

(1966) 06 CAL CK 0016
In the Calcutta High Court
Case No : C.R. No. 1415 of 1961

Kashi Nath Pal

APPELLANT

Vs

Umapada Pal and Others

RESPONDENT

Date of Decision : 24-06-1966

Acts Referred:

Bengal Tenancy Act, 1885 — Section 26F
Constitution of India, 1950 — Article 372
Hindu Womens Right to Property Act, 1937 — Section 3

Citation : AIR 1968 Cal 83 : (1967) 1 CALLT 102 : 71 CWN 321

Hon'ble Judges : K.C. Sen, J;A.C. Sen, J

Bench : Division Bench

Advocate : Purna Chandra Basu, for the Appellant; Dhruba Kumar Mukherjee, for the Respondent

Judgement

A.C. Sen, J.—The present dispute relates to the pre-emption of Plot No. 1292 of khatian No. 87 of mouza Pashi Narayanpur, District Hooghly appertaining to an occupancy holding originally belonging to Dukhiram Pal, Ananda Pal and Jatindra Pal in equal shares. Dukhiram died leaving behind him his son Panchanan (opposite party No. 4), as his only heir; Ananda died leaving behind him his son Gopal (O. P. No. 5) as his only heir. Jatindra died leaving behind him a son Nimai and the widow Thakadamoyee. Nemai alone according to the petitioner, inherited 1/3rd share in the disputed Plot which is agricultural land. On 5-9-59 the preemptor (O. P. Nos. 1, 2, 3) purchased 1/3rd share of the disputed plot from Thakadamoyee by a registered kobala on the footing that on the death of Jatindra his widow Thakoda inherited 1/3rd share of the disputed plot. The remaining 2/3rd share of the disputed plot was purchased by the petitioner on 16-11-59 from opposite parties Nos. 4 and 5 by a registered kobala.

2. O. P. Nos. 1, 2, 3 filed an application u/s 26-F of the Bengal Tenancy Act for pre-empting 2/3rd share of the disputed plot purchased by the petitioner. The petitioner objected to the application for preemption. The petitioner's case inter alia was that the kobala executed by Thakodamoyee in favour of the opposite

parties Nos. 1 to 3 was fraudulent, void and without consideration; that Thakodamoyee had no interest in the disputed land to sell, and that the said kobala was executed by her suppressing the fact that Jatindra left a son Nemai.

3. By his judgment and order dated 29-7-60 Mr. G. C. Mukherjee, Munsif, First Court, Hooghly allowed the application for pre-emption. Against the aforesaid order the petitioner preferred Misc. Appeal No. 346 of 1960 to the Court of the District Judge, Hooghly and on 19-1-61 Mr. T. P. Mukherjee, District Judge, Hooghly sent the case back to the learned Munsif for determining the date of death of Jatindra Pal, husband of Thakodamoyee, holding that the Hindu Women's Rights to Property Act, 1937 would apply to agricultural land after the coming into operation of the Constitution of India.

4. The case was sent back to the Court of first instance in order to ascertain whether the pre-emptors, that is to say, opposite parties Nos. 1 to 3 acquired any interest in the disputed land by reason of their purchase from Thakodamoyee widow of Jatindra.

5. The lower appellate Court has found that the disputed plot must be regarded as agricultural land. The validity of this finding has not been challenged before us. The Hindu Women's Rights to Property Act, 1937 had no application to agricultural lands. Therefore Thakodamoyee could not have acquired interest in the disputed plot as an heir of Jatindra under the said Act as it stood before the Constitution of India. The lower appellate Court however thinks on the authority of an Orissa decision *Sm. Laxmi Debi Vs. Surendra Kumar Panda and Others*, that the said Act became applicable to agricultural lands after the Constitution of India had come into force. The view of the lower appellate Court is quoted below:--

"Thakodamoyee could inherit the property along with her son only under the Hindu Women's Rights to Property Act. That Act however did not apply to agricultural lands so long as the Government of India Act was in operation. It was held in the case reported in *Sm. Laxmi Debi Vs. Surendra Kumar Panda and Others*, that the legislative incompetence of the Central Legislature was the ground on which it was held by the Federal Court in the case reported in AIR 1941 72 (Federal Court) that agricultural lands did not come within the purview of the Hindu Women's Rights to Property Act and that incompetence having been removed with the coming into operation of the Constitution of India, that Act will now apply to agricultural lands also and the Federal Court decision above would no longer hold good.

6. In the order for remand the lower appellate Court has given the direction to the Court of first instance that if Jatindra is found to have died after the Constitution, the prayer for pre-emption should be allowed.

7. The learned advocate for the petitioner contends that the Constitution of India has not in any way affected the legal position as to the applicability of the Hindu Women's Rights to Property Act, 1937 to agricultural lands and that the decision

of the Federal Court reported in AIR 1941 72 (Federal Court) still holds good. He further submits that as Thakodamoyee cannot be regarded as an heir of Jatindra so far as the disputed plot is concerned, no matter whether Jatindra died before or after the Constitution, the lower appellate Court was not justified in remanding the case for the purpose of ascertaining whether Jatindra died before or after the Constitution. According to him, the petition for pre-emption should have been dismissed by the lower appellate Court on the ground that the pre-emptors opposite parties Nos. 1 to 3 did not acquire any interest in the disputed plot by virtue of their purchase from Thakodamoyee. Mr. Mukherjee, learned advocate for the opposite parties Nos. 1 to 3, however, supports the view taken by the lower appellate Court.

8. Therefore, the only point for determination is whether the Hindu Women's Rights to Property Act became applicable to agricultural lands after the commencement of the present Constitution. This case first appeared before P. N. Mookerjee, J. sitting singly. His Lordship was pleased to refer it to a Division Bench with the following observations:--

"Having considered the matter further and having heard the learned advocates again, I recall my unsigned judgment, delivered on February 23, 1966, and as, in my opinion, in view of the two decisions of the Supreme Court, namely, M.P.V. Sundararamier and Co. Vs. The State of Andhra Pradesh and Another, cited earlier and Deep Chand Vs. The State of Uttar Pradesh and Others, which has come to my notice since, the point at issue between the parties in this Rule is of sufficient importance to justify a reference to the Division Bench, I refer this case to the Division Bench for disposal."

9. The lower appellate Court has not correctly appreciated the view expressed by the Orissa High Court in Sm. Laxmi Debi Vs. Surendra Kumar Panda and Others, regarding the applicability of the Hindu Women's Rights to Property Act, 1937 to agricultural lands after the Constitution had come into force. Das, J. in one place has said:

"We have no doubt, therefore, that in view of the change in law, the Act will apply to agricultural lands also, and the decision in AIR 1941 72 (Federal Court) would no longer hold good.

10. The lower appellate Court seems to think that the word "Act" in the above extract means the Hindu Women's Rights to Property Act, 1937, but in fact that word means the Hindu Succession Act, 1956. There on the death of one Brojo Mohan leaving behind three widows his sister instituted a suit for declaration of her reversionary right in respect of the properties left by Brojo Mohan. The suit was dismissed on a finding that Brojo Mohan left behind a daughter besides the three widows and that consequently the plaintiff had no immediate reversionary right. The plaintiff preferred an appeal and during the pendency of the appeal the Hindu Succession Act, 1956 came into force and the question arose as to the maintainability of the suit. The learned advocate for the appellant contended that

the Act would not apply to agricultural lands and for this he relied upon the Federal Court decision in the matter of Hindu Women's Rights to Property Act, 1937 reported in AIR 1941 72 (Federal Court) . In refuting the argument Das, J. observed:

"This decision, in view of the changed position in law, no longer holds good. The Federal Court decision was based upon the law of legislative competence as it then stood, by the Government of India Act, 1935." The Hindu Women's Rights to Property Act was passed by the Central Legislature under the Government of India Act, 1935 in exercise of the power conferred by Entry No. 7 of List III, Concurrent List, which is in the following terms:

"Wills, intestacy and succession, save as regards agricultural lands "under the present Constitution of India, the relevant entry in the Concurrent List is Entry No. 5, which is in the following terms:" . wills, intestacy and succession."

The words "save as regards agricultural land" have been omitted. From this difference in language Das, J. concluded as follows:

"It is clear that Parliament had omitted the phrase "save as regards agricultural land" from item No. 5 of the Concurrent List in order to have a uniform personal law for Hindus throughout India and accordingly it necessitated the enlargement of Entry No. 5. We have no doubt, therefore, that in view of the change in law, the Act will apply to agricultural land also and the decision in AIR 1941 72 (Federal Court) would no longer hold good."

That the words "the Act" refer to the Hindu Succession Act, 1956 will be clear from the earlier part of the judgment where it has been stated while mentioning the Hindu Succession Act, 1956 for the first time that it will be referred to hereafter as "the Act". The Orissa High Court as a matter of fact was not called upon to decide whether after the Constitution the Hindu Women's Rights to Property Act became applicable to agricultural lands before its repeal by the Hindu Succession Act. The lower appellate Court was evidently in error in thinking that the Orissa High Court has held that the Hindu Women's Rights to Property Act will apply to agricultural lands after the commencement of the Constitution.

11. Mr. Mukherjee, learned advocate for the opposite parties, however, seeks to support the view of the lower appellate Court on the doctrine of eclipse which was not argued before the lower appellate Court. The Federal Court in the matter of the Hindu Women's Rights to Property Act, 1937 expressed the following opinion:

"The Hindu Women's Rights to Property Act, 1937 and the Hindu Women's Rights to Property (Amendment) Act, 1938 do not operate to regulate succession to agricultural land in the Governor's provinces.

12. Mr. Mukherjee, therefore, argues that the Hindu Women's Rights to Property Act, 1937 as well as the Amendment Act of 1938 regulated succession to

agricultural lands as well in the Chief Commissioner's provinces. According to him, this position also follows from the fact that under the Government of India Act, 1935 the Federal Legislature was competent without restriction to legislate on subjects comprised in all the legislative lists including the provincial lists, because under Sub-section (4) of Section 100 of the Government of India Act, 1935 the Federal Legislature had power to make laws with respect to matters enumerated in the Provincial Legislative List except for a province or any part thereof. The Hindu Women's Rights to Property Act, 1937, the argument proceeds, was not still born so far as succession to agricultural land was concerned; it purported to regulate succession to properties in general including agricultural land but by reason of the legislative incompetence of the Central Legislature to legislate in relation to agricultural land in Governor's provinces, the Act was void in the Governor's provinces in so far as it purported to regulate succession to agricultural lands and therefore it did not operate to regulate succession to agricultural land in the Governor's provinces. The next step in the argument is that the said Act was a valid piece of legislation even in respect of agricultural lands in the Chief Commissioner's provinces and that it could not operate on agricultural land in the Governor's provinces by reason of the shadow cast by the words "save as regards agricultural lands" in Entry No. 7 of the Concurrent List under the Government of India Act, 1935 and Entry No. 21 of the Provincial Legislative List dealing inter alia with the devolution of agricultural lands. This shadow having been removed, he contends, by the present Constitution, by the widening of the scope of Entry 5 of the Concurrent List in Schedule VII to the present Constitution so as to include succession to agricultural lands as well, the Hindu Women's Rights to Property Act, 1937 became operative on agricultural lands in the States, representing the former provinces immediately after the introduction of the present Constitution of India. He, therefore, concludes that if it is found that the husband of Thakodamoyee died after the 26th January 1950 and before the repeal of the Hindu Women's Rights to Property Act, 1937, then it must be held that Thakodamoyee became entitled to 1/6th share in the disputed plot by way of inheritance that the pre-emptors by their purchase from Thakodamoyee obtained this 1/6th share and that consequently they are entitled to preempt the petitioner.

13. The learned advocate for the pre-emptors, opposite parties, relied on *Deep Chand Vs. The State of Uttar Pradesh and Others*, and also on *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, also in (1956) SCA 1. *Deep Chand's* case has no application to the facts of the present case. In that case the validity of the post-Constitution Act of the Uttar Pradesh Legislature, namely, the U. P. Transport Services (Development) Act of 1955 as well as the notification thereunder was challenged, The validity of the said Act was challenged on various grounds, one of them being that the Act was repugnant to and inconsistent with a later Central Act, namely, the Motor Vehicles (Amendment) Act No. 100 of 1956 passed by Parliament. It was argued on behalf of the appellant, stage carriage operator, (i) that by reason of the

coming into operation of the Central Act No. 100 of 1956 the U. P. Act had become void and (ii) that by reason of Article 254 of the Constitution the U. P. Act, being repugnant and inconsistent with the Central Act No. 100 of 1956 had become void since the coming into operation of the said Central Act No. 100 of 1956. The validity of the U. P. Act was challenged also on the ground that it offended the provisions of Article 31 of the Constitution, as it stood before the Constitution (4th amendment) Act, 1955, as, though the State had acquired the appellant's interest in a commercial undertaking, no compensation for the said interest was given, as it should be under the said Article. It may be mentioned that under the said U. P. Act, the U. P. Government issued a notification directing that the routes served by the appellants along with others should be exclusively served by the stage carriages of the Government. So far as the last point is concerned, namely, that the U. P. Act was void, as it did not provide for compensation on acquisition, the question arose whether this point would be decided with reference to Article 31 before its amendment in 1955 or with reference to Article 31 after its amendment in 1955. The view of the majority was that the validity of the U. P. Act could not be tested on the basis of the Constitution (4th Amendment) Act, 1955 but only on the relevant Articles as they existed prior to the amendment. It was, however, found on an examination of the relevant provision of the U. P. Act that it did provide for adequate compensation for the interest acquired.

14. As to the first contention on behalf of the appellants in that case, namely, that the U. P. Act being repugnant to the Central Act No. 100 of 1956, became void under the provisions of Article 254(1) of the Constitution, the majority of the Judges held on the language of Article 254(1) that what was void was not the entire U. P. Act but only to the extent of its repugnancy with the law made by Parliament, that is to say, Central Act No. 100 of 1956. Their Lordships concluded as follows:-

"Therefore under Article 254(1) the law under the U. P. Act subsists to support the scheme framed thereunder and it becomes void only in respect of schemes framed under the Central Act."

15. It will be seen from what has been stated above regarding Deep Chand Vs. The State of Uttar Pradesh and Others, that the questions involved there were entirely different from the question involved in the instant case. Subba Rao, J. however entered into an elaborate discussion as to the applicability of the doctrine of eclipse to a post-Constitution Act in order to meet the point raised by the Advocate General on behalf of the State of U. P., namely, whether the amendment of the Constitution removing a constitutional limitation on a legislature to make a particular law has the effect of validating the Act made by it when its power was subject to that limitation. It should be remembered that in Deep Chand Vs. The State of Uttar Pradesh and Others, the Supreme Court had to deal with post-Constitution Act. Subba Rao, J. who spoke for the majority said that the principle of eclipse had no application to post-Constitution laws

infringing the fundamental rights as they would be ab initio void in toto or to the extent of their contravention of the Fundamental rights. Here we are concerned with the Hindu Women's Rights to Property Act, 1937, a pre-Constitution Act. Therefore, the observations of Subba Rao J. as to the applicability of the doctrine of eclipse to a post-Constitution Act are not very material for our purpose.

16. Let us next consider how far *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, supports the contention of the pre-emptor, respondents. There the validity of the C. P. and Berar Motor Vehicles (Amendment) Act, 1947 (C. P. Act 3 of 1948) was challenged by certain owners of motor buses carrying on the business of stage carriage operators under permits granted u/s 58 of the Motor Vehicles Act 1939 (Central Act IV of 1939) as amended by the C. P. and Berar Motor Vehicles (Amendment) Act, 1947. The impugned Act, namely, C. P. Act 3 of 1948 conferred extensive powers on the Provincial Government including the power to create a monopoly of the motor transport business in its favour to the exclusion of all motor transport operators. The impugned Act was an existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed to the citizens of India by Article 19(1)(g) restriction which could not be justified as reasonable under Clause (6) of Article 19 as it then stood and consequently under Article 13(1) that existing law became void to the extent of such inconsistency. The impugned Act continued in force even after the commencement of the Constitution with respect to persons who were not citizens and could not claim the fundamental right. Nevertheless after 18th June, 1951 when Clause (6) of Article 19 was amended by the Constitution (First Amendment) Act, 1951, the impugned Act ceased to be inconsistent with the fundamental right guaranteed by Article 19(1)(g) read with the amended Clause (6) of Article 19, because that clause after the amendment permitted the creation by law of State monopoly in respect, inter alia, of motor transport services. It was contended on behalf of the operators that the impugned Act having become void for unconstitutionality was dead and could not be vitalised by a subsequent amendment of the Constitution removing the constitutional objection unless it was re-enacted. On behalf of the State of M. P. it was argued that although the impugned Act became on and from 26-1-50 void as against the citizens to the extent of its inconsistency with the provisions of Article 19(1)(g), nevertheless after 18-6-51 when Clause (6) of Article 19 was amended by the Constitution (First Amendment) Act, 1951, the impugned Act ceased to be inconsistent with the fundamental right guaranteed by Article 19(1)(g) read with amended Clause (6) of Article 19, because that clause, after its amendment, permitted the creation by law of State monopoly in respect, inter alia, of motor transport business and it became operative again even as against the citizens. The Supreme Court accepted the contention of the State. The reason for the decision is to be found in the following extract from the judgment of the Supreme Court: *Deep Chand Vs. The State of Uttar Pradesh and Others*, .

".... on and after the commencement of the Constitution, the existing law as a

result of its becoming inconsistent with the provisions of Article 19(1)(g) read with Clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right. Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute book In short, Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with Article 19(1)(g) read with Clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only with respect to the exercise of the fundamental right on and after the date of the commencement of the Constitution. Therefore, between the 26th January, 1950 and 18th June, 1951 the impugned Act could not stand in the way of the exercise of the fundamental right of a citizen under Article 19(1)(g). The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The American authorities refer only to post-Constitution laws which were inconsistent with the provisions of the Constitution. Such laws never came to life but were still-born as it were . . . Such laws (pre-constitution laws of India) were not dead for all purposes. They existed for the purpose of pre-Constitution rights and liabilities and they remain operative, even after the Constitution, as against non-citizens. It is only as against the citizens that they remain etc. in a dormant or a moribund condition."

17. The argument advanced by Mr. Mukherjee on behalf of the pre-emptor respondents is entirely different from the argument advanced on behalf of the Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, . Moreover, the impugned Act in that case was perfectly valid when it was passed. But Mr. Mukherjee argument proceeds on the footing that before the commencement of the Constitution the Hindu Women's Rights to Property Act, 1937 was void in the Governor's provinces in so far as it purported to regulate succession to agricultural lands. Then again in Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, the shadow was cast on the impugned Act by the fundamental rights defined in Part III of the Constitution, whereas in the case of the Hindu Women's Rights to Property Act there is no question of any shadow being cast on it by any provision of the Constitution. The argument of Mr. Mukherjee is entirely based on the enlargement of the legislative competence of the Central Legislature under the Constitution and not on any shadow being removed by an amendment of the Constitution. Therefore, in our opinion the principle laid down in Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another, that is to say, the doctrine of eclipse has no manner of application to the Hindu Women's Rights to Property Act, as interpreted by Mr. Mukherjee. Therefore Mr. Mukherjee's argument is not in any way supported by that case.

18. Next, it should be remembered that the Federal Court construed the word "property" in a restricted sense so as to exclude agricultural land and came to the conclusion that no part of the Act, namely, Hindu Women's Rights to Property Act, 1937 was beyond the Legislature's powers. Mr. Mukherjee has not

given any reason as to why the construction put on the said Act and especially on the word "property" by the Federal Court should not be accepted. The Federal Court on this point observed as follows:

" No doubt if the Act does affect agricultural land in the Governor's provinces, it was beyond the competence of the Legislature to enact it, and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, 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 question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate, that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not arise. The Court does not seek to divide the Act into two parts, namely, the part which the Legislature was competent, and the part which it was incompetent to enact. It holds that, on the true construction of the Act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers. There is a general presumption that a Legislature does not intend to exceed its jurisdiction. (Maxwell on the Interpretation of Statutes (Edn. 8, p. 126); and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it."

19. On the view taken by the Federal Court the position is the same as if the Hindu Women's Rights to Property Act expressly provided that it would not apply to agricultural lands, anywhere in British India including the Chief Commissioner's provinces. If that be the case, then the very bottom of Mr. Mukherjee's argument is knocked out. Mr. Mukherjee argued that the Hindu Women's Rights to Property Act, 1937 was a valid piece of legislation even in respect of agricultural lands in the Chief Commissioner's provinces. But this argument is unsustainable on the view expressed by the Federal Court as to the scope of the said Act.

20. Another argument of Mr. Mukherjee which is only a variant of his argument noted above may be considered. It is based on explanation 1 to Article 372 of the Constitution. It runs thus :--

"The expression "law in force" in this Article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed notwithstanding that it or part of it may not be then in operation either at all or in particular area."

21. The argument is that the Hindu Women's Rights to Property Act, 1937 in so far as it applied to agricultural land was in operation in the Chief Commissioner's provinces though not in the Governor's provinces, immediately before the Constitution; that it continued in force as an existing law under Article 372(1) of the Constitution; and that with the extension of the Legislative competence of the Central Legislature so as to enable it to make law for the regulation of succession of all kinds of property, including agricultural land, the Hindu Women's Rights to Property Act in so far as it applied to agricultural land became automatically extended to the Governor's provinces. As we have noted above that the Hindu Women's Rights to Property Act at no point of time applied to agricultural land even in the Chief Commissioner's provinces, this argument of Mr. Mukherjee falls to the ground.

22. If the Central Legislature before the commencement of the present Constitution attempted to make law regulating succession to agricultural land, it would have been still-born for want of legislative competence and the doctrine of eclipse or the doctrine of automatic extension has no application to a law which is still-born. The following observation of the Supreme Court in *Deep Chand Vs. The State of Uttar Pradesh and Others*, is instructive :--

"The validity of a statute is to be tested by the constitutional power of a legislature at the time of its enactment by that legislature, and, if thus tested, it is beyond the legislative power, it is not rendered valid, without re-enactment if later by constitutional amendment, the necessary legislative power is granted. An after-acquired power cannot, *ex proprio vigore*, validate a statute void when enacted.

However, it has been held that where an Act is within the general legislative power of the enacting body, but is rendered unconstitutional by reason of some adventitious circumstance, as, for example, when a State legislature is prevented from regulating a matter by reason of the fact that the Federal Congress has already legislated upon that matter, or by reason of its silence is to be construed as indicating that there should be no regulation, the Act does not need to be re-enacted in order to be enforced if this cause of its unconstitutionality is removed."

23. Mr. Mukherjee relied on *Wilkerson's case* (1891) 140 US 548 : 35 LED 572 noted by the Supreme Court in *Deep Chand Vs. The State of Uttar Pradesh and Others*, . The facts in that case were thus stated by the Supreme Court :

"In June 1890, the petitioner, a citizen of the United States and an agent of Maynard, Hopkins and Co. received from his principal intoxicating liquor in packages, The packages were shipped from the State of Missouri to various points in the State of Kansas and other States. On August 9, 1890, the petitioner offered for sale and sold two packages in the State of Kansas. The packages sold were a portion of the liquor shipped by Maynard, Hopkins and Co. It was sold in the same packages in which it was received. The petitioner was prosecuted for violating the prohibitory Liquor Law of the State of Kansas; for, under the said

law, "any person or persons who shall manufacture, sell or barter any intoxicating liquors, shall be guilty of a misdemeanour", On August 8, 1890 an Act of Congress was passed to the effect that intoxicating liquors transported into any State should upon arrival in such State be subject to the operation and effect of the laws of such State. It will be seen from the aforesaid facts that at the time the State Laws were made, they were valid, but they did not operate upon packages of liquors imported into the Kansas State in the course of inter-State commerce, for the regulation of inter-State commerce was within the powers of the Congress; and that before the two sales in the Kansas State, the Congress made an Act making intoxicating liquors transported into a State subject to the laws of that State, with the result that from that date the State Laws operated on the liquors so transported." Under those circumstances, the Supreme Court of the United States held :

"It was not necessary, after the passage of the Act of Congress of August 8, 1890 to re-enact the Law of Kansas of 1899, forbidding the sale of intoxicating liquors in that State, in order to make such State Law operative on the sale of imported liquors." The reason for the decision is found at page 578 :

"This is not the case of a law enacted in the unauthorised exercise of a power exclusively confided to Congress, but of a law which it was competent for the State to pass, but which could not operate upon articles occupying a certain situation until the passage of the Act of Congress. That Act in turn removed the obstacle, and we perceive no adequate ground for adjudging that a re-enactment of the State Law was required before it could have the effect upon imported which it had always had upon domestic property."

24. The Supreme Court itself has pointed out that in *Wilkerson's* case (1891) 140 US 548 :35 LED 572 the Act was valid when made but it could not operate on certain articles imported in the course of inter-State trade. It was also pointed out that when an Act is void from its inception an after-acquired power cannot ex proprio vigore, validate it. Hence it follows that if the Hindu Women's Rights to Property Act attempted to regulate succession to agricultural land, it would have been void from its inception at least to the extent it attempted to do so and the after-acquired power of the Central Legislature under the present Constitution could not validate it: it would have been necessary for the Central Legislature to legislate afresh in exercise of its after-acquired power.

25. From the above discussion it is clear that the argument of Mr. Mukherjee in either form is untenable. Mr. Bose appearing on behalf of the petitioner referred us to the case of *Hari Dass Vs. Hukmi*, , a recent decision of the Punjab High Court dealing with the question involved in the present case. In that case the trial Court relying on the decision of the Supreme Court in *Bhikaji Narain Dhakras and Others Vs. The State of Madhya Pradesh and Another*, observed :

"The impugned Act (Hindu Women's Rights to Property Act, 1937) 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 ..."

26. On appeal the Punjab High Court held that the view of the trial Court on this point could not be sustained. The Punjab High Court relied on two decisions one by the Federal Court in AIR 1945 25 (Federal Court) and the other by the Lahore High Court in *Udham Kaur v. Parkash Kaur* AIR 1945 Lah 282. Their Lordships quoted with approval the following passages from the judgment of the Federal Court in AIR 1945 25 (Federal Court) :

"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 given by this Court that on the principle of the decision in *Macleod v. Attorney General for New South Wales*, 1891 AC 455, 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 AIR 1945 Lah 282 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."

27. After referring to these two decisions A. N. Grover, J. observed as follows :--

"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 or 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."

28. We fully agree with the view expressed by the Punjab High Court. We therefore consider that there is no point in deciding whether the vendor's husband Jatin died before or after the Constitution, because even after the Constitution Thakadamoyee, the vendor of the Opposite Parties Nos. 1 to 3 could not obtain any interest in the disputed agricultural land by way of inheritance. No question of Thakadmoyee's interest in the disputed land under the Hindu Succession Act 1956 is involved in this Case. Therefore the lower appellate Court was not justified in remanding the case to the trial Court which the direction

contained therein. In any event, he was not justified in directing that if it is found that Jatin died subsequent to the Constitution, the prayer for pre-emption should be allowed. The lower appellate Court should have dismissed the application for pre-emption forthwith.

29. The Rule is accordingly made absolute. The judgment and order of both the Courts below are hereby set aside and the application for pre-emption is dismissed.

30. Parties will bear their respective costs throughout.

K.C. Sen, J.

31. I agree.