

HINDU SUCCESSION (AMENDMENT) ACT 2005: A CRITIQUE*By***—SACHET SINGH****NALSAR University of Law
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R.R. Dist., Hyderabad-78*****Introduction***

Hindu succession laws have long been viewed as a set of gender discriminatory laws. However not much effort has been put in going into the genesis of such laws. The laws framed by the ancient law givers were according to the prevalent conditions in the society at that time. To discard them as being a piece of work of some chauvinists who wanted to dis-empower the women is not correct. The society in ancient times was such that the men had more responsibilities as far as dealing with the outer world was concerned. The popular misconception is that the *smritis* were written at a time when the women enjoyed equal status along with men in the society. However it is not true because the version of *smritis* which we have received were written during the *Sunga* period. Till then the condition of women had already deteriorated and their involvement in the social sphere had been restricted to a large scale. Therefore to expect the law givers to reflect views which were contrary to the prevailing views is not correct. Moreover the family ties and the kinship bonds were much stronger at that time and the law givers may not have expected that the rights of women will not be protected by their male family members.

The above statements do not mean that whatever laws exist is correct, they merely try to put forth a perspective which has not often been heard of. The understanding of above views will help us formulate the prospective laws in a better manner. To elaborate on my point I will put forth an example. In earlier times the position of sisters was that of importance in the family and the brothers were under a sort of social binding

to fulfill all her needs. However the situation today has changed a lot. There is no surety whether the male family members will protect her rights in the family property. On the contrary they might try to take away her rights. Similarly earlier a widow of deceased brother was given respect in the family and the social forces ensured that she was not denied her rights. However today the picture is completely changed and the widow definitely needs legal support to assert her rights in the joint family property.

Some steps to empower women were taken when the Hindu Code Bill was drafted but when the actual act was passed the changes which were expected were not there. The predominance of male members in matters of Hindu joint family property did not end. Rather it got a legal sanction. Earlier the Hindu law was not codified but after the passing of Hindu Succession Act (HSA) 1956¹, the earlier law was retained largely and moreover it now became more easy for the male members of the coparcenaries to enforce their rights through the courts of law.

After the 174th report of the Law Commission, which was published in 2000 the government's attention was drawn towards this problem and finally the Hindu Succession (Amendment) Act 2004 was drafted. However this draft Bill has also created a lot of controversy and various women groups are alleging that the provisions of this bill are not enough to ensure gender equality. They are trying to bring in the Constitutional issue of neglecting Article 14, which talks about equality.

1. Act No.30 of 1956

The present paper tries to look into the matter deeply and find out whether the provisions of the proposed amendments are sufficient to provide equality or not and how to correct the lacunae if any.

The present paper is mainly divided into four parts. The first part is the introduction which introduces the reader to the topic. The second part deals with the draft Bill which has been introduced in the Rajya Sabha. The third part discusses the problems which the Hindu Succession Act had with regard to gender related issues. The fourth part discusses how the draft Bill is far removed from the social realities and does not take into consideration various practical consideration. The last part is the conclusion which puts forth the views of the researcher on the topic and also a few suggestions which the researcher feels will help address some of the anomalies present in the Act.

The Draft Bill

The new draft Bill aims at removing the gender related disabilities of the earlier act. It primarily substitutes Section 6 of the Hindu Succession Act with a new section. The important features of the new Section are as follows:

- * It makes the daughters coparceners in a Hindu joint family governed by the *Mitakshara* law and gives them coparcenary rights.
- * She will be entitled to dispose of the property which she gets as a coparcener by her will or other testamentary disposition.
- * After the commencement of this act the devolution of the interest of a member of Hindu joint family after his death will be done according to the testamentary or intestate succession and not by survivorship.
- * The share of the daughter will be protected during the notional partition

and she will be given equal share as given to the son.

- * The share of the predeceased son or daughter will be given to his or her son or daughter. The share of the predeceased child of a predeceased son or daughter will be given to the child of such predeceased child.
- * After the commencement of this act no court will recognize any right to proceed against a son, grandson, or great-grandson for recovery of debt due from his father, grandfather, or great-grandfather on the ground of the pious obligation under the Hindu law of above mentioned people to discharge any such debt. However this provision will not be attracted for any debt contracted before the commencement of the act.

Besides the above section the draft Bill also envisages to omit Section 23 of the Hindu Succession Act. This section deals with the dwelling house and provides absolute powers to the male heirs of Hindu with regard to partition of the dwelling house. It says that after the death of a Hindu his female heirs cannot demand partition of the dwelling house. They will have to wait till the male heirs decide to partition the dwelling house. This section has created a lot of controversy in the past. Various judicial pronouncements have interpreted this section differently. The draft Bill therefore proposes to repeal this section.

Another contentious section of the Hindu Succession Act is Section 30. The draft Bill aims at bringing in changes in this section also. It substitutes the word “disposed of by him or by her” in place of “disposed of by him.

Problems in the Hindu Succession Act

The Hindu Succession Act 1956 was enacted to codify the succession laws among

Hindus. Moreover it also wanted to bring about uniformity in the laws. It was also expected that the act will provide equal status to women in matters of property. However, as said earlier, when the act was enacted it was viewed as an opportunity forgone. Such sentiments were aired because it could not drop the gender bias in favour of male heirs. Various sections of the Hindu succession act were clearly biased in favour of males. In addition the Legislature did not provide any rational reason for such a conduct. A glaring example is Section 23 of the act wherein it's said that the female heirs can't demand partition of the dwelling house until the male heirs open partition. The section doesn't give any rationale behind such a line of thought. Even the judgments on this section have strengthened this view that the section has an open bias in favour of the male heirs². Similarly Section 6 of the act also denies coparcenary rights to the daughters. This eventually means that they are entitled to a lesser share in the joint family property. An illustration will make this point clear. If suppose a person A dies intestate leaving behind a brother B, two sons S1 and S2 and a daughter D. The coparcenary rights of A will devolve upon B, S1 and S2. Besides S1 and S2 will also get share from the self acquired property of A. whereas the daughter will get the share only from self acquired property. Thus it's very clear that the daughter is in a disadvantageous position. The present project will deal with the contentious sections one by one.

Section 4

Sub-section (2) of Section 4 of the Act deals with the devolution of tenancy rights, laws preventing the fragmentation of agricultural holdings or for fixation of ceilings. It clearly says that in case a state law is already in place dealing with the above mentioned subjects the HSA will have no

effect. The major issue of contention is that this provision takes away the right of women to get a share in the agricultural land which is the chief form of property in rural India. This in effect means that they are denied substantial rights which might have proved useful in ameliorating the position of the rural womenfolk. *Kirti Singh* in her article 'Amendments to the Hindu Succession Act-Are They Enough to Bring about Gender Equality?'³, writes:

"The most important section, which has been used to deny property rights to women in agricultural land, is Section 4(2) of Hindu Succession Act which allows the state legislation to prevail over the Hindu Succession Act. Judgments under this section have upheld laws under Section 4(2) of the Hindu Succession Amendment Act and have mostly denied women equal rights in agricultural land. Courts have upheld the state land reform acts, relating to devolution of tenancy rights even though these do not allow women to inherit these tenancies. Some courts have further interpreted the term 'devolution' of tenancy rights broadly/ comprehensively to include devolution of tenure holder's right and have thus also denied women ownership rights over agricultural land. Thus even laws meant for land reform and to enforce ceiling have resulted in denying to women equal rights over land and a chance to improve her disempowered status."

Women organisations believe that one of the major reasons of the exploitation of women in rural India is that they are economically dependent on their male relatives. Therefore they believe that the removal of this section will help in bettering the condition of women in villages.

2. *Narasimhamurthy v. Susheelabai*, AIR 1996 SC 1826

3. *Kirti Singh*, Amendments to the Hindu Succession Act-Are they Enough to Bring About Gender Equality, *Combat Law*, Vol.3, Issue 5, January 2005

Section 6

Section 6 of the Hindu Succession Act basically denies the female heirs coparcenary rights in the *Mitakshara* Hindu joint family. It confers the coparcenary rights to only the male heirs. This has invited a lot of controversy as it ostensibly discriminates against the women. In fact the major amendment which the draft bill envisages is in this section. The present section of the act has grave implications for the female relatives of the deceased male such as daughters. For example if property rights are devolved according to the existing law then at the death of a male Hindu who has left two son and a daughter along with a widow, the sons and widow will get 1/5th of the deceased's interest in the coparcenary. Besides they will also get 1/5th of his share which will amount to 1/25th of the total property. However the daughter will get the rights only according to succession. This will actually amount to a mere 1/25th of the total property. Thus we find that the daughter is clearly in a disadvantageous position. Other than this the major disadvantage of not being given the coparcener status is that they can't demand partition at their will. Every adult coparcener is entitled to enforce a partition of the coparcenary property⁴. However since the women are not awarded the coparcener status in the *Mitakshara* joint family they can not demand partition until the male coparceners demand partition.

Under the latest amendments there are certain provisions, which manifests in form of discrimination like keeping the right by birth exclusive to unmarried daughters and women who married after the commencement of the act and in exclusion of women who were married before the date of commencement. Under the state amendments it is stated that "nothing...shall apply to a daughter married prior to...the

commencement" of the Amendment⁵. The above implies that only the unmarried daughters and daughters who subsequently get married will be recognized as coparceners by birth whereas daughters who got married prior to the commencement of the amendments will not be recognized as coparcener. The provision thus discriminates between daughters who are unmarried or who marry after the amendment and the daughters who were married before the above enactment. This has given root to much criticism as the Supreme Court in the case *Savita Samvedi v. Union of India*⁶, lends support to the view that differentiation between a married and an unmarried daughter is unconstitutional. Under Article 14 it has been elaborated that the test for classification adopted by the legislation is twofold:

- (a) The classification must be founded on intelligible differentia, and
- (b) The differentia must have a rational relation to the object sought to be achieved by the law.

However in a case before the Karnataka High Court, *Nanjamma v. State of Karnataka*⁷, the High Court held that the differentiation between unmarried and married daughters is constitutional and not violative of Article 14 of the Constitution.

Section 23

The next section of the Hindu Succession Act which has been targeted as being gender biased is Section 23. It deals with the right to partition of the dwelling house. It primarily says that a female heir cannot ask for the

4. Mulla, Principles of Hindu Law, S.A. Desai(ed.), 18th ed., 2004, p.418

5. Section 6-A(d), the Hindu Succession (Karnataka Amendment) Act 1994, Section 29-A (iv), The Hindu Succession (Andhra Pradesh Amendment) Act 1986; Section 29-A(iv), The Hindu Succession (Tamil Nadu Amendment) Act 1989, Section 29-A(iv), The Hindu Succession (Maharashtra Amendment) Act, 1994.

6. (1996) 2 SCC 380

7. 1999 AIHC 3003 (Karn.)

partition of the dwelling house completely owned by the members of the joint family until and unless the male heirs decide to open partition. The section also says that the female heirs will have a right to residence in such dwelling house subject to the condition that if such a heir is a daughter she must be unmarried or deserted or separated from her husband or must be a widow. However those demanding changes in the present law contend that the socio-economic conditions have changed a lot and now every woman wants to have an independent living house. They further add that the living of such female heirs within the joint family's dwelling house leads to their exploitation by other members of the joint family.

In the case of *G. Sekar v. Geetha*⁸, with regards to the application of Section 23 of the Act, it was opined:

“It is no doubt true that such amendment has come into force during pendency of the appeal. However, even assuming that there was any embargo at the time of filing the suit or passing the judgment by the learned Single Judge as contemplated under Section 23 of the Act as it stood, in view of the amendment and deletion of such provision, it is obvious that there is no such embargo after 9.9.2005. In other words, after 9.9.2005 any female heir can seek for partition even in respect of a dwelling house. This subsequent event arising out of change in law is obviously to be applied and, therefore, the question of applying bar under Section 23 of the Act no longer arises for consideration.”

The change in the Hindu Succession (Amendment) Act, 2005 does not alter A woman's position as legal heir to her husband's share. But her husband's share would shrink to the extent that her daughter is now given a share equal to that of her son.

3.4 Section 30

Section 30 of the Act deals with testamentary succession. It says that any Hindu may dispose of any property at his disposal by a will or any other form of testamentary disposition. This property also includes the interest of that Hindu in an undivided *Mitakshara* joint family. Now the major gender issue involved here is that this section is often used to disentitle daughters and other female heirs from getting any share in the property. The alternative that is suggested is that a limit should be put on the amount till which the property can be disposed of by will. It is something very similar to the provisions of the Muslim law wherein a person can dispose of his property by will only to the extent of 1/3rd of the total property.

The Draft Bill: Far From Social Realities

Indifference to Existing Social Realities

The draft legislation which was tabled in the Rajya Sabha could have been given a little more thought. It seems that the draft Bill's various provisions which are supposedly there to remove gender bias from Hindu Succession Act have not taken into account the present social realities. By social realities, it is meant the present situation of the women with regard to education, their role in social sphere and their awareness about legal and social issues. The draft Bill has tried to give various rights to women without thinking about the practical consequences of such a step. The abolition of Section 23 is one such step which might lead to disastrous consequences. The subsequent portions of the project deal with the various amendments and their legal and social effects.

Coparcenary Rights to Daughters: A Recipe for Disaster

The granting of coparcenary status to women is definitely a recipe for disaster. The

8. AIR 2009 SC 2649

present draft envisages granting coparcenary rights by birth to all daughters. Now before moving on we must remember the fact that most of the girls in India get married and the number of girls living unmarried is very less. This would eventually mean that the daughters will get property rights in both natal and marital families. Moreover the draft also ignores the fact that daughters usually get a lot of property from their natal families at the time of marriage in form of dowry or streedhana. Thus giving more property from the coparcenary property is unjust towards the male coparceners. The conferring of coparcenary status would also mean that the daughters will also get a right to become karta in their natal family even though continuing to be members of their marital family. This would be highly unacceptable to the male members of the joint family as after marriage the daughter is presumed to become a member of the other family.

Besides all this, the most important point to note in this regard is that as soon as they will become coparceners they will get a right to ask for partition. This will make them more vulnerable for exploitation by her in laws. Their husband might start torturing in case she does not entertain his demand for having a partition. Mulla in his 'Principles of Hindu Law' has also supported this view and has said that if the intention of the Legislature was something different then it would not have allowed the son of predeceased daughter to claim partition of the dwelling house⁹.

Another important problem in granting coparcenary rights to the daughter is that the widow's share in the property will be reduced. Thus on one hand the draft Bill tries to improve the situation of the daughter whereas on the other hand it worsens the situation of the widow. The daughter will go her marital home after marriage. But the widow will get lesser share in the property and this will make her future life more insecure.

9. Ibid at p.447

Abolition of Section 23: A Step in Haste

The abolition of Section 23 is another area where the author disagrees with the drafters of the bill. The new Bill altogether repeals the earlier Section and the defence for such an act is that it discriminated against women. However it must always be kept in mind that the female heirs were never denied a right of residence in that dwelling house. If at all the section would have been discriminatory then even such a right could have been denied to the women. Dwelling house is supposed to have emotional importance to the people inhabiting it. The daughter after marriage is considered to be the member of a different family. Then how can the right to partition such a house be given to a person who is not even considered a member of that family. Besides, if we look into the intention of the Legislature in making such a provision we find that it is to protect the daughter from unnecessary torture from her in laws. The section is intended to ensure easement of disruptive influences, which would operate, if the right of a female heir to claim partition of the family dwelling house were left unrestricted¹⁰. This intention of the Legislature becomes further clearer when we find that it placed no bar on the right of a son of a predeceased daughter to claim partition of the dwelling house.

Moreover the judiciary has upheld the right of the daughter to ask for partition of dwelling house in case she is the only other surviving successor along with her brother. The full bench of Orissa High Court pronounced its judgment in *Mahanti v. Olurni*¹¹, declaring that daughter is entitled to claim partition when property is inherited by a single male heir. Even if the argument that, the section is ambiguous, accepted then also it will be more sensible to amend the section suitably so as to make the intention of the Legislature clearer rather than abolishing the section altogether.

10. Ibid.

11. AIR 1993 Ori. 36 (FB)

Section 30: Opportunity Lost

The biggest drawback of the proposed amendment is the foregone opportunity of amending Section 30. Section 30, in effect, takes away all the benefits which have been upon the women by Hindu Succession Act, 1956. Under this section a Hindu can dispose of his property according to his will. This means that a Hindu can by will deprive his female heir of her rights in his property. However the draft Bill merely replaces the words 'disposed of by him' with 'disposed of by him or her'. This is an amendment merely to remove a technical shortcoming in the act. However the important issue still remains that a Hindu male can always disentitle his female heirs from inheriting his property. The right way to go about amending this section would have been to place a limit on the property which he can dispose of by will. Similar to the provisions of Muslim law a limit of 1/3rd could have been set in case of a Hindu also. If not 1/3rd it could have been something else also. The limit can be matter of deliberation left open to the legislators to debate and decide upon. A Bill which claims to remove discrimination and give equal rights to daughters¹², cannot be expected to make such blunders. The whole purpose of the amendment can be defeated if this section is not amended.

Conclusion and Suggestions

Some other anomalies present in the Amendment are:

- * One stems from retaining the *Mitaksara* joint property system. Making daughters coparceners will decrease the shares of other Class I female heirs, such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit will decline. In States where the wife takes a share on partition, as in

Maharashtra, the widow's potential share will now equal the son's and daughter's. But where the wife takes no share on partition, as in Tamil Nadu or Andhra Pradesh, the widow's potential share will fall below the daughter's.

- * Co-parcenary remains a primary entitlement of males; the law, no doubt provides for equal division of the male co-parcener's share on his death between all heirs, male and female; still, the law puts the male heirs on a higher footing by providing that they shall inherit an additional independent share in co-parcenary property over and above what they inherit equally with female heirs; the very concept of co-parcenary is that of an exclusive male membership club and therefore should be abolished.

But such abolition needed to be dovetailed with partially restricting the right to will (say to 1/3 of the property). Such restrictions are common in several European countries. Otherwise women may inherit little, as wills often disinherit them. However, since the 2005 Act does not touch testamentary freedom, retaining the *Mitaksara* system and making daughters coparceners, while not the ideal solution, at least provides women assured shares in joint family property (if we include landholdings, the numbers benefiting could be large). 3. If a Hindu female dies intestate, her property devolves first to husband's heirs, then to husband's father's heirs and finally only to mother's heirs; thus the intestate Hindu female property is kept within the husband's lien.

Another reason for having an all India legislation is that if the Joint Family has properties in two states, one which is governed by the Amending Act and the other not so governed, it may result in two Kartas, one a daughter and the other a son. Difficulties pertaining to territorial application

12. Hindu Succession (Amendment) Bill, 2004 (Bill No.LV of 2004)

of Amending Act will also arise. Thus is the need for an all India Act or Uniform Civil Code more immediate.

Thus it can be clearly seen that the new draft Bill has various shortcomings. Its sections are not drafted in a manner which would comprehensively empower women. In many instances it confers rights upon one category of women and deprives the other category of women. In other instance it does not take into consideration the social realities. With regard to some issue it can be seen as an opportunity foregone.

However the present paper will not agree with the critics of the Amendment also who say that more should be done to bring about gender equality in property rights. The author believes that before taking such radical steps and conferring equal property rights one has to work towards making women more aware of the social and legal situation. This means that before the proposed rights are conferred upon they should be made more educated so that they become intelligent enough to understand the intricacies of law. We can see a lot of legislations which provide security to women such as the Sexual Harassment Bill. But these laws will remain ineffective until and unless the women become aware of their rights. In most cases at present the women do not even know of the existing rights which they have. More legislation will only add to the volume of already large number of laws existing in this country.

The present paper will suggest certain remedies to make the Amendment effective:

- * The new draft should try to make its position clear on Section 4(2) of the Hindu Succession Act, 1956. It should state in clear terms that the provisions of the Hindu Succession Act are not attracted only in cases where the state laws are formulated to check fragmentation, promote consolidation or are related to devolution of tenancy

rights. It should take into account the decisions of the court with regard to this section saying that sub-section (2) relates only to certain specified matters¹³.

- * The daughters should not be granted coparcenary status. It would lead to various practical and legal problems as discussed above in the project. Rather the government should try to give her rights in the marital family. This is because according to Hindu custom after marriage the daughter is considered to be the member of her husband's family. Even if she is granted coparcenary status in the natal family it should be withdrawn from her as soon as she gets married. This would resolve the problem of her becoming the karta even though not being a part of the family. Alongside it will also alleviate the fears of the male members of her natal family about her demanding a partition. Besides it will also save her from unnecessary torture by her in laws.
- * As regards Section 23, it is unexplainable why the section altogether needs to be deleted. The rights of the other female heir could have been increased with regard to the dwelling house. As regards daughter she already has a right of residence if she is unmarried or is deserted, separated or is a widow. Besides even in case of daughters various judicial pronouncements¹⁴, have shown that in cases where the daughter is the only surviving heir along with her brother then she can demand partition of the family dwelling house. This line of thought should have been taken forward while amending the section.
- * With regards to Section 30 again the amendment proposed are redundant.

13. *Tukaram Jadhav v. Laxman Jadhav*, AIR 1994 Bom. 247

14. *Supra* n.7.

The objective of the amendment is to bring the women on par with men in property matters. However Section 30 deals with testamentary succession and it also says that a coparcener's interest in the undivided Hindu family property can also be disposed of through will. It places no restriction or limit on the property which can be disposed of through will. This in essence means that a father or mother can dispose of all the property in favour of the male heirs, if they so desire. Thus Section 30 becomes a tool for discrimination and that too with a legal sanction. Therefore we find that the Bill which tries to amend the lacunae in Hindu Succession Act so as to remove gender inequality fails to discern such an important tool for perpetrating discrimination against women.

Lastly, the paper will look into the constitutional aspect of this whole problem. The Supreme Court, in its decision in *Sant Ram v. Labh Singh*¹⁵, said that all customs are within the ambit of Article 13 and therefore should not be contrary to Article 14 of the Constitution. However in a later decision in case of *Sri Krishna v. Mathura Abir*¹⁶, the same court said that personal laws do not come within ambit of Part III of Constitution. *Sen J.*, commenting on question of whether *Shastric* law is valid or not said:

“In our opinion the learned Judge failed to appreciate that Part III of the constitution does not touch upon the personal laws of the parties, he could not

introduce his own concepts of modern times but should have enforced the laws as derived from recognized and authoritative sources of Hindu law.”¹⁷

The prevailing judicial position thus leaves the following alternatives¹⁸:

- * To reconcile the decision in *Sant Ram* and in *Sbri Krishna Singh* and to conclude that while custom is governed by fundamental rights, a personal law is not subject to; and
- * To hold that both custom and personal laws are within the ambit of fundamental rights.

Prof. B. Sivarammaya has considered the second position to be correct. Even though the author is of the view that personal laws should not come within the ambit of fundamental rights, but still if his position is accepted then also the proposed amendment is flawed as it discriminates between women married and not married, between daughters and other female heirs, between natural born daughters and adopted daughters.

Thus it is crystal clear that the proposed amendment is definitely not an amendment to empower women. Rather it has tried to create distinction between women. Also whatever issues it tries to address, it does not do so in a comprehensive and logical manner. Therefore the draft bill needs detailed deliberations keeping in mind the social realities and assessing the consequences of the amended provisions on the society.

15. AIR 1965 SC 314

16. (1981) 3 SCC 689

17. Ibid

18. B. Sivarammaya, Coparcenary Rights to Daughters : Constitutional and Interpretational Issues, *Ranbir Singh and Vijender Kumar* (ed.), Cases and Material on Family Law-II, p11