

Property Rights of Women: Gender Issues



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Abstract

The property rights of the Hindu women are highly fragmented on the basis of several factors apart from religion and the geographical region depending on her status in the family and her marital status whether she is married or unmarried, deserted, wife, widow or mother. This paper proposes to examine the property rights of Hindu women. An attempt has been made to analyse the Inheritance rights of Hindu women in her respective personal law and reforms made with passage of time to keep pace with progressive society. Development is classified in four stages pre-1937, 1937-1956, 1956-2005 and post-2005. The paper also highlights landmark reforms made in the Hindu women's right to property by the Hindu Succession (Amendment) Act 2005 that conferred birth right to Hindu daughters in the Mitakshara joint Hindu family property. I have tried to analyze the law prior to and after The Hindu Succession Act, 1956, as well as Amendment to the Act in 2005 and has given few suggestions to ensure the effective implementation of the Act, so that it could be made an effective code and would be in a position to settle the litigations.

Keywords: Hindu Succession, Coparcener, Inheritance, Property Rights, Amendment, Hindu Joint Family.

Introduction

"Women constitute half the world's population, perform nearly two-thirds of its hours, receive one-tenth of the world's income and less than 1/100th of property" (The United Nation's Report, 1980)

Since times immemorial many legislations are enacted for benefit and advantage of men, and women¹. In family law succession laws in India are diverse in their nature owing to their varied origin and are very complex. The property law is a gradual growth and continues to be complex and discriminatory against women. Gender inequality facets in different forms but there is disparity in property rights from ancient times.

The property rights of the Indian woman is determined on bases of religion, whether she is married or unmarried, widow or divorced including place of her residence. This paper proposes to examine the property rights of Hindu women. An attempt has been made to analyse the Inheritance rights of Hindu women in her respective personal law and reforms made with passage of time to keep pace with progressive society. The paper also highlights landmark reforms made in the Hindu women's right to property by the Hindu Succession (Amendment) Act 2005 that conferred birth right to Hindu daughters in the Mitakshara joint Hindu family property.

Review of Literature

Mulla in Principles of Hindu Law (2017) has discussed different phases through which property of Hindu females was recognised as per smritis, commentaries as stridhan and later on inherited by females as limited owner. Further Maynee (2015) in Hindu Law and usage has discussed in detail how limited estate was converted into absolute ownership as per Hindu Succession Act but finally landmark changes were brought by amendment in 2005 wherein the daughter became coparcener as that of the son. Law Commission in 2000 published its report where it has deliberated on need to amend succession laws to equate men and women at par. In Sekar v. Geetha & Ors (2009) the Supreme Court made it clear that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right to a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act. In Prakash & others. Versus Phulavati & others (2016) Hon'ble Supreme Court has recently passed a judgment in respect of whether the amendment of 2005 to the Hindu Succession Act

("The Amendment Act") is prospective or retrospective. Khwaja A. Muntaqim, in Protection of human Rights (2016) has explained While discussing article 16(2) of the Convention on the Elimination of All forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports but practically suffers from so much disparity when personal laws are applied in the country.

Aims of Study

The paper highlights property rights of Hindu Woman under personal laws in India, exploring concept of stridhan and how limited estate was converted into absolute ownership under Hindu Succession Act Finally amendment in Section 6 of Hindu Succession in 2005 gave way to Equate Daughters in getting their share in Hindu joint family and thus eliminating barriers and laying the foundation for achieving gender balance by eliminating institutional discrimination against women. An attempt is made to examine whether, the state adhere to its promise of moving towards uniformity and gender equality, or whether there has been a reverse trend pertaining to property rights of Hindu woman without fulfilling all the commitments made at national and international level.

Property Rights of Hindu Women

The property rights of the Hindu women are highly fragmented on the basis of several factors apart from those like religion and the geographical region depending on her status in the family and her marital status whether is married or unmarried, deserted, wife, widow or mother. Property rights of women are discussed in four stages pre-1937, 1937-1956, 1956-2005 and post-2005².

Pre-1937 Period

If we start tracing historical background in relation to property rights of a Hindu woman as daughter, wife or widow, we will find that she is given due place as per Hindu Shastras and Customary laws which varies from region to region. Since ancient times stridhana was treated as women's separate property³. Manusmriti, Yajnavalkya, Katyayana and Narada always promoted the women's right to property. However in patriarchal family women and children was oppressed and subjugated in the traditional patriarchal families. Woman in Hindu society had no right of succession to property and since widow had no economic security, she was looked as parasite⁴.

Earliest legislation bringing females into the scheme of inheritance is the Hindu Law of Inheritance Act, 1929. This Act, conferred inheritance rights on three female heirs i.e. son's daughter, daughter's daughter and sister (thereby creating a limited restriction on the rule of survivorship).

Another landmark legislation conferring ownership rights on woman was the Hindu Women's Right to Property Act (XVIII of) 1937. The said Act was the upshot of discontent expressed by a substantial section of society against the unsatisfactory state of affairs of the women's rights to property and brought changes not only in the law of

coparcenaries but also in matters related to partition, alienation of property, inheritance and adoption. As per the Act the interests of male coparceners devolve on their death upon widows as women's estate (limited estate). Widows were entitled to get their share by Partition but she had only limited interest which would be terminated on her death though this Act did not completely answer the demands of society. Act entitles widow to a limited interest over the property of her husband which was recognised as 'Hindu widow's estate'. The Act of 1937 allowed the widow to succeed along with the son and to take a share equal to that of the son. The Act was amended in 1938 to exclude the widow from any interest in agricultural land⁵.

Hindu Succession Act, 1956

The Hindu Succession Act enacted in 1956 was the first law to provide a comprehensive and uniform system of inheritance among Hindus and to address gender inequalities in the area of inheritance. It was therefore a process of codification as well as step forward for reformation and equality.

The Main Scheme of the act are as following;

1. Hindu Women were denied rights in the ancestral property of a Hindu Joint Family. Only male members could become coparceners and property devolved on male members through survivorship. The daughters had equal rights only in the separate or self acquired property of their father. The father can easily disinherit a daughter by executing a Will⁶. However the exclusion of women from a coparcener goes against the constitutional mandate of gender equality and not in consonance with article 44 of the Constitution. Moreover the 1956 Act still perpetuate the centuries old gender bias by giving general preference to agnates
2. Remarriage, conversion and unchastity are no longer held as grounds for disability to inherit.
3. Widow's position was strengthened and limited estate given to women was converted to absolute one and thus removed the disability of a female to acquire and hold property as an absolute owner.
4. Section 8 & 15 of the Act provides two different laws based on the sex of the intestate. This double scheme is the traditional method intended to protect the family property.
5. Similarly section 15 is the first statutory enactment that deals with succession of Hindu female's property when she dies intestate⁷. The property of a female Hindu dying intestate shall devolve according to the rules set out under section 15(1). (a) Firstly sons and daughters (including the children of any predeceased son or daughter) and husband (b) secondly upon the heirs of the husband in case there is no one in 1st entry. Thirdly upon the mother and father in absence of heir in first two entries (d) fourthly

upon the heirs of the father in absence of 1st 3 entries (e) lastly upon the heirs of the mother. Story does not end here. This rule exists in case the female has not inherited property from parents or husband/inlaws Property inherited by Hindu female from her father or mother shall devolve if she is issueless or in case there are no grand children of deceased would revert to the heirs of the father and not to the mother's heirs and any property inherited by a Hindu female from her husband or from her father –in –law shall devolve in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) upon the heirs of the husband. This separate scheme of succession reflects a strong patriarchal and orthodox outlook. This principle has subsequently been reiterated and expanded in several later decisions. While the Hindu Succession Act may be said to have revolutionized the previously held concepts on rules of inheritance, it has its own flaws while dealing with property rights of women since it still does not give the right to the daughter of a coparcener in a Hindu joint family to be coparcener by birth in her own right in the same manner as the son or to have right of claim by birth.

The Judiciary has played a significant role to widen further the scope of Section 14 of the Hindu Succession Act 1956. In *Tulsamma v. Sesha Reddy*⁸, the Supreme Court observed that the shackles placed on the Hindu women over her property have been broken by this Act and her status has been brought on par with men. In the instant case the trial court decreed the suit on the ground that the appellant had a limited interest in the property allotted to her by the respondent, her deceased husband's brother. The appellant was entitled to maintenance out of the joint family property when she leased out her property.

It seems that this discrimination is very deep and systematic. To overcome gender inequalities the Law Commission⁹ in order to remove anomalies, ambiguities and inequalities in the law, decided to undertake a study of certain provisions regarding the property rights of Hindu women under the Hindu Succession Act, 1956.

Law Commission of India took the initiative and submitted its 174th Report in 2000 pointing out that in the matter of property rights of Hindu women, inequality and discrimination existing in 1956 Act and made recommendation for the amendment of the Hindu Succession Act 1956 in order to provide Hindu women equal inheritance right in the ancestral property. At last, the law has been reformed by the Parliament in the year of 2005

Hindu Succession (Amendment) Act 2005

The Amendment Act 2005 abolished the exclusive right of male coparceners in order to give effect to the principle of equality enshrined in Part III of the Indian Constitution. The gender discrimination in the Mitakshara coparcenery has been removed by raising the status of female members of the Hindu joint family equal to that of the male coparceners. Section 6 of the amended Act 2005 has completely

wiped off all the inequalities in Section 6 of the 1956 Act to larger extent. The daughters in the joint families are given due status of coparceners having birth right in the ancestral property equal to that of a son.

The omission of Section 4(2) of The Hindu Succession Act 1956 is another achievement of the 2005 amendment Act. By the deletion of Section 4(2) of The Hindu Succession Act 1956, a highly discriminatory clause of the Hindu Succession Act 1956 has been removed. Now woman also has inheritance rights over agricultural lands just as men. It is another significant achievement of the 2005 amendment.

The third achievement of the Amendment Act 2005 (The Hindu Succession Act) is the omission of Section 23 of the 1956 Act, thereby giving all daughters (married or not) the same rights as sons to reside in or seek partition of the family dwelling house. Section 23 denied residential rights to married daughters in their parental home. Unmarried daughters are given residence rights but could not demand partition.

In *Sekar v. Geetha & Ors*¹⁰ the Supreme Court made it clear that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right to a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act. Consequently Section 23 of the 2005 (Amendment) Act was omitted to confer all daughters (including married daughters) the same rights as sons to reside in or seek partition of the parental dwelling house. By deleting Section 23 of 1956 Act, the amending Act (2005) removed the last remnants of discrimination against women. The objective of the section is to prevent the fragmentation of a family dwelling house at the instance of a female heir to the prejudice of the male heir.

It is pertinent to note here the Supreme Court's landmark decision in *Savitha Samvedi v. Union of India*¹¹, It was held that the differentiation based on marital status is wholly unfair, unreasonable and gender biased, and violates Article 14 of our Constitution. The eligibility of a married daughter must be placed on par with an unmarried daughter so as to claim the benefit referred to in the Railway Ministry's circular restricting the eligibility of married daughter of the retiring official for regularization. It is worth quoting the common saying that a son is a son until he gets a wife; a daughter is a daughter throughout her life.

Anomalies in the Amending Act 2005

The Amendment Act gives equal birthright to daughter or women on the one hand but on the other hand, it also gives rise to many doubts, flaws and drawbacks in it. The detailed explanation of these doubts, drawbacks, flaws and lacunas are as follows

Prospective Operation of the Amendment

Section 6 of the Amendment Act gives birth right to the daughter in the Joint Family Property. It means that it applies to the girl child born after the passing of the Amendment Act and it does not cover the disputes before amendments. Therefore, this Act is prospective and does not have retrospective effect.

This is the great anomaly, which is there in the amendment because the right has not been given to them who fought for it, but it is given to them who were not yet born. In *Prakash & others. Versus Phulavati & others* (2016) 2 SCC 36 : The Hon'ble Supreme Court has recently passed a judgment in respect of whether the amendment of 2005 to the Hindu Succession Act ("The Amendment Act") is prospective or retrospective. The Hon'ble Supreme Court held: "Rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. The Hon'ble Supreme Court also considered the judgment of the Bombay High Court in *Vaishali Satish Ganorkar vs. Satish Kesharao Ganorkar*¹². In *Vaishali Satish Ganorkar vs. Satish Kesharao Ganorkar*, the Bombay High Court held that the amendment will not apply unless the daughter is born after the 2005 Amendment, but on this aspect a different view has been taken in the later larger Bench judgment. We are unable to find any reason to hold that birth of the daughter after the amendment was a necessary condition for its applicability. All that is required is that daughter should be alive and her father should also be alive on the date of the amendment."

The Hon'ble Supreme Court also considered the Full Bench judgment of the Hon'ble Bombay High Court in *Badrinarayan Shankar Bhandari vs. Omprakash Shankar Bhandari*¹³ and held: "Full Bench judgment of Bombay High Court in *Badrinarayan Shankar Bhandari Vs. Omprakash Shankar Bhandari* also appears to be consistent with the view taken hereinabove."

Position of Mother Viz-A-Viz the Coparcenary Remains the Same

Mother, not being a member of the coparcenary, will not get a share at the time of the notional partition. The mother will be entitled to an equal share with other class I heirs only from the separate share of the father computed at the time of the notional partition. In effect, the actual share of the mother will go down, as the separate share of the mother will be less, as the property will now be equally divided between father, sons and daughters in the notional partition.

Over-Lapping in Class I and Class II Heirs

As per 2005 Amendment four heirs are added in the list of legal heirs under class-I of the Schedule provided under the said Hindu Succession Act. Four added in class I was already in class II prior to the amendment and though they have been elevated to class I. Under 2nd and 3rd entry respectively under class II heirs which are still present under the aforesaid provisions only in different words as son's daughter's daughter, daughter's son's daughter, daughter's daughter's son and daughter's daughter's daughter¹⁴.

However, all the above entries in class II prima-facie seems to be different due to the use of word 'pre-deceased' in class I for the same. Actually

meaning wise, both the relations are same and will only come into picture if their legal ascendants died prior to the opening of succession i.e. after the death of the Hindu male dying intestate, with respect of whom all the above relations are derived.

Position of Father's Widow

Entry 6 in class II heirs specifies father's widow along with brother's widow and is placed below grandfather and grandmother of the deceased male coparceners dying intestate. It may be noted that the term father's widow include mother in its ambit. But mother has already been included in class I heirs. Thus, father's widow in class II, Entry 6, will logically refer to stepmother only and not real mother. However, the related entry does not expressly say so. It may be relevant to note Rule 1 and 2 in Section 10 of Hindu Succession Act in this regard. According to Rule 1, the intestate's widow, or if there are more than one, all the widows together shall take one share. The Indian law provides for monogamy and prohibits bigamy. Thus, there is remote possibility for someone to have more than one widow. Rule 2 of Section 10 provides that the surviving sons, daughters and mother of the intestate shall each take one share. Thus, it may be seen that if mother of the intestate takes her share as class I heir, then nothing will remain for the stepmother, if any, to succeed

Decrease in the Share of Other Class I Female Heirs

Making daughter 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. The amended Section 6 includes the daughter into the Coparcenary, but no other female has been given recognition as a member of the Coparcenary. Justice cannot be secured for one category of women at the expense of another. It is impossible to deal with succession laws in isolation. Thus, there is scope of change in the amended Act also. Instead of using 'daughter' in a limited sense, the legislative intent would have been more achieved if it is worded as '*daughter of any coparcener*'. However, it cannot be argued that The Hindu Succession Act made a revolutionary change in the law relating to succession, especially for female Hindus. It has been a huge relief for females who were devoid of property rights under the traditional Hindu law.

Thus the Amendment of Hindu Succession Act of 1956 in 2005 is a total commitment for the women empowerment and protection of women's right to property. This Amending Act in Mitakshara school of Hindu law opened the door for the women and has enhanced women's security, by giving them birthrights in property

Explanation of the Amended Section 6

Explanation of the Amended Section 6 defines "partition" as any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition affected by a decree of court. This definition of "partition" does not include oral partition and family arrangement. Since the amended Act has failed to include oral partition

and family arrangement within the definition of "partition", which are common and legally accepted modes of division of property under the Hindu Law, the Commission undertook this subject *suo motu*. When oral partition or a partition list incorporating the partition earlier effected are legal about two decades ago, how the parties will predict a law containing a provision like explanation to section 6 that will affect the earlier transaction once legal at that point of time. The explanation is not happily drafted. But it is doubtful whether object is achieved. The reasons for my doubts are as follows:

International Status

With regard to articles 5(a) and 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women, the Government of the Republic of India ensure that these provisions are in conformity with its policy of non-interference in the personal affairs of any Community without their initiative and consent. With regard to article 16(2) of the Convention on the Elimination of All forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy. The international Conventions on women always focus on women's inheritance¹⁵. The Law Commission also has played vital role in reforms of Hindu Succession Law. After the Law Commissions recommendations the Government has reformed laws in Hindu Succession but despite these enactments, there are still many defects in many respects and give rise to number of anomalies so inequality still continues.

Conclusion and Suggestions

Legislations in India has always been framed to uplift weaker sections of society and to give them better and equal rights. Legislature has always tried to diminish the shortcomings by supporting the voice by amending legislations. Why women are still struggling for their equal status to that of men? Why they are discriminated, attacked and abused and victim of domestic violence? Answer is that the laws are not properly implemented, or we are not aware of our rights of succession and inheritance. Hence, to make such legislations more effective and worthwhile a joint action is required from all the parts of the society. Law has to grow in order to satisfy the need of the fast changing society and keep abreast with the

international Declarations where India is signatory. The courts are very cautious in following and interpreting the laws but somewhere we are still lacking in fulfilling basic object of providing distributive justice.

Recently passed Hindu Succession (Amendment) Act, 2005 can become successful if the legislature reconsiders some of the shortcomings, drawbacks and anomalies and if it is effectively implemented. There can be effective law without any defect if certain defects are removed. Legislation after amendments tends to overcome the inherent defects to ensure equality to both men and women without discrimination.

References

1. Das. P.K, *Property Rights of women and daughters*, Universal Law Publishing Co.,
2. Mulla *Principles of Hindu Law Vol.1*. Lexis Nexis, butterworths ed.18th 2017.
3. Alladi Kuppaswami (ed.) *Mayne's Hindu law and Usage 840*(12th edn., Bharat Law House, 1986).
4. Mayne, J.D, *A Treatise on Hindu Law and Usage*, 17th ed. pg 1175-1187.
5. Mayne, J.D, *A Treatise on Hindu Law and Usage*, 17th ed. pp 1175-1187.
6. Section 30 of *The Hindu Succession Act 1956* provides that any Hindu may dispose of by Will or other testamentary disposition any property which is capable of being so disposed of by him in accordance with the provisions of the Indian Succession Act 1925.
7. Section .15 of HSA provides general rules of succession in the case of Hindu females.
8. AIR 1977, SC 1944.
9. 174th Report of Law Commission of India under the Chairmanship of Justice B.P. Jeevan Reddy, vide D.O. No. 6(3)(59)/99-LC(LS), dated 5th May, 2000
10. AIR 2009 SC 2649
11. (1996) 2 SCC 380.
12. AIR 2012, BOM 101
13. AIR 2014, BOM 151
14. Alladi Kuppaswami(ed.) *Mayne's Hindu law and Usage 840*(16th edn., Bharat Law House, 2015).
15. Khwaja A. Muntaqim, *Protection of human Rights*, 3rd Ed..2016, Law Publisher Pvt. Ltd.Pg1122,