

*Before K. Kannan, J.*  
JASWANT KAUR AND ANOTHER—*Petitioner*  
*versus*  
STATE OF PUNJAB AND OTHERS—*Respondents*  
RFA No. 200 of 1994

September 7, 2012

*Land Acquisition Act, 1894 - Ss. 18 & 30 - Indian Succession Act, 1925 - Indian Evidence Act, 1872 - S. 90 - Ss. 227 - Isher Singh executed registered Will in favour of Jaswant Singh on 16.7.1948 - Thereafter executed Gift Deed in favour of Udham Singh on 21.9.1952 - Possession delivered to Udham Singh - On death of Isher Singh probate granted to Jaswant Singh - Property which had belonged to Isher Singh acquired on 27.6.1989 - Claim to compensation - Suit filed restraining Makhan Singh who claimed interest in suit property through Udham Singh from receiving compensation by persons claiming interest through Jaswant Singh - Suit dismissed on ground that adjudication regarding compensation must be taken through reference under Section 30 of Land Acquisition Act - Reference Court dismissed petition on ground of limitation and holding that Jaswant Singh had become owner of property under Will - Challenge to order passed by Reference Court held that Section 30 itself does not contemplate any period of limitation - Moreover Probate Court did not adjudicate on title of probate - Appeal allowed.*

*Held*, that section 30 itself does not contemplate any period of limitation. The question, therefore, would be whether there is any period of limitation at all for filing the petition. In 'Sharda Devi V. State of Bihar (2003) 3 SCC 128' held that there was no period of limitation and that reference could be made within a reasonable time. The finding to the contra before the Reference Court was, therefore, erroneous.

(Para 8)

*Further held*, that Probate Court did not adjudicate on title to the property. A Probate Court is not to see whether the testator had title to the property or not. To that extent the well known proposition obtaining in probate jurisdiction is that the Probate Court does not decide on title to the property.

(Para 12)

*Further held*, that section 227 of the Indian Succession Act is another provision with reference to the effect of probate. The probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such. This Section is in the context of the powers of the executor and validation of rights that could include a right of sale by the executor in due administration of the estate. It can only be conclusive on the testamentary capacity of the testator and the genuineness of the Will that was probated as regards the factum of its execution and the validity of such Will. A Will is not conclusive as to the right of the testator to dispose of the property concerned (see Halbury's Laws of India 4th Edition Vol. 80 p. 373).

(Para 16)

*Further held*, that the issue of a claim by the appellants on a reference under Section 30 must have been decided only from the fact that the claimant was pressing his right to property through an instrument executed in the Year 1952 and also on the basis that he had continued in possession. There is definite reference to the fact that his possession had been continuous and open and adverse. This I would understand as making possible for the application for the theory of lost to grant.

(Para 23)

*Further held*, that in this case I have already observed that the appellants were admittedly in possession and there was also evidence before the Civil Court that the Government took possession of the property at the time of acquisition only from the appellants' predecessor Makhan Singh. The amount was claimed through a grant by the respondents. In effect, the person in possession was denied the right to compensation for the property, which was acquired from him. Although the reference was sought by the appellants, it must be taken that they were literally claiming a right of defence to continue in possession of the property and when the possession was disturbed, to make an issue of the right to claim the compensation from such acquisition that resulted in dispossession. It was this right that appellants were pleading for. It is not a case of special pleading for the appellants but the legal incident of what they were contending for by reference to their continued possession and their entitlement to the money assessed as payable.

(Para 27)

*Further held*, that on an overall consideration, I would hold that the claim by the respondents to the compensation could not have been upheld in the light of a clear, well established devolution of rights established on the admitted possession of the appellants and the predecessors right from the time of death of Ishar Singh, who was the undisputed original owner of the property. The compensation ought to have been, therefore, awarded only to the appellants.

(Para 28)

Suddeep Mahajan, Advocate, *for the appellants.*

Ram Lal Gupta, Addl. A.G., Punjab for respondent Nos. 1 and 2.

Keshav Gupta, Advocate respondent Nos. 3 and 4.

**K. KANNAN, J.**

### **I. The parties to litigation**

(1) The property, which was the subject of acquisition in respect of which a reference under Section 30 of the Land Acquisition Act came to be made, admittedly belonged to one Ishar Singh. He had been married to a person by name Seva Devi but he had no issue through her. His brother's son was Jaswant Singh, who is arrayed as 3rd respondent herein. The 3rd respondent was, however, working in a Government of India undertaking at Dhanbad in another State. His brother's wife was Harjinder Kaur. She was resident of Amritsar and she was the power of attorney of Jaswant Singh. She is arrayed as the 4th respondent. One Udham Singh claimed that he was the foster son of Ishar Singh. Udham Singh's daughter was Ajit Kaur. The contest is essentially between the appellants, who claimed as successors-in-interest to Udham Singh tracing his title to a registered gift deed said to have been executed by Ishar Singh after the Will and the respondents No. 3 and 4, who set up a Will executed by Ishar Singh in respect of which a probate was also issued. The Reference Court upheld the claim of respondent Nos. 3 and 4.

### **II. The legal issue for adjudication**

(2) The point for consideration in the case is whether the grant of probate finally concluded the title to the property and consequently, to the money which was assessed as payable to the legatee of the property. The

issue shall also be to examine the merit of contention of the appellants tracing their title and entitlement to Udham Singh. There are also subsidiary issues relating to validity of reference under Land Acquisition Act. Some more facts which are necessary ought to therefore immediately follow.

### **III. History of litigation**

(3) The property acquired by the Government belonged to Ishar Singh. He had no children and he had executed a Will in favour of Jaswant Singh-3rd respondent on 16.07.1948. The Will had also been registered on at the Sub Registrar's office on 11.08.1948. After the death of Ishar Singh, Jaswant Singh applied for grant of probate. This was contested by Udham Singh, who claimed the very same property as having been gifted to him under a registered document on 21.09.1952. The contest for grant, which was the subject of bequest had been that the testator Ishar Singh had divested himself of property by gift deed in favour of Udham Singh and therefore, the Will did not operate to constitute a valid bequest. The Court of Probate rejected the contention and held by reference to case law that issue of title itself was not relevant and only point for consideration was that whether the Will executed by the deceased Ishar Singh was true or not. He, therefore, passed an order on 27.07.1953 for issue of a grant on the basis of Will.

(4) It is a matter of record that the beneficiary under the Will namely Jaswant Singh himself did not take possession of the property. On the contrary, Udham Singh was in possession of property and after his death, his daughter Ajit Kaur claimed as an heir to her father. She in turn sold the property to Gurdip Kaur by a sale deed dated 22.06.1973, who in turn sold the property to Makhan Singh on 14.06.1974. The property was claimed by Makhan Singh by successive devolution of interest through registered documents and when the property was acquired on 27.06.1989 by the Government after issuing notification under Section 4 of the Land Acquisition Act, Makhan Singh moved for payment of the amount. The amount, however, had not been paid in view of the contest inter se between respondent Nos.3 and 4 and himself with reference to the property. A suit instituted by 3rd respondent against Makhan Singh for a restraint against payment of compensation to the latter was pending before the Subordinate Judge, Amritsar but it did not go for a full-fledged adjudication on title but

the Court had dismissed it on the ground that in view of the acquisition of property by the Government, the adjudication regarding the claim to money for acquisition of property must be taken only through a proper reference made under Section 30 of the Land Acquisition Act. The petition under Section 30 came to be filed, therefore, on the rejection of relief in a suit holding that only a Reference Court under Section 30 of the Land Acquisition Act would have the competency to adjudicate on the amount assessed.

*IV. Was the reference under S.30 barred by limitation?*

(5) When the matter was brought on a reference from the Civil Court, the Court was confronted also with issue of limitation. The award of the Collector had been passed on 27.06.1989 and the petition had been filed before the Court on 22.02.1990. The Court observed that a reference had to be made within six weeks from the award but the present reference had been made after eight months. The Court held that the earlier suit before the Civil Court itself had dismissed the suit as not maintainable on 12.12.1989 and the mere pendency of the case between the parties before the Court earlier could not go to enlarge the period of limitation. Even while dismissing the petition on the ground of limitation, the Court held that the maintainability of the petition itself could be taken only from the pleadings and not from the defence and therefore, proceeded to hold that the petition was maintainable. Adjudging on the alleged entitlement of the petitioner on merits, the Court held that the 3rd respondent, Jaswant Singh, had become the owner of the property under a Will by a probate issued and therefore, the petitioners/appellants could not claim any right over the property or the amount determined thereon.

*(a) Contingencies when reference under s. 18 shall be attracted*

(6) On the issue of limitation, it has to be noticed that Section 18 of the Land Acquisition Act contains through sub clause (2) a provision for presentation of petition to seek for reference. The subsection reads thus:-

“18.(2) The application shall state the grounds on which objection to the award is taken: Provided that every such application shall be made-

(a) if the person making it was present or represented before the Collector at the time when he made his award, within six weeks from the date of the Collector's award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire."

Three different contingencies are brought out through the said subsection. At the time of making of the award, the person, who was claiming the amount but who was refusing to receive it, could make an application to the Collector for reference for determination of the amount for two reasons given under sub-section, which are (i) for measurement of the property; (ii) amount of compensation. This application shall be filed under sub-clause (a) of Section 2 (i) within six weeks from the date of Collector's award if he had been present before the Collector. (ii) In other cases, by which expression it should mean that when a person was not present at the time when the Collector made award, it should be done within six weeks from the date of receipt of notice from the Collector under Section 12(2) or (iii) within six months from the date of Collector's award whichever first expired. Admittedly, in the case the dispute was not with reference to either the measurement of the land or the quantum of compensation, which was required to be adjudicated upon. The contingencies contemplated under Section 18 do not, therefore, apply.

*(b) No period of limitation exists for reference under s.30*

(7) The provision for petition for reference has been made under Section 30, which reads thus:-

**"30. Dispute as to apportionment.**- When the amount of compensation has been settled under section 11, if any dispute arises as to the apportionment of the same or any part thereof, or as to the persons to whom the same or any part thereof, is payable, the Collector may refer such dispute to the decision of the Court."

*(c) S.C. judgment shows the way*

(8) The Section itself does not contemplate any period of limitation. The question, therefore, would be whether there is any period of limitation at all for filing the petition. In *Sharda Devi* versus *State of Bihar (1)*, the

Supreme Court held that there was no period of limitation and that reference could be made within a reasonable time. In a subsequent decision, without reference to the above ruling the Supreme Court considered the issue again but with a minor modification. This was dealt with by the Supreme Court in *Mehar Rusi Dalal* versus *Union of India and others (2)*, where the case was with reference to a reference sought at the instance of the State under Sections 18 and 30. The Supreme Court found that reference under Section 18 was not competent at the instance of the State. While advertng to the issue of limitation for a reference under Section 30, the Court held in para 24 as follows:-

“...Under Section 18 if a party wants to claim a Reference it is to be done within a particular period. Undoubtedly under Section 30 no such time limit has been prescribed. However, it is clear that any such application must be made within a reasonable time. What is the reasonable time will depend upon the facts and circumstances of each case. In cases where the parties have notice of the acquisition proceedings, even presuming, they can apply for a reference under Section 30, the reasonable time would be the period prescribed under Section 10. It is clarified further that where parties do not have notice of the acquisition proceedings and/or their rights come into existence subsequent to the acquisition proceedings the starting point of limitation may be postponed but the reasonable time would be the time set out in Section 18 from the date of the knowledge or from the date they acquire rights, whichever is later. ...”

*(d) what is reasonable time for reference?*

(9) The reasonable time would have to be seen in the context of Section 10 and Section 18 themselves. Section 10 of the Land Acquisition Act deals with the power of the Collector to require the attendance of a person, who may be interested in the property and enforce making of statements as to means and interests. In this case, it is seen that the Collector was aware of the fact that there had been a litigation between the person, who was in possession, who was Makhan Singh (appellants' predecessor) and respondents, who were claiming under the probate issued by the Court.

The Collector made a statement before the Civil Court giving evidence of the fact that at the time when the property was secured by the Government for the purpose of beautification of the Golden Temple at Amritsar, the property had been in the possession of Makhan Singh and they had taken possession of the property from him on 31.01.1989. The suit before the Civil Court came to be disposed of only subsequently by holding that it had no jurisdiction and the parties could have a reference made only under Section 30 of the Land Acquisition Act. It was, under such circumstances, that the appellants before this Court had filed a petition seeking for reference. I have already observed that the suit was disposed of as incompetent on 12.12.1989 and the petition had been presented before the Court on 22.02.1990. Hardly any time was lost between the disposal of the case where there had been a Court's direction and the institution of the petition. If the Supreme Court's dictum must be seen that there is no provision for limitation under Section 30 but it must be presented within reasonable time, I would hold that the filing of petition for reference before the Court under Section 30 was within reasonable time. If we must understand the observations of the Supreme Court that the reasonable time must be understood as the time set out under Section 18 from the date of knowledge of the award or from the date when the party acquired rights whichever was later, then, when the Collector passed the award, the respondent Nos.3 and 4 had already filed a suit for declaration of the compensation amount and he could not have again asked for a reference to civil court. The right to seek for a reference under Section 30 of the Land Acquisition Act itself obtained only when the Civil Court issued such direction and declined to adjudicate the issue itself. There was, therefore, no bar of limitation. The finding to the contra before the Reference Court was, therefore, erroneous.

#### ***V. The effect of grant of probate or letters of administration***

##### *(a) The grant operates as judgment in rem*

(10) As regards the finding of the Court that since the 3rd respondent had a bequest in her favour through the grant that was issued, the judgment being a judgment in rem could operate res judicata between the parties. The appellants, being the successors of interest of Udham Singh, who was the party in proceedings, was, therefore, bound by the probate issued. This



will require us to examine of what the proceeding under probate is conclusive about and what is the finality that obtains through the grant.

*(b) Probate court did not adjudicate on title to the property but rendered adjudication on the genuineness of the will only*

(11) There is some element of confusion as regards what a probate can render as final in view of the judgment operating in rem and would, therefore, require the matter to be examined at some length. Learned counsel for the respondents refers to me to the decision in *Basanti Devi versus Raviprakash Ramprasad Jaiswal (3)*, that a probate proceeding is a judgment in rem and therefore, a person who is aggrieved thereby and having no knowledge about the proceedings would, if there was no proper citation was entitled for revocation of probate. The judgment itself will otherwise be binding. The judgment that operates in rem makes irrelevant whether a person had knowledge of the proceedings or not or whether such a person was a party to the proceeding or not. We do not confront with such a provision, for it is nobody's case that Udham Singh under whom the appellant's claimed had no knowledge of proceedings. On the other hand, he contested the grant by setting up a registered deed of gift in his favour dated 21.09.1952. The Court did not hold the gift settlement to be bad but it found that there was no need to take the objections of Udham Singh for the issue of grant, since the Court did not decide on title to the property itself. This holding was perhaps not wholly correct, for a person, who had claimed under the very same testator Ishar Singh was not setting up title against the testator himself. On the other hand, he was contending that Ishar Singh's Will did not operate to constitute transfer of interest, for at his death, the property was not even the property of Ishar Singh and that he divested himself of the right of property. Udham Singh had definitely a caveatable interest and therefore, the contest to the grant was perfectly justified. The Court did not, however, think that it was necessary to entertain the issue of whether Ishar Singh died possessed of the property. If the Court held, therefore, that grant should be issued without adjudicating on the validity of transfer by Ishar Singh at that time and whether grant could be issued or not, the decision must be taken as obtaining finality only to what the adjudication was about.

*(c) The issue of valid execution and attestation of Will alone would obtain finality and constitute res judicata*

(12) The finality that the grant obtains is only to the genuineness and a valid execution of the Will. A grant never decides on the title to the property itself. A Probate Court is not required to see whether the testator had title to the property or not. To that extent, the well known proposition obtaining in probate jurisdiction is that the Probate Court does not decide on title to the property.

(13) In *Krishna Kumar Birla versus Rajender Singh Lodha and others* (4), the Supreme Court raised the question whether under Section 284 nor Section 295, a caveator was required to show any interest in the estate of the deceased, and finding that neither section contained the mandate, observed that still it would not mean that anybody and everybody, who intended to oppose the grant of probate would be entitled to lodge caveat. The Supreme Court had examined among types of interests, which the parties were claiming, the classes of interests that were caveatable and those which were not. Among the types of interests, the Court also observed that a person, who would have otherwise succeeded to the estate of the testator, would ordinarily have a caveatable interest and that any other person must ordinarily show a special interest in the estate. A wider understanding to caveatable interest was also brought by yet another decision of the Supreme Court in *G. Gopal versus C. Bhaskar and others* (5). Even a restrictive entitlement to the caveatability was subsequently doubted by the Supreme Court in *Jagjeet Singh and others versus Pamela Manmohan Singh* (6). It was the latter approach for wider meaning that has given rise to a reference to a larger Bench.

*(d) Transfer of interest of Isher Singh through gift shall be taken to be left open and undecided in probate proceedings*

(14) All these observations are merely to set the issue in its proper perspective that when Udham Singh was opposing the grant, he was within his right to do so. The fact that the Court did not take the objection and

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(4) 2008(4) SC 300

(5) 2008(10) SCC 489

(6) 2010 (2) SCALE 805

held that the grant issued must be issued without going into the question of the validity of the gift by the testator must be taken to mean that the validity of the gift pleaded in opposition to the grant was not yet decided by the court. The transfer of interest would depend on whether the deceased himself had transferred the property at any time before the Will took effect. The Probate Court had not the competency to decide, especially when it failed to examine the defence of whether the deceased had made the gift of the property to Udham Singh.

*(e) Effect of the grant under the Indian Succession Act*

(15) The effect of a grant and the meaning of making the decision in a Probate Court to operate as a judgment in rem must be seen through the prism of Section 273 of the Indian Succession Act. The said Section deals with the conclusiveness of probate or letters of administration.

**“273. Conclusiveness of probate or letters of administration.-**

Probate or letters of administration shall have effect over all the property and estate, moveable or immovable, of the deceased, throughout the State in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted: Provided that probates and letters of administration granted-

(a) by a High Court, or

(b) by a District Judge, where the deceased at the time of his death had a fixed place of abode situate within the jurisdiction of such Judge, and such Judge certifies that the value of the property and estate affected beyond the limits of the State does not exceed ten thousand rupees, shall, unless otherwise directed by the grant, have like effect throughout the other States. The proviso to this section shall apply in India after the separation of Burma and Aden from India to probates and letters of administration granted in Burma and Aden before the date of the separation, or after that date in proceedings which were

pending at that date. The proviso shall also apply in India after the separation of Pakistan from India to probates and letters of administration granted before the date of the separation, or after that date in proceedings pending at that date, in any of the territories which on that date constituted Pakistan.

(16) It can only give a conclusive right to be represented against all the debtors of the deceased and all persons holding property which belonged to him. The issue of whether the property belonged to the deceased itself is never conclusive. As far as the 3 respondent's dealing with the grant is concerned, Section 273 of the Indian Succession Act affords a full indemnity to all debtors paying the debts and to all persons delivering up such property to the person to whom such probate or letters of administration had been granted. The right under the Will based on interpretation to various terms contained in the Will is never a matter on which the Probate Court has any jurisdiction. The conclusiveness of the grant is only with relation to the validity of the Will. The issues regarding interpretation to the Will or the terms contained therein or to examine whether the deceased had an interest in the property are beyond the jurisdiction of Probate Court. Even if such a finding were to be rendered by the Court, it could be ignored. Section 227 of the Indian Succession Act is another provision with reference to the effect of probate. The probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such. This Section is in the context of the powers of the executor and validation of rights that could include a right of sale by the executor in due administration of the estate. It can only be conclusive on the testamentary capacity of the testator and the genuineness of the Will that was probated as regards the factum of its execution and the validity of such Will. A Will is not conclusive as to the right of the testator to dispose of the property concerned (see Halbury's Laws of India 4th Edition Vol.80 P.373).

(17) In *Delhi Development Authority versus Mrs. Vijaya C. Gurshaney & Another* (7), the Supreme Court held in relation to a grant of letters of administration, which has the same effect as the grant of probate that the grant itself confers no title to the property. The title should be

independently challenged even through the grant of probate or letters of administration. The Court held as follows:

“The High Court clearly erred in holding that merely because Letters of Administration are granted, the appellants could not inquire into the true nature of the transaction. It is settled law that a Testamentary Court whilst granting Probate or Letters of Administration does not even consider particularly in uncontested matters, the motive behind execution of a testamentary instrument. A Testamentary court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. It is settled law that the grant of a Probate or Letters of Administration does not confer title to property. They merely enable administration of the estate of the deceased. Thus, it is always open to a person to dispute title even though probate or Letters of Administration have been granted (para 8).”

*(c) Summing up the law on the subject of effect of grant*

(18) To distill the reference to these Sections and the decisions referred to above, it could be simply stated as follows:-

- (i) the judgment rendered in Probate Court is a judgment in rem and binds the person whether he is a party to proceedings or not.
- (ii) the conclusiveness of the grant is with reference to the representative character to the estate of the deceased.
- (iii) if the grant is with reference to a Will, the conclusiveness is as regards the valid execution and attestation of the Will, which includes the conclusiveness of the mental capacity of the testator to make the Will.
- (iv) The Probate Court does not settle issues on title to the property dealt with through the testamentary instrument.
- (v) a grant does not bar a person against whom it is used to contend that the Will does not operate to create any transfer of the property and that the title either did not ever vest with the testator or the testator did not die possessed of the property for the testamentary disposition to operate.

## VI. *Adjudication – Will v Gift, which is to operate*

(19) If the grant itself could not be taken to have rendered the claim by the defendants to set up title, the only point that has to be seen is whether the appellants had acquired title to the property. In this case, the appellants were the persons, who claimed the property from Udham Singh. Udham Singh had in turn claimed the property under a gift deed executed by Ishar Singh in his favour in the year 1951. The original deed of gift in his favour had been filed in the Court as Ex.P3 and copy produced in court from lawful custody by PW5, Ajit Kaur, daughter of Udham Singh was brought before the Reference Court. There is a presumption of genuineness of a document which is executed more than 30 years before when it is sought to be relied on by party. This presumption is available under Section 90 of the Indian Evidence Act.

(20) A certified copy appears to have been obtained in the year 1957 and the certified copy of the gift deed is produced before the Court. It is not seen from evidence or records as to why the document in original in the Probate Court has not been produced. If the original had been produced, the genuineness of presumption could be inferred by invoking Section 90 of the Indian Evidence Act. There is considerable case law on the subject of whether the presumption of the valid execution and genuineness could be extended also to certified copy. There are divergence of views, which say that it is not applicable to certified copy but some Courts also have taken the view that if the certified copy itself has been taken more than 30 years earlier, the presumption could be invoked. I am not prepared to examine the proof of the genuineness and I would rest the case on the eloquent proof of possession of the property with Udham Singh and the successors-ininterest upto Makhan Singh from whom the property was taken possession of. The entitlement of right to the property and the entitlement to the compensation assessed must be seen through the settlement deed which was executed on 21.09.1952 and the subsequent devolutions which have taken place.

(21) Since the appellants had rested their contention by pressing the title to the document of the year 1952 executed in favour of Udham Singh and to the subsequent transfers through sales, their possession, assessment to property types and payment of electricity charges, I found

that there was manifest evidence about the possession of the defendants adversely to the interest of respondents No.3 and 4. I directed the respective counsel to therefore examine if the theory of loss grant could be invoked and the case considered on that basis. I must point out that there is no specific mention of the theory either in the pleadings or in the grounds. I take this to be a legal issue, which would flow out of the pleadings and the facts brought out through evidence. To the credit of the counsel appearing on behalf of the respondent he has done substantial research and brought the legal precedents touching upon the subject.

#### *VII. Theory of lost grant applicable to appellants' possession*

(22) It is an admitted case that the persons in possession of the property were claiming the property under Udham Singh. For all the time when the property was in possession of Udham Singh and his successors, the 3rd respondent had never asserted any right or secured any relief to recover the possession of the property. The 3rd respondent merely rest contented by securing the probate and did not take action to recover possession. The records bear out that he had sought for possession in purported exercise of the power of management of the estate as an executor. The District Judge as a probate Judge has passed an order on 06.02.1954 that he has no power to give possession from 1st respondent in probate proceedings, from Udham Singh. Learned counsel appearing for the respondent contended vehemently that Udham Singh or a person claiming under him did not file any suit to assert the title of the property. That was indeed the direction of the Probate Court itself on 06.02.1954. I will not take this to be an issue at all, for there was no necessity for the person in possession to be forced to go to court first. On the other hand, a person, who was obtaining a grant and who had known about Udham Singh setting up rival title and who was actually in possession of the property, ought to have instituted a suit on the basis of grant and recovered possession of the property. The grantee alone could have forced an adjudication regarding the validity or otherwise of the gift deed and the entitlement of the donee to remain in possession of property. It is a fundamental precept of law that possession is 9 points in law and a person in possession must be presumed to have right to be in property in terms of Section 110 of the Indian Evidence

Act. If the grantee had not taken action for recovery of possession and he had allowed Udham Singh and his successors to continue, it should be taken that title to the property itself was lost in favour of person, who was setting up the instrument of gift as constituting title to remain in possession.

(23) In this case, the issue of a claim by the appellants on a reference under Section 30 must have been decided only from the fact that the claimant was pressing his right to property through an instrument executed in the year 1952 and also on the basis that he had continued in possession. There is a definite reference to the fact that his possession had been continuous and open and adverse. This I would understand as making possible for the application for the theory of lost to grant.

*(a) Origin of theory of lost grant*

(24) The theory originated in England and was shown to have existed since 1189 from the time of accession of Richard I in 1189. Theory of lost grant has been traced in judgment of House of Lords in *Regina versus Oxfordshire County Council and others, Ex Parte Sunningwell Parish Council* (8). The judgment itself observes that there had never been any consistent theory of Prescription. English Law did not treat long enjoyment as being a method of acquiring title. Instead it approached the question from the other end by treating the lapse of time as either barring the remedy of the former owner or giving rise to a presumption that he had done some act which conferred a lawful title upon the person in de facto possession or enjoyment. Cockburn C.J., who traced the history of English Law of Prescription in *Bryant versus Foot* (9), stated thus:-

“Juries were first told that from user, during living memory, or even during 20 years, they might presume a lost grant or deed; next they were recommended to make such presumption; and lastly, as the final consummation of judicial legislation, it was held that a jury should be told, not only that they might, but also that they were bound to presume the existence of such a lost grant, although neither judge nor jury, nor any one else, had the shadow of a belief that any such instrument had ever really existed.”

*(b) Ingredient of theory includes acquiescence*

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(8) 1999 3 ALL I.R. 385

(9) (1867) I.L.R. 2 Q.B. 161



(25) The basic ingredient of the theory of lost grant itself was taken to rest on acquiescence in *Charles Dalton versus Henry Angus and Co. (10)*. The House of Lords had ruled

“the whole Law of Prescription and the whole law, which governs the presumption or inference of a grant or covenant rest upon acquiescence. The Courts and Judges had recourse to various expedients for quieting the possession of property in the exercise of rights which have not been resisted by the persons against whom they are exercised, but in all cases it appears to me that acquiescence and nothing else is the principle upon which these expedients rest.”

Nothing can be more akin to the facts in issue where Udham Singh set up his objection to the grant in the year 1952. The Court took on record the document, which must have put the grantee in knowledge of the fact that a deceased person was said to have dealt with the property after he had made a Will before his death. The mere grant could not have secured a right to the property. The grant must have been used as an instrument for enforcing a right if the grantee sought to stake a claim to the property. The person, who was setting up an independent title and was resisting the grant in the year 1952 was allowed to be in possession. In other words, the grantee and the successors had acquiesced in the continuous possession for five decades more, which ought to be taken as giving rise to a situation of lost grant.

*(c) The application of the theory in India*

(26) The principle of lost grant was referred to by the Supreme Court in *B. Satyanarayana and others versus Konduru Venkatapayya and others (11)*. The Supreme Court held that lost grant and presumption of title would not be made where there was sufficient evidence of the nature of grant. This judgment is referred to by the counsel appearing for the respondent to show that the defendant who was setting up a claim through an instrument ought not to have the benefit of the application of the doctrine of lost grant. The same view was also taken in yet another decision in *C. Periaswami Gounder and others versus Sundaresa Ayya and others (12)*. I am examining in this issue from an alternate standpoint that if the

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(10) (1881) UKHL 1

(11) AIR 1953 SC 195

(12) AIR 1965 SC 516

title to the property under the gift were to be taken as not established, at least the possession of the property by Udham Singh and his successors was an admitted fact by the respondents. Udham Singh was actually setting up a hostile title to the grantee ever since 1952. That the theory of lost grant itself is not unknown to India and that it is applied by our Courts in India ever since English jurisprudence was applied to Indian Courts for the historical reasons of the English Rule over India. This was referred to by the Supreme Court in Five Member Bench decision in *Sri Manohar Das Mohanta versus Charu Chandra Pal and others* (13). The Supreme Court held in Para 7 thus:-

“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 presumption *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* (1901) 2 Ch D 671. 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* 1951 SCR 431. There will likewise be no scope for this 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.”

(27) It has been also the trend of this Court never to apply the principle of prescription for person, who was asserting title as a plaintiff. I would not think that the principle must be seen from the point of view of parties bargaining the position either as plaintiff or defendant. It should be seen in the context of a person, who is in possession, whose possession is sought to be disturbed or a person who seeks to establish a right against a person, who is actually in possession. In this case, I have already observed that the appellants were admittedly in possession and there was also evidence before the Civil Court that the Government took possession of the property at the time of acquisition only from the appellants' predecessor Makhan Singh. The amount was claimed through a grant by the respondents. In effect, the person in possession was denied the right to compensation for the property, which was acquired from him. Although the reference was sought by the appellants, it must be taken that they were literally claiming a right of defence to continue in possession of the property and when the possession was disturbed, to make an issue of the right to claim the compensation from such acquisition that resulted in dispossession. It was this right that the appellants were pleading for. It is not a case of special pleading for the appellants but the legal incident of what they were contending for by reference to their continued possession and their entitlement to the money assessed as payable.

#### **VI. *Disposition***

(28) On an overall consideration, I would hold that the claim by the respondents to the compensation could not have been upheld in the light of a clear, well established devolution of rights established on the admitted possession of the appellants and the predecessors right from the time of death of Ishar Singh, who was the undisputed original owner of the property. The compensation ought to have been, therefore, awarded only to the appellants.

(29) The award of the Court below granting to the compensation to the respondents was erroneous and set aside. On the other hand, the appellants alone are entitled to the amount determined. The appeal is allowed with costs with counsel fee fixed at Rs. 10,000/-.