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date of the filing of the suit till the date of realisation at the rate of 6 per cent per annum on the amount of Rs. 25,000 only. The defendant shall have three months time from today to pay the amount, failing which the property on which the charge is claimed shall be put to sale. A preliminary decree shall be drawn up in the appropriate form.

Taking into consideration the entire circumstances the parties will be left to bear their own costs in this Court.

Dua, J.

INDER DEV DUA, J.—I agree.

K. S. K.

LETTERS PATENT APPEAL

Before D. Falshaw, C. J., and A. N. Grover, J.

HARI DASS,—*Appellant.*

v.

HUKMI—*Respondent.*

Letters Patent Appeal No. 7 of 1960.

1963

August, 19th

Hindu Women's Rights to Property Act (XVIII of 1937)—S. 3—Property—Whether includes agricultural land—Constitution of India—Seventh Schedule, List III, item 5—Effect of Act—Whether becomes applicable to agricultural lands after the passing of the Constitution of India without fresh legislation.

Held, that before the passing of the Constitution of India, it was laid down that the word "property" as used in the Hindu Women's Rights to Property Act, 1937, must be construed as referring only to those forms of property with respect to which the legislature which enacted the Act was competent to legislate, that is, property other than agricultural land and that legislation with regard to usufructuary mortgages of agricultural land was solely within the purview of the Provincial Legislature. After the enactment of

the Constitution the Union Parliament is competent to legislate in the matter of wills, intestacy and succession in respect of agricultural land also but this does not mean that without fresh legislation the word "property" in the said Act could be read to include agricultural land. The true position is that at the time when the said Act was enacted it could not touch or cover agricultural land. This Act continued to be the law by virtue of Article 372 of the Constitution but until it was suitably amended by the Union Parliament or fresh legislation was enacted uhder Item 5. List III of the Seventh Schedule, that law could not govern devolution or succession to agricultural land.

Bhikaji Narain v. *State of Madhya Pradesh* (1), distinguished.

(1) A.I.R. 1955 S.C. 781.

Letters Patent Appeal under Clause X of the Letters Patent of the Punjab High Court against the judgment of the Hon'ble Mr. Justice Shamsher Bahadur, passed in R. S. A. No. 977 of 1958 on 16th September, 1959.

D. N. AGGARWAL, ADVOCATE, for the Appellant.

Y. P. GANDHI AND A. L. BAHRI, ADVOCATES, for the Respondent.

ORDER.

GROVER, J.—This is an appeal under clause 10 of the Letters Patent against a judgment of a learned Single Judge dismissing the suit of the appellant, Hari Dass minor. Grover, J

One Ram Nath, who belonged to village Raipur, tehsil Una, district Hoshiarpur, died on 28th February. 1956, leaving behind two widows Mst. Savitri and Mst. Hukmi. The appellant is his son from the former and and Mst. Soma Wanti is his daughter from the latter.

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On 21st June, 1956, the land belonging to Ram Nath was mutated equally in favour of Mst. Hukmi and the appellant. Sometime afterwards the appellant instituted a suit for a declaration that the land belonged to him and that the mutation in favour of Mst. Hukmi was illegal and ineffective and for an injunction to restrain her from interfering with his possession. Alternatively he prayed for a decree for possession. According to Mst. Hukmi, she was an heir along with the plaintiff under Hindu Law by which the parties were governed, and, in any event, she was entitled to retain possession of the land in lieu of maintenance. The trial Court framed appropriate issues and after deciding them, decreed the suit for possession. On appeal, the learned District Judge only varied the decree to the extent that the property was made subject to a charge in favour of Mst. Hukmi in the sum of Rs. 133.29 nP. annually on account of maintenance payable in equal instalments of Rs. 66.64 nP. Mst. Hukmi filed an appeal to this Court which came up before Shamsher Bahadur, J. The contention which found favour with him was that under the Hindu Women's Rights to Property Act (Act No. XVIII) of 1937 (hereinafter to be referred to as Act XVIII of 1937) Mst. Hukmi would be entitled to one-half share as a widow. While holding that Act XVIII of 1937 was not within the legislative competence of the Central Legislature when it was enacted so far as agricultural land was concerned, the learned Judge was of the view that on the enactment of the Constitution the shadow that had been cast on it was lifted inasmuch as under List III of the Seventh Schedule, item 5, the subject-matter of "wills, intestacy, and succession" came within the concurrent field without the qualification which was attached to that subject in the Government of India Act, in item 7 of List III. He relied on a decision of the Supreme Court in *Bhikaji*

Narain v. *State of Madhya Pradesh* (1), and observed—

> "The impugned Act had suffered only from a temporary eclipse and the shadow which had been cast on the impugned Act was removed by the Constitution of India * * * * *."

He did not decide the other point which had been raised before him with regard to the quantum of maintenance.

Mr. D. N. Aggarwal contends that the learned Single Judge did not properly appreciate and apply the law laid down in *Bhikaji Narain's case* (1) by the Supreme Court and that Act XVIII of 1937 could not possibly be made applicable in case of succession to agricultural land. In *Umayal Achi* v. *Lakshmi Achi* (2), one Arunachalam Chettiar had executed a will in respect of his extensive properties. After his death, his daughter-in-law while disputing the will claimed certain rights under Act XVIII of 1937. Admittedly under the ordinary Hindu Law she was not an heir to his estate. The defence raised *inter alia* was that Act XVIII of 1937 was invalid. Another question which arose was whether under Act XVIII of 1937, even if valid, the plaintiff would be entitled to any share in the agricultural lands. At page 31, it was observed—

> "In dealing with the last contention, it may be conceded that Act 18 of 1937 cannot affect the devolution of agricultural land in the Governor's Provinces; but it would not follow that the Act was on this account wholly *ultra vires* the Indian Legislature. It was pointed out in the advisory opinion

(1) A.I.R. 1955 S.C. 781.
(2) A.I.R. 1945 F.C. 25.

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given by this Court that on the principle of the decision in *Macleod* v. *Attorney-General for New South Wales* (3), the general term 'property' used in the Act must, as a matter of construction, be limited to property in respect of which the Indian Legislature had power to legislate."

In *Udham Kaur* v. *Parkash Kaur* (4), a Bench consisting of Harries, C.J., and Abdul Rashid, J., laid down that the word "property" as used in Act XVIII of 1937 must be construed as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate, that is, property other than agricultural land and that legislation with regard to usufructuary mortgages of agricultural land was solely within the purview of the Provincial Legislature. It is true that after the enactment of the Constitution the Union Parliament would be competent to legislate in the matter of wills, intestacy and succession in respect of agricultural land also but this does not mean, as has been rightly contended by Mr. D. N. Aggarwal, that without fresh legislation the word "property" in Act XVIII of 1937 could be read to include agricultural land. The true position is that at the time when Act XVIII of 1937 was enacted it could not touch or cover agricultural land. This Act continued to be the law by virtue of Article 372 of the Constitution but until it was suitably amended by the Union Parliament or fresh legislation was enacted under Item 5 of List III of the Seventh Schedule, that law could not govern devolution or succession to agricultural land. It is common ground that there has been no amendment or fresh legislation in that behalf. *Bhikaji Narain's case* (1) is wholly distinguishable and

(3) (1891) A.C. 455.
(4) A.I.R. 1945 Lah. 282.

it is not possible to see how its ratio had any bearing on the present case. What had happened there was that certain amendments had been made in the Motor Vehicles Act, 1939, by the C.P. & Berar Motor Vehicles (Amendment) Act, 1947 (Act III of 1948). Extensive powers were given to the Provincial Government to carry out and implement the policy of nationalisation of the road transport business adopted by the Government. At the date of the passing of Act III of 1948, there was no such thing as fundamental rights of the citizens and it was well within the legislative competency of the Provincial Legislature to enact that law. As pointed out in the judgment of their Lordships, it was conceded that the amending Act was, at the date of its passing, a perfectly valid piece of legislation. When the Constitution was enacted, Articles relating to fundamental rights guaranteed to all citizens the right to freedom under seven heads. By virtue of Article 13 the amendments introduced by Act III of 1948, constituted an infringment of the provisions of Article 19(1)(g) of the Constitution and were, therefore, void unless they could be justified under the provisions of clause (6) of Article 19. Later on, however, the Constitution (First Amendment) Act, 1951, was passed. The result was that Act III of 1948 ceased to be inconsistent with the fundamental right guaranteed by Article 19(1)(g) read with clause (6) of that Article. The exact scope of the meaning to be given to the word "void" in Article 13 had been considered in an earlier decision in *Keshavan Madhava Menon* v. *The State of Bombay* (5). It was held that Act III of 1948 became void not *in toto* or for all purposes or for all times or for all persons but only to the extent of such inconsistency, that is to say, to the extent it became inconsistent with the provisions of

(5) A.I.R. 1951 S.C. 128.

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Part III of the Constitution. The following observations at page 785 may be set out with advantage:—

> "The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951, was to remove the shadow and to make the impugned Act free from all blemish or infirmity. If that were not so, then it is not intelligible what 'existing law' could have been sought to be saved from the operation of Article 19(1)(g) by the amended clause (6) in so far as it sanctioned the creation of State monopoly, for 'ex hypothesi', all existing laws creating such monopoly had already become void at the date of the commencement of the Constitution in view of clause (6) as it then stood."

The position was, therefore, completely different in the Supreme Court case inasmuch as Act III of 1948 when enacted was a valid piece of legislation and it was only on account of the enforcement of the Constitution and the consequent infringement of Article 19(1)(g) as it stood before the Constitution (First Amendment) Act, 1951, that the Act in question was to be treated as void and as soon as the amended provisions in the Constitution came into force "the shadow" was removed and the law became enforceable as constitutionally valid. In the present case Act XVIII of 1937 as interpreted by the Federal Court and the Lahore High Court governed devolution and succession of property other than agricultural land. It was a valid piece of legislation *qua* that property. There was no question of any shadow being removed after the Constitution came into force and there had

to be fresh legislation in order to make Act XVIII of 1937, applicable to agricultural land also. In this view of the matter the decision of the learned Single Judge cannot be sustained on the main point.

Mr. Y. P. Gandhi, who appears for the respondent, contends that Mst. Hukmi was in possession of the land in dispute by virtue of the mutation effected in June, 1956, and by that time the Hindu Succession Act, 1956, had come into force. Under section 14 any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. "Property" includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance, etc. Mr. Gandhi says that Mst. Hukmi must be regarded as having acquired the land in lieu of maintenance. This point was neither raised in the pleadings nor at any previous stage of litigation or before the learned Single Judge. It is, therefore, neither possible nor permissible to go into this matter.

Lastly, it has also been urged by Mr. Y. P. Gandhi on behalf of the respondents that the quantum of maintenance which has been allowed is very meagre and has not been determined properly. Indeed, there was no direct issue which had been framed with regard to the maintenance to which Mst. Hukmi and her daughter would admittedly be entitled. Issue No. 4 was whether defendant was entitled to retain the possession of the land in dispute for her maintenance. It appears that because there was no direct issue, there was hardly any proper investigation in respect of the entire income from the estate of Ram Nath. The learned District Judge did consider this matter and

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rightly so in view of the decision of this Court in *Mst. Sodhan* v. *Khushi Ram* (6), where it has been laid down that when a coparcener sues for possession of property against the widow of a deceased co-parcener the question as to the right of maintenance and residence of the widow can be raised in such suit and it is in the interests of justice that the widow should not be forced to file a separate suit for maintenance. The learned District Judge took into consideration a statement of produce which the respondent had got prepared for Kharif, 1956 and Rabi, 1957, from the office of the Qanungo which was proved by D. W. 4. According to it, the value of one-third share of the landlord of the produce in respect of the property in question would be only Rs. 133.29 nP. per annum. The learned Judge considered that this amount would not at all be unreasonable or excessive for the maintenance of the respondent. There can be no doubt that the aforesaid amount is very meagre and considering the magnitude of the property which was left by Ram Nath and which had been described by the learned Single Judge as a fairly large holding, it is difficult to accept that the income would be so little. At any rate, while determining the amount of maintenance it is the income of the entire property left by Ram Nath which has to be determined and this having not been done, it is essential to call for a report under Order XLI, rule 25 of the Code of Civil Procedure in this behalf. We accordingly direct the trial Court to record such further evidence as the parties may wish to adduce and make a report with regard to the total income from the entire estate left by the deceased Ram Nath and to suggest the figure at which the maintenance to be paid to the respondent should be fixed. This report should reach this Court before the expiration of three months from today.

(6) A.I.R. 1950 E.P. 261,

The parties are directed to appear before the trial Court on 9th September, 1963. The office shall see that the records are despatched immediately to the trial Court. The appeal shall be set down for hearing as soon as the report is received.

D. FALSHAW, C.J.—I agree.

K.S.K.

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