DEVELOPMENT IN SUCCESSION UNDER HINDU LAW

By

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Hindu Law was not king made Law. Ancient sages like Yagna Valkya and Manu promoulgaged foundations of "Dharma" based upon Sruthi and Vedas to maintain an orderly Hindu society. Whether by custom or usage; a distinction is made relating to property rights between a 'Man and a Woman' in a joint family.

Nevertheless the Ancient Texts of Hindu System gave a mandate to adore a woman in the family, failure of which would ruin it.

The society advanced from time to time whereunder woman began agitating for equal rights in joint family properties in par with sons. This was taken cognition by the state. Dr. *Deshmukh* sponsored "Hindu women's rights to property Act, 1937 to some extent to pacify the demands. Under Act, 1937 limited interest is created in the family property of her deceased Husband, instead of life estate.

This Act was passed by the then federal Legislature. Agriculture was in the provincial legislation. Hence, the validity of the Act was struck down on the ground that the Federal Legislation has no legal authority to pass the Act. And as such it was held *ultra vires*, (*vide* reference 49 Law Weekly 257) to get over this conflict, Act XXVI of 47 was promulgated extending the provisions of the Act even to agricultural lands of the family. This Act came into force with effect from 26th November, 1946. Consequently, a woman was enjoying limited estate in the properties of her deceased husband including the agricultural lands.

It was also not to the satisfaction of women's social organisations. Under the Constitution of India, discrimination of sex is prohibited under Article 15 as well, equality before Law is provided as Fundamental Right, under Article 14 of the Constitution. Thus discrimination on the ground of gender, religion, Race caste, Sex or place of birth are prohibited under Article 15 of the Constitution and equality before law was promulgated under Article 14 of the Constitution.

In view of these fundamental rights, confirmed under the Constitution, the discrimination relating to property rights had to be abolished. Hence the Centre passed Hindu Succession Act, 1956 (Act 30 of 56). On passing the above Act, 1956 conflicting issues arose regarding the property rights as well relating to the concept of "Coparcenary" under Hindu Law.

With a view to remove these conflict the Centre passed an Amendment Act 39 of 2005 (The Hindu Succession Amendment Act, 2005) the nomenclature shows that it is an amendment Act of 1956 *i.e.*, Act 30 of 1956. The word "Amend" means "Improvement".

Now the question for consideration is whether under Act 39 of 2005, the Hindu Succession Amendment Act any improvement is made relating to the Rights of daughter as promulgated under Act, 1956.

Formation of "Mitakshara" Co-parcenary.

It is a narrow body consisting of Male members alone upto three degrees from a common Ancestor. They have right by birth and to demand partition of property of the Holder. Females are excluded as members of co-parcenary.

Joint family is of wider circle. It includes males, together with females such as mother, wife, or widow and unmarried daughters bound by sapindaship or family relationships, or distinguishing feature of the institution.

Since a daughter has no right by birth in the properties of the deceased property holder provincial legislations created such right to a daughter in line with that of son.

Under these state of affairs, the Centre passed Act, 30/56. The Hindu Succession Act, with effect from 18-6-1956 in line with that of provincial Legislation.

Some Radical changes are made under the above Act, hereinafter called 1956 Act.

Section 4 of the Act has overriding effect of any Text, Rule, custom *etc.*

(a) The primary section is 6 of the Act. Under this section if a Hindu dies after the Act, holding interest in mitakshara co-parcenary property, it devolves by survivorship upon the surviving members of the co-parcenary.

(b) If the deceased leaves a surviving female relative specified in Class-I of the Schedule *etc.* The interest of the deceased in the Mitaksharam co-parcenary property shall devolve by testamentary or intestate succession under the Act and not by survivorship.

(c) A separated co-parcener, shall not have any share or interest in the co-parcenary property of the deceased even if he dies intestate provided the separation was during the lifetime of the deceased. It is pertinent to note that right by birth to a daughter is not provided in the section, but included in the schedule alone, with son, widow and mother *etc.*, morefully detailed in the schedule.

In the schedule daughter alone with other female legal heirs are included, but grandson *i.e.*, son's son is omitted.

Section 8 of the Act, prescribes Rule of Succession in the case of males. This had to be followed as per the list of legal heirs prescribed in the schedule. Schedule is a combination of males and females, grandson is omitted from Mitaskhara co-parcenary property in the 1st instance.

Controversy arose whether Mitakshare co-parcenary is abrogated for the reasons that son's son is excluded and female members are included in the schedule contrary to the concept of co-parcenary.

If so, property inherited by class-I legal heirs hold it as personal property or as a co-parcenary property ?

In the case reported in AIR 1986 SC 1753, their Lordship held that in view of these radical changes including female members, and omitting grand-son are against the concept of Mitakshare co-parcenary and as such it was held that the concept of Mitakshare co-parcenary is abrogated and that it is his separate property, this decision is followed by subsequent decisions of High Courts as well apex Court.

Further order of Succession of a Hindu female is also deviated under Section 16 of the Act.

The rights of demand for partition of the dwelling Houses was restricted under the Act.

Succession on remarriage of a widow and conversion disqualified from claiming Succession under Sections 24 and 26 of the Act.

While the Central Act, provided Rights to members-not by birth and when all provincial legislations promulgated right by birth to a daughter, A.P. State passed Act, 13/86 with effect from 5-9-1985.

Under this Act, 13/86 A.P. State created "Right by birth to a daughter" under Section 29A of the said Act with a proviso that married daughters before commencement

of the Act, shall not have any right as well to reopen earlier partition.

Thus daughter has become entitled to the share in the Mitaskhara Co-parcenary property in line with that of a son. She shall hold it with the incidents of co-parcenary ownership son of a predeceased son is included.

As could be examined, this provincial Legislation is in line of Karnataka and other provincial legislations.

These provincial legislations are valid as they too had the Assent of President of India like Central Act.

Since the subject of succession is in Concurrent List in the Constitution, wherever there is a conflict between these two legislations, the provincial Act shall prevail.

In the case purported in 2002 (6) ALD page 415 DB. it is held that the well established principle is, if two legislations are there, *i.e.*, one by Parliament, and another by the State and if they are inconsistent, with each other, State Amendment will prevail over the parliamentary legislation, since the State Legislation has received the approval of the President. If there is no conflict or if the State Act is silent on any particular aspect, the parliamentary legislation will prevail. Their Lordships further held that *non-obstante* clause used in Section 29(a) of the Act is intended to confer additional benefits in favour of the daughters who remained unmarried till 5-9-1985. Hence, their Lordships held 'daughter' in the schedule includes a "married daughter" also. Whereas the provincial Legislation under Section 29(a) prohibited married daughters prior to 5-9-1985 from claiming a share in the interests of co-parcenary property. Likewise, they are also prohibited from reopening the partition already taken place before the commencement of the Act.

Thus under the Central Act, it is held that the daughter in Class 1 of the Schedule includes married daughter whereas under Section 29(a) of the Act, by the A.P. Legislation deprives the married daughter from claiming interest in the Mitakshara co-parcenary property as well as to reopen the partition already taken place. Thus there is a patent conflict of rights in relation to a daughter.

Further, Section 15 of the Act, prescribes, general rules of succession in the case of female Hindu, it provides, that in the absence of the husband and children as the case may be if the property is inherited from her father or mother shall devolve upon the legal heirs of her parents.

These conflicting views which are contrary to the concept of the formation of Mittakshara co-parcenary property where a female has no right by birth *etc.* Act 39 of 2005 Hindu Succession (Amendment Act), 2005 is promulgated which came into force with effect from 5-9-2005. Reference hereinafter made is in relation to Act 39 of 2005 which commenced from 5-9-2005.

This Amendment Act deletes Section 4 of Act, 1956. Similarly Section 6 is modified under Section 6 of the present Act, of 39/05 Sections 23 and 24 of Act, 1956 are completely omitted under the present Amendment Act. The preamble shows that in view of the conflicting views in between provincial Legislations and Central Legislations, in relation to the interests of a male in Hindu co-parcenary property and the daughters thereon, on the ground of gender led to oppression and negation of fundamental right of equality guaranteed by the Constitution. Hence, to remove the discrimination the present Amendment Act 39 of 2005 is said to have been promulgated.

Section 6 of the present Act, deals with devolution of interest in co-parcenary property. A daughter of a co-parcenor shall by birth becomes a co-parcenor in her own right in the same manner as the son.

(b) She has the same right in the co-parcenary property as if she had been a son.

(c) She is subject to the same liability in respect of the said co-parcenary property as that of a son. It further prohibits a daughter from reopening an earlier partition or challenge an alienation or testamentary depositions which have taken place before 20th day of December, 2004.

It is pertinent to know that the daughter of a co-parcenary used in Section 6 includes a married daughter also. But since provincial legislation excluded a married daughter, the observation in 2000 (6) ALD page 415 has become otiose.

Any property to which female Hindu became entitled by virtue of the section shall be held with incidents of co-parcenary ownership and shall be regarded as property capable of being disposed off by her testamentary dispossession.

It also pertinent to know that under clause (2) of Section 6 of the Act, when it is held that the female shall own the property with the incidents of co-parcenary ownership and when the concept of co-parcenary ownership is abrogated by including females along with males, the question of holding such property with the incidents of co-parcenary ownership is highly conflicting. This is not clarified with whom she became a co-parcenar ? Is it with the brother or with her children ? This mode of succession again contradicts the mode of devolution of property as laid down under Section 16 of 1956 Act.

Clause (3) of the present Act, abolishes survivorship in the contingency detailed in the section.

It is also very pertinent to note that the word "co-parcenary used" being held abrogated by the Supreme Court in the case reported in AIR 1986 SC page 1753 (*Commissioner of Wealth Tax v. Chandrachud* and followed in 1987 SC page 558 and 1994 A.P. page 153. The word of "Co-parcenary" used in the Act, is of no legal value.

Clause 4 of Section 6 of the Act, abolishes pious obligation, to pay the debts of their ancestors if they are incurred subsequent thereto, but not for the prior debts before the Act.

The son included with grandsons. Clause 5 prohibits that nothing concerned in this section shall apply to a partition before 20th day of December, 2004. Whereas Act 1956 prohibits to challenge or to reopen prior partition by married daughter effected before 5-9-1985. How to solve this conflict ?

(a) So, a married daughter has no right by birth and to challenge earlier partition.

(b) The succession prescribes after the present Act in the line of the succession prescribed as co-parcenary, when co-parcenaryship is abrogated the question of succession according to the said principle is no more available.

Right by birth to a daughter is provided expressly under the present Act.

Right of pre-emption is provided under Section 22 in case the property devolves upon two or more legal heirs.

On a cursory look at the provisions of the present Act conferring rights to a daughter in the same line as a son appears to be plausible. The framers of the Constitution created a fundamental right under Article 15 so far, freedom of religion is concerned. So every person or citizen has a fundamental right to propagate and observe his own tenets of his own religion.

"Religion" means and includes a particular system of belief and faith in godliness followed with reverence to or devotion towards their ancestors. It is not an empty

Jar. Every religion imposed many formalities and usages to observe by custom or otherwise from generations past. If a female is equated with that of male would the society agree to perform obsequies and spiritual manifestations to the deceased ?. Do the society accept this Radical change in custom ? Does it not amount to interference with the mode of performing various rituals, ceremonies, needs of its religion on the death of the deceased ancestor ? In no religion, a female is allowed to perform the ceremonies of spiritual nature for the past many generations. The moment a daughter is married she becomes a member of other family. She is not obliged to perform spiritual manifestations on the death of the father or mother as the case may be. Even if allowed under law, imposition becomes *OTIOSE*.

This amendment is directly and by implication disturbs the system of religion. It could never be to the taste of any religion. Thus the Act becomes un-implementable. Law should not be passed which is not acceptable and would not be implemented.

Persons of different categories, accustomed to a particular school of thought and faith expressing their devotion or faith towards their deceased ancestors should not be disturbed.

The daughter takes away share along with his son, without any religious obligations to her ancestors.

So freedom of religion means, the incidents and functions or the ceremonies prescribed by the religion. Such things cannot be disturbed. It amounts to violation of the Constitution which is guaranteed under the heading "Freedom of Religion" This situation leads to a chaotic condition.

This is the reason why if a rule or a Legislation or custom is followed by the citizens for generations past the principle *stare decisis* should be maintained.

Further a female becomes entitled to inheritance in the case of intestacy as a daughter, as a mother and as a widow.

Now in view of all these Radical Changes under the present Act, can it be said that 1956 Act is improved by Act 39 of 2005 (The Hindu Succession (Amendment) Act) ?

Hence, this Act deserves reconsideration keeping in view, the "Freedom of Religion conferred as a Fundamental Right.

NRI MARRIAGES: CAUSES OF CONCERN AND CONFLICT OF LAWS

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There is an alarming breakdown of NRI marriages resulting in a large number of Indian women helpless in an alien country, has become a cause of major concern. There is need to analyse the causes of the frequent breakdown of NRI marriages and identify areas of concern. In issues relating to marital status, divorce, maintenance, guardianship, the application of private international law comes into picture.

This study is divided into three parts. Part I discusses the facts of cases with respect to NRI Marriages/engagements handled by

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