HIMACHAL PRADESH HIGH COURT

Lachhman

Vs.

Thunia

Second Appeal No. 1 of 1971

(M.H. Beg, C.J., D.B. Lal and Chet Ram Thakur, JJ.)

25.08.1971

JUDGMENT

Chet Ram Thakur, J.

1. This second appeal has been referred to a Full Bench as one of the questions which arose, when it came up for hearing before one of us, was whether the rights of the reversioners who had obtained a decree declaring that their rights were intact despite an alienation made by a widow, prior to the passing of the Hindu Succession Act,1956, (hereinafter referred to as the Act), were affected by the provisions of the Act. A Full Bench of the Punjab High Court in *Amar Singh v. Sewa Ram*[1], had, it was submitted, held that the rights of reversioners are not governed by the provisions of the Act, but by the law prevailing before the commencement of the Act. This question arose, on the facts found by the lower courts, as detailed below.

2. On the death of Shihnu, the last male holder of the property in dispute, his widow, Smt. Karju, succeeded as a limited owner of the estate left. On 22-5-1946, she gifted the land in dispute, which included her share in Shamilat land, to Lachhman defendant appellant. Thunia Ram, respondent and two others, claiming to be the collaterals of the last male owner, filed suit No.407 of 1946 for possession of the property consisting of land, a house, a kitchen, a cow-shed, and some share in Shamilat deh. The plaintiff's in that suit denied that Smt Karju was the widow of Sihnu, so that she had no right to make any gift in favour of Lachhman. They claimed the property left by Sihnu to be theirs as his collaterals, irrespective of whether she had made a gift or not. In the alternative, the plaintiff's set up the case that, if Smt. Karju was the widow of Sihnu, the gift made by her could not bind the plaintiff's after the death of Smt. Karju and prayed for a declaration to that effect. The plaintiffs failed on the first plea so that their suit for possession could not be decreed, but the alternative case was accepted so that a declaration was given that the plaintiffs were reversioners of Sihnu and that the gift made by Smt. Karju was not binding on them after her death.

3. After the death of Smt. Karju, in February, 1966. Thunia, plaintiff-respondent, filed the suit, out of which the second appeal before us has arisen, for possession of the property in dispute on the ground that he was entitled as a reversioner and the nearest heir. The trial

[1]62 Pun LR 537 : (AIR 1960 Pun 530 FB)
Court repelled the plea of the defendant-appellant, Lachhman denying the right of Thunia as the reversioner and nearest heir to Sihnu. It also rejected Lachhman's claim to the house properties put forward on the allegation that the constructions had been made by Lachhman. Lachhman had also set up his own right to Shamilat land. The trial court decreed the plaintiff's suit for possession except with regard to one-third share of the Shamilat land. So far as the constructions were concerned, the trial court had held that, although they were involved to the previous suit, the claim to these had been dismissed in that suit on the ground that they were not the subject matter of the gift so that no declaration could be given to the plaintiff at that time with respect to these.

4. The lower appellate court had observed that the defendant-appellant did not either question the right of the plaintiff to buildings or the finding of the trial court that the buildings in dispute were the subject-matter of the former suit. The defendant-appellant had conceded that the buildings were also claimed in the previous suit, but they pointed out that the previous suit had been dismissed in respect of these. The ground of this dismissal, however, was that the claim of the reversioners was premature and that no declaration could be granted in respect of these as they were not the subject-matter of the gift. Affirming the findings of the trial court the lower appellate court had dismissed the defendant's appeal.

5. In this Court, the first objection taken by the defendant-appellant is that the plaintiff cannot succeed on the ground that he was the nearest heir as there was neither any plea nor any issue on this question. According to the defendant-appellant, the plaintiff had come to Court only on the strength of the decree obtained by him as a reversioner and not on the ground that he was the nearest heir. After having examined the pleadings and the issues, we are unable to agree with this contention of the defendant-appellant. We find that the question was specifically raised in the pleadings and adjudicated upon after framing issues covering it.

6. It is apparent from the above mentioned statement of facts that Thunia and two others had obtained a declaratory decree in their favour in 1947. It is true that they had included the house property in the previous suit, but they had claimed possession of the house property on the ground that Smt. Karju had no right to gift it. As the houses were not included in the gift, no declaratory relief, to which the decree was confined, could be given in respect of house property. We think that the contention that the present suit for the house property was barred because of the dismissal of the earlier suit for possession of these houses has no force. The claim for possession of the buildings was dismissed because it was premature while Smt. Karju was alive.

7. Learned counsel for the defendant-appellant has urged that a declaratory decree in favour of the reversioners creates no right or title and relies upon: *Jagdish v. Brahma*[2]*,* and *Gokal v. Haria*[3]*,* In Jagdlsh's case (supra) it was held –

> "It is well settled that till succession opens out no reversioner can claim any right to or interest in the property in the possession of the limited owner. Till succession opens out, the reversionary interest is merely in the nature of spes succession's and it cannot be postulated with regard to any particular person whether at the time the

[2]1971 Him LR 16 [3] AIR 1949 East Pun 414

> estate falls into possession he would be entitled to the property. When the presumptive reversioner brings a suit for a declaration that an alienation by a limited owner should not affect his reversionary rights as the time of the succession opening out and the suit is decreed, the only effect of the decree is to declare the alienation to be invalid except for the life of the alienor. The declaratory decree does not pass any title to the presumptive reversioner and does not create any right in him in the property alienated. The title still remains in the alienee."

The passage cited above enunciated a well settled principle. It is pointed out there that the decree in favour of a reversioner enures for the benefit of the whole body of reversioners. It only removes a common apprehended injury to the interests of the reversioners. The fact that the right to enjoy for a limited period remains in the alienee, does not, however, mean that the right of the reversioners to the property after the death of the limited owner is not recognised by the declaratory decree. If such could be the position, the declaratory decree would be worthless. We are unable to accept such a contention.

8. The argument that the co-plaintiff's of Thunia Ram, plaintiff-respondent in the former suit, were necessary parties in the present suit is also unacceptable. It is amply proved by evidence on record that Thunia Ram, the fifth degree collateral of the last male hoder, is the nearest reversioner and heir. The defendant-appellant had alleged that there were nearer reversioners, but had failed to prove the allegation. The pedigree, which is on record, and the findings of the court below, based on good evidence, are sufficient to repel this contention. In fact, the defendant-appellant had given no evidence worth the name to substantiate the case that they were nearer reversioners. His counsel had very rightly abandoned such a claim in the lower appellate court.

9. We may now take up the claim to the house property with regard to which there is no dispute that Smt. Karju was in possession of it when the Act came into force. Smt. Karju became its full owner under the provisions of Section 14 of the Act. The concurrent findings of fact arrived at by the Courts below repelled the defendant's contention that the house was constructed by him. We have also examined the evidence on this point and find that the defendant's claim that the house was constructed by him could not be true at all. The house was in existence in the life time of Shihnu. As Smt. Karju had died intestate, the succession to this property will be governed by the provisions of Section 15 of the Act. In the instant case, the property cannot be said to have been inherited by her from her own father or mother. She acquired a limited estate in this property which was once owned by her husband. She left no children. The applicability of Section 15(1) (a) is, therefore, excluded. The property must devolve in accordance with the provisions of Section 15(2) (b) upon the heirs of the husband. Thunia was shown to be the nearest heir of the husband. Therefore, the suit in respect of the house property had been rightly decreed in his favour in accordance with Rule 3 of Section 16 of the Act.

10. The real contest in the case before us relates to property other than house property. The appellant's contention was that, the gift being invalid, the widow must be deemed to be in constructive possession through her donee. It was submitted that she must be assumed to be in possession of the property when the Act came into force so the she became its absolute owner under Section 14 of the Act. It was also contended, in the alternative, that the gift made by her must be deemed to be valid because the rights of the donor had been enlarged by the Act and the

possibility of succession by the reversioners was excluded despite the decree in their favor. In other words, the contention was that the statute overrides the effect of a decree which only related to the position as it existed before the Act came into force.

11. Learned counsel for the appellant relied on G.T.M. Kotturuswami v.S. Veeravva, AIR 1959 Supreme Court 577 where the Supreme Court held:

> "It is sufficient to say that the word "possessed" in Section 14 is used in a broad sense and in the context means the state of owning or having in one's hand or power".

Their Lordships quoted a passage from G. Behari v, Haridas Samantra, AIR 1957 Calcutta 557 at page 559 interpreting the words "any property possessed by a female Hindu" as follows:-

> "The opening words 'property possessed by a female Hindu' obviously mean that to come within the purview of the section the property must be in possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's possession when the Act came into force. That possession might have been either actual or constructive or in any form recognized by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word 'possession' in its widest connotation, when the Act came into force, the section would not apply."

After quoting the above mentioned observations, their Lordships of the Supreme Court said:

> "In our opinion, the view expressed above is the correct view as to how the words 'any property' possessed by a female Hindu should be interpreted. In the present case if the adoption was invalid, the full owner of Veerappa's estate was his widow Veeravva and even if it be assumed that the second defendant was in actual possession of the estate his possession was merely permissive and Veeravva must be regarded as being in constructive possession of it through the second defendant. In this situation, at the time when the Act came into force, the property of Veerappa must be regarded in law as being possessed by Veeravva."

12. Now, the above mentioned case relates to the position which emerged from the declaration of an adoption as invalid. In the case before us, the gift by Smt. Karju was not held to be void. It was quite valid and binding upon her so long as she was alive. She had parted with the possession of it for her life-time. It cannot, in our opinion, be held that the done was in possession on behalf of the widow. If the widow had tried to dispossess him, he could claim an injunction against her. If she were to dispossess him he could sue her for possession and get back the property. The donee's possession is not on behalf of the donor, but in his own right. This, in our opinion, is the position even where the donation is valid only for a limited period. On the other hand, the position of a person whose adoption is invalid is, as stated in Mulla's Hindu Law (13 Edn. 1966), that:

> "as a general rule the adopted son does not acquire any rights in the adopted family nor does he forfeit his rights in his natural family".

Hence, a person who is in possessing of a property by reason of invalid adoption can be a licensee or in permissive and constructive possession, but a donee would be in possession in his own right. Therefore, we do not think that the donee of Smt. Karju can benefit from Section 14 of the Act which enlarges the estate of the widow in possession but not of her donee.

13. Learned counsel for the appellant also relied on *Lalchand Bhur v. Smt. Sushila Sundari Dassi*[4], where it was held that the terms of a consent decree in a suit by reversioners against a widow before the passing of the Act, by which she undertook not to alienate or otherwise deal with the estate so as to prejudice the rights of reversioners, was not binding upon her after the passing of the Act. In that case, there was no claim against the donee but the widow in possession herself had filed a suit for declaration of her enlarged rights by reason of Section 14 of the Act. We therefore, think that it was not applicable to the facts of the present case.

14. Again, *Bai Kamla v. Occhavlal Chaganlal*[5], also does not help the appellant because, in that case, it was only held that the rights of reversioners were extinguished in property governed by Section 14(1) of the Act. This provision, however, applies only to property which is in the possession of the widow at the time when the Act comes into force.

15. In *Rameshwar v. Hardas,*[6] it was held that the conception of a reversioner has not been wiped out by the Hindu Succession Act, but remains intact with regard to properties to which the widow does not get the right of a full owner under Section 14 of the Act. Hence, in that case, a reversioner's suit for a declaration of their rights with regard to the property not covered by Section 14 of the Act was held to be maintainable even after the passing of the Act. It was observed there:-

> "All the High Courts are further agreed that when a Hindu female makes an absolute transfer i. e. by sale or a gift, and puts the transferee in possession, she is not 'possessed' of any property within the meaning of Section 14 of the Hindu Succession Act. It is, thus, clear that in such property the Hindu female will not retain any interest at the date of her death. Section 15 of the Hindu Succession Act will, hence, not govern the succession to such property. There is no other provision of the Hindu Succession Act which may apply in such a situation. Consequently the rules of Shastric Hindu Law will be applicable. The reversioners, who are a creation of the Shastric Hindu Law, will continue to remain in the picture with reference to such property and will take the property on death of the female. Their right to challenge the validity of an alienation by a Hindu female recognized by the Shastric Hindu Law will continue, even after the Hindu Succession Act."

[4] AIR 1962 Cal 623 [6] AIR 1964 All 308

[5] AIR 1965 Guj 84

16. In *Radha Rani Bhargava v. H.P. Bhargava*[7], it was held that reversioners can file a declaratory suit challenging the validity of an alienation by a widow prior to the coining into force of the Act and can sue the alienee for possession after her death. In this case, there is an

observation that the reversioners can wait until the death of the widow "treating the alienation as a nullity without the intervention of the Court". In this case, the alienation itself was said to be a nullity as it was without legal necessity. It was not a case of donation which is binding for the life time of a widow.

17. In *Badri Pershad v. Smt. Kanso Devi*[8], it was held that the word "possessed" under Section 14(1) is generally used in its widest connotation and stands for possession which may be either actual or constructive or in any form recognized by law. Reliance was placed here upon two earlier decisions of the Supreme court in AIR 1959 Supreme Court 577 and *Sukh Ram v. Gauri Shanker*[9], As we have already observed cases of constructive possession can be distinguished from the case of a donee of a Hindu widow, who is in actual possession in his own right, although only for the widow's lifetime. Hence, these cases also do not help the appellant.

18. In *Jagat Singh v. Teja Singh*[10], A Full Bench of the Punjab High Court held that neither a widow nor a reversioner could recover possession during the widow's life of a property alienated by a widow where the alienation was binding upon her for life-time. Harbans Singh, J., quoted paragraph 176 of Mulla's Hindu Law (13th Edn.1966), describing the widow's estate as follows :-

> "A widow or other limited heir is not a tenant-for-life, but is owner of the property inherited by her subject to certain restrictions on alienation, and subject to its devolving upon the next heir of the last full owner upon her death. The whole estate is for the time vested in her, and she represents it completely. As stated in a Privy Council case, *Janaki Ammal v. Narayanasami*[11], her right is of the nature of a right of property; her position is that of owner; her powers in that character are, however, limited; but..... so long as she is alive no one has any vested interest in the succession."

19. After having surveyed all the authorities cited before us on the question that Section 14(1) of the Act had no application to the property which was not in the possession of the widow at the time when the Act came into force and that the property which had been donated by her was not such property as could be held to be in her constructive possession.

20. One of the contentions advanced by the learned counsel for the appellant was that the property which was the subject-matter of the declaration had been reconveyed by the donee to the widow before the enforcement of the Act and that this was mentioned in the judgment in the former suit. Hence, it was urged that she had become an absolute owner by reason of this alleged reconveyance. It appears to us, after perusing the judgment relied upon, that an application was made by the defendant, in the course of the hearing of that case, that the property had been returned to defendant No.I, but, apparently, there were no findings given on this question. There were no pleadings and no issue on such a

[7] AIR 1966 SC 216
[8] AIR 1970SC1963
[9] AIR 1968 SC 365
[10] AIR 1970 Pun and Har 309
[11]43 Ind App 207 at page 209 : AIR 1916 PC 117

question. The defendant had not applied for any amendment of the pleadings in that suit. The reference in the judgment, to the application of the defendant-appellant in that case, is the only supposed evidence before us for such an alleged return of the property by the donee to the widow. We may also observe that there is no such plea in the case before us and no issue was

framed on it here also. The question was not even raised in courts below. We are, therefore, unable to hold that this submission can help the appellant.
21. The next question which requires consideration is whether the succession to the property on the death of the widow is to be governed by the old Hindu Law or succession takes place in accordance with the provisions of the Act prevailing at the time of the death of the widow. There are conflicting authorities on this question. One view is that succession is to be traced back to the time when the last male holder died and the law prevailing at the time of the death of the last male owner would govern the succession. The other view is that succession would be governed by the Act which was applicable at the time of the death of the widow because the last male holder is deemed to have died on the date when the widow dies, and, therefore, his succession would be governed by the law prevailing at the time of this deemed demise.

22. In 62 Pun LR 537 : AIR 1960 Punjab 530 (FB), it was held that Sections 15 and 16 apply to the property belonging to a female and that these sections can apply only if and when the female owner in question has become absolute owner by virtue of the provisions of Section 14 of the Act. Here, one Smt. Rajo had parted with possession of the property before the commencement of the Act and could not obviously be deemed to be in possession of the property when the Act came into force. As she had not become its absolute owner, Sections 15 and 16 of the Act could not apply to the case. It was, however, urged that the decision of the majority in this Full Bench case was that, in such cases the old Hindu Law, prior to the enforcement of the Act would apply. On going through the judgment, it appears to us that it was assumed there that the old Hindu Law would apply because the case fell outside the scope and its provisions altogether. The applicability of Section 8, read with Section 4, of the Act seems neither to have been raised nor considered there. We may point out that the question referred for decision to the Full Bench in that case was:

> "Are the collaterals (reversionrs) of the last Hindu male holder entitled to file or; if filed already, to continue a suit after the enforcement of the Hindu Succession Act challenging an alienation effected prior to the enforcement of the Act by an intervening female heir, who at the time of the alienation held only a widow's estate."

The question referred to the Full Bench did not, in fact, require any determination of question relating to succession of property which was not in the possession of a widow and in which her rights had not been enlarged. Would the succession be governed, in such a case, by the old Hindu Law or under the law prevailing at the time when the limited owner of the property died? This question was not directly under consideration there. Such observations as may be found there on this question were mere obiter dicta.

23. The authorities cited in favour of the proposition that the successor to the estate of the last male holder has to be found in accordance with the law prevailing at the time of the death of the widow, that is to say, as laid down in the Act, *Gurmit Singh Partap Singh v. Tara Singh Sahib Singh*[12], *Mst. Taro v. Darshan Singh*[13], *Smt. Banso Karam Singh v. Charan Singh*[14], *S. Kuldip Singh v. Karnail Singh Bakshish*[15], *Mangla v. Smt. Nathiya*[16], *Labh Singh v. Mst. Nihal Kaur*[17], *Ramulu v. G. Venkanna Narayana*[18], and *Harbhaj v. Mohar Singh*[19],

24. The cases relied upon for the contrary view are: *Renuka Bala Chatterji v. Aswini Kumar*

Gupta[20]*, Bai Kamla v. Occhavlal Chhaganlal*[21]*, Rameshwar v. Hardas*[22]*,* and *Chaturbhuj v. Sarbeshwar*[23]*,*

25. In AIR 1960 Punjab 6, relying on AIR 1936 Lahore 124, it had been held that succession does not open to the heirs at the husband until the termination of the widow's estate. Upon its termination, the property descends to those who would have been the heirs of the husband if he had lived upto and died at the moment of her death. Further, it was held there that there is no vesting at the date of the husband's death. The death of a Hindu female life-estate holder opens the inheritance to the reversioners, and the one most nearly related at that time to the last full owner becomes entitled to possession. In her life time, however, the reversionary right is a mere possibility, or spes successionis, which is common to them all for it cannot be predicated who would be the nearest reversioner at the time of her death.

26. Similarly, in AIR 1960 Punjab 145, it was held that, where the last male holder dies, leaving a widow, before the Act, but the widow continues to live after the Act came in force, succession really opens on the demise of the intervening female heir, and it is wrong to say that the succession opens at the death of the last male holder.

27. AIR 1961 Punjab 45 was a case in which B, a Sikh governed by the Punjab customary law, had died leaving a widow and three daughters. In 1954, the widow had executed a deed of gift, in favor of her daughters, of the entire ancestral and non-ancestral property left by her husband. In 1955, the fifth degree collaterals brought a suit seeking a declaration that the deed of gift was void and inoperative against their interest after the death of the widow. The Hindu Succession Act came into force during the pendency of the suit, and it was not denied that the Act was applicable to the parties who were Sikhs. It was held that the widow held a widow's life estate, and, as, during her lifetime, the interest of the reversioners in the estate was contingent and a mere spes successionis, succession would open on the death of the widow and the property would devolve on the heirs of the last male holder, i. e., of B. Irrespective of the validity or invalidity of the gift made by the mother in favor of the daughters, the donees incontestably were found to be the next heirs with respect to the entire ancestral and non-ancestral property in view of the provisions of the Hindu Succession Act.

28. AIR 1961 Punjab 573, also lays down that, where the last male holder died before the Act coming into force and his widow died after the Act came into force and has not become absolute owner of the property, the heirs of her husband have to be found out according to the law when she died, i. e., under the Hindu Succession Act (1956) and not
according to the law as it existed before that Act.

[12] AIR 1960 Pun 6
[13] AIR 1960 Pun 145
[14] AIR 1961 Pun 45
[15] AIR 1961 Pun 573
[16]72 Pun LR 988 : AIR 1971 Pun 365
[17](1971) 73 Pun LR 413
[18] AIR 1965 And Pra 466
[19] AIR 1967 Pun 184
[20] AIR 1961 Pat 498
[21] AIR 1965 Guj 84
[22] AIR 1964 All 308
[23] AIR 1967 Pat 138

29. We find that cases reported in 72 Punj LR 988 : AIR 1971 Punjab 365; 1971-73 Pun LR 413 and AIR 1967 Punjab 184 follow the same rule. And, in AIR 1965 Andhra Pradesh 466, also the Punjab authority reported in AIR 1961 Punjab 573 was followed.

30. We may also cite: *Lala Duni Chand v. Mt. Anar Kali*[24]*,* This case involved an interpretation of the Hindu Law of Inheritance (Amendment) Act, 1929, which came into operation

immediately on the expiration of 20th February, 1929. The object of the Act was to alter the order of succession of certain heirs mentioned there, namely, a son's daughter, daughter's daughter, sister, and sister's son, and to rank them as heirs in the specified order of succession next after a father's father and before a father's brother. The question for determination in the appeal was whether, on a true construction of the Act, it applied only to the case of a Hindu male dying intestate on or after the 21st February, 1929 (the date of its commencement), or, whether it also applied to the case of such a male dying intestate before that Act, if he was succeeded by a female heir who died after that Act. Their Lordships, in this case, held:

> "Where a Hindu male died intestate before the Act came into operation (21st February, 1929) and was succeeded by a female heir who died after the Act came into operation, the succession to the estate opens out on the death of the female heir, and, hence, the Act will apply to the case and an heir under the Act will be entitled to succeed." Further, it was held here:
> "The death of a Hindu female owner opens the inheritance to the reversioners, and the one most nearly related at the time to the last full owner becomes entitled to possession. In her lifetime, however, the reversionary right is a mere possibility, or spes successionis, but this possibility is common to them all, for it cannot be predicated who would be the nearest reversioner at the time of her death."

31. On the strength of the abovementioned authorities, we have no hesitation in reaching the conclusion that succession in the case before us opened on the date of the death of Smt. Karju, which took place in the year 1964. The husband is deemed to have lived through her till her death. She was representing her husband till 1964, and, therefore, succession opened to the last male holder, not on the date of his actual death, but, on the date of his deemed death through his wife which actually occurred much after the enforcement of the Act. Since the old Shastric Hindu Law was not in force on the date when succession opened in 1964, that Law will have no application and it is the Hindu Succession Act which would apply. Hence, Section 8 of the Act will become applicable and govern the case.

32. According to the authorities which lay down a contrary view, succession is held to have opened on the date of the actual death of the last male holder and not on the date of the death of the widow. This view appears to be erroneous as succession could not open twice to the same individual; firstly, on the death of the last male holder; and, secondly, on the death of the limited owner, i.e., the widow. In a declaratory suit, the reversioner who institutes the suit can only get a declaration of his spes successionis. He can sue for possession on the basis of a decree only if he is the nearest heir entitled to succeed on the death of the female. But, the right to succeed is still one to the property of the last full-

[24] AIR 1946 PC 173

owner who was the husband. The husband cannot be said to have actually died twice, but for purposes of determining succession to his property, his death is only deemed to take place when succession to his property opens on the death of his widow. The question to be determined in accordance with Section 8 only arises after the Act has become operative and not before. In this view of the matter, no retrospective effect is given to the provisions of Hindu Succession Act. They are applied to a succession which opens after the Act becomes operative.

33. Again, Section 4 of the Act abrogates all the rules of law applicable to Hindu before the Act on matters provided for by the Act. The preamble to the Act shows that it is an Act intended "to amend and codify the law relating to intestate succession among Hindus." As was pointed out in *Commissioner of Income Tax v. Ram Rakshpal*[25], by Beg, J. (as he then was), the provisions of the Act have to be read as a whole.

34. Learned counsel for the appellant contends that the words "dies intestate", as used in Section 8, indicate that Section 8 would apply only in a case where a Hindu male dies after the Act had come into force. But, this interpretation does not appear to be correct. It was held in *Mt. Rajpali Kunwar v. Surju Rai*[26], that "dies intestate", used in Hindu Law of Inheritance (Amendment) Act (2 of 1929), refers only to the status of the deceased and not to the time of his death. Similarly, the words "dying intestate", in Section 8 of the Act before us, also do not seem to refer to the date of actual death of the last male Hindu owner but only to his status whenever his death may have occurred. We may now deal with the authorities relied upon on behalf of the appellant.
35. In AIR 1967 Patna 138, it was held by Division Bench of the Patna High Court.

> "It is well settled that when succession opens on the death of a limited owner in respect of the last male holder's estate, it will be according to the rule of succession as prevalent at the time of the death of the last male holder. (See *Renuka Bala Chatterji v. Aswini Kumar Gupta*[27],)."

In this case as well as in Renuka Bala's case (Supra), which was followed here, the ratio decidendi was that, the case having fallen outside the provisions of Section 15 of the Act, there was nothing in the Act which was applicable to the case, so that the law which prevailed when the last male owner died will apply. In Renuka Bala's case (Supra), it had been held by the Patna High Court that Section 15 of the Act is not retrospective but only prospective. That, however, is not a question arising in the case we are considering.

36. In the case before us, apart from house property, we are not dealing with property which had become vested in the Hindu widow as a full owner. We have already held that succession to the houses was governed by Section 15 of the Act because the widow had become their absolute owner. So far as other landed property was concerned the question of succession to it had also arisen only after the widow's death and the passing of the Act. Hence, Section 8 of the Act seems to us to be applicable to it. On this question, the Patna High Court, in Renuka Bala's case AIR 1961 Patna 498 (supra), had differed from the view taken by a learned Judge of that very Court in Lateshwar Jha v.Mt. Uma Ojhain, AIR 1958 Patna 502, where it was held:-

[25](1968) 67 ITR 164 (All)
[26]AIR 1936 All 507 (FB)
[27] AIR 1961 Pat 498

> "Section 8 will apply to all cases where a male Hindu dies intestate leaving behind his property, irrespective of the time of his death, and the words 'dying intestate' used in Section 8 are a mere description of the status of the deceased, and have no reference and are not intended to have any reference to the time of the death of a Hindu male."

The Patna High Court, in Renuka Bala's case (supra) also dissented from the view taken in AIR 1961 Punjab 45 by the Punjab High Court on which we have relied. It had explained away the

Privy Council decision in Duni Chand's case AIR 1946 PC 173 (supra).

37. With great respect, we concur with the view adopted by the Punjab High Court in Smt. Banso's case, AIR 1961 Punjab 45 (supra), and, so far as the meaning of the words 'dying intestate' is concerned, we find ourselves in agreement with the view of Raj Kishore Prasad, J., of the Patna High Court, in Lateshwar Jha's case AIR 1958 Patna 502 (supra). We find it difficult, for reasons given above, to accept the view of the Division Bench of the Patna High Court in Renuka Bala's case AIR 1961 Patna 498 (supra) so far as the interpretation of Section 8 is concerned.

38. In AIR 1964 Allahabad 308, on which we have relied in the earlier part of our judgment on another question, it was no doubt approvingly observed by a Division Bench of Allahabad High Court that the view taken by the Patna High Court in Renuka Bala's case AIR 1961 Patna 498 and other cases was in conformity with a Full Bench decision of the Patna High Court in *Harak Singh v. Kailash Singh*[28], but this observation was made with reference to the interpretation of Section 14 of the Act. We do not find that the Allahabad Division Bench discussed the question whether the order of succession laid down by Section 8 would apply or the Hindu law prior to the passing of the Act, which was in force at the time of the death of the last male owner, would apply to facts such as those which are before us. We, therefore, do not think that this decision advances the appellant's case that Section 8 of the Act would not apply to the case before us.

39. With much of what was held by Raju, J.,in AIR 1965 Gujarat 84 we agree, but we dissent from the view expressed there (at page 87) that if a widow out of possession, who is not entitled to an expansion of her rights under Section 14(I) of the Act, dies after the Act, the old Hindu Law of succession will apply. In this case also, the applicability of Section 8, read with Section 4 of the Act, was not considered.

40. After having carefully considered all the authorities which had been brought to our notice, we have come to the conclusion that succession to the property inherited by Smt. Karju as life-estate holder opened on her death. But, it was succession to property of which her deceased husband was the last male owner. Succession to that property of her deceased husband of which she had not become an absolute owner will be regulated by Section 8 of the Act irrespective of the date of death of the last male owner because the succession, which the law is to govern, opens after the Act. As the Act was operative when Smt. Karju, the widow, died. Section 4 of the Act makes it incumbent on us to apply to provisions of Section 8 to the case. In our opinion, the contention that, by doing so, we would be applying Section 8 retrospectively is erroneous. Upon an application of

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Section 8 to a situation which arose after the passing of the Act, we find that Thunia, the plaintiff, is the nearest heir entitled to succeed. The courts below had, therefore, rightly decreed the plaintiff's suit. This second appeal must fail and is liable to be dismissed with costs.

D.B. LAL, J.

41. I concur. I have nothing to add.

M.H. BEG, C. J.

42. I have gone through the judgment prepared by my learned brother Chet Ram Thakur where all the authorities cited before us have been comprehensively dealt with. I will only add that it will not be necessary for us to resort to a fiction - a device which should be avoided unless it is absolutely indispensable and obligatory under the law - that the last male owner of the property, although in fact dead, lives through his widow, in the eye of law until the widow also dies, if we adopt an alternative and perhaps simpler and equally well recognized but more realistic way of stating the position which emerges in such cases. This is that the vesting of property in a new absolute owner is interrupted or obstructed from taking place by the interposition of the widow's life-estate. The result is that, despite the death of the last male owner, the vesting of absolute ownership in a new owner is necessarily postponed until the obstruction is removed.

43. No doubt, the fiction that "the husband lives in the life of the widow and dies at the moment of her death" has been a well recognised rule of Hindu Law, as pointed out by Mehar Singh, J., in 62 Pun LR 537 at p.540 : AIR 1960 Punjab 530 (FB). It was acted upon by the Privy Council in *Moniram Kolita v. Keri Kolitani*[28], But, in view of Section 4 of the Hindu Succession Act, it may not be permissible to rely on this rule if the position is otherwise fully covered, as it seems to be, by the Act. Sir Henry Maine, in his "Ancient Law", pointed out that legal fictions, which Bentham disapproved of so much, need be employed only at the stage of evolution of law when its direct development by resort to legislation is difficult. The grip of the fiction that the husband and wife are one upon English law could only be released by legislation in this century. It is, it seems to me, preferable to avoid such a fiction when the statutory provisions are sufficient to cover a situation. I think my learned brother's judgment also indicates that they are sufficient.
44. It is the law which operates when the obstruction is removed, by the death of the life-estate holder, which will govern succession in the case before us because succession could really be said to open only then. To hold that this view involves giving a retrospective operation to the provisions of the Act would be to overlook the exact time at which succession opens and to assume that it opens at the death of the last male owner. Such an assumption is, as my learned brother has pointed out with the help of ample authority, erroneous.
45. I concur, subject to the observations made above, with the judgment and the order proposed by my learned brother.

BY THE COURT
[28](1880) ILR 5 Cal 776 (PC)
46. For the reasons given above we dismiss this appeal with costs.
Appeal dismissed.