K.L. Gauba Vs The Hon''ble the Chief Justice and the Judges of the High Court of Judicature at Lahore and another

None

Court: Federal Court

Date of Decision: Dec. 4, 1941

Hon'ble Judges: Justice Maurice Gwyer ,Justice Srinivasa Varadhachariar,Justice John Beaumont,

Bench: Full Bench

Judgement

Gwyer, C.J.
This is a special reference which His Excellency the Governor-General has been pleased to make to the Court Under Section

213, Constitution Act. The questions referred are:

(1) Does either the Hindu Women''s Rights to Property Act, 1937(Central Act, 18 of 1937), which was passed by the Legislative Assembly on

4th February 1937, and by the Council of State on 6th April 1937, and which received the Governor-General''s assent on 14th April 1937, or the

Hindu Women''s Rights to Property (Amendment) Act, 1938(Central Act, 11 of 1938), which was passed In all its stages after 1st April 1937,

operate to regulate (a) succession to agricultural land? (b) devolution by survivorship of property other than agricultural land?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in

Schedule 7, Government of India Act, 1935?

2. There being no ""opposite party"" properly so called to this reference, it was not considered necessary or useful to serve any parties with notice of

the reference. But as the Court desired to hear the various possible viewpoints presented and argued, it suggested to the Advocate-General of

India the desirability of inviting brief statements from the Advocates-General of the Provinces, containing the point of view that each of them

wished to present and argu-ments in support thereof. The Advocate-General of India has filed a statement on behalf of the Government of India

and he has also placed on the file statements from the Advocates-General of seven of the Provinces. As the Court further intimated that besides

hearing the Advocate-General of India it would be prepared to hear two more counsel, the Advocates-General of Madras and the United

Provinces appeared and took part in the argument. The Court is indebted to all the learned counsel for the assistance which they have afforded it.

3. The doubts which have led to the reference arise from the fact that the bill which became the Hindu Women''s Rights to Property Act, 1937

(Act 18 of 1937), which for convenience is hereafter referred to as Act 18, was passed by the Legislative Assembly of the Indian Legislature on

4th February 1937, that is, before Part III, Constitution Act, came into operation and at a time when the powers of the Legislature were plenary,

but was passed by the Council of State only on 6th April 1937, that is, after Part III had come into operation, and received the Govenor-

General''s assent only on 14th April 1937. After 1st April 1937, the Central Legislature was precluded from dealing with the subjects enumerated

in List II of Schedule 7, Constitution Act, so far as the Governors'' Provinces were concerned. Laws with respect to the ""devolution of agricultural

land"" could be enacted only by the Provincial Legislatures (entry No. 21 of List II), and ""wills, intestacy and succession, save as regards

agricultural land"" appeared as entry No. 7 of List III, the Concurrent List. Act 18, read with the amending Act of 1938, endeavoured to improve

the position of Hindu widows in two classes of cases (a) where by the operation of the principle of survivorship the widow is excluded from

enjoyment of the share of her husband in property which he held jointly with other coparceners; and (b) where, even apart from the rule of

survivorship, the widow is excluded from claiming any share in her husband''s estate by reason of the existence of sons, grandsons or great-

grandsons of the deceased who under the law take in preference to the widow. Provision is also made for securing a share to a widow even in

cases where her husband had pre-deceased the last male owner (Section 3(1), first proviso). The Act purports to deal in quite general terms with

the ""property"" or ""separate property"" of a Hindu dying intestate, or his ""interest in joint family property""; it does not distinguish between agricultural

land and other property and is therefore not limited in terms to the latter. It may be mentioned that some aspects of the questions now referred

have already been discussed in one or two cases (see, for instance, Janak Dulari v. Sri Gopal (''39) 26 AIR 1939 All 706) on the assumption that

the bill had been passed even by the Council of State before the new Constitution came into force. From the dates given in the present reference it

will be seen that this assumption is not correct. It may be added that the validity and operation of the amending Act of 1938 (Act 11 of 1938) call

for no separate discussion, since it does not enact any independent provisions, but merely makes some amendments in the Act of the previous

year.

4. Of the questions referred, question (2) will in effect be answered by the views to be expressed in the course of the discussion of question (1);

and it is therefore not separately considered. In the statements filed before the bearing and in the course of the arguments, the following contentions

were raised with respect to question (1): (i) That Act No. 18 was never properly passed at all, in view of the stage at which it was taken up and

dealt with by the Council of State and the Governor. General. (ii) That the Act was in any view ultra vires the Indian Legislature, so far as its

operation might affect agricultural land in the Governors'' Provinces. (iii) That if the Act should be held to be only in part ultra vires, it would not on

the authorities be permissible to sever the good from the bad, so as to allow it at any rate to operate in respect of property other than agricultural

land in the Governors'' Provinces. (iv) That even if it were permissible to uphold the Act to a limited extent, the provision in Section 3(2) relating to

the interest of the deceased in Hindu joint family property would be ultra vires the Indian Legislature, on the ground that the mention of

succession"" in entry No. 7 of List 3 of Schedule 7 does not include or authorize legislation in respect of the benefit which accrues to the members

of a Mitakshara joint Hindu family under the rule of survivorship.

5. In addition to the constitutional points above summarized, a suggestion was made on the construction of the Act that it does not provide for the

devolution of any property by survivorship nor confers on the widow a right by survivorship, though it gives her the same interest in the joint

property as her deceased husband had. This does not seem to be tenable. It is true that Section 3 of the Act does not use the word ""survivorship"",

and it may be that the widow taking a share under the Act does not become a coparcener with the other sharers; but there can be no doubt that in

the cases in which it gives to the widow of a deceased coparcener a right to a share in the joint property which she did not possess under the pre-

existing law, it takes away to that extent the benefit of the rule of survivorship which would have accrued to the remaining coparceners. The

reference must, therefore, be dealt with on the footing that so far as its effect goes, the Act does legislate ""with respect to"" the law of survivorship.

It can make no difference for this purpose whether the measure confers on one person a benefit by way of survivorship or takes away from

another the benefit of survivorship. On the first contention, the Court is satisfied that no objection can be taken to the validity of the Act, on the

ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part 3, Constitution Act, came into force.

Part 13, Constitution Act, contains certain provisions entitled ""Transitional Provisions"", which are to apply ""with respect to the period elapsing the

establishment of the Federation"". It is then enacted by Section 317 that the provisions of the Government of India Act, 1919, set out (with certain

amendments consequential on the provisions of the Constitution Act) in Schedule 9, are to continue to have effect, that is, during the transitional

period, notwithstanding the repeal of the earlier Act by the Constitution Act. Among the provisions thus continued are the provisions of the earlier

Act relating to the Indian Legislature; and it is clear that the Indian Legislature which was in existence immediately before the coming into force of

Part 3 of the Act was continued in existence after that date, and was in all respects the same Legislature, though its legislative powers were no

longer as extensive as they had previously been.

6. One of the provisions included in Schedule 9 is that a bill shall not be deemed to have been passed by the Indian Legislature unless it has been

agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common

ground that the Hindu Women''s Rights to Property Bill was agreed to without amendment by both Chambers of the Indian Legislature, and as

soon as it received the Governor-General''s assent, it became an Act (Schedule 9, para. 68 (2)). Not until then had this or any other Court

jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the

proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact

passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor. General''s

assent. But it does not appear to the Court that the form, content or subject-matter of a bill at the time of its introduction into, or of its

consideration by either Chamber of the Legislature is a matter with which a Court of law is concerned. The question whether either Chamber has

the right to discuss a bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its speaker, and is not a matter

with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste

its time by discussing a bill which, even if it receives the Governor-General''s assent, would obviously be beyond the competence of the Legislature

to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the bill after it has become an Act.

In the opinion of this Court, therefore, it is immaterial that the powers of the Legislature changed during the passage of the bill from the Legislative

Assembly to the Council of State. The only date with which the Court is concerned is 14th April 1937, the date on which the Governor General''s

assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to

that date and to none other.

7. It is convenient to consider the second and third contentions together, viz. that the Act was beyond the competence of the Indian Legislature, so

far as its operation might affect agricultural land in the Governors'' Provinces; and that, if it were held to be in part beyond the competence of the

Legislature, its provisions were not severable, so that it could not even affect property other than agricultural land. No doubt if the Act does affect

agricultural land in the Governors'' 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, viz., 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. ""It seeems to me"" said Lord Esher

M.R. in Colquhoun v. Heddon (1890) 25 QBD 129 at p. 134,

that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its own rights as regards the comity of nations, the

Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that

Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to

assume that Parliament (unless it expressly declares otherwise), when it uses general words, is only dealing with persons or things over which it has

properly jurisdiction.

8. Where the expression ""personal estate"" occurred in a Victorian statute imposing duties on the estates of deceased persons, it was held by the

Judicial Committee that it must be construed as referring only to such personal estate as the colonial grant of probate conferred jurisdiction on the

personal representatives to administer, whatever the domicile of the testator might be, that is to say, personal estate situate within the Colony, in

respect of which alone the Supreme Court of Victoria had power to grant probate:

Their Lordships think that in imposing a duty of this nature the Victorian Legislature also was contemplating the property which was under its own

hand, and did not intend to levy a tax in respect of property beyond its jurisdiction. Andthey hold that the general expressions which import the

contrary ought to receive the qualification for which the appellant contends, and that the statement of personal property to be made by the executor

Under Section 7(2) of the Act should be confined to that property which the probate enables him to administer: [Blackwood v. Reg (1882) 8 AC

82 at p. 98].

9. In the well known case in Macleod v. Attorney-General for New South Wales (1891) 1891 AC 455, the Legislature of New South Wales had

enacted a law providing that

whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place,

shall be liable to penal servitude for seven years.

10. The appellant, who had during the"life-time of his wife married another woman in the United States of America and had in a New South Wales

Court been convicted of bigamy under the provisions of this law, contended that the Court had had no jurisdiction to try him for the alleged

offence, since the Act under which he was tried, according to its true construction, was limited to offences committed within the jurisdiction of the

local Legislature by persons subject at the time of the offence to its jurisdiction; and that upon any other construction the Act would be ultra vires.

Lord Halsbury, delivering the judgment of the Judicial Committee, observed that if their Lordships construed the statute as it stood and upon the

bare words, any person, married to any other person, who married a second time anywhere in the habitable globe, was amenable to the criminal

jurisdiction of New South Wales, if he could be caught in that Colony. "That seems to their Lordships," he continued,

to be an impossible construction of the statutes; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the

Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a Colony, and

indeed inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would

be the reasonable limitation to apply to words so general; and their Lordships take it that the words whosoever being married mean whosoever

being married, and who is amenable, at tho time of the offence committed, to the jurisdiction of the Colony of New South Wales.

11. And again in a later passage:

It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to

comprehend a great deal more than Her Majesty"s subjects; more than any persons who may be within the jurisdiction of the Colony by any

means whatsoever; and that therefore, if that construction wore given to the statute, it would follow as a necessary result that the statute was ultra

vires of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves

so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered

limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony.

12. The principle is the same for all lawmaking bodies with limited powers;

Now it is true that a by-law must be, as a general rule, consistent with the principles of the common law; that if it violates those principles it is bad;

and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which

will make it consonant with the principles of the common law: [Collman v. Mills (1897) 1 QB 396, at p. 399].

13. In D"Emden v. Pedder (1904) 1 CLR 91, the High Court of Australia held that they would not be justified in assuming that a State Parliament

intended general words in an enactment to have an application which would conflict with the constitution of the Commonwealth.

It is in our opinion a sound principle of construction that Acts of a sovereign legislature, and indeed of subordinate Legislatures such as a municipal

authority, should, if possible, receive such an interpretation as will make them operative and not inoperative.... It is a settled rule in the

interpretation of statutes that general words will be taken to have been used in the wider or more restricted sense according to the general scope

and object of the enactment (at pp. 119, 120).

14. There is this also to be said. The underlying purpose of Act 18 is plainly stated in its Preamble: ""Whereas it is expedient to amend the Hindu

law to give better rights to women in respect of property."" It is therefore a remedial Act seeking to remove or to mitigate what the Legislature

presumably regarded as a mischief; and as such it ought to receive a beneficial interpretation:

If the enactment be manisfestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will

permit: [Gover"s Case, Coal Economising Gas. Co., In re. (1875) 1 Ch D 182 at page 198].

15. It may well be that the Indian Legislature, if it had been able to pass the Act while it still possessed plenary powers, would have desired that

the ""better rights"" which it sought to give to Hindu women should extend to agricultural land as well as to other property; but it cannot be supposed

that when, after restriction of its powers, it passed an Act with the above Preamble, it did not intend to make the enactment as effective as it was

within its power to make it. It was contended before the Court that the passing of the Act with a restricted effect might result in some cases in a

widow being deprived of advantages which she possessed under the pre-existing law. The examples adduced by the Advocate-General of India

were by no means conclusive, and it should not be assumed that the Court accepts the contention; but even if it were true that an Act intended to

be remedial, though possibly limited in scope, was found in a small minority of cases to prejudice rather than to benefit those whom it was intended

to help, this would be no reason why the Court should not adopt the construction which is on the whole best calculated to give effect to the

manifest intention of the Legislature.

16. The Court has already pointed out that the question is one of the construction of the Act, that is to say, of ascertaining its true meaning, and that

the construction which has commended itself to the Court leaves no room for the application of the principle of non-severability of subject-matter.

It should not however be thought that the Court has overlooked cases cited to it in which the same words have been applied in an Act to a number

of purposes, some within and some without the power of the Legislature, and the whole Act has been held to be bad. If the restriction of the

general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in

kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must

be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it

has used to be construed only in the narrower sense: Owners of SS. Kalibia v. Wilson (1910) 11 CLR 689, Vacuum Oil Company Ltd. v. State

of Queensland (1934) 51 CLR 677, R. v. Commonwealth Court of Conciliation and Arbitration (1910) 11 CLR 1 and British Imperial Oil Co.

Ltd. v. Federal Commissioner of Taxation (1925) 35 CLR 422. If the Act is to be upheld, it must remain, even when a narrower meaning is given

to the general words, ""an Act which is complete, intelligible and valid and which can be executed by itself;"" Wynes: Legislative and| Executive

Powers in Australia 51, citing Presser v. Illinois (1886) 116 US 252. These words appear to the Court apt to describe Act 18, if construed as the

Court has thought right to construe it, that is to say, even when a narrower meaning is given to the general words which the Legislature has used.

17. It remains to deal with the fourth contention, that is, with regard to the import of the term ""succession"" in entry No. 7 of List III and of the word

devolution"" in entry No. 21 of List II. The question raised is whether these words which prima facie imply the passing of an interest from one

person to another can include the change which takes place under the Mitakshara law in the extent of the interest possessed by the male members

of a joint Hindu family in the joint property when one of these members dies. Borrowing a term from the English law, this change has been

described as the operation of the principle of survivorship. But the note of caution sounded by Lord Dunedin in Baijnath Prasad Singh v. Tej Bali

Singh ("21) 8 AIR 1921 PC 62 as to the use of the terms ""coparcenary"" and ""coparceners"" in relation to a Mitakshara joint family is equally

applicable to the use of the terms ""joint tenancy"" and ""survivorship;"" for the incidents associated with joint ownership under the Mitakshara law are

not identical with those known to the English law of joint tenancy. There is however this degree of resemblance between the jus accrescendi and

the effect of the death of one of the owners of joint family property under the Mitakshara law, that in a sense there is only an extinction of the

deceased person''s interest, and the shares of the survivors, whose pre-existing interest extended over the whole property, are increased only

because of the diminution in the number of sharers. The argument therefore is that words like ""devolution"" and ""succession"" cannot be held to

include cases where the deceased person''s interest does not pass to another but is merely extinguished or lapses. There are at least two answers

to this argument.

18. Whatever may be the position under the English law, the theory of extinction does not exactly describe the position which arises on the death

of a member of a Mitakshara joint family. The result of a long course of decisions is that certain legal acts continue to operate on the interest of the

deceased member even when what is ordinarily spoken of as the rule of survivorship is taking effect. Thus, if a creditor obtains a decree against a

member of a joint family and during the latter''s life-time attaches his undivided interest in the family property, the creditor will be entitled to

proceed against that interest to the extent necessary for the satisfaction of his claim even after the property has survived to the other members by

reason of the death of the judgment-debtor. In some of the Provinces, there have also been decisions recognizing a right of voluntary alienation in

each joint owner, in respect of his undivided share, when the alienation is for value; and, if in this part of the country a member creates a mortgage

over his undivided share, such mortgage has been held to be operative even after the death of the mortgagor. According to several decisions of the

Madras High Court, the alienation by a member of his undivided share does not disrupt the joint status and yet the rights of the purchaser have

been held not to be defeated by the death of the alienor, though no suit for partition be instituted during his life-time. Results of this kind are wholly

inconsistent with the theory of extinction or lapse, and even more so when the deceased happens to be the father of the survivors. It was

recognized as early as Nauoml Babuasin v. Modhun Mohan (''86) 13 Cal 21 that the application of the theory of the son''s ""pious obligation"" to

pay the father''s debts has practically resulted in the pro tanto extinction of the son''s independent rights in the family property; and Section 53, Civil

P.C., provided that to the extent to which joint family property remained liable for the father''s personal debts even after his death, it ""shall be

deemed to be property which has come to the hands of the son as his legal representative.

19. It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in technical sense have the

words ""devolution and ""succession"" acquired a connotation that would preclude their application to describe the operation of the rule of

survivorship as above explained. Eminent text-writers and Judges have used one or the other of these terms to include the accession of right which

takes place on the death of one of the members of a Mitakshara joint family. Many enactments of Parliament and of the Indian Legislature have

used the words ""inheritance"" and ""succession"" in juxtaposition, justifying the inference that succession is either another category from"" or a wider

category than ""inheritance"" (see some of these enactments referred to in Ilbert''s Government of India, chapter. 4, and in Mulla''s Hindu Law, page

4). If in these enactments ""succession"" should be held not to include the principle of survivorship, it would be difficult to say what else that word is

meant to refer to and in any other view the continued administration of that part the Hindu law by the British Indian Court could not have been

provided for, because there are no other appropriate words in those provisions. Such being the position at to the meaning of the words, it is

permissible to add that it is difficult to conceiv of any reason why in framing Lists 2 and Parliament should have thought fit to take away the law of

survivorship from the jurisdiction of the Indian Legislatures, and there is no justification for attributing oversight either, when, as above explained,

the language employed may properly be held to comprehend the law of survivorship as well.

20. A line of cases in the High Courts dispensing with the production of a succession certificate when title to a ""debt"" is claimed by survivorship

may seem to support the restricted interpretation of the word ""succession:"" cf. Shailabala Dassee v. Gobardhandas (''35) 22 AIR 1935 Cal 212 at

p. 16. But taking this class of decisions as a whole they must be understood to rest not so much on the connotation of the word ""succession"" as on

the meaning of the expression ""effects of the deceased person"" and on the reason of the rule relating to the production of a succession certificate in

support of the claim to a ""debt"" prima facie due to a deceased person: see Viranan Chettiar v. Srinivasa Chariar (''21) 8 AIR 1921 Mad 168. In

any event, the two enactments not being in pari materia, such observations as may be found in these cases In support of the limited interpretation of

the word ""succession"" cannot be held to be sufficient to override the cumulative effect of the considerations referred to above. In one or two

instances, eminent writers have employed language suggesting that ""devolution"" may comprehend cases of survivorship but not the word

succession"" (see Mayne''s Hindu Law, para. 270), but it is difficult to find any basis for this distinction. ""Devolution"" may be wider in scope than

succession"" in the sense that the former is not restricted to the result of a ""death"" (see Order 22, Rule 10, Civil P.C.), but that is immaterial for the

present purpose; and, as already stated, eminent Judges have used both the terms in a sense that will include the operation of the principle of

survivorship.

21. The Court is therefore of opinion that the answers to the questions comprised in the special reference are as follows: (1) The Hindu Women''s

Rights to Property Act, 1937, and the Hindu Women"s Rights to Property (Amendment) Act, 1938, (a) do not operate to regulate succession to

agricultural land in the Governors" Provinces; and (b) do operate to regulate devolution by survivorship of property other than agricultural land. (2)

The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List 3, the Concurrent List. The

Court will report to His Excellency accordingly.