OVERVIEW OF GENDER EQUILIBRIUM FROM THE PERSPECTIVE OF WOMAN’S COPARCENARIES RIGHT

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1.1 INTRODUCTION

In this rapid phase of development, one thing which tends to be changed is the age old superiority of man over women; the superiority is manifested in the form of suppression, exploitation, domestic violence, sexual abuse, gender bias, eve teasing, molestation etc. Factor like poverty, uneven development, lack of proper education and lack of awareness etc make them to continuously getting subjected to discrimination. Therefore these have made the situation worse. Male domination society intertwined with the age old injustices; hence frames of Indian Constitution were convinced that gender equality was crucial for National Development. The Constitution of India declares in its preamble the desire to secure justice that is social, economic and political and to secure equality of status and opportunity. It declares that women shall not only have equal right and privileges with men but also that the state shall make provisions both general and special for welfare of women. The Constitution of India guarantees to all Indian women equality (Article 14), no discrimination by the State (Article 15(1)), equality of opportunity (Article 16), and equal pay for equal work (Article 39(d)). In addition, it allows special provisions to be made by the State in favour of women and children (Article 15(3)), it imposes duty on every citizen to renounces practices derogatory to the dignity of women (Article 51(A) (e)), and also allows for provisions to be made by the State for securing just and humane conditions of work and for maternity relief (Article 42).

With the independence, India has a primary focus on securing equality in the social, political and economic realms as well as for empowerment of women, hence, series of legislations passed since independence. The 73rd and 74th constitutional amendments introduced 33.3 percent reservation for women in the 3 tier Panchayat Raj institutions in the country. In 2009, the Union cabinet approved the proposal for enhancing reservation for women in Panchayat Raj institutions from one-third to at least 50 per cent. Empowerment of women is moving towards gender equilibrium and it is a process of conceptionalization and capacity building, leading to meaningful participation, effective decision making and control leading to transformative action at multiple levels of family, community, market and policy. Economic independence and financial decision making by women is the
minimum necessary condition for their dignified life. Economic empowerment of women enables them to take part in decision making process with regard to raising and distribution of resources. Economic empowerment helps deter violence and also frees women who are then able to seek help instead of suffering violence.

1.2 Hindu Women and Property Right

Since time immemorial the framing of all laws have been exclusively for the benefit of man, and woman has been treated as subservient, and dependent on male support. The right to property is important for the freedom and development of human being. Prior to the Hindu Succession Act, 1956 shastric and customary laws that varied from region to region governed Hindus and sometimes it varied in the same region on caste basis resulting in diversity in the law. In the matter of succession also, there were different schools, like Dayabhaga in Bengal and the adjoining areas; Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India with slight variations. Earlier, woman in a joint Hindu family, had a right to sustenance, but the control and ownership of property did not vest in her. In a patrilineal system, like the Mitakshara school of Hindu law, a woman, was not given a birth right in the family property like a son. Every citizen of India is guaranteed equality before law and equal protection of the laws irrespective of his gender, caste, creed, and race. The Constitution of India also contains provisions for empowerment of women. Despite the equality guaranteed by the law of the land, women in India had suffered a lot of inequalities.

1.3 Coparcenary Right under Hindu Succession Act, 1956

The Hindu Succession Act, 1956 is codifying the law relating to intestate or unwilled succession, among Hindus, Buddhists, Jains, and Sikhs. The Act lays down a uniform and comprehensive system of inheritance and applies to persons governed by both the Mitākṣarā and Dāyabhāga schools. The Hindu woman's limited estate interest is abolished by this Act. Any property possessed by a Hindu female is to be held by her absolute property and she is given full power to deal with it and dispose it by will as she likes.

Mitakshara recognises two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applies to joint family property; the rule of succession applies to property held in absolute severalty by the last owner. Dayabhaga recognises only
one mode of devolution, namely, succession. The Dayabhaga School neither accords a right by birth nor by survivorship though a joint family and joint property is recognised. Neither sons nor daughters become coparceners at birth nor do they have rights in the family property during their father's life time. However, on his death, they inherit as tenants-in-common. It is a notable feature of the Dayabhaga School that the daughters also get equal shares along with their brothers.

Under the Mitakshara law, on birth, the son acquires a right and interest in the family property. According to this school, a son, grandson and a great grandson constitute a class of coparceners, based on birth in the family. No female is a member of the coparcenary in Mitakshara law. Under the Mitakshara system, joint family property devolves by survivorship within the coparcenary. According to the Mitakshara law, each son acquires at his birth an equal interest with his father in all ancestral property held by the father and on the death of the father, the son takes the property, not as his heir, but by survivorship. The coparcenary consists of only those persons who have taken by birth an interest in the property of the holder and who can enforce a partition whenever they like it is a narrower body than joint family. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. The reason why coparcenership is so limited is to be found in the tenet of the Hindu religion that only male descendants up to three degree can offer spiritual ministration to an ancestor. Only males can be coparceners. A daughter ceases to be a member of her father's family on marriage and becomes member of her husband's family.

A Hindu joint family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth an interest in the coparcenary property, these being the sons, grandsons, and great-grandsons of the holder of the joint property for the time being: Therefore, there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners.

1.4 Hindu women’s Right to Property in the Pre-Constitutional Period

A Hindu woman, whether a maiden, a wife or a widow has never been denied the use of her property. Since ancient times stridhana was treated as women’s separate property. The ornaments, the wealth she receives at the time of marriage from her father and relatives constitute her share. The gifts from her own and husband’s family would also be added to her
own. A woman was given absolute right over her properties in the sense that nobody including father, mother, brother, husband and son can take the property away from her. In case if the husband had borrowed from her, he had to repay it with interest. Hence it sets out a warning that the male members should not touch upon the property of the women.

1.4.1 Widow’s Estate
The earliest legislation bringing females into the scheme of inheritance was the Hindu Law of Inheritance Act, 1929. The 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. The Hindu Women’s Right to Property Act, 1937 was one of the most important enactment that brought about changes to give better rights to women. Even the said Act did not give an absolute right to women. Under the said Act a widow was entitled to a limited interest over the property of her husband – what was to be termed as Hindu widow’s estate. The Act was amended in 1938 to exclude the widow from any interest in agricultural land.

The Act enabled the widow to succeed along with the son but, the widow did not become a coparcener even though she possessed a right akin to a coparcenary interest in the property and was a member of the joint family. The widow was entitled only to a limited estate in the property of the deceased with a right to claim partition. A daughter had virtually no inheritance rights.

Sri Pandit Jawaharlal Nehru, the then Prime Minister of India expressed his unequivocal commitment to carry out reforms to remove the disparities and disabilities suffered by Hindu women. As a consequence, despite the resistance of the orthodox section of the Hindus, the Hindu Succession Act, 1956 was enacted and came into force on 17th June, 1956. It applies to all the Hindus including Buddhists, Jains and Sikhs. It lays down a uniform and comprehensive system of inheritance and applies to those governed both by the Mitakshara and the Dayabahaga Schools and also to those in South India governed by the Murumakkattayam, Aliyasantana, Nambudri and other systems of Hindu Law. Many changes were brought about giving women greater rights, yet in Section 6 the Mitakshara Coparcenary was retained.

In respect of the property of a male Hindu dying intestate, equal rights were given to a female Hindu by treating her as Class I heir along with son of the deceased. However, the said enactment had no application to coparcenary property. Prior to 1956 Act, the daughter in
a Hindu Joint Family governed by Mitakshara law was not considered a co-parcener. Even after 1956 Act the position continued to be the same. The Act of 1956 did not deal with devolution of interest in the coparcenary property. Section 6 made it clear that, when a male Hindu dies after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Hindu Succession Act. Therefore, the Act was not made applicable to coparcenary property. However, the proviso to the said Section provided that, if a male Hindu dies leaving behind a surviving female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship.

1.6 Reformation in Hindu Women Property Right

The inequality between a son and a daughter contained in the shastric and customary Mitakshara law continued to persist till 2005. The concept of the Mitakshara coparcenary property retained under Section 6 of the Hindu Succession Act has not been amended till 2005. Part of this Act was amended in 2005 by the Hindu Succession (Amendment) Act, 2005. “The new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The legislature has now conferred substantive right in favour of the daughters.

“According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The term coparcener refers to the equal inheritance right of a person in ancestral property.

Social justice demands that a woman should be treated equally both in the economic and the social sphere. The exclusion of daughters from participating in coparcenary property ownership merely by reason of their sex is unjust. Improving their economic condition and social status by giving equal rights by birth is a long felt social need. Undoubtedly a radical reform of the Mitakshara law of coparcenary was needed to provide equal distribution of property not only with respect to the separate or self-acquired property of the deceased male but also in respect of his undivided interest in the coparcenary property.

State tolerated this inequality for nearly 50 years. Article 13 of the Constitution declares that all laws in force in the territory of India immediately before the commencement of this
Constitution, in so far as they are inconsistent with the provisions of Part III fundamental rights shall, to the extent of such inconsistency, be void after the commencement of the Constitution. Article 12(2) declares that the State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of the said clause, shall to the extent of the contravention, be void. To amend the section 6 Hindu Succession Act, 1956 took nearly 50 years to realise this inequality and restore equality. It is in this background the Parliament, took note of the events for the last 50 years after the enactment, various pronouncements of the Apex Court while interpreting Articles 14, 15 and 16 and the attempts made by successive Governments to eradicate gender bias and came up with the Hindu Succession (Amendment) Act, 2005. That is the purpose of this amendment.

The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also had led to oppression and negation of her fundamental right of equality guaranteed by the Constitution having regard to the need to render social justice to women. The discrimination was existed only in Mitakshara School. Therefore, amended section makes it clear that the declaration made is confined only to "a Joint Family property governed by Mitakshara law". Thus, Gender discrimination between the son and daughter is removed and bringing the law in conformity with the Articles 14 and 15 of the Constitution.

The Apex Court in Eramma v. Veerupana case after referring Section 6 of the Act, it was held that, it is clear from the express language of the section that it applies only to coparcenary property of the male Hindu holder who dies after the commencement of the Act. It is manifest that the language of Section 8 must be construed in the context of Section 6 of the Act. Accordingly, they held that the provisions of Section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force i.e., where succession opened before the Act, Section 8 of the Act will have no application. Therefore, while enacting this substituted provision of Section 6 also it cannot be made retrospective in the sense applicable to the daughters born before the Act [Hindu Succession Act, 1956] came into force. If the Act before amendment the daughter of a coparcener was not conferred the status of a coparcener. Such a status is conferred only by the Amendment Act in 2005. After conferring such status, right to coparcenary property is given from the date of her birth. Therefore, it should necessarily follow such a date of birth should be after the Act came into force, i.e., 17.6.1956.
The proviso states that nothing contained in Sub-section (1) of Section 6 shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which has taken place before the 20th day of December 2004.

The bill prepared by the Law Commission contained a provision making the amended provision not applicable to married daughters. That is precisely what is contained in the amendments carried out to the Act by the legislatures of Karnataka, Andhra Pradesh, Maharashtra and Tamil Nadu. However, in the bill passed by the Parliament we do not find the said provision.

Secondly, the marriage has no relevance to the succession or inheritance of the property. When a male Hindu marries, his right to succeed to a property or inherit a property is in no way affected by the act of marriage. Therefore, the Parliament consciously has not used the word 'married daughter' in the entire Section as the case in the earlier State Amendment where they added an explanation, to exclude the married daughter.

Thirdly, the language employed and the declaration made in Section 6 makes the legislative intent explicit and clear, i.e., the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have it if she had been a son. It means whatever right the son possesses in a coparcenary property is sought to be conferred on the daughter.

Deletion of Sections 4(2) and 23 of HSA 1956

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. 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. Earlier section 23 denied residential rights to married daughters in their parental home. Unmarried daughters are given residence rights but could not demand partition.

Supreme Court in Narasimha Murthy v. Susheelabai declared that though in the words the male heirs choose to divide their respective shares suggest that at least two such male heirs must exist and decide not to partition, the dwelling house in which the right of the female heir is postponed and kept in abeyance until the male heir or heirs of the Hindu intestate decides
to partition it, it does not necessarily lead to the only in evitable conclusion that the operation of Section 23 must stand excluded in the case of Hindu intestate leaving behind his/her surviving only a son and a daughter.

1.7 Conclusion:

The basic object of the amendment to the Section 6 of the Hindu Succession Act was to achieve equal inheritance for all. Daughter of a coparcener in a Hindu joint family governed by Mitakshara Law now is coparcener by birth in her own right in the same manner as a son; she has right of claim by survivorship and has same liabilities and disabilities as a son; now coparcenary property to be divided and allotted in equal share. But these laws cannot be successful unless and until there is social awareness amongst the women about their rights. Women themselves relinquish their rights and tend to suffer deprivation. The change which took about 49 years to bring daughters at par with the sons with respect to their right in their ancestral property cannot be lost sight of just because of ignorance of people. The judiciary should also make efforts to implement the law so as to achieve the objective behind the amendment of the law. Above all it’s the woman herself who has to be aware of and assert her rights.

The legal system has features which are actively discriminatory to women, denying them equal rights to property, to certain kinds of employment and so on.

a) Even where there is de jure equality law in its actual functioning discrimination women became legal agents.

b) Even when law treats men and women equally it is discriminatory to women because men and women are located in an unequal and hierarchical manner in cultural, social and economic formulations. In other words, it is unjust to treat unequals equally.

c) The law and the state render invisible women’s subjective experience oppression since objectivity is installed as the norm. That why till date the Indian law is salient about marital rape i.e. rape within marriage. In this sense the law is essentially male and can only ever partially comprehended the harms done to women.

In 9 March 2010, one day after International Women's day, Rajya Sabha passed the Women's Reservation Bill requiring that 33% of seats in India's Parliament and state legislative bodies be reserved for women.
1 State shall not deny to any person equality before law or the equal protection of the laws within the territory of India.

2 The state shall not discrimination against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them.

3 There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.

4 The state shall, in particular, direct its policy towards securing-
   Equal pay for Equal Work for both men and women.

5 Article 15(3) was broad enough to cover any special provision for women.

6 It shall be the fundamental duty of every citizen of India to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.

7 State shall make provision for securing just and humane conditions of work and maternity relief.

8 Article 15(3) of Indian Constitution.

9 The Hindu Women’s Right to Property Act, 1937 under this Act a widow was entitled to a limited interest over the property of her husband – what was to be termed as Hindu widow’s estate. The Act was amended in 1938 to exclude the widow from any interest in agricultural land.

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