appellant's lessor ever claimed the land in dispute adverse to the State. On these facts there is no scope to invoke the principle of tacking the possession of the Inamdar or presumption of continuity of possession backward. There can be no doubt that passing of adverse order against the appellant would not cause any interruption in his possession. So also filing of application before statutory authority under the Inams Abolition Act for occupancy rights, causes no interruption in the continuity of possession of the appellant but it does abrogate his animus to hold the land in derogation of the title of the State and breaks the chain of continuity of the animus. (Paras 63 and 64)

Balkrishan v. *Satyaprakash*, (2001) 2 SCC 498 : JT (2001) 2 SC 357, *relied on*

S.M. Karim v. *Bibi Sakina*, AIR 1964 SC 1254, *cited*

It must, therefore, be held that the appellant neither proved factum of possession of the land in dispute for a period of 30 years nor succeeded in showing that he had *animus possidendi* for the whole statutory period. Therefore, the confirming view of the High Court that the appellant failed to acquire title to the land in dispute by adverse possession must be maintained. (Para 65)

G. **Grants — Lost grant — Presumption of, in favour of possessor of land — When arises — When appellant came to possess the land in 1954 under an unregistered perpetual lease from the erstwhile Inamdar, held, presumption of lost grant would not be available to him — Words and Phrases — "Lost grant"**

Held :

The principle of lost grant is a presumption which arises in cases of immemorial user. It has its origin from the long possession and exercise of right by user of an easement with the acquiescence of the owner that there must have been originally a grant to the claimant which had been lost. The presumption of lost grant was extended in favour of possessor of land for considerably long period when such user is found to be in open assertion of title, exclusive and uninterrupted. However, when the use is explainable, the presumption cannot be called in aid. In the present case the appellant traces his possession from 1954 under an unregistered perpetual lease from the erstwhile Inamdar (Maqtedar). Therefore, the presumption of lost grant will not be available to the appellant. (Para 67)

Monohar Das Mohanta v. *Charu Chandra Pal*, AIR 1955 SC 228, *relied on*

Attorney-General v. *Simpson*, (1901) 2 Ch 671 : 70 LJ Ch 828 : 85 LT 325, *cited*

H. **Civil Procedure Code, 1908 — S. 11 Expln. IV — Constructive res judicata — "Might and ought" — Condition of the matter having "been heard and finally decided" under main S. 11 must be satisfied before Expln. IV can apply — Hence plea which might and ought to have been taken in earlier suit or proceedings can be deemed to have been taken and decided against the person raising the plea in the subsequent suit or proceeding only where there had been final determination of rights of the parties in the earlier suit or proceeding**

Held :

A conjoint reading of Section 11 and Explanation IV shows that a plea which might and ought to have been taken in the earlier suit, shall be deemed to have been taken and decided against the person raising the plea in the subsequent suit. But to attract the provisions of Section 11 CPC, there must be a final

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adjudication of the matter between the parties in earlier suit or proceeding. In the present case there had been no final determination of the rights of the parties. Therefore, the principle of constructive res judicata under Explanation IV to Section 11 CPC was not attracted in the present case. (Paras 23 and 25)

Sha Shivraj Gopalji v. *Edappakath Ayissa Bi*, AIR 1949 PC 302 : (1949) 2 MLJ 493, *distinguished*

Kewal Singh v. *Lajwanti*, (1980) 1 SCC 290 : AIR 1980 SC 161, *relied on*

Ram Kirpal Shukul v. *Rup Kuari*, (1883-84) 11 IA 37 : 6 All 269 (PC), *cited*

I. **Tenancy and Land Laws — Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (12 of 1982) — S. 8(8) — Transfer of case from civil court to Special Court — Validity of order of transfer not urged before High Court in writ petition filed to challenge the judgment of the Special Court, out of which the appeal before Supreme Court arose — Held, transfer of the suit cannot be allowed to be challenged in appeal before Supreme Court — Constitution of India, Art. 136 — New plea (Para 20)**

J. **Tenancy and Land Laws — Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (12 of 1982) — Ss. 7 to 9 and 15 — Jurisdiction of Special Court — Scope — Civil Procedure Code, 1908, S. 9**

The jurisdiction of the civil court under Section 9 of the Code of Civil Procedure and under the Civil Courts Act is ousted and the Act which is special law will prevail and as such the Special Court will have jurisdiction in respect of the matters dealt with thereunder. (Para 17)

Sanwarmal Kejriwal v. *Vishwa Coop. Housing Society Ltd.*, (1990) 2 SCC 288, *relied on*

Dhulabhai v. *State of M.P.*, AIR 1969 SC 78 : (1968) 3 SCR 662, *referred to*

K. **Tenancy and Land Laws — Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (12 of 1982) — S. 10 — Presumption of the person alleged to have grabbed the land being a land grabber — Burden lies on the alleged land grabber to disprove that the land had not been grabbed by him — Evidence Act, 1872, Ss. 4 and 101-103**

Where the presumption under Section 10 that the person who is alleged to have grabbed the land is a land grabber is drawn by the Special Court/Special Tribunal, the burden of proving that the land has not been grabbed by him is cast on the alleged land grabber. In view of the meaning of the words "shall presume" in Section 4 of the Indian Evidence Act, the effect of raising presumption under Section 10 of the Act would be that unless the alleged land grabber disproves that the land has been grabbed by him, the Special Court/Special Tribunal shall regard that the land in question has been grabbed by the alleged land grabber. (Para 19)

R-M/25138/C

Advocates who appeared in this case :

K. Parasaran, Senior Advocate (P. Niroop, Pavan Kumar, P.R. Tiwari and P. Vinay Kumar, Advocates, with him) for the Appellant;

Altaf Ahmed, Additional Solicitor-General and Ms K. Amareswari, Senior Advocate (G. Prabhakar and K. Ram Kumar, Advocates, with them) for the Respondents.

Chronological list of cases cited ***on page(s)***

1. (2001) 2 SCC 498 : JT (2001) 2 SC 357, *Balkrishan* v. *Satyaprakash* 290*a-b*, 291*d-e*
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3. (1999) 3 SCC 522 : 1999 SCC (Cri) 445, *Sardul Singh* v. *Pritam Singh* 294*f-g*
4. (1994) 6 SCC 591, *Thakur Kishan Singh* v. *Arvind Kumar* 288*d-e*
5. (1990) 2 SCC 288, *Sanwarmal Kejriwal* v. *Vishwa Coop. Housing Society Ltd.* 273*g-h*
6. 1989 Supp (1) SCC 628, *Kali Prasad Agarwalla* v. *Bharat Coking Coal Ltd.* 294*f-g*
7. (1980) 3 SCC 346, *Nanda Ballabh Gururani* v. *Maqbool Begum* 288*f-g*
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10. AIR 1964 SC 1254, *S.M. Karim* v. *Bibi Sakina* 290*b-c*
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12. AIR 1961 SC 1747 : (1962) 2 SCR 474, *Ram Saran Lall* v. *Domini Kuer* 288*f-g*
13. AIR 1959 SC 1238 : (1959) 37 ITR 151, *Omar Salay Mohamed Sait* v. *CIT* 286*b*
14. AIR 1958 SC 255 : 1958 SCR 895, *Venkataramana Devaru* v. *State of Mysore* 294*c*
15. AIR 1955 SC 228, *Monohar Das Mohanta* v. *Charu Chandra Pal* 291*g-h*, 292*b*
16. AIR 1949 PC 302 : (1949) 2 MLJ 493, *Sha Shivraj Gopalji* v. *Edappakath Ayissa Bi* 276*f*
17. (1901) 2 Ch 671 : 70 LJ Ch 828 : 85 LT 325, *Attorney-General* v. *Simpson* 292*e-f*
18. (1883-84) 11 IA 37 : 6 All 269 (PC), *Ram Kirpal Shukul* v. *Rup Kuari* 277*a-b*
19. 128 SW 2d 931, 933, 278 Ky 430, *Smith* v. *Pure Oil Co.* 280*b*, 280*b-c*, 280*c*

The Judgment of the Court was delivered by

SYED SHAH MOHAMMED QUADRI, J.— This appeal, by special leave, is from the judgment of the Division Bench of the High Court of Judicature, Andhra Pradesh at Hyderabad dated 27-10-1998 dismissing Writ Petition No. 5332 of 1993, filed by the appellant assailing the order of the Special Court under the A.P. Land Grabbing (Prohibition) Act, 1982 (for short "the Act") in LGC No. 61 of 1990 dated 16-4-1993. The Special Court had upheld the claim of the first respondent (the State of Andhra Pradesh represented by its Chief Secretary) that the appellant was a land grabber of land to an extent of 2 acres 6 guntas, comprised in Survey Nos. 9/15 paiki, 9/16 and 9/17 of Khairathabad village, Golconda mandal, Hyderabad district (for short "the land in dispute") and directed the appellant to restore possession of that land to the first respondent in terms of the decree.

2. To comprehend the controversy in the appeal it would be appropriate to set out the relevant facts. The appellant traces his title to the land in dispute under an unregistered agreement for perpetual lease executed by one of the successors of the Inamdar, Mohd. Noorudin Asrari, in respect of the Inam land in Survey Nos. 9/15, 9/16, 9/17 and 9/18, on 28-11-1954 (Ext. B-39). Later the said Asrari executed a registered perpetual lease deed in favour of the appellant on 11-12-1957 (a certified copy is marked as Ext. B-40). Soon thereafter one Rasheed Shahpurji Chenoy had set up a rival claim to the land in dispute by filing Original Suit No. 13 of 1958, in the Court of the Additional Chief Judge, City Civil Court, Hyderabad, against the first respondent, the appellant and others praying for declaration of title to and recovery of possession of the said land. In that suit the learned Additional

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Chief Judge passed an interim order directing the parties to maintain status quo in regard to the land in dispute. However, the appellant having sought permission of the court, constructed a building "Jala Drushyam" on the land in dispute on his giving an undertaking that in the event of the plaintiff therein succeeding in the suit, the building would be vacated by him, leaving the structures intact, without claiming any compensation. On 11-11-1975 the said suit of Rasheed Shahpurji Chenoy was dismissed recording the finding that he did not have any title to the suit land which was the government land (Ext. A-1).

3. It appears that as a follow-up action of the minutes of the Committee held in the chamber of the Chief Secretary to the Government of Andhra Pradesh, the Deputy Secretary, GAD (OPLLL) by his letter dated 14-9-1959 (Ext. B-35) asked the Collector, inter alia, to declare the land situated between the Secretariat and the Fisheries Department (which includes the land in dispute) as the government land. Thereafter on 5-10-1959, the Collector passed order declaring Survey Nos. 9/15 paiki, 9/16, 9/17, 9/18 and 9/19 admeasuring 19 acres 29 guntas as government land and informed the Chief Secretary accordingly on 20-10-1959 (Ext. A-14 and Ext. B-34).

4. On 28-2-1976, the Tahsildar, Hyderabad, Urban Taluq, noticing that the appellant was in unauthorised occupation of the government land, issued eviction notice calling upon him to vacate the land comprised in Survey Nos. 9/15 paiki, 9/16 and 9/17 admeasuring 2 acres 28 guntas (Ext. B-38). Pursuant to the said notice, an order of eviction was passed against the appellant on 28-5-1977 (Ext. B-58). That order was challenged by the appellant in Writ Petition No. 1414 of 1977 in the High Court of Judicature, Andhra Pradesh at Hyderabad. A learned Single Judge of the High Court allowed the writ petition on 20-1-1978 (Ext. A-3). Questioning that order the first respondent filed WA No. 61 of 1978 before the Division Bench. It would be relevant to note here that the Act came into force on 6-9-1982 but that fact was not brought to the notice of the Division Bench at the hearing of the writ appeal. The Division Bench opined that there was bona fide dispute of title to the land in dispute between the appellant and the Government which must be adjudicated upon by the ordinary court of law and that the Government could not decide unilaterally in its own favour and resort to summary eviction proceedings under the Andhra Pradesh Land Encroachment Act, 1905 (for short "the Land Encroachment Act") and dismissed the writ appeal on 14-11-1983 (Ext. A-4). The appellant again filed Writ Petition No. 15724 of 1984 apprehending his dispossession from the land in dispute. On 16-6-1986, a learned Single Judge of the High Court disposed of the writ petition taking note of the observations of the Division Bench in the said writ appeal and the fact that the first respondent had filed, OS No. 1497 of 1985 in the Court of the IVth Additional Judge, City Civil Court, Hyderabad for declaration of title and recovery of possession of land in dispute on 25-11-1985.

5. In view of the provisions of sub-section (8) of Section 8 of the Act, the said suit of the first respondent was transferred to the Special Court from the Court of the IVth Additional Judge. Though the order of the transfer of the

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suit was challenged by the appellant in the High Court by filing civil revision petition, it was later dismissed as not pressed. Be that as it may, the first respondent filed an application invoking jurisdiction of the Special Court for taking cognizance of the case and prayed that the plaint in the said suit be read as part of the application. Thereupon, the Special Court issued notification for consideration of objections under the first proviso to sub-section (6) of Section 8 of the Act in the Andhra Pradesh Gazette on 1-4-1992. The Special Court, after considering the objections filed by the appellant taking cognizance of the case, LGC No. 61 of 1990 (referred to in this judgment as "the case"), tried the case as a civil suit. The parties were given opportunity to lead evidence, both oral and documentary. The first respondent examined PW 1 and marked Exts. A-1 to A-48; the appellant examined himself as RW 1 and marked Exts. B-1 to B-65. By consent of the parties Exts. X-1 to X-4 (copies of various plans) were also marked. After considering the evidence adduced by both the sides the Special Court decreed the case of the first respondent on 16-4-1993 which was upheld by the Division Bench of the High Court in the said WP No. 5332 of 1993 (filed by the appellant) by its judgment and order dated 27-10-1998 which is under challenge in this appeal.

6. Three main contentions were elaborated by Mr K. Parasaran, the learned Senior Counsel appearing for the appellant. His first contention is that the appellant could not be held to be a land grabber as his possession was alleged to be permissive by the first respondent and he was found to have prima facie bona fide claim to the property in dispute by the High Court in Writ Petition No. 1414 of 1977 and Writ Appeal No. 61 of 1978. The second contention is that the Special Court had no jurisdiction to try the case and the third contention is that, in any event, the appellant had perfected his title to the land in dispute by adverse possession.

7. Mr Altaf Ahmed, the learned Additional Solicitor-General, appearing for the first respondent, has argued that the questions whether the appellant is a land grabber and whether he has title to the land in dispute or it is a government land, were decided by the Special Court after trial and the appellant had ample opportunity to establish his case; the appellant challenged the order of the transfer of the suit from the civil court to the Special Court in the High Court by filing a civil revision petition; he, however, did not press it. After the said questions were found against him by the Special Court, submitted Mr Ahmed, the appellant could not be permitted to challenge the jurisdiction of the Special Court and they, being the findings of fact, are not open to challenge in appeal filed under Article 136 of the Constitution.

8. These contentions can conveniently be dealt with together.

9. On the contentions, urged before us, we find that the Special Court framed Issues 3, 5 and 6 which are as follows:

> "(*3*) Whether this Court has jurisdiction to entertain the suit as it raises bona fide dispute of title?

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(*5*) Whether the respondent perfected title by adverse possession?

(*6*) Whether the respondent is a land grabber within the meaning of the Act?"

10. It was held, on those issues, that the Special Court had jurisdiction to try the case; the appellant did not prescribe title by adverse possession and that the appellant was a land grabber. The findings recorded by the Special Court were approved by the High Court in the writ petition filed by the appellant. The correctness of those findings are assailed in this appeal.

11. Before proceeding further, it is appropriate to determine the question of jurisdiction of the Special Court. On this question, it is noted above, Issue 3 was framed and the Special Court held that it had jurisdiction. The High Court after adverting to the relevant provisions of the Act, concluded:

> "We find, therefore, in the totality of the situation and in view of the specific provisions as laid down by the Act, the Special Court was within its jurisdiction to deal with the matter and to go into the case as to whether there is any title involved in favour of the writ petitioner. Incidentally, be it noted that the statute itself has equated the Special Court with that of a civil court with all the powers of the civil court. Elaborate and detailed enquiry has been conducted by way of a regular trial like any other civil suit, and like any other civil suit, evidence has been recorded and considered and the Special Court came to a definite finding. Does it warrant intervention of the writ court on the basis of the above? The answer cannot but be in the negative."

12. Having regard to the principles laid down by a Constitution Bench of this Court in *Dhulabhai* v. *State of M.P.*[1] it will be apt to advert to the scheme and the provisions of the Act having a bearing on the question of jurisdiction of the Special Court and the Special Tribunal.

13. Section 17-B of the Act provides that the Schedule to the Act shall constitute the guidelines for the interpretation and implementation of the Act. We have perused the Schedule to the Act containing the Statement of Objects and Reasons to the Andhra Pradesh Land Grabbing (Prohibition) Bill of 1982 as well as the Bill of 1987. The point that is sought to be made out in the Schedule is that having regard to the increasing trend in grabbing the lands of the Government, local authorities, wakfs, charitable and religious endowments, evacuees and private persons by unscrupulous and resourceful persons forming a distinct class of economic offenders backed by wealth without any semblance of right and having taken note of the delays in disposal of civil and criminal cases in the regular courts, the State Legislature felt that unless all such cases of land grabbing are immediately detected and dealt with sternly and swiftly by specially devised adjudicating forums the evil cannot subside and social injustice will continue to be perpetrated with impunity. The Act constituted a Special Court, having both the civil and criminal jurisdiction, which consists of a serving or retired Judge of a High

1 AIR 1969 SC 78 : (1968) 3 SCR 662

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Court (Chairman), a serving or retired District Judge and a serving or retired civil servant not below the rank of a District Collector (as members) to entertain the cases in which the magnitude of the evil needs immediate eradication *so as to avoid duplication and to further the cause of justice*. The Court of the District Judge having jurisdiction over the area including Chief Judge, City Civil Court, Hyderabad, is constituted as a Special Tribunal to try cases of which cognizance was not taken by the Special Court in regard to any alleged act of land grabbing or with respect to ownership and title to or lawful possession of the land grabbed on or after the commencement of the Act. Against any judgment or order of the Special Tribunal (not being interlocutory order) an appeal is provided to the Special Court on questions of both law and fact. The Special Tribunal has only civil jurisdiction and the Code of Civil Procedure is applicable to the proceedings before it whereas the Special Court has both the civil as well as the criminal jurisdiction to which the provisions of Codes of Civil Procedure and Criminal Procedure apply. Both the Special Court as well as the Special Tribunals have power to reject any case brought before them if it is prima facie frivolous or vexatious. It is provided that any case pending before any court or other authority immediately before the commencement of the Act as would have been within the jurisdiction of the Special Tribunal/Special Court, shall stand transferred to the Special Tribunal/Special Court, as the case may be, as if the cause of action on which such suit or proceeding is based, had arisen after such commencement. If the Special Court is of the opinion that any case brought before it is not a fit case to be taken cognizance of, it may return the same for presentation before the Special Tribunal. There is, however, no provision that the case should be transferred back to the civil court if the final determination by the Special Tribunal or by the Special Court results in recording a finding that the occupation of the land by the respondent does not amount to land grabbing. This is because statutorily the Special Court is a civil court having both original and appellate jurisdiction as well as a Court of Session for all practical purposes and the District Judge having jurisdiction over the area in which land is alleged to be grabbed is constituted as a Special Tribunal.

14. It is apt to refer to the relevant provisions of the Act. Section 2 contains definition of various terms and expressions used in the Act. Section 3 of the Act which declares that land grabbing in any form is unlawful and any activity connected with or arising out of land grabbing shall be an offence punishable under the Act, cannot be lost sight of. Section 4 of the Act ordains that no person shall commit or cause to be committed land grabbing. It further declares that any person who, on or after the commencement of this Act, continues to be in occupation, otherwise than as a lawful tenant, of a grabbed land belonging to the Government, local authority, religious or charitable institution or endowment including a wakf, or other private person, shall be guilty of an offence under the Act and on conviction the offence is punishable with imprisonment for a term which shall not be less than six months but which may extend to five years, and

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with fine which may extend to five thousand rupees. Likewise Section 5 of the Act provides penalty for other offences in connection with land grabbing. Offences by companies fall within the ambit of the Act as provided in Section 6 of the Act.

15. It will be useful to read Sections 7 to 10 of the Act which deal with the Special Court insofar as they are relevant for the present discussion. They are as under:

"7. *Constitution of Special Courts.*—(1) The Government may, for the purpose of providing speedy enquiry into any alleged act of land grabbing, and trial of cases in respect of the ownership and title to, or lawful possession of, the land grabbed, by notification, constitute a Special Court.

(2)-(5-C) * * *

(5-D)(*i*) Notwithstanding anything in the Code of Civil Procedure, 1908 (5 of 1908) the Special Court may follow its own procedure which shall not be inconsistent with the principles of natural justice and fair play and subject to the other provisions of this Act and of any rules made thereunder while deciding the civil liability.

(*ii*)-(6) * * *

7-A. * * *

8. *Procedure and powers of the Special Courts.*—(1) The Special Court may, either suo motu or on application made by any person, officer or authority take cognizance of and try every case arising out of any alleged act of land grabbing or with respect to the ownership and title to, or lawful possession of, the land grabbed, whether before or after the commencement of this Act, and pass such orders (including orders by way of interim directions) as it deems fit;

(1-A) The Special Court shall, for the purpose of taking cognizance of the case, consider the location, or extent or value of the land alleged to have been grabbed or of the substantial nature of the evil involved or in the interest of justice required or any other relevant matter:

Provided that the Special Court shall not take cognizance of any such case without hearing the petitioner;

(2) Notwithstanding anything in the Code of Civil Procedure, 1908 the Code of Criminal Procedure, 1973 or in the Andhra Pradesh Civil Courts Act, 1972, any case in respect of an alleged act of land grabbing or the determination of question of title and ownership to, or lawful possession of any land grabbed under this Act, shall be triable only in a Special Court constituted for the area in which the land grabbed is situated; and the decision of the Special Court shall be final.

(2-A) If the Special Court is of the opinion that any case brought before it, is not a fit case to be taken cognizance of, it may return the same for presentation before the Special Tribunal:

Provided that if, in the opinion of the Special Court, any application filed before it is prima facie frivolous or vexatious, it shall reject the same without any further enquiry:

Provided further that if on an application from an interested person to withdraw and try a case pending before any Special Tribunal the Special

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Court is of the opinion that it is a fit case to be withdrawn and tried by it, it may for reasons to be recorded in writing withdraw any such case from such Special Tribunal and shall deal with it as if the case was originally instituted before the Special Court.

(2-B) Notwithstanding anything in the Code of Criminal Procedure, 1973, it shall be lawful for the Special Court to try all offences punishable under this Act.

(2-C) The Special Court shall determine the order in which the civil and criminal liability against a land grabber be initiated. It shall be within the discretion of the Special Court whether or not to deliver its decision or order until both civil and criminal proceedings are completed. The evidence admitted during the criminal proceeding may be made use of while trying the civil liability. But additional evidence, if any, adduced in the civil proceedings shall not be considered by the Special Court while determining the criminal liability. Any person accused of land grabbing or the abetment thereof before the Special Court shall be a competent witness for the defence and may give evidence on oath in disproof of the charge made against him or any person charged together with him in the criminal proceeding:

Provided that he shall not be called as a witness except on his own request in writing or his failure to give evidence shall be made the subject of any comment by any of the parties or the Special Court or give rise to any presumption against himself or any person charged together with him at the same proceeding.

(3)-(5) * * *

(6) Every finding of the Special Court with regard to any alleged act of land grabbing shall be conclusive proof of the fact of land grabbing and of the persons who committed such land grabbing, and every judgment of the Special Court with regard to the determination of title and ownership to, or lawful possession of, any land grabbed shall be binding on all persons having interest in such land.

Provided that the Special Court shall, by notification, specify the fact of taking cognizance of the case under this Act. Such notification shall state that any objection which may be received by the Special Court from any person including the custodian of evacuee property within the period specified therein will be considered by it;

Provided further that where the custodian of evacuee property objects to the Special Court taking cognizance of the case, the Special Court shall not proceed further with the case in regard to such property;

Provided also that the Special Court shall cause a notice of taking cognizance of the case under the Act, served on any person known or believed to be interested in the land, after a summary enquiry to satisfy itself about the persons likely to be interested in the land.

(7) * * *

(8) Any case, pending before any court or other authority immediately before the constitution of a Special Court, as would have been within the jurisdiction of such Special Court, shall stand transferred to the Special Court as if the cause of action on which such suit or proceeding is based had arisen after the constitution of the Special Court.

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9. *Special Court to have the powers of the civil court and the Court of Session.*—Save as expressly provided in this Act, the provisions of the Code of Civil Procedure, 1908, the Andhra Pradesh Civil Courts Act, 1972 and the Code of Criminal Procedure, 1973, insofar as they are not inconsistent with the provisions of this Act, shall apply to the proceedings before the Special Court and for the purposes of the provisions of the said enactments, Special Court shall be deemed to be a civil court, or as the case may be, a Court of Session and shall have all the powers of a civil court and a Court of Session and the person conducting a prosecution before the Special Court shall be deemed to be a Public Prosecutor.

10. *Burden of proof.*—Where in any proceedings under this Act, a land is alleged to have been grabbed, and such land is prima facie proved to be the land owned by the Government or by a private person the Special Court or as the case may be, the Special Tribunal shall presume that the person who is alleged to have grabbed the land is a land grabber and the burden of proving that the land has not been grabbed by him shall be on such person."

16. Section 7 of the Act envisages constitution of Special Courts. Sub-section (1) of Section 7 enables the Government to constitute a Special Court for the purpose of providing speedy enquiry into any alleged act of land grabbing and trial of cases in respect of the ownership and title to, or lawful possession of the land "grabbed" which in the context includes "alleged to have been grabbed". Clause (*i*) of sub-section (5-D) enables the Special Court to follow its own procedure which shall not be inconsistent with the principles of natural justice and fair play, subject of course, to the other provisions of the Act and the Rules made thereunder while deciding the civil liability. Clause (*ii*) of sub-section (5-D) of Section 7 provides that notwithstanding anything contained in Section 260 or Section 262 of the Code of Criminal Procedure, 1973 every offence, punishable under this Act, shall be tried in a summary way and the provisions of Sections 263 to 265 (both inclusive) of the said Code, shall apply to such trial. Section 8 of the Act specifies the procedure and powers of the Special Court. Sub-section (1) of Section 8 authorises a Special Court to take cognizance of and try *every case arising out of any alleged act of land grabbing* either suo motu or on application made by any person, officer or authority. It has also the power to try every case with respect to the ownership and title to, or lawful possession of the land alleged to have been grabbed whether before or after the commencement of the Act and pass such orders including interim orders as it deems fit.

17. It is pertinent to note that mere allegation of an act of land grabbing is sufficient to invoke the jurisdiction of the Special Court. In both Section 7(1) and Section 8(1) of the Act the phrase "any alleged act of land grabbing" is employed and not "act of land grabbing". It appears to us that it is designedly done by the legislature to obviate the difficulty of duplication of trial once in the courts under the Act and over again in the ordinary civil court. The purpose of the Act is to identify cases involving allegation of land grabbing for speedy enquiry and trial. The courts under the Act are

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nonetheless civil courts which follow the Code of Civil Procedure and are competent to grant the same reliefs which can be obtained from ordinary civil courts. For the purpose of taking cognizance of the case the Special Court is required to consider the location or extent or value of the land alleged to have been grabbed or of the substantial nature of the evil involved or in the interest of justice required and to give an opportunity of being heard to the petitioner [sub-section (1-A)]. It is plain that sub-section (2) opens with a non obstante clause and mandates that notwithstanding anything in the Code of Civil Procedure, the Code of Criminal Procedure, or in the Andhra Pradesh Civil Courts Act, 1972, any case in respect of an alleged act of land grabbing or the determination of question of title and ownership to, or lawful possession of any land alleged to have been grabbed under the Act, shall be triable only in a Special Court constituted for the area in which the land grabbed is situated *and the decision of the Special Court shall be final.* Sub-section (2-B) specifically provides that notwithstanding anything in the Code of Criminal Procedure, 1973, it shall be lawful for the Special Court to try all offences punishable under this Act. It is left to the Special Court to determine the order in which the civil and criminal liability against a land grabber be initiated. Sub-section (6) provides that every finding of the Special Court with regard to any alleged act of land grabbing shall be conclusive proof of the fact of the land grabbing and of the persons who committed such land grabbing and every judgment of the Special Court with regard to determination of title and ownership to, or lawful possession of, any land alleged to have been grabbed, shall be binding on all persons having interest in such land. It contains three provisos but they are not relevant for the present discussion. Sub-section (8) brings about automatic transfer of any case pending before any court or authority immediately before the constitution of a Special Court, as would have been within the jurisdiction of the Special Court if the cause of action on which such suit or proceeding is based, has arisen after the constitution of the Special Court. The provisions of sub-section (2) of Section 8 which commences with a non obstante clause confer jurisdiction on the Special Court and Section 15 of the Act directs that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or custom, usage or agreement or decree or order of a court or any other tribunal or authority. A combined reading of these provisions leads to the conclusion that the jurisdiction of the civil court under Section 9 of the Code of Civil Procedure and under the Civil Courts Act is ousted and the Act which is special law will prevail and as such the Special Court will have jurisdiction in respect of the matters dealt with thereunder. (See: *Sanwarmal Kejriwal* v. *Vishwa Coop. Housing Society Ltd.*[2])

18. Section 9 provides, inter alia, that except as expressly provided in this Act, the provisions of the Code of Criminal Procedure, insofar as they are not

2 (1990) 2 SCC 288

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inconsistent with the provisions of the Act, shall apply to the proceedings before the Special Court and for purposes of the said Code, the Special Court shall be deemed to be a Court of Session and shall have all the powers of a Court of Session.

19. The discussion of the above provisions would be incomplete without taking note of Section 10 of the Act which is a procedural provision and deals with burden of proof. A plain reading of this section would indicate that in any proceedings under this Act — (*i*) where a land is alleged to have been grabbed; and (*ii*) such land is prima facie proved to be the land owned by the Government or by a private person, the Special Court/Special Tribunal shall presume that the person who is alleged to have grabbed the land is a land grabber. When the presumption under Section 10 is drawn by the Special Court/Special Tribunal, the burden of proving that the land has not been grabbed by him is cast on the alleged land grabber. In view of the meaning of the words "shall presume" in Section 4 of the Indian Evidence Act, the effect of raising presumption under Section 10 of the Act would be that unless the alleged land grabber disproves that the land has been grabbed by him, the Special Court/Special Tribunal shall regard that the land in question has been grabbed by the alleged land grabber.

20. It has been noticed above that OS No. 1497 of 1985 filed by the first respondent in the Court of the IVth Additional Judge, City Civil Court, Hyderabad, was transferred to the Special Court in view of the provisions of sub-section (8) of Section 8 of the Act. The order transferring the case from the civil court to the Special Court was assailed by the appellant in the High Court in a civil revision petition which was later dismissed as not pressed. Irrespective of the answer to the question whether the order of transfer of the said suit from the civil court to the Special Court operates as issue estoppel or not, it is plain that the validity of the order of transfer of the suit from the civil court to the Special Court was not urged before the High Court in the writ petition (filed to challenge the judgment of the Special Court), out of which this appeal arises, so the transfer of the suit cannot be allowed to be challenged in this appeal. Be that as it may, the following facts disclose that dehors the transfer of the suit, the jurisdiction of the Special Court was invoked by the first respondent under the Act.

21. The first respondent filed petition under sub-section (1) of Section 7 read with sub-section (1) of Section 8 of the Act before the Special Court on 20-3-1992 complaining of the alleged act of land grabbing and praying the court to declare the appellant as a land grabber and the structures raised thereon by him as unauthorised and to order his eviction from the land grabbed and deliver possession of the same. The Special Court issued notification under Rule 7(1) of the Land Grabbing Rules, which was published in the A.P. Gazette on 1-4-1992 which reads as follows:

"NOTIFICATION BY HEADS OF DEPARTMENTS ETC.

JUDICIAL NOTIFICATIONS

LAND GRABBING CASES

FORM II(A)

See Rule 7(1)

NOTICE

In the Special Court under the Andhra Pradesh Land Grabbing (Prohibition) Act, 3, R.K.R. Govt. Offices Complex, II Floor, 'B' Block, Tank Bund Road, Hyderabad.

LGC No. 61 of 1990 — The Special Court has taken cognizance of the case filed by the State of Andhra Pradesh represented by the Collector, Hyderabad District, Hyderabad. It is alleged that the land belonging to the Government as specified in the schedule below is grabbed by Shri Konda Lakshmana Bapuji, son of Bapuji, II. No. 6-1-2/1, Khairathabad, near Tank Bund, Hyderabad.

The Schedule

Name of the owner of the land: Government.

Village in which it is located: Khairathabad village.

Mandal/District in which it falls: Golconda taluq.

Hyderabad district.

Sl. No., Sub-Division No. of the alleged land: 9/15 paiki, 9/16 and 9/17.

Extent of land: 2.06 ac. guntas.

Boundaries of the land:

North: Sy. No. 9/1, Hussainsagar Tank.

South: Sy. No. 37, Fisheries Department Building and Road.

East: Land of Smt Laxmi Gunti.

West: Open Land of Sy. Nos. 9/16 part and 9/18 part.

Notice is hereby given to whomsoever it may concern including the custodian of evacuee property concerned as required under the first proviso to sub-section (6) of Section 8 of the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (A.P. Act 12 of 1982). If any person intends to object, he may submit his objections, if any, before the Special Court on or before the 15th day of April, 1992 for its consideration.

If no objections are received by the Special Court within the stipulated time it will be presumed that there are no objections for proceeding further and the case will be proceeded accordingly.

P.V. Raman Rao,
Registrar,
Special Court,
A.P. Land Grabbing (Prohibition) Act,
Hyderabad."

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22. In response to the said notice the appellant filed his objections on 10-4-1992. He denied the allegation of land grabbing but did not object to the jurisdiction of the Special Court. After considering the objections, filed by the appellant, to the Special Court taking cognizance of the case numbered as LGC No. 61 of 1990, the case was decided on the evidence adduced by the parties before the Special Court.

23. In this context the following submission, pressed by Mr Parasaran, may be considered here. He argued that the High Court in the writ petition filed by the appellant challenging the validity of the notice of eviction under the Land Encroachment Act, gave liberty to the first respondent to establish its title in the civil court, which was also confirmed by the Division Bench in the writ appeal filed by the first respondent; although before the date of the disposal of the writ appeal the Act had come into force on 6-9-1982, the first respondent did not seek liberty from the court to approach the Special Court, therefore, on the principle of "might and ought" he was barred from approaching the Special Court and the proceeding before the Special Court was barred by the principle of *res judicata*. Section 11 of the Code of Civil Procedure incorporates the principle of *res judicata* which, in short, means a matter which has already been adjudged judicially between the same parties. In substance, Section 11 bars a court from trying any suit in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties in a court and has been heard and finally decided by such court which is competent to try such subsequent suit or the suit in which such issue has been subsequently raised. Eight Explanations are appended to it. We are concerned with Explanation IV which embodies the principle of constructive *res judicata* and says that any matter which "might and ought" to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit. A conjoint reading of Section 11 and Explanation IV shows that a plea which might and ought to have been taken in the earlier suit, shall be deemed to have been taken and decided against the person raising the plea in the subsequent suit.

24. Mr Parasaran relied upon the judgment of the Privy Council in *Sha Shivraj Gopalji* v. *Edappakath Ayissa Bi*[3]. In that case, the appellant filed second execution petition and sought to attach the right, title and interest of the respondent in the properties on the basis of the Mappilla Marumakkattayam Act, 1938 ("the Act of 1938"). A Division Bench of the High Court of Madras referred to the contention urged in subsequent proceedings at the stage of appeal that the assignee decree-holder could proceed against the tavazhi properties under the said Act was not dealt with on merits in those proceedings and held that that was a point which the appellant could have raised in his petition in the earlier proceedings and he failed to do so and therefore the dismissal of the earlier execution petition filed in 1940 operated as *res judicata* in the subsequent case. While

3 AIR 1949 PC 302 : (1949) 2 MLJ 493

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approving the said conclusion of the High Court, the Privy Council observed: (AIR p. 304, para 10)

> "Apart from the provisions of Section 11 CPC it would be contrary to principle (see: *Ram Kirpal Shukul* v. *Rup Kuari*[4]) to allow him in fresh proceedings to renew the same claim viz. that the properties in question were properties of the respondents liable to attachment or, as he would now put it, that the respondents had severable interests in the properties which are liable to attachment, merely because he neglected at the proper stage in previous proceedings to support that claim by an argument of which he now wishes to avail himself."

It may be noticed that in that case there was final determination of the rights of the parties in the first execution petition in which the plea of executability of the decree against the right, title and interest of the respondents by virtue of the Act of 1938 was available but was not urged. In the instant case, there has been no final determination of the rights of the parties in regard to their title to the land in dispute in the writ proceeding.

25. The principle that to attract the provisions of Section 11 CPC, there must be a final adjudication of the matter between the parties in earlier suit or proceeding is too well settled to need elaboration. The same principle applies to constructive *res judicata*. In *Kewal Singh* v. *Lajwanti*[5] this Court held: (SCC pp. 296-97, para 8)

> "[A]s regards the question of constructive res judicata it has no application whatsoever in the instant case. It is well settled that one of the essential conditions of res judicata is that there must be a formal adjudication between the parties after full hearing, in other words, the matter must be finally decided between the parties. Here also at a time when the plaintiff relinquished her first cause of action the defendant was nowhere in the picture, and there being no adjudication between the parties the doctrine of res judicata does not apply."

26. It may be recalled that in this case the first respondent issued notice for eviction of the appellant from the land in dispute (under the Land Encroachment Act) on the ground that he was unauthorisedly in occupation of the government land. As the appellant claimed title to the land in dispute and thus the title of the first respondent to the land in question was disputed, the High Court observed that the State could not resolve the issue of title in its favour and proceed under the Land Encroachment Act. In view of the rival claims to the land in dispute the High Court granted liberty to the first respondent to establish its title in the competent civil court. It is true that on the date of disposal of Writ Appeal No. 61 of 1978 (14-11-1983) the Act had come into force and that fact was not brought to the notice of the Division Bench of the High Court but there was no final adjudication on the question of rival claims of the parties to the title of the land in dispute on merit in writ appeal by the Division Bench of the High Court. Pursuant to the liberty

4 (1883-84) 11 IA 37 : 6 All 269 (PC)
5 (1980) 1 SCC 290 : AIR 1980 SC 161

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granted to the first respondent by the learned Single Judge which was confirmed by the Division Bench in the aforementioned suit, OS No. 1497 of 1985, was in fact filed by the first respondent against the appellant in the Court of the IVth Additional Judge, City Civil Court for declaration of title to and recovery of possession of the land in dispute. The first respondent had thus acted in accordance with the liberty granted to it by the High Court. It is by operation of law, under sub-section (8) of Section 8 of the Act, the said suit stood transferred to the Special Court. The first respondent also invoked the jurisdiction of the Special Court under Sections 7 and 8 of the Act by filing a petition against the appellant. For the reasons stated above, the principle of constructive res judicata, on the ground that the fact of enforcement of the Act on 6-9-1982 was not brought to the notice of the Division Bench of the High Court at the time of disposal of the writ appeal, is not available to the appellant. Further, as a statutory right is created in favour of the State under the Act, to eradicate a public mischief, it cannot be precluded from having recourse to the provisions of the Act by operation of the principle of "might and ought" in Explanation IV of Section 11 CPC when its title or interest had not been finally determined by the High Court. For these reasons, we cannot accept the contention of the learned Senior Counsel.

27. The upshot of the above discussion is that the Special Court is a civil court having original as well as appellate jurisdiction having all the trappings of a civil court and also a criminal court having powers of the Court of Session to which the provisions of the Code of Civil Procedure, the A.P. Civil Courts Act and the Code of Criminal Procedure, apply. The Special Court can take cognizance of and try every case arising out of any alleged act of land grabbing or with respect to the ownership and title to, or lawful possession of, the land grabbed and determine the ownership, title to, or lawful possession of the land alleged to have been grabbed whose decision will be binding on all the persons interested. Mere allegation of land grabbing is sufficient to invoke the jurisdiction of the Special Court either suo motu or on application by any person including any officer or authority. In this view of the matter, we find no illegality in the conclusion arrived at by the High Court in affirming the finding with regard to the jurisdiction of the Special Court.

28. Now, adverting to the remaining two contentions, it is important to note that under the Act "land grabbing" is not only an actionable wrong but also an offence and a "land grabber" is an offender punishable thereunder. The definitions of the expressions "land grabber" and "land grabbing", in clauses (*d*) and (*e*), respectively, of Section 2 of the Act, apply to both civil and criminal proceedings. It is, therefore, essential to construe the definitions of the said expressions strictly. We shall first examine the relevant provisions of the Act and then the case set up by the first respondent against the appellant before the Special Court to describe him as a land grabber.

29. Clauses (*d*) and (*e*) of Section 2 of the Act may be quoted here:

"2. *Definitions.*—In this Act, unless the context otherwise requires,—

(*a*)-(*cc*) * * *

(*d*) 'land grabber' means a person or a group of persons who commits land grabbing and includes any person who gives financial aid to any person for taking illegal possession of lands or for construction of unauthorised structures thereon, or who collects or attempts to collect from any occupiers of such lands rent, compensation and other charges by criminal intimidation, or who abets the doing of any of the abovementioned acts; and also includes the successors-in-interest;

(*e*) 'land grabbing' means every activity of grabbing of any land (whether belonging to the Government, a local authority, a religious or charitable institution or endowment, including a wakf, or any other private person) by a person or group of persons, without any lawful entitlement and with a view to illegally taking possession of such lands, or enter into or create illegal tenancies or lease and licence agreements or any other illegal agreements in respect of such lands, or to construct unauthorised structures thereon for sale or hire, or give such lands to any person on rental or lease and licence basis for construction, or use and occupation, of unauthorised structures; and the term 'to grab land' shall be construed accordingly;"

30. A perusal of clause (*d*) shows that the expression "land grabber" takes in its fold: (1) a person or a group of persons who commits land grabbing; (2) a person who gives financial aid to any person for (*a*) taking illegal possession of the lands, or (*b*) construction of unauthorised structures thereon; (3) a person who collects or attempts to collect from any occupiers of such lands rent, compensation and other charges by criminal intimidation; (4) a person who abets the doing of any of the abovementioned acts; and (5) the successors-in-interest of such a person. Among these five categories, the first category is relevant for the present discussion — a person or a group of persons who commits land grabbing.

31. Clause (*e*) of Section 2, quoted above, defines the expression "land grabbing" to mean: (1) every activity of grabbing of any land (whether belonging to the Government, a local authority, a religious or charitable institution or endowment, including a wakf, or any other private person) by a person or group of persons; (2) such grabbing must be: (*i*) without any lawful entitlement, and (*ii*) with a view to: (*a*) illegally taking possession of such lands; or (*b*) to enter into or create illegal tenancies, lease and licence agreements or any other illegal agreements in respect of such lands; or (*c*) to construct unauthorised structures thereon for sale or hire; or (*d*) to give such lands to any person on (*i*) rental, or (*ii*) lease and licence basis for construction, or (*iii*) use and occupation of unauthorised structures.

32. Inasmuch as the aforementioned expressions are defined employing the term "grabbing", it is necessary to ascertain the import of that term. It is not defined in the Act. It is not a technical term or a term of art so it has to be understood in its ordinary common meaning.

33. The meaning of the term "grab" in the *New International Webster's Comprehensive Dictionary of the English Language*, is given as follows:

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"To grasp or seize forcibly or suddenly; to take possession of violently or dishonestly; to make a sudden grasp. See synonyms under grasp — (*i*) The act of grabbing, or that which is grabbed. (*ii*) A dishonest or unlawful taking possession or acquisition. (*iii*) An apparatus for grappling."

34. In *Words and Phrases*, Permanent Edn., Vol. 18, the meaning of "grab" is noted as under:

"The word 'grab' means an act or practice of appropriating unscrupulously, as in politics. *Smith* v. *Pure Oil Co.*[6]

The word 'grab' means a seizure or acquisition by violent or unscrupulous means. *Smith* v. *Pure Oil Co.*[6]

The word 'grab' means to seize, grasp, or snatch forcibly or suddenly with the hand, hence to take possession of suddenly, violently, or dishonestly. *Smith* v. *Pure Oil Co.*[6]"

35. *Corpus Juris Secundum*, Vol. 38, records the meaning of the term "grab' thus:

"As a verb, to seize, grasp or snatch forcibly or suddenly with the hand, hence to take possession of suddenly, violently, or dishonestly."

36. In *Concise Oxford Dictionary*, the following meanings of the word "grab" are noted:

"seize suddenly; capture, arrest; take greedily or unfairly; attract the attention of, impress; make a sudden snatch at; *intr.* (of the brakes of a motor vehicle) act harshly or jerkily; *n.* (*i*) a sudden clutch or attempt to seize; (*ii*) a mechanical device for clutching".

37. The various meanings noted above, disclose that the term "grab" has a broad meaning — to take unauthorisedly, greedily or unfairly — and a narrow meaning of snatching forcibly or violently or by unscrupulous means. Having regard to the object of the Act and the various provisions employing that term we are of the view that the term "grab" is used in the Act in both its narrow as well as broad meanings. Thus understood, the ingredients of the expression "land grabbing" would comprise (*i*) the factum of an activity of taking possession of any land forcibly, violently, unscrupulously, unfairly or greedily without any lawful entitlement, and (*ii*) the mens rea/intention — "with the intention of/with a view to" (*a*) illegally taking possession of such lands, or (*b*) enter into or create illegal tenancies, lease and licence agreements or any other illegal agreements in respect of such lands, or (*c*) to construct unauthorised structures thereon for sale or hire, or (*d*) to give such lands to any person on (*i*) rental, or (*ii*) lease and licence basis for construction, or (*iii*) use and occupation of unauthorised structures.

38. A combined reading of clauses (*d*) and (*e*) would suggest that to bring a person within the meaning of the expression "land grabber" it must be shown that: (*i*)(*a*) he has taken unauthorisedly, unfairly, greedily, snatched forcibly, violently or unscrupulously any land belonging to the Government

6 128 SW 2d 931, 933, 278 Ky 430

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or a local authority, a religious or charitable institution or endowment, including a wakf, or any other private person; (*b*) without any lawful entitlement; and (*c*) with a view to illegally taking possession of such lands, or enter or create illegal tenancies or lease and licence agreements or any other illegal agreements in respect of such lands or to construct unauthorised structures thereon for sale or hire, or give such lands to any person on rental or lease and licence basis for construction, or use and occupation of unauthorised structures; or (*ii*) he has given financial aid to any person for taking illegal possession of lands or for construction of unauthorised structures thereon; or (*iii*) he is collecting or attempting to collect from any occupiers of such lands rent, compensation and other charges by criminal intimidation; or (*iv*) he is abetting the doing of any of the abovementioned acts; or (*v*) that he is the successor-in-interest of any such persons.

39. It must be borne in mind that for purposes of taking cognizance of a case under the Act, existence of an allegation of any act of land grabbing is the *sine qua non* and not the truth or otherwise of such an allegation. But to hold that a person is a land grabber it is necessary to find that the allegations satisfying the requirements of land grabbing are proved.

40. To make out a case in a civil case that the appellant is a land grabber the first respondent must aver and prove both the ingredients — the factum as well as the intention — that the appellant falls in the categories of the persons, mentioned above [clause (*d*) of Section 2 of the Act], has occupied the land in dispute, which belonged to the first respondent, without any lawful entitlement and with a view to or with the intention of illegally taking possession of such land or entering into the land for any of the purposes mentioned in clause (*e*) of Section 2 of the Act, summarised above.

41. What needs to be looked into in the present controversy is: whether the appellant has any lawful entitlement (proprietary or possessory) to the land in dispute and had come into possession of the land in dispute unauthorisedly. Here, we may note the contention of Mr Parasaran that in effect the suit of the first respondent-plaintiff being a suit for declaration of title and ejectment of the appellant from the land in dispute, it ought to have been dismissed; the first respondent should succeed on the strength of its own title and it cannot take advantage of the defects in the title of the appellant to the land in dispute. We may notice the case set up by the parties in their pleadings and the documentary and oral evidence adduced by them.

42. The case of the first respondent stated in the concise statement enclosed to the application filed before the Special Court on 20-3-1992 and as contained in the plaint filed in the Court of the IVth Additional Judge, City Civil Court, Hyderabad (OS No. 1497 of 1985) is as follows: the first respondent is the absolute owner of the land of an extent of 2 acres and 6 guntas in Survey Nos. 9/15 paiki, 9/16 and 9/17, forming part of the Hussainsagar Tank Bund land, situated at Khairathabad village, Hyderabad district, Hyderabad, there were wrong entries in the record of rights which were corrected by the Collector on 5-10-1959. It is stated, alternatively, if the

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land in dispute formed part of the Inam land the same had vested in the first respondent with effect from 20-7-1955, the date of vesting as per Section 3 of the A.P. (Telangana Area) Abolition of Inams Act, 1955 (Act 8 of 1955) (for short "the Inams Act"). None of the heirs of the alleged Inamdar appeared before the Collector, Hyderabad District, Hyderabad, for claiming registration as occupants under Section 10 of the said Act. The land in dispute, it is noted, was shown as Maqta land belonging to Naimatullah Shah for some time and thereafter as Inam land and the appellant claimed to be the lessee of Mohd. Noorudin Asrari, one of the successors to the said Maqta; he occupied the said land in the year 1958 or so and raised a building known as "Jala Drushyam". The claim of the appellant was not proper, valid and legal because the land never belonged to the said Maqta; even otherwise it vested in the Government with effect from the said date and the order of the Collector, correcting entries in the record of rights, had become final. The plaint refers also to the facts that the land in dispute was the subject-matter of OS No. 13 of 1958 on the file of the Additional Chief Judge, City Civil Court, Hyderabad, filed by one Rasheed Shahpurji Chenoy, which was dismissed holding that it was government land. On giving an undertaking in the said suit, the appellant with the permission of the Court constructed the said house "Jala Drushyam" and, therefore, the possession of the appellant partakes the character of permissive possession. After the dismissal of the suit the first respondent issued notice of eviction to the appellant under Section 6 of the Land Encroachment Act, on the ground that he was in unauthorised occupation of land in dispute, but the notice was quashed in the writ petition filed by the appellant and that order was upheld in writ appeal giving liberty to the first respondent to establish its title in a civil court. The first respondent sought from the Special Court the following reliefs: to declare the appellant a land grabber and to restore possession of the land grabbed by him.

43. The case of the appellant was that the land in dispute was part of *Sarfekhas* land and that after Inam inquiry, ordered by HEH, the Nizam, Muntakhab was issued in favour of the Inamdar (Maqtedar) and thereafter succession was granted in favour of his vendor (lessor). It was also stated in the written statement that the appellant has been in possession of the land from November 1954 and that before him his predecessors-in-title were in possession for innumerable years as Inamdars, so he was entitled to tack on their possession for purposes of perfecting his title by adverse possession; even otherwise from the date of his own coming into possession in 1954 he perfected his title by adverse possession as against the first respondent.

44. The Special Court has determined that the occupation of the land in dispute by the appellant is without any lawful entitlement and decided the question of the ownership and title to and lawful possession of the land in dispute on appreciating the evidence on record. It held, inter alia, that the land in dispute was not part of Inam and that even if it was so there was no valid confirmation of grant of the land in dispute by the civil administrator under Ext. B-6 and consequently no title had passed under Ext. B-9 to the

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vendor of the appellant and hence no title was obtained by the appellant under Ext. B-40. Though the findings recorded by the Special Court in regard to absence of lawful entitlement of the appellant to the land in dispute and upholding the title of the first respondent that it is a government land, are findings of fact which were not interfered with by the High Court in the writ petition filed by the appellant, yet to satisfy ourselves, we have gone through the depositions of PW 1 and RW 1 and perused the documentary evidence in great detail; the original record is in Urdu. We find no valid reason to take a different view of the matter and inasmuch as we are sustaining the said findings it is not necessary to redo the whole exercise of discussing all the evidence here. However, we shall refer to a few important documents and aspects which clinch the issue.

45. In regard to the ingredients of the expression "land grabber", it is necessary to point out that it is only when a person has lawful entitlement to the land alleged to be grabbed that he cannot be brought within the mischief of the said expression. A mere prima facie bona fide claim to the land alleged to be grabbed by such a person, cannot avert being roped in within the ambit of the expression "land grabber". What is germane is lawful entitlement to and not a mere prima facie bona fide claim to the land alleged to be grabbed. Therefore, the observation of the Division Bench of the High Court in the said Writ Appeal No. 61 of 1978 that the appellant can be taken to have prima facie bona fide claim to the land in dispute which was relevant for the said Land Encroachment Act, cannot be called in aid as a substitute for lawful entitlement to the land alleged to be grabbed, which alone is relevant under the Act.

46. A copy of the statement of Maqta enquiry (Ext. B-15) which is in Urdu shows that the Maqta was granted by the Qutub Shahi rulers, which became Sarfekhas property (private property of the Nizam) subsequently. In the Maqta enquiry the Taluqdar (Sarfekhas) recommended that Maqta be regranted in favour of Mohd. Abdul Quadir and others (who were ancestors of the lessor of the appellant). The location of the Maqta (which is referred to as "Maqta Naimatullah Shah") was mentioned as adjacent to Hussainsagar. Ext. A-20 is a copy of Muntakhab Statement of Inam Enquiry (Sarfekhas) bearing Execution No. 1050 dated 9-1-1327 Fasli. It shows that as per the letter of Administrative Committee of Sarfekhas (Mubark) bearing No. 1185 dated 19-9-1326 Fasli, HEH, the Nizam had sanctioned confirmation of cash grant and the Maqta excluding the land *covered by graveyard and the King's bungalow*. It is also clear that the land which was appurtenant to the King's bungalow was returned to Sarfekhas and it was subsequently directed to be sold for adequate price by HEH, the Nizam on 12-2-1343 Fasli. A perusal of Ext. A-26 lends support to the fact that the original Muntakhab No. 1050 of 1327 Fasli of Maqta Naimatullah Shah had excluded the King's bungalow with the land and the graveyard while sanctioning the confirmation of Maqta by HEH, the Nizam. It appears to us that a palace was constructed during the lifetime of HEH, the Nizam VI which was referred to as King's bungalow and which later came to be known as the Secretariat. The land between the

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Secretariat and the Hussainsagar was part of the excluded land and was lying vacant. It was the land of the Sarfekhas and in regard to that land various persons including predecessors-in-interest of the appellant made their claims but all the claims were rejected by the then Sadarul Maham (Minister) of Sarfekhas and it was directed that the land should be under the control and protection of Babe Hukumat (GAD) and the Revenue Department was specifically directed to supervise the same. That order was appealed against before Moaziz Committee of Sarfekhas (comprising the Chief Justice and two Hon'ble Judges of the High Court of the then State of Hyderabad). The Committee confirmed the said order of the Minister and dismissed the appeals on Mehr 30, 1357 Fasli. Thus, it is abundantly clear that Survey Nos. 9/15 paiki, 9/16, 9/17, 9/18, 9/19 were not part of Maqta which was reconfirmed in favour of the predecessors-in-interest of the appellant. They remained land of Sarfekhas (private estate of the Nizam) which merged in Diwani, that is State Government, on 5-2-1949 (Ext. A-30). It is noted in Ext. B-20, letter from Tehsil Taluq, Hyderabad West, addressed to the Collector, Hyderabad, dated 27-7-1954 that Survey Nos. 9/15, 9/16, 9/17, 9/18 and 9/19 of Maqta Naimatullah Shah are situate in between the Secretariat and Hussainsagar Tank. That was also stated to by the appellant in his deposition. Inasmuch as the Maqta remained under attachment and in the possession of the Sarfekhas during the period of Inam enquiry an attempt was made to show that under Ext. B-11, a letter dated 12-10-1356 Fasli (English translation Ext. B-12), the Maqta was directed to be released in favour of the Maqtadar. Ext. B-13, a certified copy of the panchnama dated 2-11-1356 Fasli is filed to show that the land bearing Survey Nos. 9/2, 9/10, 9/12, 9/15 and 9/16 to 9/20 measuring 54 acres, was inspected and while Survey Nos. 9/17 and 9/18 measuring 7 acres and 7 guntas alone were retained in the government possession the rest of the survey numbers were put in possession of the Inamdar. English translation of Ext. B-13 is marked as Ext. B-14. Ext. B-15, English translation is a certified copy of receipt dated 2-11-1356 Fasli which was filed to show that possession was taken by the Maqtadar. These documents were, however, treated by the Special Court as spurious. The said documents are certified copies and they are in Urdu. A careful reading of Ext. B-11 in Urdu and Ext. B-12 (English translation) discloses that the recitals:

> "Hence the Maqta may be restored in favour of Syed Shah Mohd. Wajihullah Hussain Asrari, Maqtedar of Maqta Naimatullah Shah and after release and handing over a detailed compliance report, should be sent along with the receipt"

are out of context with the other recitals therein. Such an important order directing delivery of possession of land, bearing survey numbers noted above, which was excluded from regrant of Maqta under Muntakhab, could not have been directed to be delivered under Ext. B-11. In the ordinary course of event a decision ought to be taken first and then only it would be communicated. Such a decision should be in the file. No order was filed in support of Ext. B-11. Further, the subject-matter of the letter dated 12-10-1356 Fasli (Exts. B-11 and B-12) from the First Taluqdar, District Atraf-e-

Balda, Sarfekhas addressed to the Tahsildar, Taluq West shows that the proceeding commenced on the application for waiving the land revenue on the ground that the land was under attachment and in the possession of the Government. It is strange to note that in reply to an application to waive the land revenue the possession of the land was directed to be delivered by the First Taluqdar in his letter Ext. B-11 dated 12-10-1356 Fasli (English translation Ext. B-12) and purported to have been delivered under Exts. B-13 and B-14 dated 2nd Mehr 1356 (2-11-1356 Fasli) (wrongly noted in the English translation as 2-11-1355 Fasli), while the appeal in regard to the land of which the said survey numbers are a part, was still pending before the Moaziz Committee. From Ext. A-27 it is seen that the Moaziz Committee decided the appeal on Mehr 30, 1357 (30-11-1357 Fasli) after sending the said letter (Ext. B-11). These documents are not originals. They are certified copies and, therefore, it is not possible to make out whether the portion noted above as out of context, really formed part of the letter as in the absence of the order including the said survey numbers in the regrant directing delivery of possession, gives rise to lot of suspicion. We say no more. For the aforementioned reasons, they do not inspire any confidence to be accepted as correct. In view of these strong reasons we are not persuaded to disagree with the view of the Special Court that they are spurious documents. Thus, it is clear that the land in dispute was not part of Maqta land. That land remained as Sarfekhas land and on merger of Sarfekhas in Diwani on 5-2-1949, it became government land. Even assuming that it was part of regranted Inam land, on coming into force of the Inams Act, it vested in the Government. Admittedly, neither the Inamdar nor the appellant obtained occupancy certificate in respect of the land in dispute under the Inams Abolition Act. In support of the allegations in the petition and the plaint PW 1 has categorically stated that the appellant is a land grabber and he was not cross-examined on that aspect. We have, therefore, no hesitation in endorsing the finding that the said Mohd. Noorudin Asrari had no title to the land in dispute and consequently the appellant acquired no title to it.

47. Having regard to the absence of any material on record, all the circumstances and the probabilities of the case, it is hard to believe that at any time before or on the date of execution of Ext. B-39 the lessor of the appellant who had no title to or interest in the land which was directed to be under the supervision of the GAD, was in possession of the land in dispute which was lying vacant.

48. It is relevant to note that as the decision of the Special Court on the question of title to the land in dispute was not based on the order of the Collector contained in the letter dated 5-10-1959 (Ext. A-14), the validity of that order is inconsequential. We, therefore, do not propose to examine that aspect. We may note here that the Special Court did not invoke the presumption under Section 10 of the Act against the appellant. It is also evident that the title of the first respondent to the land in dispute was upheld dehors the weakness in the title of the appellant.

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49. On a careful perusal of the judgment of the Special Court on the question of title of the first respondent and that of the appellant and his lessor Inamdar we are satisfied that neither was any relevant material excluded from consideration nor was any irrelevant material relied upon by the Special Court in recording its finding. There was, therefore, no scope for the High Court to interfere with those findings. In our view, the High Court committed no error of law in not interfering with the findings of the Special Court in regard to the title of the first respondent and absence of title in the appellant to the land in dispute (see: *Omar Salay Mohamed Sait* v. *CIT*[7]). On the conclusions arrived at by us no interference is warranted by this Court in this appeal filed under Article 136 of the Constitution of India. (See: *Mehar Singh* v. *Shiromani Gurudwara Prabandhak Committee*[8].)

50. To complete the discussion on the lawful entitlement, the appellant's claim of title to the land in dispute by prescription remains to be examined. The contention of Mr Parasaran is that the appellant, who has been in possession of the land since 1954 on the basis of Ext. B-39 (an unregistered agreement for perpetual lease), perfected his title by adverse possession as on the date of the suit on 25-11-1985.

51. Mr Altaf Ahmed, on the other hand, relied on the conduct of the appellant to show that he had no requisite animus to possess the land in dispute adverse to the title and interest of the first respondent and that the essential requirements of adverse possession were not satisfied as neither the appellant had the requisite animus nor he fulfilled the requirement of possession of the land in dispute for the statutory period of 30 years; both the Special Court as well as the High Court concurrently held that the appellant did not perfect his title to the land in dispute by adverse possession and that finding would not be open to challenge in this appeal.

52. The Special Court, on the pleadings of the parties, framed Issue 5, noted above. The onus of proving that issue is on the appellant who claims title by adverse possession.

53. The question of a person perfecting title by adverse possession is a mixed question of law and fact. The principle of law in regard to adverse possession is firmly established. It is a well-settled proposition that mere possession of the land, however long it may be, would not ripen into possessory title unless the possessor has *animus possidendi* to hold the land adverse to the title of the true owner. It is true that assertion of title to the land in dispute by the possessor would, in an appropriate case, be sufficient indication of the *animus possidendi* to hold adverse to the title of the true owner. But such an assertion of title must be clear and unequivocal though it need not be addressed to the real owner. For reckoning the statutory period to perfect title by prescription both the possession as well as the *animus possidendi* must be shown to exist. Where, however, at the commencement of the possession there is no *animus possidendi*, the period for the purpose of

7 AIR 1959 SC 1238 : (1959) 37 ITR 151
8 (2000) 2 SCC 97

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reckoning adverse possession will commence from the date when both the actual possession and assertion of title by the possessor are shown to exist. The length of possession to perfect title by adverse possession as against the Government is 30 years.

54. The appellant (defendant) in his written statement averred that he was claiming title under Mohd. Noorudin Asrari who was successor of the original Inamdar Sheikh Naimatullah Shah. The land in dispute is a part of the Maqta land which was in his possession from 28-11-1954 under an agreement for perpetual lease which was confirmed under the registered lease deed executed on 11-12-1957/12-12-1957. He alleged that he constructed a small structure in 1955 and thereafter, having taken due permission, constructed a pucca building. He denied that the said land came in his possession in 1958 as alleged in the plaint. He stated that he had been in possession adverse to the first respondent-plaintiff since 28-11-1954 for more than 30 years prior to the filing of the suit on 25-11-1985. It is further averred that his predecessors-in-title being in possession of the said land for innumerable years prior to 1954 in their own right as Inamdar, he is entitled to tack on their possession to perfect his title by adverse possession.

55. The first respondent-plaintiff, perhaps with a view to foreclose the plea of adverse possession, stated in the plaint itself that the possession of the appellant-defendant could not amount to adverse possession for many reasons; the appellant raised the building with the permission of the court while OS No. 13 of 1958 filed by Rasheed Shahpurji Chenoy was pending before the Additional Chief Judge, City Civil Court, Hyderabad, after giving an undertaking and in view of the undertaking his possession partakes the character of permissive possession; he paid Siwaijama and applied for occupancy certificate. The first respondent had instituted eviction proceedings by issuing notice against the defendant under Section 6 of the Land Encroachment Act.

56. To appreciate the plea of the first respondent that the appellant's possession of the land in dispute has the character of permissive possession so he cannot acquire title by adverse possession, it will be appropriate to refer to the averments in the plaint to understand their true import, which are as follows:

> "The suit lands in the beginning were open and vacant tank bund lands and the defendant raised the building 'Jala Drushyam' with the permission of the Court while OS No. 13 of 1958 was pending before the Court of the Additional Chief Judge, City Civil Court, Hyderabad, and the undertaking of the defendant given in the shape of a bond, while seeking permission to construct the said building, was to the effect that he would not claim any compensation from the plaintiff for the building raised on the suit lands in case the same are ultimately declared and held to be the government lands.... *The possession of the defendant in view of his undertaking in the above suit partakes the character of permissive*

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possession and in that view of the matter also the defendant cannot claim adverse possession against the plaintiff." (emphasis supplied)

In the concise statement filed along with the application dated 22-3-1992 before the Special Court the first respondent stated:

"Pending OS No. 13 of 1958, the respondent herein (the appellant) constructed a building Jala Drushyam. After the dismissal of the suit, the Government of A.P. initiated eviction proceedings. *The possession of the respondent (the appellant) in view of his undertaking given in the trial court amounts to permissive possession.*"

From the above averments, it is evident that permission was granted by the court to the appellant to construct the building "Jala Drushyam". Therefore, the said building could be said to be a construction with permission of the court and not unauthorised. But certainly the appellant's possession of the land in dispute, if otherwise adverse to the title of the first respondent, does not acquire the character of permissive possession on the ground the appellant sought permission of the court to erect a building thereon. We are, therefore, of the view that the said averments cannot come in the way of the appellant in acquiring title by adverse possession if other requirements of adverse possession are satisfied.

57. As to the period of the appellant's possession, Mr Parasaran contended, that though Ext. B-40 perpetual lease agreement was registered on 12-12-1957 yet it would relate back to the date of Ext. B-39 (28-11-1954) which would be the date of commencement of possession. He sought to derive support from *Thakur Kishan Singh* v. *Arvind Kumar*[9]. We cannot accept the submission as a correct proposition of law. In that case the lease deed was executed on 5-12-1949 but it was registered on 30-3-1950. On that factual background this Court held: (SCC p. 593, para 3)

"Section 47 of the Registration Act provides that a registered document shall operate from the time it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. It is well established that a document so long it is not registered is not valid yet once it is registered it takes effect from the date of its execution. (See: *Ram Saran Lall* v. *Domini Kuer*[10] and *Nanda Ballabh Gururani* v. *Maqbool Begum*[11].) Since admittedly, the lease deed was executed on 5-12-1949, the plaintiff after registration of it on 3-4-1950 became owner by operation of law on the date when the deed was executed."

In the instant case Ext. B-39 (unregistered perpetual lease agreement dated 28-11-1954) was not registered subsequently. Ext. B-40, the perpetual lease deed dated 11-12-1957 is a different document which was registered on 12-12-1957. Therefore, Ext. B-40 would relate back to the date of its execution i.e. 11-12-1957 on its subsequent registration on 12-12-1957 but

9 (1994) 6 SCC 591
10 AIR 1961 SC 1747 : (1962) 2 SCR 474
11 (1980) 3 SCC 346

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not on the date of execution of Ext. B-39 i.e. 28-11-1954. The principle laid down in the above case is therefore, of no benefit to the appellant.

58. The Special Court found that the appellant's possession could not be ascribed to the date of the agreement for lease deed dated 28-11-1954 (Ext. B-39) or registered lease deed dated 11-12-1957 (Ext. B-40) which were excluded from consideration. In regard to Ext. B-39 the Special Court held that it was a tampered document; the survey numbers of the land leased were given in it as Survey Nos. 9/15 and 9/17 which were altered to appear as Survey Nos. 9/15 to 9/18 and the extent of the land was not mentioned therein. The Special Court noted that in the absence of original of Ext. B-40, it was not possible to say whether Ext. B-40 also suffered from the same vice of subsequent alteration in the survey numbers, therefore, it declined to rely on Ext. B-40 also. In view of the criticism of the Special Court we perused the Urdu documents Ext. B-39 and Ext. B-40. "Survey Nos. 9/15 and 9/17" (Ext. B-39) were altered to appear as "9/15 to 9/18". This is visible to the naked eye. The alteration was not authenticated so the criticism of the Special Court is well founded. It is also noticed that the original of Ext. B-40 was not filed in the court and no case is made out to lead secondary evidence. Further, in Exts. B-13 and B-14 (which are discussed above) it is specifically mentioned that Survey Nos. 9/17 and 9/18 which were selected for the offices of the Secretariat were retained with the Government. If that be so, it remained unexplained as to how the appellant obtained the said surveys numbers on lease from the said Noorudin. This clearly shows the contradiction in the claim of the appellant which makes it unacceptable. After excluding the said documents from consideration the Special Court held that the solitary statement of the appellant that his adverse possession commenced from 28-11-1954, could not be accepted to hold that he has been in continuous possession for a period of 30 years as no receipt of payment of rent (nuzul) under the perpetual lease agreement Ext. B-39 was filed to prove that the appellant has been in possession of the said land from 28-11-1954. The Special Court counted the period of possession of the land in dispute from the date the appellant obtained permission for construction of the house under Ext. B-42 dated 9-8-1958 and the preceding correspondence under Exts. B-60 to B-62 between March 1958 and August 1958. Pointing out that the suit was filed on 25-11-1985, so the period of 30 years was not completed from 1958, it rejected the plea of adverse possession.

59. In regard to the animus of the appellant to possess the land in dispute adverse to the interest of the first respondent, the Special Court pointed out that the appellant applied for occupancy certificate to the authority concerned under the Inams Abolition Act which nullified the animus of adverse possession. The Special Court also relied on Ext. A-42 (Ext. B-43) issued by the State demanding Siwaijamabandi on 14-5-1960 and payment of the same under Exts. A-44 and A-45 dated 30-6-1960 to show that the requisite animus was lacking. These documents were put to the appellant when he was in the witness box and he admitted the same. On the basis of the above evidence the Special Court came to the conclusion that the appellant failed to prove

adverse possession. In the said writ petition the High Court did not find any illegality in the approach or decision of the Special Court and declined to interfere with the said finding.

60. We have already noted above the requirements of adverse possession.

61. In *Balkrishan* v. *Satyaprakash*[12] this Court held: (SCC p. 501, para 7)

> "7. The law with regard to perfecting title by adverse possession is well settled. A person claiming title by adverse possession has to prove three *nec — nec vi, nec clam* and *nec precario*. In other words, he must show that his possession is adequate in continuity, in publicity and in extent. In *S.M. Karim* v. *Bibi Sakina*[13] speaking for this Court Hidayatullah, J. (as he then was) observed thus:
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> > 'Adverse possession must be adequate in continuity, in publicity and extent and a plea is required at the least to show when possession becomes adverse so that the starting point of limitation against the party affected can be found.' "

In that case the requirement of *animus possidendi* was not adverted to as on facts it was shown to be present; the controversy, however, was about the other ingredient of adverse possession. It is clear that it must be shown by the person claiming title by prescription that he has been in possession of the land for the statutory period which is adequate in continuity, in publicity and in extent with the animus of holding the land adverse to the true owner.

62. Mr Parasaran, however, contended and reiterated in his written submissions that possession in assertion of one's own title was animus of adverse possession and that passing an adverse order against the appellant or the appellant himself filing an application to any statutory authorities for occupancy certificate would not interrupt his adverse possession of the land in dispute. It was also contended that as a derivative title-holder he was entitled to tack his possession to that of his predecessors-in-interest and that in any event the presumption of the continuity of state of things backwards could also be drawn as the appellant's possession from 1958 was accepted and the possession earlier to 1958 should also be presumed.

63. Regarding the animus of the appellant, admittedly he claimed as a lessee under the Inamdar. Indeed, in his written statement filed in Rasheed Shahpurji Chenoy's suit (OS No. 13 of 1958 on the file of Additional Chief Judge, City Civil Court, Hyderabad) he claimed to be a lessee under the Inamdar. He, however, did not assert title to the land in dispute in himself nor did he lay any claim on the ground of adverse possession. Even otherwise, there is no material to show that between 28-11-1954 [unregistered perpetual lease agreement, assuming it to be free from interpolation and admissible as agreement for lease and registered lease deed (Ext. B-40) dated 11-12-1957 (assuming that the secondary evidence is admissible)] and the date of filing of the written statement on 28-1-1987 the appellant claimed title to the land

12 (2001) 2 SCC 498 : JT (2001) 2 SC 357
13 AIR 1964 SC 1254

in dispute otherwise than under Ext. B-40 much less by way of asserting adverse title. It is only in the written statement filed in the present suit that he pleaded adverse possession for the first time. The possession of the said land from the date of Ext. B-39, 1954, till the date of the filing of the written statement in 1987 cannot, therefore, be treated as adverse because there was no animus possidendi during the said period. Before the date of filing the written statement he never claimed title to the land in dispute adverse to the State. On the other hand, he paid Siwaijamabandi and applied for occupation of rights. Indeed in his deposition as RW 1 in chief examination before the Special Court he stated,

> "on being satisfied about the nature of the Inam, I entered into an agreement of perpetual lease on 28-11-1954 with Inamdar as per Ext. B-39.... I have taken possession from the Maqtedar under Ext. B-39 on 28-11-1954. Since then I am in occupation uninterruptedly and enjoying the same".

We found no assertion of title by adverse possession in his deposition. Further there is nothing on record to show that his lessor, Mohd. Noorudin Asrari, ever claimed the land in dispute adverse to the State. On these facts there is no scope to invoke the principle of tacking the possession of the Inamdar or presumption of continuity of possession backward.

64. There can be no doubt that passing of adverse order against the appellant would not cause any interruption in his possession (see: *Balkrishan* v. *Satyaprakash*[12]). So also filing of application before statutory authority under the Inams Abolition Act for occupancy rights, in our view, causes no interruption in the continuity of possession of the appellant but it does abrogate his animus to hold the land in derogation of the title of the State and breaks the chain of continuity of the animus.

65. In the light of the above discussion we hold that the appellant neither proved factum of possession of the land in dispute for a period of 30 years nor succeeded in showing that he had *animus possidendi* for the whole statutory period. Therefore, we cannot but maintain the confirming view of the High Court that the appellant failed to acquire title to the land in dispute by adverse possession. We may also add that the lessee of a Maqtedar (the Inamdar) cannot acquire title to the demised land by adverse possession either as against the State or the Maqtedar (Inamdar) so long as his possession under the lease continues.

66. Mr Parasaran has contended that should the point of adverse possession be found against the appellant, the principle of lost grant would apply as the appellant has been in possession of the land in dispute for a considerable length of time under an assertion of title. In support of his contention he placed reliance on *Monohar Das Mohanta* v. *Charu Chandra Pal*[14].

67. The principle of lost grant is a presumption which arises in cases of immemorial user. It has its origin from the long possession and exercise of

14 AIR 1955 SC 228

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right by user of an easement with the acquiescence of the owner that there must have been originally a grant to the claimant which had been lost. The presumption of lost grant was extended in favour of possessor of land for a considerably long period when such user is found to be in open assertion of title, exclusive and uninterrupted. However, when the use is explainable, the presumption cannot be called in aid. A Constitution Bench of this Court explained the principle in *Monohar Das Mohanta*[14] thus: (AIR pp. 230-31, para 7)

> "7. The circumstances and conditions under which a presumption of lost grant could be made are well settled. When a person was found in possession and enjoyment of land for a considerable period of time under an assertion of title without challenge, courts in England were inclined to ascribe a legal origin to such possession, and when on the facts a title by prescription could not be sustained, it was held that a presumption could be made that the possession was referable to a grant by the owner entitled to the land, but that such grant had been lost. It was a presumption made for securing ancient and continued possession, which could not otherwise be reasonably accounted for. But it was not a 'presumptio juris et de jure'."

A presumptio juris et de jure, means an irrebuttable presumption, is one which the law will not suffer to be rebutted by any counter-evidence, but establishes as conclusive; whereas a presumption juris tantum is one which holds good in the absence of evidence to the contrary, but may be rebutted. (*Juris et de jure — Of law and of right*)

> "and the courts were not bound to raise it, if the facts in evidence went against it.
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> 'It cannot be the duty of a Judge to presume a grant of the non-existence of which he is convinced' observed Farwell, J. in — *Attorney-General* v. *Simpson*[15], Ch at p. 698."

In that case the possession of the defendant was claimed to be for over 200 years but there was no finding on the length of possession. On the ground, inter alia, that the land was part of Mal lands (assessed land) within the zamindari, it was held that there was no scope for applying presumption of lost grant. In the case on hand the appellant traces his possession from 1954 under an unregistered perpetual lease from the erstwhile Inamdar (Maqtedar). Therefore, the presumption of lost grant will not be available to the appellant.

68. Thus, it follows that the appellant has unauthorisedly come into possession of the land in dispute of the first respondent without lawful entitlement.

69. Now reverting to the other ingredient of the definition of the expression "land grabbing" — intention of the appellant — embodied in the phrase "with a view to" illegally taking possession of the land in dispute or entering into the land for any of the purposes mentioned in clause (*e*) of

15 (1901) 2 Ch 671 : 70 LJ Ch 828 : 85 LT 325

Section 2, the Special Court discussed exhaustively both the documentary evidence on record and the oral evidence of the appellant under the caption — design of the first appellant in obtaining the documents of title and resisting possession — and concluded that he was fully aware of the infirmity of the title of his vendor for want of confirmation of the grant by the civil administrator and subsequent mutation proceedings, willingly suffered Siwaijama assessment, paid the same and raised structures when a suit was pending and therefore he was a land grabber. The High Court having noted the discussion of the Special Court on the said issue and having adverted to the evidence, declined to interfere with that finding in the writ petition.

70. The requisite intention which is an important ingredient of the land grabber, though not stated specifically, can be inferred by necessary implication from the averments in the petition and the plaint and the deposition of witness like any other fact. If a person comes into occupation of any government land under the guise of a perpetual lease executed by an unauthorised person having no title to or interest in the land it cannot but be with a view to illegally taking possession of such land. We make it clear that we are expressing no opinion on the point whether those averments would constitute "mens rea" for purposes of offence under the Act.

71. We have carefully gone through the concise statement accompanying the application filed by the first respondent before the Special Court on 20-3-1992 and the plaint in OS No. 1497 of 1985 filed by the first respondent in the Court of the IVth Additional Judge, City Civil Court, Hyderabad. It is also averred that the appellant occupied the land in dispute in the year 1958 and raised a building "Jala Drushyam" and on coming to know of it the first respondent took action for his eviction under Section 6 of the Land Encroachment Act. It is also stated that the claim of the appellant to the land in dispute is not proper, valid or legal as it never belonged to Naimatullah Shah Maqta and even otherwise, the land ceased to be Inam land from 20-7-1955 and had vested in the first respondent and none of the heirs of Naimatullah Shah had come forward to be declared as occupant under the Inam Abolition Act. The land in dispute is described by the first respondent as land grabbed and a declaration is sought from the Special Court that the appellant is a land grabber.

72. It may be observed here that though it may be apt yet it is not necessary for any petitioner who invokes the jurisdiction of the Special Court/Special Tribunal to use in his petition under Sections 7(1) and 8(1) of the Act, the actual words employed in the relevant provisions of the Act, namely, grabbing of the land without any lawful entitlement and with a view to or with the intention of (*a*) illegally taking possession of such lands; or (*b*) enter into or create illegal tenancies, lease or licence agreements or any other illegal agreements in respect of such lands; or (*c*) to construct unauthorised structures thereon for sale or hire; or (*d*) to give such lands to any person on (*i*) rental, or (*ii*) lease and licence basis for construction, or (*iii*) use and occupation of unauthorised structures, as the case may be. Prima facie it will

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satisfy the requirements of the Act if the petitioner alleges that the respondent is a land grabber or that he has grabbed the land. What is pertinent is that the allegations in the petition/plaint, in whatever language made, should make out the ingredients of land grabbing against such a person or his being a land grabber within the meaning of those expressions under the Act, as explained above. It is only when the allegations made in the petition/plaint are proved the activity of taking possession of the land will fall within the meaning of land grabbing that such a possessor can be termed as a "land grabber" within the meaning of that expression under the Act.

73. It is generally true that in the absence of necessary pleadings in regard to the ingredients of the definition of "land grabbing" no finding can validly be recorded on the basis of the evidence even if such evidence is brought on record. Mr Parasaran cited the judgment of this Court in *Venkataramana Devaru* v. *State of Mysore*[16] (SCR p. 906) to support his submission that without necessary pleading, the evidence on record cannot be looked into. However, it is a settled position that if the parties have understood the pleadings of each other correctly, an issue was also framed by the Court, the parties led evidence in support of their respective cases, then the absence of a specific plea would make no difference. In *Nedunuri Kameswaramma* v. *Sampati Subba Rao*[17], Hidayatullah, J. (as he then was) speaking for a three-Judge Bench of this Court observed at SCR p. 214 thus: (AIR p. 886, para 6)

> "Though the appellant had not mentioned a *Karnikam* service inam, parties well understood that the two cases opposed to each other were of *Dharmila Sarvadumbala* inam as against a *Karnikam* service inam. The evidence which has been led in the case clearly showed that the respondent attempted to prove that this was a *Dharmila* inam and to refute that this was a *Karnikam* service inam. No doubt, no issue was framed, and the one, which was framed, could have been more elaborate; but since the parties went to trial fully knowing the rival case and led all the evidence not only in support of their contentions but in refutation of those of the other side, it cannot be said that the absence of an issue was fatal to the case, or that there was that mistrial which vitiates proceedings."

The same view is expressed by this Court in the following two cases: *Kali Prasad Agarwalla* v. *Bharat Coking Coal Ltd.*[18] and *Sardul Singh* v. *Pritam Singh*[19].

74. Now, in the instant case the appellant has never pleaded before the Special Court that necessary pleading in regard to the requirements of land grabbing is lacking in the case. On the other hand, he understood the averments in the petition read with the plaint correctly as allegations of land

16 AIR 1958 SC 255 : 1958 SCR 895
17 AIR 1963 SC 884 : (1963) 2 SCR 208
18 1989 Supp (1) SCC 628
19 (1999) 3 SCC 522 : 1999 SCC (Cri) 445

grabbing as can be seen from the affidavit containing objections to the gazette notification dated 1-4-1992, referred to above, filed on 16-4-1992 (affidavit was attested on 10-4-1992). He stated "I deny the petitioner's allegation of land grabbing whatsoever, made in its petition dated 20-3-1992." He further stated that the documents filed by him and the first respondent "nullify the petitioner's allegation of land grabbing, claim of title over the land and claim of right to get the possession of the land and the building...". On this pleading the Special Court framed Issue 6 aforementioned. The parties adduced evidence, oral and documentary, on that issue. We have already discussed documentary evidence above. PW 1 in his statement categorically stated that the appellant was a land grabber. What is surprising to note is that there was no cross-examination on that aspect. What is more surprising is that in his deposition he did not even state that he was not a land grabber and the land in dispute was not a grabbed land. We have not taken this as his admission but only an aspect in appreciation of oral evidence.

75. The Special Court is, therefore, correct in discussing the evidence on record under the caption "design" in view of the pleading on that aspect, adverted to above and the High Court rightly upheld the same. We have already pointed out that the activity of grabbing of any land should not only be without any lawful entitlement but should also be, inter alia, with a view to illegally taking possession of such lands. These two ingredients are found against the appellant.

76. It is nonetheless submitted by Mr Parasaran that the plaint mentions that the possession of the appellant partakes the character of permissive possession and this averment negates the very concept of land grabbing. It is no doubt true that if the possession is permissive then it cannot be treated as illegal for purposes of clauses (*d*) and (*e*) of sub-section (2) of the Act. We have already discussed above with regard to the alleged plea of permissive possession and held that those averments in the plaint would not constitute plea of "permissive possession".

77. In the light of the above discussion, we have no option but to sustain the view of the High Court in approving the finding of the Special Court on Issue 6, that the appellant falls within the mischief of the definition of the expression "land grabber" under the Act.

78. In the result, we uphold the judgment and order of the High Court under challenge declining to interfere with the judgment and decree of the Special Court. The appeal is dismissed, the parties shall bear their own costs.
