

# MADHYA PRADESH HIGH COURT

Nahar Hirasingh

Vs.

Mst. Dukalhin

Letters Patent Appeal No. 20 of 1968, against Judgement of R.J. Shave, J., in Second Appeal No. 468 of 1963  
(P.K. Tare, C.J., Raina and Dube, JJ.)

16.11.1973

## JUDGMENT

**Tare, C.J.**

1. This opinion shall govern the disposal of this Letters Patent. Appeal as also the Second - (*Durgaprasad v. Chunnilal*). <sup>1</sup>
2. The present Letters Patent Appeal has been referred to this Court for decision of the entire appeal by a Division Bench of this Court, by order, dated 31-3-1971, as also for decision of the question whether a Bhumiswami under the Madhya Pradesh Land Revenue Code, 1959, is a tenure holder within the meaning of Section 4 of the Hindu Succession Act, 1956. That question is also involved in Second Appeal No. 91 of 1966 (Madh Pra). Therefore, by this opinion, we propose to decide that question and later on, we propose to decide the Letters Patent Appeal on merits. On expression of the opinion on the question referred. Second Appeal No, 91 of 1966, will have to go back to the Single Bench for decision on merits in accordance with the opinion of this Full Bench Along with these two cases. Second (*Madh Pra*) - (*Smt. Rangu v. Anji*) <sup>2</sup> had already been referred to this Full Bench for opinion on the question relating to Section 184 of die Madhya Pradesh Land Revenue Code. 1959. However, in that case it was found that the appellants and respondents were remoter heirs and the deceased Krishnarao had left a son, whose existence was disclosed during the pendency of the case before this Full Bench. Therefore, the decision of the question referred was more or less of an academic nature and consequently, by order, dated 25th September, 1973, we allowed that appeal and dismissed the plaintiffs" suit holding that the plaintiffs and defendants had no right to the property left by the deceased Krishnarao, whose son is

living. In the presence of the son, other remoter heirs could have no claim to the property of the deceased.

3. In the Letters Patent Appeal, one more question of law is involved namely, whether under Section 164 as it stood then, the female mentioned in Sub-Section (2) of Section 164 of the M.P. Land Revenue Code, 1959, was a female who had herself inherited the property under Sub-Section (1) of that Section. For that reason the entire case was referred to this Full Bench for decision on merits.

4. For the purpose of giving our opinion whether a Bhumiswami under the M.P. Land Revenue Code, 1959, is a tenure holder within live meaning of Section 4 of the Hindu Succession Act, 1956, it is not necessary for us to state the facts of the two cases in details. But, we may have to take note of the trend of decisions on this point with reference to the provisions of the M.P. Land Revenue Code, 1959, and the Hindu Succession Act, 1956. We shall come to facts when we decide the Letters Patent Appeal on merits.

5. The M.P. Land Revenue Code, 1959, came into force on 2-10-1959. Before that the M.P. Land Revenue Code, 1954 (Act No. 2 of 1965) came into force on different dates. Section 1 and Section 242 of the Act came into operation immediately. i.e. on publication of the Act in the M.P. Gazette (Extraordinary) dated 12-2-1955, and the remaining Sections were to come into force from such date as the State Government might by Notification appoint. The appointed date was 1-10-1955. The said Act contemplated two kinds of tenure holders, as per Section 145 of that Act, namely, (i) Bhumiswami and fill Bhumidhari. Section 146 of the Act defines a "Bhumiswami" to mean every person, who at the coming into force of this Code belonged to any of the following classes and he was to have all the rights and be subject to all the liabilities conferred or imposed upon a Bhumiswami by or under the Code, namely :-

- (a) Every person in respect of land held by him as a malik-makbuza or a plot proprietor in the Central Provinces or the merged territories;
- (b) Every person in respect of land lawfully hold by him as house site in abadi in the Central provinces or the merged territories;
- (c) Every person in respect of land held by him as a raiyat malik in the Central Provinces;
- (d) Every person in respect of land held by him as an absolute occupancy tenant

in the Central Provinces;

(e) Every person in respect of land held by him as an occupant in Berar;

(f) Every person in respect of land held by him as an ante-alienation tenant or a tenant-of-antiquity in Berar in respect of which he has become lessee of the State under Sub-Section (2) of Section 68 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals. Alienated Lands) Act, 1950.

Section 347 of the said Code defines a "Bhumidhari" as under :- Every person who at the coming into force of this Code belonged to any of the following classes shall be called a Bhumidhari and shall have all the rights and be subject to all the liabilities conferred or imposed upon a Bhumidhari by or under this Code, namely :-

(a) every person in respect of land held by him as an occupancy tenant in the Central Provinces;

(b) every person in respect of land held by him as a raiyat or raiyat sarkar in the Central Provinces;

(c) every person in respect of land held by him as a raiyat or tenant in the merged territories;

(d) every person in respect of land held by him as a lessee of the State Government under Sub-Section (2) of Section 68 of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950, not falling under clause (f) of Section 146, Section 148 of the Code provided that every Bhumiswami or every Bhumidhari was liable to pay land revenue -

(a) if he was paying land - revenue in respect of the lands held by him - such land - revenue, and

(b) if he was paying rent in respect of the lands held by him - an amount equal to such rent.

6. Therefore from the said provisions it is clear that the phrase "tenure holder" included not only Bhumiswamis, who were akin to plot-proprietors, or raiyat malik but also Bhumidharis, some of whom were at least considered to be tenants under the C.P. Tenancy Act, 1920. Bhumidharis had lesser rights. However. Section 150 of the Code provided that they could acquire Bhumiswami rights by applying to the Revenue Officer by filing an application and by depositing three times the revenue assessed on the holding. Section 151 of the Code regarding devolution of the rights of the tenure holder was the subject-matter of several decisions of this Court as also the Bombay

High Court. For the sake of convenience we might reproduce the said section, which is as follows:-

"Section 151. - Subject to his personal law the interest of a tenure holder shall on his death pass by inheritance survivorship or bequest, as the case may be." Therefore, it is clear that the said section contemplated devolution of the rights of the tenure holder, which would include devolution of the tenancy rights as well. It is this scheme of the said Code, which would be material for consideration of the instant question referred to this Full Bench. Presently, we propose to consider the provisions of the M.P. Land Revenue Code, 1959. But before that, we may refer to the divergent opinion expressed in some cases.

7. In *Bhagatram v. Sitaram*,<sup>3</sup> decided by P.R. Sharma, J. and *Bhondu v. Mira*,<sup>4</sup> decided by one of us, namely. Tare, J., it was held that the personal law mentioned in Section 151 of the M.P. Land Revenue Code, 1954, would be the Hindu Law as amended by the Hindu Succession Act, 1956. However, when the matter came up for consideration before K.L. Pandey, J. in *Kumari Ramlali v. Mst. Bhaguntibai*.<sup>5</sup> the learned Judge did not accept the view as propounded by the other Single Judges of this Court and purported to follow the view as expressed by Vyas, J. of the Bombay High Court in *Sitabai v. Kothulal Lodhi*,<sup>6</sup> wherein Vyas, J. with reference to Section 151 of the M.P. Land Revenue Code, 1954, held that the personal law contemplated in that Section would mean the personal law prevailing on the date the M.P. Land Revenue Code, 1954, was enacted and not the personal law as may be amended from time to time. In that view Vyas, J., held that the Hindu Succession Act, 1956, would altogether be out of consideration for ascertaining the devolution of interest of a tenure holder and the learned Judge., held that so far as the law regarding the devolution of tenancy rights in respect of agricultural holdings among Hindus was concerned, the principle of reversion still holds good, notwithstanding the enactment of the Hindu Succession Act, 1956. In that view, the suit filed by the reversioner was held tenable by the learned Judge.

8. However, that view of Vyas, J. did not find favor before a Division Bench of the Bombay High Court in *Smt. Indubai Naik v. Vyankati Vithoba*,<sup>7</sup> Although the learned Judges constituting the Division Bench overruled the case decided by Vyas, J. by holding that the personal law applicable to devolution of tenure holder's right would be the law as amended subsequently by the Hindu Succession Act, 1956, yet in the opinion of the learned Judges of the Division Bench. Section 4(2) of the Hindu

Succession Act, 1956, contemplated a law for devolution of tenancy rights and in the opinion of the Division Bench, the M.P. Land Revenue Code, 1954, was not a tenancy legislation, the exception made in Section 4(2) of the Hindu Succession Act, 1956, will not be applicable. Thus, the Division Bench laid down two propositions, one was that the personal law as amended from time to time will be applicable when the question of devolution comes up for consideration and the question of devolution cannot be decided merely with reference to the personal law existing at the commencement of the M.P. Land Revenue Code, 1954, and secondly, the M.P. Land Revenue Code, 1954, not providing for devolution of tenancy rights, but for devolution of tenure holder's rights. Section 4(2) of the Hindu Succession Act, 1956, would not at all be attracted.

9. However, when the case of C.A. No. 69 of 1963, D/-6-4-1965 (Madh Pra) (supra), decided by K.L. Pandey, J., came up for consideration before a Division Bench of this Court in a Letters Patent Appeal, reported as *Kumari Ramlali v. Mst. Bhaguntibai*,<sup>8</sup>, Dixit, C.J., and Bhave, J., held that the personal law referred to in Section 151 of the M.P. Land Revenue Code, 1954, would mean the personal law applicable as on the date when the succession opened and not the personal law as it existed on the date of commencement of the said Code. The Division Bench preferred the view expressed in the Division Bench case of the Bombay High Court in AIR 1966 Bombay 64 (supra) and dissented from the view of Vyas, J., expressed, in AIR 1959 Bombay 78 (supra). Similarly, the view as expressed in the Single Bench decisions of this Court was also approved. However, as regards the applicability of Section 4(2) of the Hindu Succession Act, 1956, the Division Bench laid down that the same contemplates the law relating to devolution of tenancy rights and not the rights of tenure holders and in that view, Section 151 of the M.P. Land Revenue Code, 1954, cannot be said to be dealing with devolution of interest of tenancy rights, but it relates to devolution of tenure holder's rights. It is this aspect particularly which was made the subject-matter of arguments before the Full Bench and the learned Counsel for the appellants criticized this view saying that there is as real distinction of this sort as the M.P. Land Revenue Code, 1954, and the M.P. Land Revenue Code, 1959, have made provision not only for tenure holders rights, but also for devolution of tenancy rights. According to the learned Counsel, the phrase "devolution of tenancy rights" occurring in Section 4(2) of the Hindu Succession Act, 1956, has been used in a broad and comprehensive sense so as to include all legislations providing for devolution of land tenures and not necessarily restricted to devolution of rights of persons, who might be considered to be

tenants under any Land Revenue or Tenancy Act. It is, therefore, necessary for us to examine this aspect.

10. Before examining this question, especially with reference to the provisions of the M.P. Land Revenue Code, 1959, we may advert to a Supreme Court decision wherein their Lordships had to construe the word "estate" occurring in Article 31-A(2)(a) of the Constitution of India with reference to the Kerala Agrarian Relations Act, 1961, wherein then Lordships made the following observations; in *Purushothaman Nambudiri v. State of Kerala*,<sup>9</sup>

"In this connection it is pertinent to remember that the Constitution-makers were aware that in several local areas in the country where the zamindari tenure did not prevail the expression "estate" as defined by the relevant law included estates which did not satisfy the requirement of the presence of intermediaries, and yet clause (2)(a) expressly includes estates in such areas within its purview and that incidentally shows that the concept of "estate" as contemplated by clause (2)(a) is not necessarily conditioned by the rigid and inflexible requirement that it must be landlord-tenure of the character of zamindari estate. That is why, treating the expression "estate" as of wide denotation in every case we will have to enquire whether there is a local definition of "estate" prevailing in the relevant existing law; if there is one that would determine the nature of the property. If there is no definition in the relevant existing law defining the word "estate" as such, we will have to enquire whether there is a local equivalent, and in that connection it would be necessary to consider the character of the given agricultural property and its attributes and then decide whether it can constitute an estate under clause (2)(a). If the expression "estate" is construed in the narrow sense in which the petitioner wants it to be construed then it may not be easy to reconcile the said narrow denotation with the wide extent of the word "estate" as is defined in some local definitions of the word "estate". Therefore, in deciding the question as to whether the properties of the petitioner are an "estate" within the meaning of Article 31-A(2)(a) we are not prepared to adopt the narrow construction that the estate must always and in every case represent the estate held by zamindars or other similar intermediaries who are the alienees of land revenue."

Further on, their Lordships observed as follows in para 24 of the majority decision :

"It is necessary therefore to have some basic idea of the meaning of the word "estate" as used in Article 31-A(2)(a). As we have said already where the word "estate" as such is used in the existing law relating to land tenures in force in a particular area, there is no difficulty and the word "estate" as defined in the existing law would have that meaning for that area and there would be no necessity for looking for a local equivalent. But where the word "estate" as such is not defined in an existing law it will be necessary to see if some other term is defined or used in the existing law in a particular area which in that area is the local equivalent of the word "estate". In that case the word "estate" would have the meaning assigned to that term in the existing law in that area. To determine therefore whether a particular term defined or used in a particular area is the local equivalent of the word "estate" as used in Article 31-A(2)(a) it is necessary to have some basic concept of the meaning of the word "estate" as used in the relevant Article of the Constitution. It seems to us that the basic concept of the word "estate" is that the person holding the estate should be proprietor of the soil and should be in direct relationship with the State paying land revenue to it except where it is remitted in whole or in part. If, therefore, a term is used or defined in any existing law in a local area which corresponds to this basic concept of "estate" that would be the local equivalent of the word "estate" to that area. It is not necessary that there must be an intermediary in an estate before it can be called an estate within the meaning of Article 31-A(2)(a); it is true that in many cases of estates such intermediaries exist, but there are many holders of small estates who cultivate their lands without any intermediary whatever. It is not the presence of the intermediary that determines whether a particular landed property is an estate or not; what determines the character of such property to be an estate is whether it comes within the definition of the word "estate" in the existing law in a particular area or is for the purpose of that area the local equivalent of the word "estate", irrespective of whether there are intermediaries in existence or not. This, in our opinion, is also borne out by consideration of the relevant decisions of this Court to which we will now turn."

11. Thus, their Lordships held that purport of the Kerala Agrarian Relations Act, 1961, was to alter the rights conferred by Proclamation of Cochin (1905), vide clauses 13 and 14 and to confer on the holding of Pandaravaka Verumpattom tenure holder better

rights from that of a tenant into that of a proprietary holder and in that view, their Lordships held that Pandaravaka Verumpattom would be regarded as a local equivalent of an estate under clause (2)(a) of Article 31-A of the Constitution of India.

12. We may then advert to the relevant provisions of the M.P. Land Revenue Code, 1959, Chapter XII relates to tenure-holders. The two classes of tenure-holders, namely, Bhumiswami and Bhumidhari in the M.P. Land Revenue Code, 1954, were made into one class of tenure-holders, known as Bhumiswami by virtue of Section 157 of the new Code. Section 158 provided for different classes of persons, who would become Bhumiswami. The said section is as follows :-

"S. 158. Bhumiswami - Every person, who at the time of coming into force of this Code, belongs to any of the following classes shall be called a Bhumiswami and shall have all the rights and be subject to all the liabilities conferred or imposed upon a Bhumiswami by or under this Code, namely :-

(a) every person in respect of land held by him in the Mahakoshal region in Bhumiswami or Bhumidhari rights in accordance with the provisions of the Madhya Pradesh Land Revenue Code, 1954 (II of 1955) :

(b) every person in respect of land held by him in the Madhya Bharat region as a Pakka tenant or as a Muafidar, Inamdar, or Concessional holder, as defined in the Madhya Bharat Land Revenue and Tenancy Act, Samvat 2007 (66 of 1950) :

(c) every person in respect of land held by him in the Bhopal region as an occupant as defined in the Bhopal State Land Revenue Act, 1932 (IV of 1932);

(d)(i) every person in respect of land held by him in the Vindhya Pradesh region as a Pachpan Paintalis tenant, Patedar tenant, a grove holder or as a holder of a tank as defined in the Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (III of 1955);

(ii) every person in respect of land other than land which is a grove or tank or which has been acquired or which is required for Government or public purposes held by him in the Vindhya Pradesh region as a Gair Haqdar tenant and in respect of which he is entitled to a Patta in accordance with the provisions of Sub-Section (4) of Section 57 of the Rewa State Land Revenue and Tenancy Code, 1935;

(iii) every person in respect of land held by him as a tenant in the Vindhya Pradesh region and in respect of which he is entitled to a Patta in accordance

with the provisions of Sub-Sections (2) and (3) of Section 151 of the Vindhya Pradesh Land Revenue and Tenancy Act, 1953 (III of 1955), but has omitted to obtain such Patta before the coming into force of this Code;

(e) every person in respect of land held by him in Sironj region as a Khatedar tenant or as grove holder as defined in the Rajasthan Tenancy Act, 1955 (3 of 1955);"

13. Thus, Bhumiswamis under the new Code would encompass not only plot-proprietors, but also persons who were considered to be tenants previously. Thus, Bhumiswami under Section 158 of the M.P. Land Revenue Code, 1959, comprises of all categories, whether plot-proprietors or tenants and they are made into a single category of tenure-holder.

14. Section 164 of the said Code provides for devolution. The section as it originally stood with which we are concerned was as follows :-

"164. Devolution. - (1) Notwithstanding any law, custom or usage to the contrary the interest of a Bhumiswami shall on his death devolve in accordance with the order of succession given below :-

Class I - Son, predeceased son's son, son of a predeceased son's predeceased son, widow or husband as the case may be, predeceased son's widow, widow of a predeceased son's predeceased son and widow of a predeceased son's predeceased son's predeceased son.

Explanation I - A grand son whose father is dead and great grandson whose father and grandfather are both dead shall inherit equally with the son.

Explanation II - The widow of the deceased or if there are more widows than one, all his widows together shall take the same share as that of a son. The widow of a predeceased son shall inherit in the manner as a son if there is no son surviving of such predeceased son, and in the like manner as a son's son, if there is surviving a son or a son's son of such predeceased son. The same rule shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

Class II - Daughter.

Class III - Father.

Class IV - Mother (if she is a widow).

Class V - Step mother (if she is a widow).  
Class VI - Brother of the whole blood.  
Class VII - Brother of the half blood (being a son of the same father).  
Class VIII - Daughter's son.  
Class IX - Brother's son.  
Class X - Brother's sons' son.  
Class XI - Father's father.  
Class XII - Father's mother (if she is a widow).  
Class XIII - Sister.  
Class XIV - Sister's son.  
Class XV - Paternal uncle (father's brother).  
Class XVI - Paternal uncle's son (father's brother's son).  
Class XVII - Paternal uncle's son's son.  
Class XVIII - Father's father's father.  
Class XIX - Father's father's mother (if she is a widow).  
Class XX - Father's paternal uncle.  
Class XXI - Father's paternal uncle's son.  
Class XXII - Father's paternal uncle's son's son.

Explanation - (1) If there are more heirs than one of the same class, other than Class I, who shall inherit per stirpes, all shall share equally.

(2) Notwithstanding anything contained in Sub-Section (1) where the interest of a Bhumiswami is inherited by a female :-

(a) from her father or mother, such interest on the death of the female shall, in the absence of her heirs of Class I or Class II of the order of succession specified in Sub-Section (1), devolve upon the nearest surviving heir of her father as ascertained in accordance with the provisions of Sub-Section (1).

(b) from her husband or her father-in-law such interest on the death of the female shall, in the absence of her heirs of Class I or Class II of the order of succession specified in Sub-Section (1), devolve upon the nearest surviving heir of her husband as ascertained in accordance with the provisions of Sub-Section (1).

(c) as a widow, mother, father's mother or father's father's mother such interest shall, on her remarriage, devolve upon the nearest surviving heir of the last male holder of such interests as ascertained in accordance with the provisions of Sub-Section (1).

(3) Where the total area of land in possession of a Bhumiswami together with the land which he is entitled to inherit under this section exceeds the prescribed ceiling limit, so much of the inheritable land as makes the total exceed the prescribed ceiling limit shall after selection by the Bhumiswami and demarcation in the prescribed manner devolve upon the other heirs of the propositus as ascertained in accordance with the provisions of Sub-Section (1)."

14-A. However, this section was repealed by the M.P. Land Revenue Code (Amendment) Act No. 38 of 1961, which came into force with effect from 8-12-1961 and again the personal law was made applicable to devolution of Bhumiswami rights and property of the Bhumiswami after his death is to pass by inheritance, survivorship or bequest, as the case may be. However, we are not concerned with the law as amended by Act No. 38 of 1961, but by the original provision which remained in force till 8-12-1961.

15. The counsel for both the parties agreed that in the Letters Patent Appeal as Mst. Dukalhin remarried on 31-3-1960, succession to her would have to be traced out in accordance with Section 164 of the M.P. Land Revenue Code, 1959, as it originally stood before the said amendment. Similarly it was also agreed by the learned Counsel for both the parties in Second Appeal No. 91 of 1966 that Sukbiram died on 19-2-1961 and that would be the relevant date when succession to her would have to be traced out. Thus, this position is not disputed that both these cases are governed by the original Section 164 of the M.P. Land Revenue Code, 1959, as it originally stood, provided that notwithstanding any law, custom or usage to the contrary, the interest of a Bhumiswami would devolve in accordance with the table of heirs given in that Section. This would necessarily mean that the provisions of any other enactment, including the personal law, would not apply to devolution of interest of a Bhumiswami and such question would have to be decided according to the table of heirs given in the said Section and not otherwise.

16. We may then consider the Division Bench case of AIR 1968 Madhya Pradesh 247. We may also observe that a similar view was taken by another Division Bench in *Heeralal v. Smt. Budhivarin*,<sup>10</sup> In that case the Division Bench, presided over by T.C. Shrivastava and O.P. Singh, JJ., held that Bhumiswami rights could not be equated with tenancy rights as Section 4(2) of the Hindu Succession Act, 1956, put devolution of tenancy rights only outside the purview of that Act, the said section would not

apply to Bhumiswami rights and consequently devolution of Bhumiswami rights would be governed by the Hindu Succession Act, 1956. For that proposition the Division Bench relied on the Division Bench case of the Bombay High Court in AIR 1966 Bombay 64. The learned Judges also considered the question regarding the legislative competence of the Proclamation to enact a law with reference to Entry 18 in List II of the VIIth Schedule to the Constitution. The learned Judges expressed the opinion that the matter would fall within the ambit of Entry 5 of List III of VIIth Schedule of the Constitution of India and that being a concurrent subject, the Parliament would have the power to modify the Hindu Law relating to widow's estate as indicated in Section 14(2) of the Hindu Succession Act. In that view, the learned Judges held that Mst. Budhiyarin became an absolute owner and the alienation made by her could not be challenged by the reversioners on the ground of her limited interest.

17. Before expressing our opinion, we may as well refer to the two Single Bench decisions of this Court on this subject; one is *Rajaram v. Dindayal*,<sup>11</sup> decided by one of us, namely, Tare, J. and the other is *Gopikabai v. Bajva*,<sup>12</sup> decided by Shiv Dayal, J. In 1971 MPLJ 172 (supra), Tare, J., held that in order that Section 14(1) of the Hindu Succession Act should apply conferring absolute estate on a widow, it would be necessary that the widow should not only possess the right to hold property, but also she must be in possession when the Succession Act came into force. If either of the two requisites is absent, Sub-Section (1) of Section 14 of the Act will not be attracted. It is not necessary that the right and possession should co-exist. What would be necessary would be that at some point of time they should co-exist, although they may come into existence at different points of time. With reference to the applicability of Section 164 of the Land Revenue Code, 1959, the view as expressed in the Division Bench case of the Bombay High Court in AIR 1966 Bombay 64 (supra) was followed drawing a distinction between tenure rights and tenancy rights.

18. In 1971 MPLJ 335 (supra), Shiv Dayal, J., also expressed the opinion that Section 151 of the M.P. Land Revenue Code, 1954, which deals with the devolution of interest of a Bhumiswami or a Bhumidhari tenure holder could not be regarded as a provision dealing with devolution of tenancy rights. Consequently, Section 4(2) of the Hindu Succession Act, 1956, would in no way save Section 151 of the M.P. Land Revenue Code, 1954, and it could not be held that the Hindu Succession Act does not affect the personal law according to which the devolution of interest of a tenure-holder passes

under Section 151 of the Code. In order to attract Section 4(2) of the Hindu Succession Act, the legislation must provide for devolution of tenancy rights. As regards the applicability of Section 15 of the Hindu Succession Act, 1956, the learned Judge held that the crucial date would be the date of the death of the female and not the date of the death of the husband from whom she may have inherited the property.

19. Thus, in all these, cases following the view of the Division Bench of the Bombay High Court in AIR 1966 Bombay 64 (supra), opinion has been expressed that Section 4(2) of the Hindu Succession Act, 1956, contemplates devolution of tenancy rights and not the rights of tenure-holders. Therefore, Section 4(2) of the Hindu Succession Act, 1956, would not come in the way of applying the provisions of the Hindu Succession Act, 1956, to cases of devolution of interest of tenure-holder's rights.

20. In this connection we find that the word "tenure" has been defined by Stroud in his Judicial Dictionary of Words and Phrases (Third Edition), Volume 4, at page 2995 as follows :-

" "Tenure" word signifies the relation of tenant to lord."

The Dictionary meaning is comprehensive enough to include all cases as between the landlord and tenant, including the incidence of tenure holders.

21. Similarly, Jowitt, in his Dictionary of English Law, (1959 Edition), Volume 2. at page 1374, defined the word "tenure" as follows :-

" "Tenure" in its general sense is a mode of holding or occupying."

22. In the light of these Dictionary meanings attributed by the learned authors to the word "tenure", we feel that the Parliament while using the word "devolution of tenancy rights" in Section 4(2) of the Hindu Succession Act, 1956, intended to use it in a broad and comprehensive sense so as to include devolution of all rights relating to tenancies, including those of tenure-holders and that there is no real distinction between the two, as was sought to be made out by the Division Bench of the Bombay High Court in AIR 1966 Bombay 64 (supra) and by a Division Bench of this Court in AIR 1968 Madhya Pradesh 247 (supra). Our reason for coming to this conclusion is that the provisions of the M.P. Land Revenue Code, 1954 and also those in the M.P. Land Revenue Code, 1959, contemplate a tenure-holder to mean not only a plot

proprietor, but also a tenant, who previously was considered as such and on whom better rights are intended to be bestowed, by this new enactment. For this reason we feel that the distinction is not very real but imaginary and that the Parliament while using the phrase in Section 4(2) of the Hindu Succession Act, 1956, meant to use it in a broadest possible sense so as to include all rights of devolution in relation to agricultural lands not only confined to tenancy rights, but also to tenure-holder's rights. However, the actual effect of this would be that where a tenancy or a land tenure legislation makes a special provision for devolution of rights to lands, that provision will prevail and in that event, Section 4(2) of the Hindu Succession Act, 1956, will make the provisions of the Hindu Succession Act, 1956, inapplicable to such devolutions provided by the tenancy or the land tenure legislations. But, if the land tenure legislation itself makes the personal law of the parties applicable in that event certainly, the Hindu Succession Act, 1956, or any other personal law, such as the Mohammadan Law or the Indian Succession Act, 1925, will be applicable.

23. The real difficulty that we are finding in accepting the view of the Division Bench of the Bombay High Court in AIR 1966 Bombay 64 (supra) and the case of AIR 1968 Madhya Pradesh 247 (supra), is that if we confine the meaning of the phrase "devolution of tenancy rights" occurring in Section 4(2) of the Hindu Succession Act, 1956; in that event especially the tenancy legislation or tenure-holder legislation will be applicable to devolution of rights of tenants proper, such as occupancy tenants or absolute occupancy tenants envisaged by the C.P. Tenancy Act, 1920, and they will not be applicable to Bhumiswami or Bhumidhari rights, which are tenure-holder rights. This line of reasoning would ignore the fact that the very absolute occupancy tenant had been made Bhumidharis under the M.P. Land Revenue Code, 1954, and even these Bhumidharis along with Bhumiswamis will be considered to be tenure-holders. Thus, if we were to adopt the reasoning of the Division Bench of the Bombay High Court and this Court, we would be led into an anomalous and untenable situation of excluding the due operation of the Hindu Succession Act, 1956, on wrong premises. Therefore, we do not approve of the view expressed by the two Division Benches as on this point we hold that Section 4(2) of the Hindu Succession Act, 1956, would encompass any legislation providing for devolution of tenure-holder or tenancy right. The phrase, in our opinion, has been used in its broader sense. On a perusal of several Land Revenue Acts and Tenancy Acts, we find that although as Act may be named as a Tenancy Act, it does encompass matters which may strictly not be described as tenancy lights. For instance, the C.P. Tenancy Act, 1920, pertaining to the rights of Sir

Holders and also Khudkasht holders, which were proprietary rights. In the broad sense tenancy legislation might encompass rights pertaining to lands including rights of tenure-holders and it is from that point of view that the Parliament used the word devolution of tenancy rights so as to include not only the rights of tenant proper, but also rights of tenure-holders may be of different kinds. Therefore, in our view, the special provisions made in any tenancy legislation with respect to devolution of tenancy rights or tenure-holder's rights would govern the matter so as to exclude the operation of the provisions of the Hindu Succession Act, 1956, which would, however be applicable if the tenancy or the tenure-holder legislation itself makes provision for that. On this particular point we would overrule the Division Bench case of this Court in AIR 1968 Madhya Pradesh 247 (supra), as also other cases which might have taken that view following the Division Bench view of the Bombay High Court. It is not necessary for us to mention all those Single Bench cases.

24. This brings us to the other question as to which personal law would govern the matter of devolution. In this connection we would affirm the view of the Division Bench of this Court in AIR 1968 Madhya Pradesh 247 (supra), which has followed the view of the Bombay High Court in AIR 1966 Bombay 64 (supra). In our opinion, the said two Division Bench cases had taken the correct view and the personal law applicable will be the law as amended from time to time up to the stage when the relevant question of devolution comes to be considered. If we were to accept the untenable view of Vyas, J., it would imply as pointed out in one of the Single Bench decisions of this Court that the question of succession will have to be considered with reference to the point of time when a person is alive. That will clearly be absurd, and such an interpretation cannot be permitted as was put on Section 151 of the M.P. Land Revenue Code, 1954, by Vyas, J., of the Bombay High Court and by K.L. Pandey, J., of this Court.

25. This brings us to the next question whether succession provided by Section 164 of the M.P. Land Revenue Code, 1959, as it stood before its amendment in 1961, was a valid provision or it was ultra vires in view of Section 4 of the Hindu Succession Act, 1956. The learned Chief Justice sitting singly in Second Appeal No. 91 of 1966 (Madh. Pra.) was of the opinion that the Division Bench of this Court in AIR 1963 Madhya Pradesh 247 had taken the view that this provision was ultra vires. The learned Chief Justice was not in agreement with that conclusion and consequently, he referred the said case to the Full Bench. This very question is involved in the Letters

Patent Appeal and the earlier question that we have discussed, whether a Bhumiswami is a tenure-holder and not a tenant within the meaning of Section 4 of the Hindu Succession Act, 1956, is also involved in both these cases.

26. As regards the question whether Section 164 of the M.P. Land Revenue Code, 1959, is ultra vires in view of Section 4 of the Hindu Succession Act, 1956, the Division Bench in AIR 1968 Madhya Pradesh 247 (supra), did not as such declare Section 151 of the M.P. Land Revenue Code, 1954, ultra vires, but certain observations might lead to that suggestion. We may observe that certain obiter observations do not amount to deciding the point and we do not think that the Division Bench of this Court actually intended to examine the constitutionality of Section 151 of the M.P. Land Revenue Code, 1954. However, it does appear that the other Division Bench in F. A. No. 13 of 1964, D/-12-3-1968 (Madh Pra) did purport to consider the constitutionality of Section 151 of the M.P. Land Revenue Code, 1954. In that case it was argued on behalf of the appellant, Hiralal that the Hindu Succession Act had no application to agricultural lands as it is beyond the competence of the Central Legislature to legislate on any matters relating to agricultural lands. According to the learned Counsel, the matter falls under Entry 18 in List II of the Seventh Schedule to the Constitution. On the other hand, the contention of the learned Counsel for the respondents was that the Parliament was competent to enact the legislation for devolution under Entry 5, in List III of the Seventh Schedule to the Constitution. The Division Bench held that the Parliament was competent to legislate in respect of devolution under Entry 5 in List III of the Seventh Schedule of the Constitution and the Division Bench purported to follow the Full Bench decision of the Punjab High Court in *Amar Singh v. Baldev Singh*,<sup>13</sup> In that view, the contention of the appellant in that case was negatived.

27. We may advert to another Division Bench case of the Allahabad High Court in *Smt. Prema Devi v. Joint Director of Consolidation (Head Quarters) at Gorakhpur Camp*,<sup>14</sup> on account of which probably, the learned Chief Justice might have thought it proper to refer the present cases to a Full Bench. In that case B. Dayal, J., (as he then was) sitting with Lokur, J. expressed the following view :-

"In the first place, we are of the opinion that the Hindu Succession Act, 1956, cannot be made applicable to agricultural plots. This Act was passed by the Central Legislature in 1956 and the only Entry under which the Central

Legislature had the jurisdiction to pass the Act, was Entry No. 5 in the Third List of the Seventh Schedule of the Constitution. This Entry is as follows :-

"5 - Marriage and divorce; infants and minors; adoption, wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

This entry obviously relates only to personal law and laws passed under this entry do not apply to any particular property They merely determine the personal law. In List 2, Entry No. 18 is as follows :-

"Land, that is to say, right in or over land, land tenures including the relation of landlord and tenant, and the Collection of rents; transfer and alteration of agricultural land; land improvement and agricultural lands colonization."

This entry which is in the exclusive jurisdiction of the State Legislature is in the widest term. All laws relating to land and land tenures are, therefore, within the exclusive jurisdiction of the State Legislature. Even personal law can become applicable to land tenures if so provided in the State Law, but it cannot override State Legislation."

"It is noteworthy that in list 3 wherever the entry relates to rights in land "agricultural land" has expressly been excluded. For instance, Entry No. 6 is as follows : "Transfer of Property other than agricultural land ....." Entry No. 7 is as follows :

"Contracts, including partnership, agency contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land." No such exception was expressly mentioned in Entry No. 5 because this entry related only to matters personal to individuals and did not relate directly to any property. While legislating in respect of such general subject the Legislature must be assumed to pass law only affecting property which it had jurisdiction to legislate about. Gwyer, C.J. while delivering the judgment of the Federal Court in a reference on the Hindu Women's Rights to Property Act, 1937, reported in In the matter of the Hindu Womens Rights to Property Act, 1937, AIR 1941 FC 72 observed as follows :-

"There is a general presumption that a Legislature does not intend to exceed its

jurisdiction. When a Legislature with limited and restricted powers makes use of a word of such wide and general import as "property", the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other ....."

The Hindu Succession Act, 1956, was passed merely to alter the personal law of succession applicable to Hindu. It had no reference to any kind of property in particular and was not meant to govern rights in agricultural tenancies. Sub-Section (2) of Section 4 of the Act runs as follows :-

"For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

This Sub-Section indicates that it was only for the removal of doubts that this provision had been included. Even without the provision, the Act could not apply to agricultural holdings.

28. We may observe that that might be the position so far as other States were concerned. Evidently, the Hindu Women's Rights to Property Act, 1937, did not apply to agricultural holdings. It was for that reason that their Lordships of the Federal Court had held to that effect *in Re Hindu Women's Rights to Property Act, 1937, AIR 1941 FC 72*. But, so far as the old Central Provinces were concerned, the position obtained was different. By an Amendment effected in the year 1942, vide Act No. VI of 1942, by enacting the Hindu Women's Rights to Property (Amendment) Act, 1942, the State Legislature had specifically made the Hindu Women's Rights to Property Act, 1937, applicable to agricultural land. Therefore, this was a unique position which did not obtain in any other State and by virtue of the Amendment Act of 1942, the Hindu Women's Rights to Property Act, 1937, was made applicable to all agricultural properties as well and the women were given such rights in all kinds of properties, including agricultural properties. Therefore, the position obtaining in the old Central Provinces, which now would be a part of the present Madhya Pradesh, would be different and any betterment of the rights of Hindu Women by enacting the Hindu Succession Act, 1956, would certainly include betterment of the rights of Hindu women in agricultural properties as well because they had such rights under the Hindu

Women's Rights to Property Act, 1937. In that sense the provisions of the Hindu Succession Act, 1956, in our opinion, will be applicable to all kinds of properties, including the agricultural properties in the matter of devolution of succession, provided the tenancy legislation as mentioned in Section 4(2) of the Hindu Succession Act, 1956, or which we may properly describe as land tenure legislation in which sense the Parliament has used the phrase, permits the same and does not make any special provision in that behalf. So far as the power of the State Legislature to enact Section 164 of the M.P. Land Revenue Code, 1959, is concerned, we may observe that if Entry No. 18 in List II. of the Seventh Schedule to the Constitution be held to include devolution and succession to agricultural properties, then the State Legislature would certainly have the power to legislate in that behalf. But, along with that we have to read Item No. 5, in List No. III of the Seventh Schedule to the Constitution, which relates to succession as well. Therefore, the matter of succession being in the concurrent List, we feel that not only the State Legislature, but also the Parliament would be competent to legislate in that behalf, including devolution or succession to agricultural properties. However, in this connection we might observe that in such a situation Article 254 of the Constitution will be attracted. We may reproduce Article 254 of the Constitution, which is as follows :-

"Article 254(1) If any provision of, law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of any existing law with respect to one of the matters enumerated in the Concurrent List then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State ..... with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State;

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the

State."

29. We may observe that the M.P. Land Revenue Code, 1954, as also the M.P. Land Revenue Code, 1959, had received the assent of the President and, therefore, by virtue of sub-clause (2) of Article 254 of the Constitution, that law will prevail in the State of Madhya Pradesh as against any provisions of the Hindu Succession Act, 1956. However, the matter will be different when the M.P. Land Revenue Code, 1959, after amendment of Section 164 by the M.P. Land Revenue Code (Amendment) Act of 1961 makes the personal law of the parties applicable to devolution to agricultural properties. Upon such amendment, the personal law as amended from time to time will be applicable. We do not find any conflict between the State law and the Central enactment and, therefore, we are of the opinion that it cannot be urged that the State law and particularly Section 164 of the M.P. Land Revenue Code, 1959, or even the provisions of the Hindu Succession Act, 1956, in their applicability to devolution of agricultural properties in the State of Madhya Pradesh would be ultra vires or unconstitutional. We would reject such a contention outright. In our opinion, so far as the Madhya Pradesh State is concerned, it is the special provision of the tenancy law (land tenure Legislation), which will prevail on account of the assent given by the President and if such legislation does not make any provision, whatsoever, or if such legislation specifically makes the personal law of the parties applicable to devolution of agricultural tenures; in that event the provisions of the Hindu Succession Act, 1956, will be applicable to Bhumiswamis who are Hindus and as regards the other Bhumiswamis having different personal laws, their personal law will be applicable to them as may have been amended from time to time till the question of devolution or succession comes to be considered in any particular case. That is the conclusion we would arrive at. Thus, we have adopted the line of reasoning slightly different from the Division Bench of this Court as also of the Bombay High Court and the Allahabad High Court in the cases mentioned earlier. But, in our opinion, this is the only rational line of reasoning, which will harmonise the different statutory provisions avoiding any conflict. There is a presumption that the Legislatures act within their power may be either the State Legislature or the Parliament and the presumption is against the unconstitutionality. Therefore, although some doubt may have been thrown on the constitutionality of either Section 151 of the M.P. Land Revenue Code, 1954, or Section 164 of the M.P. Land Revenue Code, 1959, or the provisions of the Hindu Succession Act in their applicability to devolution of agricultural properties, we would reject all those suggestions and would hold all the three Legislations constitutional,

which were perfectly within the competence of the State Legislature or the Parliament, as the case may be.

30. This would dispose of the question referred to us in both these cases. Accordingly, recording our opinion to the following effect, we remit Second Appeal No. 91 of 1966 to the Single Bench for a decision of the other questions on merits and recording the same opinion in the Letters Patent Appeal, we propose to decide the said appeal on merits. Our answer to the question posed is as under :-

"That Section 164 of the M.P. Land Revenue Code, 1959, as it stood before its amendment in the year 1961, was a valid provision and that it was not ultra vires in view of Section 4 of the Hindu Succession Act, 1956."

31. As regards the Letters Patent Appeal, one main question is involved which the learned Single Judge has decided against the appellants. The said question is, whether under Section 164 of the M.P. Land Revenue Code, as it stood then, the female mentioned in Sub-Section (2) was a female who had herself inherited the property under Sub-Section (1) of that Section. The learned Single Judge expressed the opinion that not only succession should open after the enactment of the M.P. Land Revenue Code, 1959, but also the female mentioned in Sub-Section (2) of Section 164 of the M.P. Land Revenue Code, 1959, should have acquired that interest of a Bhumiswami subsequent to the enactment of the M.P. Land Revenue Code, 1959. Therefore, this is the only aspect which we are required to examine in the Letters Patent Appeal. For the sake of convenience, we have reproduced the relevant portions of Section 164 of the M.P. Land Revenue Code, 1959, before its amendment in the year 1961, in paragraph 14 above.

32. The reasoning of the learned Single Judge was that Section 164 of the M.P. Land Revenue Code, 1959, has no retrospective operation. Therefore, according to the learned Judge the acquisition of interest by a Bhumiswami under Sub-Section (1) should be after the coming into force of the 1959 Code, i.e., after 2-10-1959 or thereafter. Therefore, we have to examine this line of reasoning adopted by the learned Single Judge.

33. So far as the facts of the present case are concerned, Mst. Dukalhin's husband, Karansingh died in the year 1956 according to the respondents and in the year 1954,

according to the appellants. The widow, Mst. Dukalhin, therefore, would get her husband's interest in the agricultural property, assuming that Karansingh died in the year 1954, i.e., before the Hindu Succession Act, 1956, came into force (i.e., before 17-6-1956); in that event Mst. Dukalhin will get the agricultural property of her husband in a limited right as per Section 3 of the Hindu Women's Rights to Property Act, 1937, and upon the coming into force of the M.P. Land Revenue Code, 1954, she would become a Bhumiswami of those lands. Upon the coming into force of the Hindu Succession Act, 1956, her limited interest in such property would become an absolute interest by virtue of Section 14 of the Hindu Succession Act, 1956, and upon coming into force of the M.P. Land Revenue Code, 1959, she would become a Bhumiswami on 2-10-1959, by virtue of Section 158 of the M.P. Land Revenue Code, 1959. It is true that Section 164 of the M.P. Land Revenue Code, 1959, had no retrospective operation and Sub-Section (1) will certainly apply to a Bhumiswami, who is a Bhumiswami at the commencement of the 1959 Code and who dies after the said Code. But, Sub-Section (2) of Section 164 of the said Code, is not dependent on Sub-Section (1). The learned Single Judge, in our opinion, was in error in thinking that Sub-Section (2) of Section 164 will be attracted only if the widow has inherited her husband's property, who might have got it as per Sub-Section (1). It is true that Sub-Section (1) does contemplate death of the Bhumiswami after commencement of the Code. But, so far as Sub-Section (2) is concerned, it will operate notwithstanding anything contained in Sub-Section (1). Therefore, we do not think that the learned Single Judge was right in restricting the operation of Sub-Section (2) to the event happening in Sub-Section (1). In our opinion, Sub-Section (2) will be operative independently and it will be immaterial whether the death of the male holder might have taken place before the commencement of the 1959 Code. But, what is necessary is that the female Bhumiswami must have acquired interest as a Bhumiswami and her capacity as a Bhumiswami must be there at the commencement of the Code. That condition is fulfilled in the present case. Mst. Dukalhin was a Bhumiswami at the commencement of the Code and she could be said to be a female Bhumiswami, who had inherited her husband's property as a widow. Therefore, it was not necessary that her husband should have died after the commencement of the Code. We are unable to endorse the reasoning of the learned Single Judge in that behalf, and we feel that by adopting that interpretation the very purpose for which this provision was enacted will be defeated. Here the implication of Sub-Section (2) of Section 164 appears to be that any female Bhumiswami inheriting the property from a particular source, the property should go back to the heirs of that source unless the female Bhumiswami had disposed

of the property during her lifetime, in which event the property will not at all be available for devolution or succession.

34. In the present case as the matter is governed by Sub-Section (2) of Section 164 of the M.P. Land Revenue Code, 1959, sub-clause (c) of Section 164(2) will be attracted. Of course there will be no divesting if the provisions of the Hindu Succession Act, 1956 apply. The provision of divesting under Section 164(2)(c) was a special provision, which must be given effect to as long as that remained a part of the statute. In this connection we might refer to a Full Bench case of this Court in *Bhondu Ganpat Kirad v. Ramdayal Govindram Kirad*<sup>15</sup> That was a case of a Hindu widow remarrying, who had inherited her husband's property under Section 3(2) of the Hindu Women's Rights to Property Act, 1937. The Full Bench laid down that by virtue of Section 2 of the Hindu Widows Remarriage Act, 1856, she would be divested of all property that she might inherit from her husband, but she would not be divested of the separate property of her son to whom she would succeed as mother. To that extent only divestment under Section 2 of the Hindu Widow's Remarriage Act, 1856, was excluded. We are of the opinion that the same principle will be applicable to a case of divestment on account of remarriage as provided by Section 164(2)(c) of the M.P. Land Revenue Code. 1959, Section 164(2)(c) is wider in its operation as the female Bhumiswami must have inherited property, either as a widow or as mother or as father's mother or as father's mother, which means the property must have belonged to her husband at some point of time, and on her remarriage such property will devolve upon the nearest surviving heir of the last male holder. The present Letters Patent Appeal is clearly governed by Section 164(2)(c) of the M.P. Land Revenue Code, 1959, as the widow, Mst Dukalhin remarried on 31-3-1960. Consequent on her remarriage she would be divested of the property and as such she would have no right to execute a gift or a sale of that property on 21-4-1960 or on 6-4-1960 and the gift or sale will be void and inoperative and they would not confer any rights on the donees or the vendees. As such, the property would revert to her husband's heir. As regards the appellants, they are Mst Dukalhin's husband's brother's sons, who are his heirs after his death.

35. Consequently, the present appeal succeeds and is allowed with costs throughout Counsel's fee shall be according to schedule or certificate, whichever be less.

**Rahva, J.**

36. This opinion shall also govern the disposal of second appeal No. 91 of 1966 (Madh Pra).

37. So far as second appeal No. 91 of 1966 is concerned, I entirely agree with the opinion of My Lord the Chief Justice that Section 164 of the Madhya Pradesh Land Revenue Code, 1959, as it stood before its amendment in the year 1961, was a valid provision and that it was not ultra vires in view of Section 4 of the Hindu Succession Act, 1956, I also agree with the reasons given by him in support of the opinion.

38. As regards the judgement in Letters Patent Appeal No. 20 of 1968, I must say, with great respect, that I am unable to agree with the interpretation put by My Lord the Chief Justice on Sub-Section (2) of section 164 of the Madhya Pradesh Land Revenue Code, 1959 as it stood before the amendment

39. Section 164 of the Code, as it stood before the amendment, is reproduced below for facility of reference :

"164. Devolution. - (1) Notwithstanding any law, custom or usage to the contrary, the interest of a Bhumiswami shall on his death devolve in accordance with the order of succession given below :-

Class I - Son, predeceased son's son, son of a predeceased son's predeceased son, widow or husband as the case may be, predeceased son widow, widow of a predeceased son's predeceased son and widow of a predeceased son's predeceased son's predeceased son.

Explanation I - A grandson whose father is dead and great grandson whose father and grandfather are both dead shall inherit equally with the son.

"Explanation II - The widow of the deceased or if there are more widows than one all his widow together shall take the same share as that of a son. The widow of a predeceased son shall inherit in the manner as a son if then a no son surviving of such deceased son and in the like manner as a son's son if then it surviving a son or son's son of such predeceased son. The same rule shall apply mutatis mutandis to the widow of a predeceased son of a predeceased son.

Class II - Daughter.

Class III - Father.

Class IV- Mother (if she is a widow).

Class V - Stepmother (if she is a widow).

Class VI - Brother of the whole blood.

Class VII - Brother of the half blood (being a son of the same father).

Class VIII - Daughter's son.

Class IX - Brother's son.

Class X - Brother's son's son

Class XI - Father's father.

Class XII - Father's mother (if she is a widow).

Class XIII - Sister.

Class XIV - Sister's son.

Class XV - Paternal uncle (father's brother).

Class XVI - Paternal uncle's son (father's brother's son).

Class XVII - Paternal uncle's son's son

Class XVIII - Father's father's father.

Class XIX - Father's father's mother (if she is a widow).

Class XX - Father's paternal uncle.

Class XXI - Father's paternal uncle's son.

Class XXII - Father's paternal uncle's son's son.

Explanation. - (1) If there are more heirs than one of the same class, other than class I, who shall inherit per stirpes, all that share equally.

(2) Notwithstanding anything contained in Sub-Section (1) where the interest of a Bhumiswami is inherited by a female :-

(a) from her father or mother, such interest on the death of the female shall, in the absence of her heirs of Class I or Class II of the order of succession specified in Sub-Section (1) devolve upon the nearest surviving heir of her father as ascertained in accordance with the provisions of Sub-Section (1);

(b) from her husband or her father-in-law, such interest on the death of the female shall, in the absence of her heirs of Class I or Class II of the order of succession specified in Sub-Section (1), devolve upon the nearest surviving heir of her husband as ascertained in accordance with the provisions of Sub-Section (1);

(c) as a widow, mother, father's mother or father's mother, such interest shall on her remarriage devolve upon the nearest surviving heir of the last male holder of such interest as ascertained in accordance with the provisions of Sub-Section (1).

(3) Where the total area of land in possession of a Bhumiswami together with the which he is entitled to inherit under this section exceeds the prescribed ceiling limit, so much of the inheritable land as makes the total exceed the prescribed ceiling limit shall after selection by the Bhumiswami and

demarcation In the prescribed manner devolve upon the other heirs of the porosities as ascertained hi accordance with the provisions of Sub-Section (1).

40. The learned single Judge held in paragraph 10 of the judgment that Sub-Section (2) of the aforesaid section is nothing but a proviso to Sub-Section (1) and I am inclined to agree with him. Ordinarily, the non obstante clause is employed to give the enacting part of the section an overriding effect over the provision or the act mentioned in the non obstante clause. Thus the snatching part of the section stands on an independent footing. But sometimes the non obstante clause is also used by the draftsman as substitute for a proviso and m such a case it has to be construed accordingly. The fact that the non obstante clause in Sub-Section (2) of Section 164 of the Code was merely intended to override the provisions of Sub-Section (1) of the said section clearly shows that it was intended to be a proviso to Sub-Section (1).

41. A proviso ii used to take special cases out of the general enactment and provide for them. In *R.N. Sons Ltd. v. Asst. Commr. of Sales Tax*, <sup>16</sup> their Lordships made the following pertinent observations regarding the construction of the proviso in paragraph 10 :

"It is a cardinal rule of interpretation that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other."

A similar view was expressed by their Lordships in *Income-tax Commr. v. I. M. Bank Ltd.*, <sup>17</sup> Their Lordships held :

"The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out, as it were, from the man enactment, a portion which, but for the proviso, would fall within the main enactment."

42. The aforesaid rules of construction have to be borne in mind while dealing with Sub-Section (2) of Section 164. My Lord the Chief Justice has observed hi paragraph 33 that Sub-Section (1) contemplates death of the Bhumiswami after the commencement of the Code and I entirely agree with this conclusion. Sub-Section (2)

of section 164 provides for a different mode of devolution than the one laid down in Sub-Section (1) where the interest of a Bhumiswami is inherited by a female. In my opinion, this provision is attracted only where a female inherits the property of a Bhumiswami who dies after the commencement of the Code, because Sub-Section (1) deals with the devolution of the interest of a Bhumiswami dying after the commencement of the Code. We have already noticed that the proviso only embraces the case which is covered by the main provision. The main provision in this case is contained in Sub-Section (1) of Section 164, which provides for devolution of the interest of a Bhumiswami who dies after the commencement of the Code. Sub-Section (2) of the section, if construed as a proviso, must, therefore, necessarily relate to a case of devolution of the interest of a Bhumiswami dying after the commencement of the Code.

43. If we carefully examine the contents of Sub-Section (2), it would appear that it creates a limited estate in the case of females succeeding to the interest of a Bhumiswami after the commencement of the Code and provides how and when this limited estate would come to an end and the interest of the Bhumiswami would revert to his other heirs.

44. Where a female inherits the interest of a Bhumiswami prior to the commencement of the Code, she would be a full-fledged Bhumiswami herself holding absolutely and not a limited estate in view of Section 14 of the Hindu Succession Act, 1956. Thus she would be a Bhumiswami within the meaning of Sub-Section (1) of section 164 of the Code and devolution of her interest would be governed by the said Sub-Section and not by Sub-Section (2). If the intention of the Legislature had been different, as suggested by My Lord the Chief Justice, the wording of Sub-Section (2) would, in my opinion have been different from the language of Sub-Section (2), as it stands, it is clear that it deals with the interest of a female heir of a Bhumiswami and not of a female Bhumiswami.

45. As pointed out by My Lord the Chief Justice, Section 164 was enacted by the State Legislature in exercise of the Legislative power under Entry 5 of the concurrent List, which reads as follows :

"5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in

judicial proceedings were immediately before the commencement of this Constitution subject to their personal law."

The expression "intestacy and succession" clearly suggests that the succession contemplated by the said Entry is succession of the estate of a deceased person. Since Section 164 of the Code is not in terms retrospective, it is obvious that it would govern a case of succession opening after the commencement of the Code. Thus, in my view, Sub-Section (2) is attracted only where the interest of a Bhumiswami has been inherited by a female after the commencement of the Code and not otherwise. Where a Bhumiswami dies before the commencement of the Code, his female heir would, under Section 14 of the Hindu Succession Act, acquire an absolute interest and Section 164 of the Code cannot be construed as adversely affecting such interest in the circumstances specified in Sub-Section (2) of Section 164 of the Code. In my opinion, it was not, and could not be intention of the Legislature to convert an absolute estate of a living Bhumiswami into a limited estate in the circumstances specified therein by enacting Section 164 of the Code.

46. In this case, Mst. Dukalhin's husband, Karansing admittedly died before the commencement of the Code; and, as observed by My Lord the Chief Justice in paragraph 33, she acquired an absolute interest by virtue of Section 14 of the Hindu Succession Act, 1956 and, upon the coining into force of the Madhya Pradesh Land Revenue Code, 1959, became a Bhumiswami by virtue of Section 158 of the Code. In the case of such a Bhumiswami, remarriage would be of no consequence, because Sub-Section (2) of section 164 of the Code would not be attracted. She was, therefore, competent to execute a gift or sale of property on 30-4-1960 or 6-4-1960. The appellants, who are Mst. Dukalhin's husband's brother's sons, cannot, therefore, claim any interest in the property which is the subject-matter of the gift or sale. On this view, the decision of the learned single Judge appears to be correct because, as pointed out by him in paragraph 11 of the judgment, the transfers were not challenged on any other ground except that of devastation resulting from remarriage.

46-A. I, therefore, hold that the appeal is liable to be dismissed with costs.

**Dube, J.**

47. I have had the advantage of reading the opinions of the learned Chief Justice and

my learned brother Raina, J. I regret my inability to agree with the views expressed by them.

48. Section 164 of the Madhya Pradesh Land Revenue Code, 1959, as it stood before its amendment in 1961, provided for the order in which the devolution of the rights of a Bhumiswami would take place after his death. The Hindu Succession Act, 1956 had already come in force when Section 164 was enacted. The Hindu Succession Act, 1956 also provided for the mode of succession of a Hindu dying intestate. The question referred for consideration of the Full Bench is whether the provision for succession of Bhumiswami rights under section 164 of the Madhya Pradesh Land Revenue Code, 1959 as it stood before its amendment in 1961, was a valid provision or it was ultra vires in view of Section 4 of the Hindu Succession Act, 1956. The reference has given rise to other important questions. The first is as to the meaning of "devolution of tenancy rights in respect of agricultural holdings" occurring in Section 4(2) of the Hindu Succession Act, 1956. Secondly whether the legislation in respect of devolution of Bhumiswami rights under Section 164 of the Madhya Pradesh Land Revenue Code, 1959 was an enactment with respect to tenancy rights of agricultural holdings. If the enactment was with respect to tenancy rights of agricultural holdings, it would undoubtedly be saved under Sub-Section (2) of section 4 of the Hindu Succession Act and in that case, there was no conflict. If not, the question arises as to which of the two laws would prevail, whether it would be the provision of Madhya Pradesh Land Revenue Code or it was the Hindu Succession Act that governed the succession of the interest of a Bhumiswami and, therefore, the question of the legislative competence to enact the two enactments also arises. Lastly, the Letters Patent Appeal has given rise to a question as to the construction of Section 164 of the M.P. Land Revenue Code of 1959 prior to its amendment.

49. The facts leading to the reference have been fully stated in the opinion of the learned Chief Justice and we can proceed to the questions involved in the case. Before we proceed to discuss the provisions it would be convenient to reproduce here the relevant sections. Section 151 of the M.P. Land Revenue Code, 1954 reads as under :-

"s. 151. - Subject to his personal law, the interest of a tenure holder shall on his death pass by inheritance, survivorship or bequest, as the case may be."

Section 164 of the M.P. Land Revenue Code, 1959 was in the following terms prior to

its amendment :-

's. 164. - Devolution - (1) Notwithstanding any law, custom or usage to the contrary, the interest of a Bhumiswami shall on his death devolve in accordance with the order of succession given below :-

(.....The order of different classes is mentioned).

(2) Notwithstanding anything contained in Sub-Section (1) where the interest of a Bhumiswami is inherited by a female :-

(a) .....

(b) .....

(c) as a widow, mother, father's mother or father's mother, such interest shall, on her remarriage, devolve upon the nearest surviving heir of the last male holder of such interest as ascertained in accordance with the provisions of Sub-Section (1)."

Section 164 as it stands after amendment is as under :-

's. 164. Devolution - Subject to his personal law the interest of a Bhumiswami shall, on his death, pass by inheritance, survivorship or bequest, as the case may be."

Section 4(2) of the Hindu Succession Act is quoted as below :-

"S. 4(2). For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings."

50. In AIR 1968 Madhya Pradesh 247 and F. A. No. 13 of 1964, D/-12-3-1968 (Madh Pra), this Court held that the legislation with respect to devolution of Bhumiswami or Bhumidhari rights under Section 151 of Madhya Pradesh Land Revenue Code, 1954 (Act No. 2 of 1955) was not a legislation with respect to tenancy rights of agricultural holdings. I would agree with the view taken in the two Division Bench cases of this

Court. The question decided in the two rulings is whether the interest of a Bhumiswami created by the Code of 1959 is a tenancy right. This question cannot be solved by reference to predecessor Acts in different parts of the State dealing with interests which have now been grouped together as Bhumiswami. Many types of tenants under the predecessor Acts have now become Bhumiswami (see the position in Vindhya Pradesh and Madhya Bharat); but it cannot be inferred from this that Bhumiswami under the Code of 1959 is a tenant, for the Code has enlarged the interest of previous holders. To decide whether Bhumiswami is a tenant of the State, reference has to be made to the Code alone and not to the historical origin of Bhumiswamis. The features that are important in the case of a Bhumiswami are that the interest of a Bhumiswami is heritable, it is transferable, the lessee under him is not a sub-tenant and most important of it all is that there is no provision in the Act providing for ejection of a Bhumiswami or termination of his interest in favor of the Government. In case of a lessee or tenant it is usual to find provisions which lay down the conditions on which the lessee or tenant can be ejected or his interest comes to an end (see, for example, Section 182(2) and Section 193). These features clearly show that there is no relationship of landlord and tenant between the Government and the Bhumiswami. A Bhumiswami is called a tenure holder but he is not a holder of tenancy rights. The words "tenure holder" may include a tenant but that does not mean that all tenure holders are tenants. The words used in Section 4 of the Hindu Succession. Act are "devolution of tenancy rights" and, therefore, unless the interest of a Bhumiswami can be called a tenancy right he will not be excluded from the operation of the Act.

51. It is well settled by the decision of the Supreme Court in *Mahadeo v. State of Bombay*<sup>18</sup> that the land in possession of a Bhumiswami who is a tenure holder is in substance an estate. Their Lordships of the Supreme Court were considering whether the rights of a tenure holder of the Bhumidhari or the Bhumiswami could appropriately be held to be an estate. Their Lordships observed as under :-

"Thus, reading the relevant definitions along with the provisions of Section 146 of the Code it would follow that the land in possession of the Bhumiswami who is a tenure-holder is in substance an estate....."

The petitioners hold lands under the State and they pay land revenue for the lands thus held by them. Therefore, there is no difficulty in holding that under the existing law

relating to land tenures the lands held by them fall within the class local equivalent of the word "estate" as contemplated by Article 31-A(2)(a)."

Again, the Supreme Court in AIR 1962 Supreme Court 694 pointed out that :-

"The basic concept of the word "estate" is that the person holding the estate should be proprietor of the soil and should be in direct relationship with the State paying land revenue to it except where it is remitted in whole or in part. If therefore a term is used or defined in any existing law in a local area which corresponds to this basic concept of "estate" that would be the local equivalent of the word "estate" in that area. It is not necessary that there must be an intermediary in an estate before it can be called an estate within the meaning of Article 31-A(2)(a); it is true that in many cases of estates such intermediaries exist, but there are many holders of small estates who cultivate their lands without any intermediary whatever."

Their Lordships reiterated the view taken in Mahadeo's case (supra) AIR 1961 Supreme Court 1517 and stated that by virtue of Sections 145 and 146 of the Code, the estate held by the petitioners satisfied the test of the local equivalent of "estate" as contemplated by Article 31-A(2)(a). The tenure-holders under Bhumiswami or Bhumidhari rights hold land directly from the State Government and there are no intermediaries. Whatever may have been the nature of their rights in the past but under the Land Revenue Code they were, in effect, the proprietors of the land and the rights were not tenancy rights. It, therefore, clearly follows from the decision of the Supreme Court that the Bhumiswami is not the tenant of the State.

52. As far as Section 151 of the M.P. Land Revenue Code, 1954 was concerned, the section, in terms, stated that personal law would be applicable in the matter of devolution of Bhumiswami and Bhumidhari. The personal law which governed the Bhumiswami or Bhumidhari was undoubtedly the law prevailing at the time of the devolution which included statute law as existing on that date. But when we come to Section 164 of M.P. Land Revenue Code of 1959, as it stood prior to the present amendment. It provided its own table of succession and came in conflict with Hindu Succession Act, 1956. According to the view expressed by the learned Chief Justice, there is no conflict between the two provisions as the phrase, "devolution of tenancy rights in respect of agricultural holdings" occurring in Sub-Section (2) of Section 4 of

Hindu Succession Act has to be construed broadly and would include legislations pertaining to rights of tenure-holders such as the Bhumiswamis and Bhumidharis with the result that Section 4(2) would save the provision occurring in the Code as to the devolution of rights of Bhumiswamis and Bhumidharis.

53. The phrase, "tenancy rights in respect of agricultural holdings" cannot be construed to include tenure holders like Bhumiswamis or Bhumidharis. There is nothing in the language of Section 4(2) or in the scheme of Hindu Succession Act as would require construing the tenancy rights in a manner as would necessitate a departure from its natural connotation. The scheme of the Hindu Succession Act seems to me to exclude the devolution of tenancy rights alone from the operation of the Act. The reason appears to be that because of the divergence of tenancy rights prevailing in different States and the varied incidence to such rights which were depending upon numerous factors that was difficult to provide for a uniform law with regard to them. The tenancy rights would be dependent on the terms of the contract and the scheme of the local law and the usage prevalent there. It was, therefore, felt that the devolution in respect of tenancy rights should best be left to the local legislature which would appreciate the needs of making any change in such rights having regard to the law prevailing there.

54. The Supreme Court in Mahadeo's case AIR 1961 Supreme Court 1517 (supra) has clearly indicated that the rights possessed by a Bhumiswami were thus of an owner of a land and such rights could be equated with an estate. The tenancy rights, on the other hand, were the rights to cultivate the land as far as permissible under the law. The rights of Bhumiswami could not be equated with tenancy rights. I have already pointed out earlier that the one important feature of the Bhumiswami rights was that the Code did not provide for the termination of the interest by the Government. The Code did not provide for a right of re-entry by the State as is available to a landlord. The rights held by the Bhumiswami in earlier Acts would not be germane to find out the character of the existing rights under the present Act. I am, therefore, of the view that it would be doing violence to the language if any other meaning is assigned to the phrase, "tenancy rights."

55. In AIR 1970 Allahabad 238 it was held that under Entry 5 of the List III of the 7th Schedule when the Parliament legislated with respect to personal law, laws made under that Entry could not be said to apply to any particular property. That Entry

merely gave the power to determine the personal law, it was further observed in that case that all laws relating to land and land tenures were within the exclusive jurisdiction of the State Legislature and even personal law becomes applicable to land tenures if so provided in the State law but it could not override State legislation. It was then observed

"The Hindu Succession Act, 1956, was passed merely to alter the personal law of succession applicable to Hindus. It had no reference to any kind of property in particular and was not meant to govern rights in agricultural tenancies.....Sub-Section (2) of section 4 indicates that it was only for the removal of doubts that this provision had been included. Even without this provision, the Act could not apply to agricultural holdings."

56. With great respect, we are unable to agree with the above view in *Prema Devi's* case (*supra*). A law prescribing succession to any property (whether agricultural land or otherwise) falls under Entry 5 in Concurrent List III of the 7th Schedule of the Constitution. This entry not only deals with personal law but specifically deals with "wills, intestacy and succession." Under the Government of India Act, 1935, Entry 7 in List III covered "wills, intestacy and succession save as regards agricultural land" and, therefore, law relating to succession of agricultural land was outside the power of Central legislature. Under the Constitution, the exception as to agricultural lands does not find place in Entry 5 in Concurrent List, hence legislative power on the topic of succession entirely falls under this Entry. The exclusion of the words, "save as regards agricultural land" from Entry 5 in the Concurrent List of the 7th Schedule of the Constitution is deliberate. The Entry 5 in Concurrent List of the 7th Schedule of the Constitution is to be given the widest construction as including all properties without any restriction unless for some reason it is cut down by the terms of the Entry itself or by any other parts of the Constitution reading it as a whole. It was pointed out in *Megh Raj v. Allah Rakhia*,<sup>19</sup> while construing the scope of an Entry in the Government of India Act, 1935 that such an Entry was a part of the Constitution and it would, on ordinary principles receive the widest construction unless for some reason it was cut down either by the terms of the Entry itself or by other parts of the Constitution read as a whole. Thus, construing the Entry, it cannot be said that it did not apply to agricultural lands. Entry 18 in List II must be construed not to exclude topics specifically dealt in Entry 5 in Concurrent List III of the 7th Schedule of the Constitution. In case of repugnancy. Section 164 of the Code will prevail under

Article 254 as it is a later law and as it received the assent of the President. The position has changed after the amendment of Section 164 by Act No. 38 of 1961. Under the amended Section 164, the rights of a Bhumiswami would be governed in matters of devolution by personal law. Thus, it now fully harmonises with the Hindu Succession Act.

57. I am, therefore, of the view that Section 164 of the Madhya Pradesh Land Revenue Code, 1959, as it stood before its amendment in the year 1961, was a valid provision. The rights of Bhumiswamis could not be equated with tenancy rights in agricultural holdings nor the phrase, "tenancy rights in agricultural holdings" occurring in Section 4(2) of the Hindu Succession Act could be so construed as to include the tenure-holders in Bhumiswami rights; with the result that even a Bhumiswami is not excluded from the operation of Hindu Succession Act. However, Section 164 of the M.P. Land Revenue Code, 1959 would prevail over the Hindu Succession Act in so far as it comes in conflict. The Second Appeal No. 91 of 1966 may, therefore, be decided in the light of the above observations.

58. Coming now to the last question which arises in the Letters Patent Appeal as to whether a female inheriting as a widow could be divested of the property after remarriage under Sub-Section (2) of Section 164 (as it stood prior to amendment), it would be seen that Sub-Section (1) provides for devolution of the interest of a Bhumiswami in case of his death. Sub-Section (2) provides for devolution of interest in case of death or remarriage where the interest of a Bhumiswami is inherited by a female falling under clauses (a), (b) (c) and such female dies or remarries. Now the word, "Bhumiswami" is not a word of general import but is a term of art whose meaning is, defined by the Statute. The term has to be construed according to the Land Revenue Code of 1959 and not as defined in any other enactments. Once the word is understood, as it ought to be as provided by the Land Revenue Code of 1959, there is no difficulty in construing Section 164.

59. Both the Sub-Sections are independent provisions and Sub-Section (2) is not a proviso to Sub-Section (1). However, the interest of a Bhumiswami dealt with in both these Sub-Sections is the interest created for the first time by Section 158. Although in nomenclature certain holders in Mahakoshal under the Code of 1954 were also known as Bhumiswamis but from this fact it cannot be said that those persons held that interest which is created by Section 158 of the Code of 1959. Different types of holders in different regions who are mentioned in Section 158 become Bhumiswamis

under the Code only from its commencement. The expression "interest of a Bhumiswami" in Section 164 must refer to the rights conferred and liabilities imposed by or under, the Code on Bhumiswami as is clear from Section 158. "The interest of a Bhumiswami" with which Section 164 deals is this interest created by the Code and this did not exist before. Sub-Section (2) of Section 164 applies when the interest of Bhumiswami is inherited by a female and that female dies or remarries. Now, if the interest of a Bhumiswami to which reference is made here is one created by the Code, the female falling under the above description must be one who has inherited after the coming into force of the Code, for it is impossible to say that any person could inherit the interest which is created by the Code before its enactment. Ill us. the case of a female who had inherited before the Code does not fall under Sub-Section (2) even if she dies after the Code. But her case will fall under Sub-Section (1).

60. I would thus agree with the conclusions arrived at by my learned brother Raina, J. though on different grounds, I would also uphold that the Letters Patent Appeal is liable to be dismissed with costs.

BY THE COURT:

61. In accordance with the majority view expressed in separate Opinions, this appeal fails and is accordingly dismissed with costs.

Appeal dismissed.

Cases Referred.

1. Appeal No. 91 of 1966
2. Appeal No. 447 of 1966
3. C.R. No. 513 of 1958, D/-12-8-1959 (Madh Pra)
4. S. A. No. 512 of 1958 D/-28-10-1961 (Madh Pra),
5. C. A. No. 69 of 1963, D/-6-4-1965 (Madh Pra).
6. AIR 1959 Bom 78
7. AIR 1966 Bom 64
8. AIR 1968 MadPra 247
9. AIR 1962 SC 694
10. F. A. No. 13 of 1964, D/-12-3-1968 (Madh Pra)

11. 1971 MPLJ 172
12. 1971 MPLJ 335
- 13 AIR 1960 Pun 666 (FB)
14. AIR 1970 All 238
15. 1959 MPLJ 1173: AIR 1960 Mad Pra 51 (FB)
16. AIR 1955 SC 765
17. AIR 1959 SC 713
18. AIR 1961 SC 1517
19. AIR 1947 PC 72