

(1973) 05 MAD CK 0015
In the Madras High Court

Anthony Servai

APPELLANT

Vs

Pethi Naicker and Others and Kulandama Naicker (died) and
Others
Narayana Konar and Others Vs
Shanmughasundarathammal

RESPONDENT

Date of Decision : 02-05-1973

Acts Referred:

Hindu Succession Act, 1956 — Section 8

Citation : (1973) ILR (Mad) 19 : (1978) 87 LW 254 : (1974) 2 MLJ 19

Hon'ble Judges : N. S. Ramaswami, J

Bench : Division Bench

Judgement

N. S. Ramaswami, J.—The question that arises in the two Second Appeals and the Letters Patent Appeal is one and the same, viz., whether the provisions of the Hindu Succession Act (XXX of 1956), hereinafter referred to as the Act, or the textual Hindu Law, which was in force prior to the coming into force of the Act, have to be applied for determining the reversioners in a case where the last male prior to the coming into force of the Act, died after the coming into force of the Act.

2. The two second appeals arise out of Original Suit No. 308 of 1965 on the file of the Court of District Munsif, Dindigul, which is one filed by the two plaintiffs in that suit as reversioners of one Pethi Naicker, a minor, who died in the year 1944, for the recovery of possession of the properties of the said Pethi. On Pethi's death in the year 1944, his mother Pap-pammal succeeded to his estate as a limited owner and she alienated the several items of suit properties. The property described in the A schedule to the plaint has been sold to the 1st defendant in the case. Other items had been alienated in favour of defendants 2 to 5, but we are not concerned with those items in the second appeals. Pappammal died on 8th February, 1965. As far as A Schedule property is concerned, the 1st defendant, the alienee, inter alia contended that Pappammal having died after the Act came into force, the reversioners of Pethi, the last male holder, should be determined as per the provisions of the Act and not in

accordance with the textual Hindu Law which was in vogue prior to the coming into force of the Act and that under the provisions of the Act, the two plaintiffs would not be the nearest reversioners of the last male holder as on the date of the death of Pappammal, the limited owner. Muthammal, impleaded as the 6th defendant, is the last male holder's sister's daughter who would be a class II heir as per the provisions of the Act. The two plaintiffs are the son's sons of one Kolandama Naicker who is the brother of the paternal great-grandfather of the last male holder. If the provisions of the Act are applicable, admittedly the plaintiffs would be owners in the picture. The 1st defendant further contended that in any event, he should be paid the monies spent by him for improving the property before he is dispossessed of the property. The trial Court found in favour of the plaintiffs regarding the question whether they are entitled to possession of the property, but held that the plaintiffs are bound to pay a sum of Rs. 3,750 to the 1st defendant towards improvements carried out by him, before getting possession. The plaintiffs filed A. S. No. 162 of 1967 on the file of the Court of Subordinate Judge, Dindigul, against that portion of the decree of the trial Court which was against them viz., the direction to the plaintiffs to pay a sum of Rs. 3,750 to the 1st defendant as a condition precedent to get possession of the property. The 1st defendant filed A.S. No. 172 of 1967 on the file of the same court challenging the decision of the trial Court that the plaintiffs are entitled to possession of the property. The two appeals were heard together by the learned Subordinate Judge, Dindigul and he concurred with the view of the trial Court that the plaintiffs are entitled to possession. Both the Courts found that the reversioners entitled to get the estate of the last male holder are to be determined only as per the textual Hindu Law which was in vogue prior to the coming into force of the Act and not under the provisions of the Act. The first appellate Court further found that the 1st defendant is not entitled to claim the value of the improvements carried out by him. Therefore the first appellate Court allowed A.S. No. 162 of 1967 filed by the plaintiffs and dismissed A.S. No. 172 of 1967 filed by the 1st defendant. The two second appeals are by the 1st defendant, Second appeal No. 1076 of 1970 being against the dismissal of A.S. No. 122 of 1967 by the first appellate Court and Second Appeal No. 1088 of 1970 being against A.S. No. 162 of 1967 which has been allowed by the first appellate Court.

3. The two second appeals came up before Raghavan, J. and the learned Judge, after referring to a number of decisions and particularly to two decisions of the Supreme Court one in *Eramma Vs. Verrupanna and Others*, . and the other in *Fateh Bibi etc. Vs. Charan Dass*, . made a reference that the two second appeals be posted before a Division Bench for the decision of the question whether Section 8 of the Act would be applicable in the case of a male Hindu Whose physical death occurred prior to the coming into force of the Act, but the limited owner alienating the estate prior to the coming into force of the Act died after the coming into force of the Act. The learned Judge felt that there was conflict of opinion regarding this question in the two decisions of the Supreme Court

referred to above and that is why the reference has been made.

4. Letters Patent Appeal No. 6 of 1972 arises out of a different matter turning on a similar question. That is against the decision of Ramanujam, J., in Second Appeal No. 1439 of 1969 which is reported in Shanmughasundarathammal Vs. Narayana Konar and Others, . There the learned Judge found that in view of the decision of the Supreme Court in Fateh Bibi etc. Vs. Charan Dass, . Section 8 of the Act would be applicable even in a case of a male Hindu whose physical death occurred prior to the coming into force of the Act, provided the limited owner, who got the estate and alienated the same before the coming into force of the Act, died after the commencement of the Act. As the question that arises in the two second Appeals as well as in the Letters Patent Appeal is one and the same, they were heard together.

5. In the two second appeals, admittedly the two plaintiffs Would be the nearest reversioners of the last male holder Pethi (who died as a minor in the year 1944), if the textual Hindu Law is applied. Similarly, if the provisions of the Act are applicable, then the 6th defendant, who is the last male holder's sister's daughter, would be the nearest reversioner as she is one of the Class II heirs under the Act who get precedence over agnates. Section 4 (1) of the Act is as follows :

Save as otherwise expressly provided in this Act--

(a) any text, rule or interpretation of Hindu Law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;

(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act.

Section 8 of the Act relates to the general rules of succession in the case of males and it is as follows :

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter :

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) Secondly, if there is no heir of Class I, then upon the heirs, being the relatives in class II of the schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

Whether Section 8 is applicable in the case of the estate of Pethi, the last male holder, is the question. We are quite clear that it does. In holding so, we do not say for a moment that Section 8 is retrospective in character. It is true that

minor Pethi died long prior to the coming into force of the Act. But his mother Pappammal intervened as a limited owner and she died only in the year 1965 after the coming into force of the Act. The succession to the estate of minor Pethi, undoubtedly opened on 8th February, 1965, the date on which Pappammal, the limited owner, died. It is settled law that even though the last male holder's physical death is on a particular date, for the purpose of determining the order of succession fictionally he would be deemed to have died only on the date on which the intervening limited owner dies. Therefore, to apply Section 8 to a case where the physical death of the last male holder happened prior to the commencement of the Act but succession to his estate opened only after the commencement of the Act (as in the present case), it is wholly unnecessary to construe Section 8 as retrospective in character. Because of the fiction referred above, the term "male Hindu dying intestate" occurring in Section 8 would, in the case of the male Hindu dying prior to the commencement of the Act but succession to his estate opening after the commencement of the Act, have reference only to the date on which the limited owner dies. In other words, in such a case, the male Hindu dies intestate only on the date on which the limited owner dies.

6. The Act is a codifying law relating to intestate succession among Hindus. Section 4 of the Act says that the law relating to succession among Hindus that was in force prior to the commencement of the Act shall cease to have effect in respect of matters for which provision has been made in the Act. Succession to a male Hindu is a matter undoubtedly provided for in the Act. That being so, we are unable to see how the old textual Hindu Law can be looked into for ascertaining the reversionary heirs of a male Hindu regarding whose estate succession opens after the commencement of the Act, merely because the physical death of the man had occurred prior to the commencement of the Act.

7. The question whether Section 8 would apply to a case where the physical death of a male Hindu occurs prior to the commencement of the Act, arises only where a limited owner takes the estate, alienates the same prior to the commencement of the Act and dies subsequent to the commencement of the Act. In cases where no limited owner takes the estate on the death of the last male holder, the estate vests in the nearest heir of the last male holder and the Act, which came into force on a subsequent date, would have no application at all to such an estate. The legislation must be taken to be only prospective in character unless there are clear words in the statute to make any particular provision to have retrospective operation. In cases where a Hindu male died intestate prior to the commencement of the Act and there was no limited owner taking the estate, the same would have gone to his heirs according to the rules of succession then in force. The estate having thus vested in such heir or heirs, they cannot be divested of the estate, even though, under the statute which comes into force subsequently, they would not be the nearest heirs of the said last male holder. Section 8 of the Act is certainly not meant to be applied to a case where the estate has already vested in a full owner as per the rules of

succession which were in force prior to the commencement of the Act.

8. Similarly, if the estate left by a male Hindu who dies prior to the commencement of the Act happened to be an interest in coparcenary property and that interest had passed on to other members of the coparcenary by survivorship, such estate would not be affected in any way by the provisions of the Act. Section 6 of the Act, which deals with devolution of interest in coparcenary property, specifically says that the provision applied to a case of a male Hindu dying after the commencement of the Act. That is so because the provisions are not meant to have retrospective operation, affecting estates which had already vested in accordance with the rules of Hindu Law which were in force prior to the commencement of the Act.

9. What happens in a case where a female Hindu takes the estate as a limited owner on the death of the last male holder prior to the commencement of the Act ? If the estate continued to be in the possession of such a female Hindu till the date on which the Act came into force, by virtue of Section 14 (1) of the Act the limited estate would get enlarged to an absolute estate, for Section 14 (1) of the Act says that any property in possession of 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. In such a case, when the female Hindu, who became the absolute owner of the estate, dies subsequently, she would be the stock of descent and succession has to be traced to her.

10. The difficulty arises only in a case where a female Hindu becomes a limited owner in respect of the estate of a male who dies prior to the commencement of the Act, then the limited owner, alienates the estate (prior to the commencement of the Act) and dies subsequent to the commencement of the Act. To such a case Section 14 of the Act is not applicable because the property is not possessed by the female Hindu as contemplated under that section. When, in such a case, the female Hindu dies after the commencement of the Act, undoubtedly succession to the estate opens on the date on which she dies. It must be remembered that the property remains that of the last male holder who died prior to the commencement of the Act, as the female Hindu who got the property held only a limited estate in the same and it never got enlarged into an absolute estate, as the female Hindu was not possessed of the property after the commencement of the Act, the same having been sold away prior to the commencement of the Act. Therefore succession is to be traced to the last male holder as if he died on the date on which the limited owner died, even though the physical death of the last male holder had occurred very much prior to the commencement of the Act. That is the situation in the present case.

11. The property in question had been alienated to the 1st defendant by Pappammal, the limited owner, prior to the commencement of the Act, but she died only on 8th February, 1965. The reversionary heirs of minor Pethi as on that date, viz., 8th February, 1965, have to be determined because of the fiction that the last male Hindu should be deemed to have died intestate only on the date on

which the limited owner died. Therefore taking Section 8 to be only prospective in character, we do not see why the provisions of that section are not to be applied in the case. If the textual Hindu Law has to be applied to the present case in order to find out the nearest reversioners, then it would, in our opinion, amount to making the intention of the legislature nugatory. When the legislature codified the law of succession relating to Hindus dying intestate, it is not possible to say that they intended that the old textual Hindu Law would apply in a case where the succession opens very much after the commencement of the Act as in the present case. That in a case where a limited owner intervenes, succession to the estate of the last male holder opens on the date on which the limited owner dies, cannot be disputed. In the present case, the suit has been filed only on the basis that succession has opened on 8th February, 1965, the date on which Pappammal, the limited owner, died. But in spite of succession so opening very much after the commencement of the Act, the plaintiffs want the Court not to apply Section 8 of the Act to determine who the nearest reversioners are and they want the old textual Hindu Law to be applied. We are quite clear that that is not possible.

12. It must be taken to be settled law that the expression "a Hindu male dying intestate" need not necessarily relate to the date of the physical death of the man and that it would relate to the date of the fictional death of the man in cases where a limited owner intervenes.

13. It is contended that a reading of Sections 6 and 8 of the Act together would show that Section 8 would be applicable only to a case where a male Hindu physically dies after the commencement of the Act. Section 6 of the Act relates to devolution of interest in coparcenary property. The section re-enacts the old textual Hindu Law that the interest of a Hindu in a Mitakshara coparcenary property shall devolve by survivorship upon the surviving members of the coparcenary. But there is a proviso to the section which says that if the male Hindu, who dies after the commencement of the Act, had left him surviving a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, his interest in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship (Explanation I to the section says the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not). Therefore in a case where a Hindu coparcener dies intestate after the commencement of the Act leaving a female relative specified in Class I of the Schedule, etc. his interest in the coparcenary would not devolve by survivorship (though it would have so devolved but for the coming into force of the Act) but as per the provisions contained in Section 8 of the Act. To this extent Section 8 is linked with Section 6. But the question is whether, because of the above link between the two sections, one can hold that Section 8 would apply only to a case where the

physical death of a male Hindu occurs after the commencement of the Act. We do not think so. It must be remembered that Section 6 relates only to devolution of interest in coparcenary property and to no other property. As far as such interest in coparcenary property is concerned, the Act applied only if the male Hindu died after the commencement of the Act. That is so because if a coparcener had died prior to the commencement of the Act, his interest in the coparcenary would have already devolved by the law of survivorship on the remaining coparceners and the same would have vested in them and the Act is not meant to divest persons of estates which had already vested in them. But Section 8 does not relate only to interest in coparcenary property but it relates to separate property of a male Hindu as well. In fact, under Explanation I to Section 6, the interest in coparcenary property of a male Hindu dying intestate is deemed to be his share in the coparcenary property in case a partition had been effected as on the date on which he died. That is for the purpose of applying the rule of succession contained in Section 8 to the interest of a coparcener who dies intestate. But as we said, Section 8 is not intended to cover only cases contemplated u/s 6 of the Act, for while Section 6 relates only to devolution of interest in coparcenary property, Section 8 operates on a wider field. Therefore, though while determining the devolution of interest in coparcenary property u/s 6, one has to look to Section 8, there would be no vice-versa. In other words, to determine the meaning of the expression "a male Hindu dying intestate" occurring in Section 8, Section 6 is not to be tacked on.

14. In AIR 1946 173 (Privy Council) the Judicial Committee had to consider this question, viz., the meaning of the expression "a Hindu male dying intestate", though it was under the Hindu Law of Inheritance (Amendment) Act, 1929. That was a case where the physical death of the Hindu male happened before the coming into force of the 1929 Act. He was succeeded by a female heir who died after the Act came into operation. The Judicial Committee held that in that case the succession to the estate opened out on the death of the female heir and hence the 1929 Act would apply to the case and an heir under the said Act would be entitled to succeed. Their Lordships pointed out that there is no vesting as at the date of the death of the last full owner and the question of who is the nearest heir or what is the class of reversionary heirs, falls to be settled at the date of the expiry of the ownership for life. It was also pointed out that during the lifetime of the female limited owner, reversionary right is a mere possibility or spes successionis and that it cannot be predicated who would be the nearest reversioner at the time of her death. Even though this decision is under the 1929 Act, the principle is the same. The question in both the cases is whether the expression "a Hindu male dying intestate" has reference only to the date of the physical death of the man or it would refer to the date of the fictional death, viz., the date on which the limited owner died. This decision of the Judicial Committee has been approved by the Supreme Court in Fateh Bibi etc. Vs. Charan Dass, . That is also a case under the 1929 Act. But we think after the above decision of the Supreme Court it would not be open to contend that the expression "a Hindu

made dying intestate" should have reference only to the date of the physical death of the man even in a case where a limited owner intervenes and succession opens after the commencement of the Act. As a matter of fact, we are of the opinion that the principle laid down by the Privy Council and approved by the Supreme Court in the above case would apply a fortiori to the present case. It must be remembered that the Hindu Law of Inheritance (Amendment) Act, 1929 was not a codifying law. It only altered the order of succession of certain persons mentioned therein. When even under that Act it is held that the expression "a male Hindu dying intestate" should be taken to have reference to the date on which the limited owner dies and succession opens, in the present case, which is under the Act which is a codifying law relating to intestate succession among Hindus, it would be incongruous to say that even though succession opens very much after the commencement of the Act, still one has to look to the old textual Hindu Law to determine the reversionary heirs, taking the expression "a male Hindu dying intestate" as having reference only to the date of physical death of the man. We are quite clear that that expression would relate to the date of the physical death of the man, only if on that date the succession to his estate finally opened and not to a case where a limited owner intervenes and keeps the reversionary succession in abeyance as it were.

15. Reliance is placed on behalf of the plaintiffs on the decision of the Supreme Court in *Eramma Vs. Verrupanna and Others*, . which is a case arising under the Act itself. It is also contended that the view expressed in *Fateh Bibi etc. Vs. Charan Dass*, . is in conflict with the view in the earlier case of the Supreme Court, viz., *Eramma Vs. Verrupanna and Others*, . and that the earlier case being one under the Act while the other case is under the 1929 Act, as far as this case is concerned, the earlier decision of the Supreme Court has to be followed. We are of the opinion that there is really no conflict between the two decisions of the Supreme Court, and the earlier decision of the Supreme Court, though under the Act, does not in any way help the plaintiffs in the present case. That was a case where the last male holder by name Basanna died in 1936-37, (i.e.,) prior to the commencement of the Act" The said Basanna was the son of one Eran Gowda who had married three wives by name Eramma, Siddamma and Sharnamma; Basanna was the son through Sharnamma. On his death, his two stepmothers, viz., Eramma and Siddamma, who had absolutely no right in his estate, had trespassed into the estate and continued to be in possession of the same. (Sharnamma, the mother of Basanna, seems to have predeceased him.) The reversioners who were entitled to the estate of Basanna filed a suit to recover possession of the estate. The two stepmothers of Basanna set up a case that each one of them had adopted a son to their late husband Eran Gowda and therefore the plaintiffs in that suit cannot recover possession. The case of adoption set up by the two step-mothers was negated by the High Court and in the case of one of the step mothers leave had been granted to appeal to the Supreme Court. In respect of the other, leave had been refused by the High Court and a special leave application had been filed in the Supreme Court by her.

When those proceedings were so pending in the Supreme Court, the Act (Hindu Succession Act, 1956) came into force. The plaintiffs in that suit having obtained a decree for possession, executed the decree. Then Eramma, one of the stepmothers of Basanna, contended that the decree became non-executable in view of the provisions of the Act as u/s 14 of the Act she had become the full owner of the property that was in her possession. This contention was negatived by the High Court and affirmed by the Supreme Court holding that Section 14 of the Act would have no application in that case because Eramma was in possession of the property only as a trespasser and not as a limited owner thereof. When Eran Gowda, the father of Basanna, died the Hindu Women's Rights to Property Act was not in force and therefore Eramma and Siddamma had absolutely no right in the estate of Basanna. Section 14 would apply only if a female Hindu is possessed of property, whether acquired before or after the commencement of the Act. Their Lordships of the Supreme Court pointed out that possession contemplated under that section is lawful possession and not possession as a trespasser.

16. It had been further contended on behalf of Eramma, one of the stepmothers of Basanna, that Section 8 of the Act is retrospective in character and that therefore it applied even to the estate of Basanna who died as early as 1936-37. That contention was negatived and their Lordships held that the provisions of Section 8 of the Act are not retrospective in operation and where a male Hindu died before the Act came into force, Section 8 of the Act will have no application. It must be remembered that in that case no limited owner intervened and the succession did not open after the commencement of the Act. Admittedly in the case before the Supreme Court the estate did not pass on to any limited owner on the death of Basanna in 1936-37. The succession to his estate had opened even in 1936-37. It is under those circumstances it was held by the Supreme Court that Section 8 of the Act would not be applicable to that case. As a matter of fact, their Lordships specifically point out that Section 8 of the Act would not be applicable where succession opened before the Act. The observation of the Supreme Court is as follows :

We accordingly hold that the provisions of Section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force, (i.e.) where succession opened before the Act, Section 8 of the Act will have no application.

Even the above observation can be interpreted as impliedly approving of the position that where succession opened after the commencement of the Act (whatever be the date on which the last male holder physically died), Section 8 would be applicable. Anyway, in that case their Lordships of the Supreme Court did not say that Section 8 would not be applicable even if succession opened after the commencement of the Act, though the male Hindu died prior to the Act. Therefore this decision is in no way conflicting with the decision of the Privy Council in AIR 1946 173 (Privy Council) and that of the Supreme Court in Fateh

Bibi etc. Vs. Charan Dass, . which are cases specifically dealing with the question of succession opening after the commencement of the Act, even though the male Hindu died before the Act. As pointed out by the Privy Council and the Supreme Court, in holding that Section 8 would be applicable to a case of a male Hindu whose physical death occurred prior to the Act but succession to his estate opened after the commencement of the Act, we are not giving retrospective effect to Section 8 as the material point of time is the date when the succession opens, viz., the death of the female Hindu who intervened.

17. In V. Sampathkumari Vs. M. Lakshmi Ammal and Others, . a Division Bench of this Court has observed that when a male Hindu dies intestate leaving a female heir like a widow or a daughter to succeed him under the law in force prior to the commencement of the Act, it is not correct to say that succession to the estate of the male does not open until the death of the intervening female heir. It was further observed that the widow is not a mere life-estate holder and having regard to the fundamental principle that succession is never in abeyance, the estate of the male Hindu must vest in some heir as soon as he dies. In that particular case, the estate so vested in the two widows of the last male holder, that was a case of the male Hindu dying prior to the commencement of the Act leaving two widows and a daughter. As per the provisions of the Hindu Women's Rights to Property Act, the two widows succeeded to the estate of the male Hindu and as they were in possession of the estate on the date on which the Act came into force; by virtue of Section 14 of the Act the limited estate became enlarged to one of absolute estate in their hands. But the daughter of the last male Hindu wanted a share in the estate on the ground that Section 8 of the Act is retrospective in operation and that it applied to the estate even though her father died prior to the commencement of the Act. The above contention of the daughter was, if we may say so with respect, rightly rejected by Ganapatia Pillai and Venkataraman, JJ. who constituted the Division Bench of this Court. As we have already pointed out, Section 8 is really not retrospective in operation and it would not apply to a case of a male Hindu who died prior to the Act, unless succession to his estate opened out after the commencement of the Act. It is needless to stress that by applying Section 8 to a case where succession opened after the commencement of the Act (though the last male holder had died prior to the Act), we are not giving any retrospective effect to that section, for the material date is the date on which the succession opened.

18. The observations of the Division Bench in V. Sampathkumari Vs. M. Lakshmi Ammal and Others, . that succession opened in that case ever on the date of physical death of the male Hindu and that the estate vested in his widows, should be understood on the facts of that case. Those observations do not cover the question as to when succession opens as far as the reversioners are concerned. It is true the widow or any other female heir who took a limited estate under the old textual law did succeed to the estate, but that succession is certainly not as full owner. It may be that the widow who so succeeds would be competent to validly liquidate the estate under certain circumstances. But what

happens if the estate is available to be taken by the reversioners on the date of the death of the widow, is the question. Undoubtedly, on such date succession to the estate of the last male Hindu opens but as far as the reversioners are concerned, if the female Hindu had alienated the property prior to the commencement of the Act, but such alienation is not binding on the reversioners, succession to the estate (which still remains to be that of the last male Hindu) does open out on the death of the female Hindu. That is what has happened in the present case. It cannot be contended and, as a matter of fact, it is not contended that the succession to the estate of minor Pethi did not open out on 8th February, 1965, the date on which Pappammal, his mother, died. The vesting of the estate in the female heir as soon as the male propositus dies, as observed by the above Division Bench, is certainly not an absolute vesting. The female heir does succeed to the estate of the male Hindu, but certainly not as full owner under the old textual Hindu Law. In the case before the Division Bench, the daughter was not entitled to a share in the estate of her father, not because the estate had absolutely vested in another before the commencement of the Act, but really because succession to the estate did not open after the commencement of the Act. It must be remembered that the widows of the last male Hindu who had taken over his estate prior to the Act were alive on the date of the commencement of the Act, so much so Section 14 came into operation and converted the limited estate into an absolute estate. In such a case, naturally the daughter cannot rely upon Section 8 of the Act and claim a share in the estate for the simple reason that no succession opened after the commencement of the Act. Therefore the observations of the Division Bench in *V. Sampathkumari by next friend and husband C. Venkatachalapathi (declared major) Vs. M. Lakshmi Ammal and Others*, are in no way inconsistent with the conclusion which we have reached in this case.

19. The Calcutta High Court in *Bepin Behary Mullick and Others Vs. Sm. Lakshasona Dassi and Others*, and *Ratan Kumari Tholia Vs. Sunder Lal Tholia and Others*, has taken a similar view as we now take regarding application of Section 8 of the Act. The Punjab High Court has also taken the same view in *Taro Vs. Darshan Singh and Others*, and *Harbhaj Vs. Mohar Singh and Others*, . The Andhra Pradesh High Court in *Ramulu and Another Vs. Govur Venkanna (Died) Govur Narayana and Others*, . the Mysore High Court in *Satyanarayana v. Seethamma* AIR 1972 Mys. 247 and a Full Bench of the Himachal Pradesh High Court in *Lachhman Vs. Thunia*, have also taken the same view. But the Patna High Court in *Renuka Bala Chatterji Vs. Aswini Kumar Gupta and Others*, . and *Chaturbhuj Pradhan and Others Vs. Sarbeshwar Pradhan and Another*, . the Mysore High Court in *Kempiah v. Girigamma* AIR 1966 Mys. 189. and the Orissa High Court in *Mst. Jandebi Vs. Upendra Sahu and Another*, . have taken a different view. But we are of the opinion that the above decisions taking a contrary view cannot be accepted in view of the decision of the Supreme Court in *Fateh Bibi etc. Vs. Charan Dass*, .

20. The Orissa High Court, in the case referred to above, has observed that the

death female Hindu after commencement of the Act refers to actual and not fictional death, purporting to follow *Eramma Vs. Verrupanna and Others*, . But the above decision of the Supreme Court did not deal with the question of fictional death. As already seen, that was a case where succession did not open after the commencement of the Act inasmuch as no limited owner intervened.

21. The Patna High Court and the Mysore High Court seem to think that applying Section 8 to a case like the present one (where the limited owner alienated the property prior to the Act and died after the Act, thereby succession to the last male Hindu opening after the Act) would amount to giving retrospective operation to Section 8. The Mysore High Court has also been critical of the decision of the Judicial Committee in AIR 1946 173 (Privy Council) . As the Supreme Court in *Fateh Bibi etc. Vs. Charan Dass*, . has approved the decision of the Privy Council, the view of the Mysore High Court cannot be followed. With respect to the learned Judges of the Mysore High Court as well as the Patna High Court, we are unable to agree with their view.

22. In the present case (the two second appeals), the plaintiffs, who are agnates of the last male Hindu (minor Pethi) removed by several degrees, cannot have any claim to his estate in preference to the 6th defendant who is the last male holder's sister's daughter. She is a Class II heir u/s 8 of the Act. Therefore Second Appeal No. 1076 of 1970 has to be allowed. However, Second Appeal No. 1088 of 1970 has to be dismissed because the question of the 1st defendant getting the value of improvements does not arise as the plaintiffs are not entitled to possession of the property.

23. The facts in the Letters Patent Appeal are as follows :

The last male holder is one Sudalaimuthu. He had two brothers by name Enamuthu and Shanmugam. The father of the last male holder is also Sudalaimuthu and he has to be referred to as Sudalaimuthu No. I and the last male holder has to be referred to as Sudalaimuthu No. II. Somu Ammal is the widow of Sudalaimuthu No. II, (the last male holder) who succeeded to the estate in the year 1919 on the death of her husband. The widow Somu Ammal sold the property in the year 1935 to the 1st defendant in the case by name Narayana Konar. Thereupon Enamuthu and Shanmugam, the two brothers of Sudalaimuthu No. II (last male holder), filed a suit (O.S. No. 275 of 1935) for a declaration that the alienation was not binding on the reversioners after the death of Somu Ammal. That suit had been decreed. Somu Ammal died on 22nd March, 1966.

24. The Letters Patent Appeal arises out of O.S. No. 299 of 1966 filed by Shanmugasundarathammal, the plaintiff, who claims to be the nearest reversioner entitled to succeed to the estate of Sudalaimuthu No. II. She is the son's daughter of Shanmugam, one of the brothers of Sudalaimuthu No. II. In the suit, the alienee from Somu Ammal was impleaded as the 1st defendant. His brother's son, who was in possession of the property, was impleaded as the 2nd

defendant and the brother of the 2nd defendant, who claimed to have been adopted by Somu Ammal and thereby became entitled to the property, was impleaded as the 3rd defendant. The Courts below concurrently found against the case of adoption set up by the 3rd defendant. The trial Court decreed the suit holding that the plaintiff is the nearest reversioner, but the first appellate Court reversed the finding. Ramanujam, J. allowed the second appeal filed by the plaintiff and the decision is reported in (Shanmughasundarathammal Vs. Narayana Konar and Others, . It is not disputed that if the provisions of Section 8 of the Act are applicable, the plaintiff would be the nearest reversioner entitled to the property and if it is not applicable and the old textual Hindu Law has to be applied in order to determine the nearest reversioners, the plaintiff has to be non-suited. Mookandi and Palavesam are the sons of two different paternal uncles of the last male holder Sudalaimuthu No. II. The last male holder's father is also Sudalaimuthu No. I and Mookandi is the son of one brother of Sudalaimuthu No. I and Palavesam is the son of another brother of the said Sudalaimuthu No. I. If the textual Hindu Law is to be applied, the said Mookandi and Palavesam, who are still alive, would get precedence over the plaintiff. But as we agree with Ramanujam, J. that Section 8 of the Act would be applicable even though the last male holder died as early as 1919, as succession opened out only after the coming into force of the Act, the plaintiff should succeed. Under Rule 1 of Section 12 of the Act, among agnates, the one who has fewer or no degrees of ascent has to be preferred. Mookandi and Palavesam, as well as the plaintiff, are agnates of the last male holder; But the plaintiff has fewer degrees of ascent than Mookandi and Palavesam (The plaintiff is the last male holder's father's son's grand-daughter. Mookandi and Palavesam are the last male holder's father's father's son's sons). Therefore the Letters Patent Appeal has to be dismissed.

25. The result is, Second Appeal No. 1076 of 1970 is allowed and Second Appeal No. 1088 of 1970 is dismissed. Parties to bear their respective costs throughout. The Letters Patent Appeal is dismissed with costs.