NOTES AND COMMENTS

REINFORCING PATRIARCHAL DICTATES THROUGH JUDICIAL MECHANISM: NEED TO REFORM LAW OF SUCCESSION TO HINDU FEMALE INTESTATES

I Introduction

INDIAN PATRIARCHAL society, typically rigid in its conservatism, firmly pushing women to the background, shows its apparent visibility virtually in every sphere of human relationship. The orthodox and parochial notions chase a female from her conception, follow her during her lifetime, and ironically refuse to leave her alone even after her demise. Prenatal diagnostic tests endeavour prevention of her birth in the world, female infanticide attempts to get rid of new born, and post death operation of succession laws ensure that her blood relations are relegated to an inferior position while her in-laws triumph in enjoying her hard earned property. While the legislature bowing under pressure of the activists under the "save baby girl" campaigns has come up with a legislation at least on paper curbing sex selective prenatal diagnostic tests, the foeticide and infanticide continues due to laxity in implementation of the enactment and monitoring of genetic clinics. The post death succession aspect, however, has both legislative and now the judicial sanction as well, perpetuating gender stereotypes unconcerned totally that it in effect promotes injustice and inequity, exactly an antithesis to the very goal of establishing the judicial system.

II Dictates of essentiality of marriage

Indian society imposes on every individual a duty to marry, making it almost mandatory for an Indian girl. hindu *dharamshastras* are full of dictates of essentiality of marriage and raising a family for perpetuation of one's lineage. This institution of marriage in a patriarchal society is perceived as bringing for a girl social and financial security, and an unmatched respectability which, comes however with a heavy price. It transforms a girl overnight into a woman, and a switch over from her own needs and care to her duties and accountability becomes the law for her. Motherhood, which follows soon, brings with it a lot of oral reverence and respect that does not translate into material or legislative benefits. On the

other hand, marriage and motherhood put several practical disabilities on a hindu woman ensuring the perpetuation of her subordination in the family and the Indian family laws strengthen this subordination. All family laws in India, governing hindus put severe restrictions on her the moment she gets married. She is the one who gives birth to children but the guardian in law remains the father. Maternal instincts take a backseat as in matters of custody the laws ensure that it is the welfare of the child that is superior to her natural carving for its custody and the issue is often influenced by her remarriage and financial vulnerability. General norms of legislative presumptions of custody of children of tender ages up to five and seven ironically put the task of bringing up the child on the mother when it requires maximum attention only to transfer its custody to the father when it is past the age of requiring 24 hours attention of the parent. In matters of adoption, the married woman tag ensures that a woman cannot adopt a child nor give her child in adoption while this right can be exercised only by a husband. Yet her general financial dependency adds to her insecurity often resulting in her clinging desperately to an unhappy marriage for fear of a worst fate outside it. Similarly, in succession laws, a man and a woman have different schemes of succession. While for a man it is his blood relations who take preference and none of his wife's relatives can ever inherit his property; for a married woman her blood relatives are pushed backwards in comparison to her husband's relatives even with respect to her hard earned property. For a man, the property's devolution is uninfluenced by his marital status and the source of acquisition of property. For a woman, the multiple categories suggest her possession and ownership of her own property as its temporary custodian as upon her death, property goes back to the same family from where it was inherited. With respect to her hard earnings, it is the in-laws who get a preference over her own blood relations. Ironically for a hindu female, her marital status, the fact she has children or not and from where she had acquired the property are extremely important and each factor influences succession to her property giving rise to unwarranted consequences in law. In the days of advocated equality of sexes, upon marriage, how is it that a married woman's property can legally be claimed by the heirs of her husband and not by her own blood relatives is a question worth examination not only by feminists but citizens who believe in the cause of gender justice and equality of spouses and eradication of legislative and judicial sponsored discrimination. Failure to take judicial cognizance of unreasonableness of the law and its implementation, leading to injustice and inequity, and a display of helplessness baring its impotency in taking corrective measure, failing utterly in discharging its constitutional obligation as upholders of gender justice is anachronistic and reactionary.

III Recent judicial pronouncement

In an important though extremely unfortunate decision,[1] the Supreme Court has held that the in-laws of a married woman have preference over her natal relations in succeeding to her hard earned property despite the fact that they had earlier kicked her out of the matrimonial home. The facts showed that a fifteen years old hindu girl, Narayani Devi married Dindayal Sharma in 1955. Three months later her husband died of snake bite and the in-laws threw her out of the matrimonial home branding her as a bad omen. Thereupon she took shelter with her parents, who gave her education so that she could stand on her feet and be financially independent. This enabled her to take up a job as a school teacher. She acquired wealth by her hard labour and all through these days, the in laws never bothered to even inquire for her, let alone look after her. Thus, she never visited her in-laws after that and there was a complete snapping of relations. She died intestate in 1996, 42 years later, leaving behind huge sums in various bank accounts, besides her provident fund and a substantial property. After her death, her mother Ramkishori sought the grant of a succession certificate under section 372 of the Indian Succession Act, but her late husband's brothers, i.e., the same in-laws who had kicked her out at the time of her becoming a widow also filed a similar application. Later, Ramkishori died and her son Om Prakash replaced her as the applicant. Ironically the claim of her mother and then the brother was negatived by the Supreme Court on the ground that as per the provision of the Hindu Succession Act, 1956, it is the heirs of the husband who have a legal right to inherit the property of an issueless married hindu woman and her parents cannot inherit in their presence. The fact that they had thrown her out and had made no contribution to her education or lent any support during her lifetime was not material enough for the court to debar them from inheriting her property. The in-laws thus succeeded and were given the judicial nod to claim the complete property left by Narayani Devi.

IV The law

The Hindu succession Act, enacted in 1956 provides for two different schemes of succession for male and female hindu intestates.[2] It is pertinent to note that this law applies only when there is no will executed by the owner of the property. Where a hindu male dies the property goes in the first instance to the class-I heirs that include his mother, widow, children,

1. *Om Prakash* v. *Radha Charan,* 2009 (7) SCALE 51.
2. See Ss. 8-13 and Ss. 15-16.

children of predeceased children, children of predeceased children of predeceased children(except two), widow of a predeceased son and widow of a predeceased son of a predeceased son. If none of the class-I heir is present then the property goes to the class-II heirs that include, the father, brothers and sisters and their descendants, grandparents, maternal and paternal uncle and aunts and brother's and father's widow. Next in line are the agnates and then finally the cognates. Where however a Hindu woman dies the property that is available for succession is divided in three categories. One that she might have inherited from her parents, which goes back to her father's heirs in case she dies issueless, the second that she might have inherited from her husband or deceased father-in-law and that goes to her husband's heirs from whom or from whose father she had inherited the property. The other category is general property that includes her self-acquisitions, property that might have been gifted to her from anyone whomsoever, or which she may have received under a will from anyone. This property in the first instance goes to her children or children of deceased children and her husband. If none of them is present as was in this case then the property goes to heirs of her deceased husband. In such a case it is presumed that the property belonged not to her but to her deceased husband and it goes to his heirs that would include the complete category of her in-laws. When none of the heirs of the husband are present then the property goes to her parents in equal shares. In absence of her parents, the property goes to heirs of her father and failing them it goes to heirs of her mother. It should be noted that in all the succession laws that apply to the disparate religious communities, it is only the hindus and the parsis that permit relations by marriage[3] to inherit the property of the deceased, otherwise the general rule of inheritance goes in favour of blood relations only. Secondly, under hindu law, it is not some of the relations of the husband that are eligible to inherit from his wife. It is all the heirs of the husband. Even a very remote cousin or collateral would be preferred to her own blood relations like her parents and brothers and sisters. It is her money and not that of the husband and should go to her blood relatives and not to her husband's. No other succession law in India including muslim law gives statutory preference to the in-laws over her own blood relatives. All succession laws (with limited exception) provide a uniform succession

3. The expression 'relatives by marriage' here refers to only those relatives who become a part of the intestate family by getting married to any of his descendants. These relatives include, among others, widows of male descendants and the widow of deceased brother in case of a hindu male intestate and for the parsis, the spouses of deceased lineal descendants, but in no case would they include the relatives of the husband of the deceased woman.

law irrespective of the sex of the intestate and in which primacy is always given to the intestate's blood relatives. For example, if a muslim woman dies leaving behind property, it is her blood relatives, her mother, her father who inherit her property even in presence of her husband, or her husband's relatives. Similarly, if a christian woman or a parsi woman dies, it is her own relatives who succeed to her property. The deceased woman's husband's relatives can never be heirs to her. The same rule applies for a hindu man. Thus, when a hindu man dies, none of his wife's relatives can ever inherit his property but if a hindu married woman dies issueless, the property can never be taken by her parents or her blood relatives in presence of even a remote relative of the husband.

None of the inheritance laws anywhere in the world confer inheritance rights in favour of the relatives of the spouse of any intestate. This is an unique feature of hindu law, giving preference to in-laws over blood relations of the deceased woman therefore is devoid of any rationality and logic and rather than questioning it, a confirmation of the same by the judiciary is extremely unfortunate.

V Practical reality

The preference of husband's relatives and in their presence the elimination of a woman's parents and siblings happens only in cases of a married woman dying as an issueless widow. Though the *dharamshastras* and the legislature proclaim that after marriage a married woman's permanent abode is the matrimonial home and that her natal or parental place is a thing of past as her ties are snapped totally from them, it is a practical reality that for any person let alone a woman, forgetting her blood relations is virtually impossible and also completely unnatural. All these hollow preachings are deliberately aired and sought to be imposed in the garb of religious dictates because transportation of a woman from the natal family to the matrimonial home is essential for enforcing patriarchal norms. Her complete absorption necessitates that she is made to and told to forget the natal family (except for the purposes of bringing gifts on festivals, other auspicious occasions and at time of birth of children in family) and make the matrimonial home her home for its betterment, yet in reality her stay at the matrimonial home can never be a matter of her right and is totally dependent on the convenience of her in-laws. The near impossible and strenuous expectations translated into her religious and matrimonial duties of obedience, respect, tolerance, accommodation and subservience to the entire clan of her husband reproducing children, nurturing and rearing them and assumption of domestic responsibilities to their satisfaction becomes her fate. If her entry coincides with an unfortunate happening, it is she who

is branded as responsible for bringing bad luck and for purification of the matrimonial home or for its well being she can be conveniently kicked out. Ironically, it is not that the legislature is unaware of this fact that a widow, that too an issueless widow would very seldom find the matrimonial home a fit place to continue to live as invariably she would be thrown out. This is the very reason why a widowed daughter was given a right of residence in her parental dwelling house even if this right was denied to a married woman generally via sec. 23 of the Hindu Succession Act, before its deletion.[4] Granting of right of residence to a widowed daughter and the denial of the same to an otherwise married woman, clearly took note of the realistic situation of need and desperation for the widowed woman to find a place to live. It also took into cognizance a practical factor that a widowed woman's stay in her matrimonial home is not by her choice but purely at the whims and wishes of her in-laws. Thus a day before, a married woman, who could not even step a foot inside her own portion of the inherited dwelling house without the consent of her brother, becomes legally competent to stay in it the moment she becomes a widow, and the consent of the brother becomes immaterial.[5] That she would be in need of her own place to live clearly shows that a young issueless woman who loses her husband, would be invariably in need of a roof over her head and if the in-laws throw her out which they normally do, it is her natal family only that would give her shelter. Thus her stay at the matrimonial home is till the time it suits her in-laws and her coming back to her parents is when the in-laws have no use of her, and she is in trouble. Further, as even today less number of women goes for remarriage, her survival for a long lonely journey in life poses a big issue. It is but natural that her blood relations would come to her rescue, help her out voluntarily or grudgingly, but would it be just then that the in-laws kick her out for no fault of hers, the parents take her in, support her and if she with her hard labour acquires the property, the same in-laws who kicked her out, lay claim over her property and are

4. S. 23 of the Hindu Succession Act, 1956 provided: **Special Provision respecting dwelling houses**: Where a Hindu intestate has left surviving him or her both male and female heirs specified in class-I of the Schedule and his or her property includes a dwelling house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein: but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband **or is a widow**.

5. For a detailed discussion see Poonam Pradhan Saxena, "Women's Right to Dwelling House under the Hindu Succession Act, 1956, *Narasimha Murthy v Sushila Bai* AIR 1996 SC 1826: A comment", II N C L Jourl. 121 (1997).

rewarded by the apex court by giving it to them? This decision appears to be both morally and even legally inappropriate. Where the law appears on the fact of it to be inequitable, the Constitution has given the task to the court to apply the law as is just in accordance with the facts and circumstance of the case. The job of the courts is not to apply the law mechanically as it appears on the statute book, but in accordance with the demands of justice, apply the law to the peculiar facts and circumstances of the case. Thus the same rules can have a variable application depending upon the facts and circumstances of each case. We do follow the common law legal system, where the judges do not merely apply the law but in fact lay down the law. The precedents are, therefore, an important source of law. The courts do not discharge their constitutional obligation to accord justice to people if they display their helplessness and take shelter behind antique and outdated patriarchal ideology enforced by law.

VI Earlier deviations and application of rule of estoppel in inheritance laws

The law of inheritance is not merely about entitlements but also about disentitling a person who in accordance with rules of equity, justice, good conscience and public policy should not inherit the property in the given set of situation. In such a case, this disqualified heir is presumed to be dead and the property passes on to the next mentioned heir. The courts in India themselves have taken this approach in some earlier pronouncements. Reference may be given to a case[6] from Andhra Pradesh where upon the death of a hindu man, his wife claimed his property as his class-I heir. The wife had deserted the husband way back in 1955 to live with her paramour, giving birth to her lover's children. On the question of her entitlement to claim her husband's property, the court held that the widow having left the family once and for all and having been under the roof of another and having begot his children cannot claim inheritance from the husband both in law and also in equity. The fact remained here that she was still the wife of the deceased and under Hindu Succession Act, 1956, the character of the wife or her conduct does not legally debar her from inheriting the property. Here the court thought that in accordance with the principles of justice, the wife did not deserve to inherit the property, and thus did not apply the rules of inheritance. If they had applied inheritance rules she being a class I heir, would have succeeded to the property. Similarly, in the present case before the apex court, the in-laws having thrown out the helpless girl of fifteen years were morally guilty of a severe nature. They having

6. *Krishnamma* v. *P Subramanyam Reddy,* AIR 2008 (NOC) 482 (AP).

abandoned the girl and abdicating from their duty of looking after a family member (if at all she could be considered one) should not have been allowed to satisfy their opportunism based greed and unjust enrichments, and applying the analogy of the previous case should have been estopped from claiming inheritance.

In another case from the Delhi High court,[7] in light of equity justice and good conscience, inheritance rules were not applied and a totally different decision inspired by equitable rules was followed. The facts of the case were as follows:

> In the unfortunate riots of 1984 called anti Sikh riots, a family of four, the husband, wife and their two very young children were burnt alive by the mob. The only two relatives who survived this family were the mother of the deceased wife and father of the deceased husband. Later the government announced an *ex- gratia* payment to be made to the next of kin of the dead. It began with Rs 10, 000 and was later enhanced to 20,000 and for all four deceased, was made to the father of the deceased husband applying the rules of inheritance under the Hindu law which governed the parties. The wife's mother was not given anything. Much later, on 16-01-2006, the government decided to make an *ex gratia* payment of Rs 3.5 lakhs to next of kin to each of the deceased which came to Rs 14 lakhs for the present family of four. The mother of the deceased wife now contended that half of this amount should be given to her, as she had also lost her daughter. Emotionally and in terms of the loss of the loved ones, both the father of the husband and she herself, were on equal terms. Both of them had lost a child each and two grandchildren. If the father of the Hindu man was entitled to get *ex gratia* payment, as he had lost his son, the mother of the married daughter had lost her daughter, the loss was not entirely that of the father of this man only. The way the case was fought displayed a very important issue; i.e., who would be the next of kin for a married woman: the husband's father or her own mother and for the children, the paternal grandfather or the maternal grandmother or both?

The husband's father claimed that upon the application of the principles of succession i.e, Hindu Succession Act, 1956, both for the property of a male and a female intestate, i.e., both for the property of his son and daughter in law and each of the grandchild, the scheme of succession preferred him over the maternal grandmother. For his son he was a class-II

7. *Ganny Kaur* v. *State of NCT of Delhi,* AIR 2007 Del 273.

heir placed in entry- I, while the mother of the wife will figure nowhere. For the property of his daughter in law, he could claim inheritance under the category of "Heirs of her husband", which is the second category while her own mother would come in the third category, i.e., "father and mother".

The court chose to ignore the principles of succession and held instead that personal law rules cannot be applied and here in terms of equity, justice and good conscience, both the mother of the deceased woman and the father of the deceased husband would get Rs 7 lakh each.

In the present case, the apex court should have taken a progressive view. The primary purpose of the court is not to apply the law mechanically but do justice. In this case it is not the case of a person deserving the property of the deceased or not, but that justice demanded that the blood relations should have been given preference in light of the special facts and circumstances.

VII The constitutional validity

The constitutional validity of the provisions providing for two separate schemes of succession for male and female intestates was challenged as violative of article 14 and article 15 and therefore ultra-vires of the guarantee of equal treatment before the Bombay High court.[8] Here, upon the death of a hindu man his wife inherited his property and on her death, the son of a cousin brother of the husband (husband's father's father's son's son) laid claim over the property. The court said, a narrow question posed centres round the phrase "heirs of husband" and whether by providing for and preferring that when a hindu female dies, any irrational and arbitrary classification is made only on ground of sex against the citizens of the state.

Upholding the constitutional validity of the impugned provision, the court dismissed the suit and observed that,[9] the constitution does not posit totally unguided non-classified equality, as equal protection under the laws is not an abstract proposition. Laws are intended to solve specific problems and achieve definitive objectives and hence absolute equality or total uniformity is impossible of achievement. The governing principles of article 14 according to the court operate upon the field that amongst the equals the law should be equal and be so administered. Discrimination is forbidden between classes and persons who are substantially similarly circumstanced. If the persons or groups are rationally classified and such classification bears the testimony of long standing position of personal law, then surely

8. *Sonabai Yeshwant Jadhav* v. *Bala Govinda Yadav*, AIR 1982 Bom. 156.
9. *Id.* Para 163.

law can reach them differently and such different treatment would not result in discrimination. If the classification is founded on intelligible differentia and has rational relation to the object the legislative provision is intended to achieve, then such a challenge can hardly merit acceptance.

Tracing the origin of the hindu society and the schemes of succession the court observed[10] that the rule of succession and inheritance that were thus made applicable when the marriage of the woman was in approved form were based on the concept that the valid marriage results in unity of the spouses, that is, wife and husband together formed one union. In recognition of that position, when succession opened to wife's property, the class known as heirs of the husband when no other immediate heirs were available was permitted to succeed. This was the logical result of initial unity, in which the husband and the wife came to be interwoven by the tie of marriage. Recognition and reference to the heirs of the husband was just a logical necessity to continue that unity in which the female had merged by marriage and becomes an integral part of such a family. It said,[11] conferment of full ownership upon a hindu female with regard to the property acquired by her and thus putting her on par with other owners of the property in a hindu family is, however, not intended either to affect her position as the "wife" in the family or to affect the character of the family or property in her hands. With specific reference to the succession to the property of a female, the court noted:[12]

> [T]he supportive principle of the provisions is sustaining unity of the family and for that the entitlement to the property carved out in favour of closer relations than remote. Choose the core group and permit remote ones to come in only in case of its want, is the principle. Even the main scheme of succession 15(1) provides that when a Hindu woman dies intestate her property has to devolve according to the rules set out in Section 16 upon her sons and daughters and her husband (all closely related blood relatives), secondly upon the heirs of husband (showing the principle of the close knit family unity with the husband), thirdly upon the mother and the father (indicating the second group of related family) and fourthly upon the heirs of the father and lastly upon the heirs of the mother (other distant related group).This scheme itself throws light upon the principles on the basis of which choice and arrangement of different classes of heirs is made, namely closer

10. *Id.* Para 164-65.
11. *Id*. Para 165.
12. *Id.* Para 166.

> blood relations is preferred to the distant one, having reference to the family where succession opens. It therefore concluded that there is hardly any manifest or remote evidence to indicate that any sex preference is legislated by this measure. On the other hand what is being provided is in favour of the family of which the beneficiaries are both male and female heirs. Only because the words of statute use the phrase like "heirs of husband" to indicate upon whom the property should devolve, such terminology does not lead to the conclusion that this has enacted preference only on the ground of sex. The true principle is that a community governed by the given personal law itself forms a recognised class within the constitutional contemplation and that itself offers a reasonable class of persons for testing the given legislation and the same has to be examined in the background of the principles by which such class is governed by the tenets of their personal law. If those principles are otherwise reasonable in the context and the history of the given system of personal law, then the challenge like the present one is hardly sustainable.

The justifications of the court can be summed up as follows:

i) The wife after marriage merges with the husband and they together form one union;

ii) As a logical result of this unity, the husband's family becomes her family, and his blood relations take preference to her own blood relations;

iii) As a single scheme of succession is provided for female intestates, there is no discrimination between daughters based on her marital status.

These arguments of the court can never be sustained in light of the legal provisions. In all patriarchal societies and not merely hindu society, upon marriage, husband and wife form an exclusive union and a woman is regarded as a member of the family of the husband, yet none of the family laws strip a married woman of her true identity and treat her as a foreigner for the parental family the way it is done under hindu law. For all other religious communities where also she inherits both from her father as also from her husband, her property is never classified in light of the source of the acquisition of her property and there is also no interposition of her husband's heirs in preference to her own parents. The second observation of the court that a husband and wife merge in one union where the marriage is in approved form again suffers from grave infirmity. Succession laws apply irrespective of the form of marriage. The only qualification is that

the marriage should be valid. After that, whether the form of solemnisation was *shastric*, approved or unapproved, or customary or even if the marriage was solemnised in court it is irrelevant and the succession laws would apply uniformly. The principles of Hindu Succession Act cannot have a varied application depending upon whether the marriage of the deceased was solemnised in approved form or in court. A pure secular solemnisation in court with no iota of religious ceremony observance would still give rise to the application of the same inheritance principles that in the view of the court are based on the merger of the husband and the wife into one. Further, with the legislative permissibility of dissolution of marriage and remarriage of widows, the unity of spouses and the merger of husband and wife have lost the permanency even if we accept the arguments of merger of the two, and in succession, a scenario imposing age old orthodox norms by the judiciary is most unwarranted.

Thirdly, for the courts to conclude that the legislature has provided a single scheme of succession respective of the marital status of the woman is incorrect. In operation the succession laws for an unmarried and a married woman are fundamentally different. In one case, the property goes to her blood relatives as should be done but the moment the woman gets married the legislative obsession of her transportation from her natal family to matrimonial home and superiority of her in-laws over her blood relations is clearly reflected in making the entire clan of the husband her heir by relegating the parents to an inferior placement. She may never have seen her husband's close or even a distant relative, but in the event of her death, her parents who bring her up are asked to take a backseat and the relatives of the husband who may never be on scene before her death can legally claim her property. It is unnatural, illogical and discriminatory.

VIII Law and the present judgment is against the principles on which succession laws are based

The whole premise of succession laws is that during the life time of an economically active person, who is the main bread winner, (presumed in majority of the cases a man but now must include a woman as well), he is surrounded by a narrow group of persons, who are financially dependent on him and he is under a duty in law to provide for them. This group is identified as his spouse, children and dependant parents. The primary and foremost purpose of providing succession laws is one, that inheritance laws apply usually in case of untimely deaths, and where a person may not have left behind him a will with respect to distribution of his property. When he dies the group of his dependants should not be left destitute and his property

should provide for them.[13] This is the reason why in all succession laws this core group of persons fall in the category of primary heirs. The primary principle on which succession laws are based is not as the Bombay High Court has opined to conserve the property within the family, but is its utilisation for the benefit of this very core group of persons who were earlier being maintained with this property by the intestate. It clearly shows that the primary intention behind the succession laws is not conservation of property but its beneficial enjoyment, by the family members. Thus maintenance and laws of inheritance are inter-related. The children have a legal right of maintenance from their father and thus after the father's death his property goes to the children. Similarly, the parents can claim maintenance from their children both son and daughter and on the child's death the property should go to them. When the parents can legitimately claim maintenance from their married daughter, what would happen to their claim if she dies as the property would legitimately be claimed by her husband's heirs. In such case her own parents would be left destitute as the property which was till her death being used to maintain her aged and infirm parents would suddenly upon her death be taken by her deceased husband's relatives having no connection, concern or even accountability in law to her parent's maintenance. The Hindu Succession Act, 1956, taking note of the practical reality but only in case of hindu male intestates had therefore replaced the earlier *mitakshara* succession rules with the rule of nearness in relationship, and had introduced both a daughter as also a mother as the class-I heir. Unfortunately, even in the year 2009, the obsession of hindus, to treat differentially a married and unmarried woman is reflected in the succession scheme for female intestates. While for the unmarried female intestates it is only her blood relatives who form the group of her heirs, for married woman, the heirs of her husband make an entry in clear preference to her blood relatives. When for a hindu male intestate, it is his relatives and not his wife's relatives who can ever inherit his property, why in case of a woman, her blood relatives cannot stand on the same or preferential platform. Why this group of husband's heirs should at all be an heir to a woman? If the parent's die, the daughter also inherits irrespective of her marital status, so when a daughter dies why are her parents not her class-I heirs?

IX Added complication: succession to the coparcenary share held by a female hindu intestate

Given the interpretation that the legislature intended the conservation of the property in the family from where it was received by a hindu female,

13. See Jeremy Bentham, *Theory of legislation* 109 (1975).

it would be extremely difficult to take a stand in the cases where a hindu female dies and leaves behind her share in the coparcenary property. What would be the character given to such share: would it be included as her general property as it cannot be called property inherited from her parents? If it is termed her general property and goes as per section 15 then in the first instance irrespective of whether she has children or not, it would go to her husband, and in absence of her husband would again go to heirs of her husband to the exclusion of her parents. In such cases the devolution would be contrary to the intention of the legislature as the property would not be conserved in the family from where it had come as in case of an issueless widow, her share in coparcenary property would come from the family of her parents, and in the event of her death would never be conserved in the same family but would legitimately go to her husband's heirs. It may lead to further complications where such share was undivided, as that would virtually mean introduction of strangers and claim of outsiders in the hindu joint family property headed by her father or her other natal relations.

X Forcing parents to differentiate between daughter and a son

The above judgment and the succession laws would in fact force parents not to gift, settle or bequeath the property on their daughter. It should be noted that while the property that a daughter inherits from her parents reverts back to her father's heirs, the property received from her parents through any other medium such as by way of gifts, settlement or even by way of a will is treated as her general property and on her death goes to her husband's heirs and not to her parents or her other natal relations.

The actual effect of the laws is far reaching with the potential of assuming dangerous consequences as it is directly linked with son-preference among hindus. The legislature cannot take two diametrically opposite positions at the same time. On one hand the parents cannot choose the sex of the child and indulge in male preference due to ban on sex selection and prenatal sex determination, on the other hand the legislature itself gives a preferential treatment to men and their relatives, but relegates those related through a married woman to an inferior position. If from a son only his blood relatives can inherit but from a daughter the blood relatives would inherit only till she remains unmarried, as different rules would prevail upon her marriage, it is discrimination linked to marriage of a hindu female. Legislation should never reflect a gender biased scheme if at all it is sincere about curbing female foeticide. Parents of a girl (her marital status notwithstanding) should have the same security as the parents of a man. If the marital status of a hindu man has no relevance in determining

who his heirs would be, the same rule should apply to a married hindu female. Leaving of the natal home upon marriage and joining of the matrimonial home is not a unique feature of hindus but is prevalent worldwide, and should not result in substitution of relations. The legislature or the judiciary cannot choose or impose relatives on a married woman alone. It is determined by blood or through the ties of marriage but only as between the spouses and cannot extend to the relatives of the spouse. The proclamations of unity of spouses, and the merger of the wife into that of the husband or her becoming a member of the family of the husband are outdated concepts that can be referred to as the cherished ideals of the bygone era and the same even in the name of preserving hindu society cannot and should not be enforced by the Indian judiciary in the twenty-first century. Time is not far when even the transportation of a woman upon marriage from natal to matrimonial home would be questioned by an Indian woman as increased awareness of the unfairness of laws and customs is dawned on her.

XI Conclusion

The present judgment is disappointing as it came from Indian judiciary which is one of the major components of state mechanism empowered to dispense justice in accordance with the constitutional principles and law enacted by the legislature. It is also viewed as upholders of gender justice and an effective tool for correcting defective and outdated laws that are against the spirit of empowerment of women. Judicial activism has raised the hopes of the Indian society, restoring the faith of the common man in it, but the self restraint that it has exercised in the present case comes as a big damper resurfacing the fears that perhaps the Indian judiciary still views the legal provisions and their implementation as a means of upholding traditional patriarchal values. The present pronouncement in fact sub serves the ends of justice. Rewarding the undeserving is in itself appalling, but rewarding the guilty is like adding insult to injury. The present case was not whether the brother of the deceased should get his due, but in fact was a case where the relationship was snapped by the in-laws by throwing a girl of tender age of fifteen out of her matrimonial home only to legally claim the relationship when an opportunity arose to gain from her. It was an occasion for the apex court to show to the world, that it would not tolerate, attempts by merciless and cruel in-laws for unjust enrichments. The atrocious situation in which the claimants to her property threw her out of her husband's house only to be rewarded later by giving them her property shows want of understanding of real human values and bares insensitivity on part of the highest pillars of Indian judiciary. Nothing can be more

humiliating than taking a girl into a family upon marriage and, throwing her on road turning their back on her when her husband dies. She was a minor, virtually a child. The very term justice suggests the very anti-thesis of what has been done by the apex court here. The court while dismissing the contention of Narayani's brother Om Prakash that her late husband's brothers were not entitled to her property, observed:[14]

> It is now a well-settled principle of law that sentiment or sympathy alone would not be a guiding factor in determining the rights of the parties, which are otherwise clear and unambiguous under the Hindu Succession Act.

The apex court also cautioned that any other interpretation based on sympathy would be contrary to the intent of Parliament, which has bestowed equality upon married and unmarried hindu women in the matter of property.

The apex court's caution of sympathies having no place in law is absolutely correct yet at the same time even elements of inequity and injustice can never find a foothold in law thus necessitating the application of rules of estopple. The courts can never be a medium for doing injustice and the judicial mechanism should not be used to accord rewards to the one deserving punishment. The judiciary is expected to come down heavily on those who first kick a fifteen year old widow out of the matrimonial home for no fault of hers and then lay claim over her hard earned property. The requirement here was of a judicial reprimand and a firm reminder to the greedy and unethical in-laws of their moral and legal duty to support a child. The courts first of all are courts of equity, justice and good conscience and the present judgment unfortunately fails to come up to expectations on all the three counts. It regrettably appears to be an unhealthy judgement that may result in shaking the confidence of an average Hindu woman, who needs to be treated as an independent individual capable to transmit her property to her blood relations rather than have her persona merged into that of her husband with the sole objective of stripping her of her true identity and a judicial imposition of superiority of her husband's entire clan over her own blood relatives in matters of succession to her property.

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14. *Supra* note 1, P.54.

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