NOTES AND COMMENTS

THE HINDU SUCCESSION (ANDHRA PRADESH AMENDMENT) ACT 1985 : A MOVE IN THE WRONG DIRECTION

I Introduction

THE HINDU Succession (Andhra Pradesh Amendment) Act 1985, which confers on daughters rights in coparcenary properties, is a significant development in the post-Independence legislations affecting the joint Hindu family. It resurrects a view which was discarded as "unknown to the law and unworkable in practice" three decades earlier.[1] The eloquent preamble to the Act refers to the fact that, the exclusion of daughter from coparcenary "ownership" is contrary to the fundamental right of equality before law proclaimed by the Constitution and that it has given rise to the pernicious dowry system which needs to be "eradicated by positive measures which will simultaneously ameliorate the condition of women in the Hindu society".

That the retention of *Mitakshara* coparcenary is a discrimination against daughters, cannot be seriously controverted. The surprising fact that such discrimination has survived forty years of Independence and is still well entrenched, speaks volumes for discrimination against women in law and society.

In this context it is relevant to recall that the policy aspects relating to retention of *Mitakshara* coparcenary have been considered by the Rau Committee even before Independence. The committee suggested conversion of *Mitakshara* into *Dayabhaga* coparcenary.

The main consideration that prompted the committee in arriving at this conclusion is the uniformity in Hindu law that would be achieved by the measure rather than promotion of equality of sexes.[2] But the recommendation found wide acceptance in knowledgeable circles. *E.g.*, Kane supporting the recommendation stated :[3]

> And the unification of Hindu Law will be helped by the abolition of the right by birth which is the cornerstone of the Mitakshara school and which the draft Hindu Code seeks to abolish.

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1. *Infra* note 4. Pataskar at the time of moving the Hindu Succession Bill in Parliament stated that a coparcenary consisting of sons and daughters is "unknown to the law and unworkable in practice".

2. *Report of the Hindu Law Committee* 57 (1947). Clause 7, rule 4 says : "Each surviving daughter of an intestate shall take half-a-share whether she is unmarried, married or a widow".

3. P.V. Kane, *History of Dharmasastra*, vol. 3, p. 823 (1946).

> Many people are vehemently opposed to the change. But they forget that, what with the rule that any member of a joint Hindu family may alienate his interest for value, what with the Gains of Learning Act, the Hindu Women's Rights to Property Act and other enactments, the real core of the ancient Hindu family system has been removed and only the outer moribund shell remains.

When moving the Hindu Succession Bill, referring to the Rau Committee's recommendation, Pataskar, Minister for Law, observed :[4]

> To retain the Mitakshara joint family and at the same time to put the daughter on the same footing as a son with respect to the right by birth, right of survivorship and to claim partition at any time, will be to provide for a joint family unknown to the law and unworkable in practice.... In the circumstances... the Rau Committee came to the only possible conclusion that hereafter... the law need recognise only one form of joint family, namely, the joint family, known to the Dayabhaga system of law. In this matter, I would be willing to be guided by the wishes of the House.

The decision of the House was to retain the *Mitakshara* coparcenary and to confer on daughters and other female members, mentioned in class I of the schedule, the right to share the undivided interest of the deceased coparcener. This, as is widely recognised, is a compromise between the progressive and conservative sections of the House. Thus over the vast territory governed by *Mitakshara* law, the discrimination inherent in the coparcenary survived without a challenge.

The State of Kerala initiated the first step to remedy the position by enacting the Kerala Joint Hindu Family System (Abolition) Act 1976[5] (hereinafter referred to as the Kerala Act). Instead of limiting itself to abolition of *Mitakshara* coparcenary, the Act purports to abolish the joint Hindu family itself.

Section 3 of the Kerala Act lays down that after its commencement, a right to claim any interest in any property of an ancestor, during his or her lifetime founded on the mere fact that the claimant was born in the family of the ancestor, shall not be recognised. The Act appears to be an overkill for not only did it destroy the primacy of males in the *Mitakshara* coparcenary but also the primacy enjoyed by females in the *Marumakkattayam* joint family.

Section 4 (1) of the Act lays down that all the members of a *Mitakshara* coparcenary will hold the property as tenants-in-common on the day the

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4. 4 *Lok Sabha Debates*, col. 8014 (1955)
5. (30 of 1976).

Act comes into force as if a partition had taken place and each holding his or her share separately. The Kerala Act leaves the existing rights in property founded on birth untouched and its effects are largely prospective. On aspects relating to *Mitakshara* coparcenary it closely follows the Hindu Code Bill of the Central Government[6] and does not confer rights on daughters in the existing coparcenary properties.

On the other hand, the approach of the Andhra legislature is strikingly new. It decisively elevates a daughter in a *Mitakshara* joint family, who is unmarried at the time of passing of the Act, to the status of a coparcener. It adopted an approach which was rejected three decades before as "unknown to the law and unworkable in practice".[7] The surprising aspect is not that it adopted such a course but that it seeks to achieve its object by means of an amendment to the Hindu Succession Act 1956 and not directly by changing the law relating to the joint family. This in turn gives rise to ambiguities in law as well as in policy.

The Andhra Pradesh amendment introduces chapter II to the existing Hindu Sucession Act 1956 (HSA) under the enigmatic heading "Succession by Survivorship". Succession denotes the passing of property from one person to another, on the death of the former ; whereas survivorship denotes the accrual or vesting of the right in a joint tenancy, on the surviving joint tenants on the demise of one of them. In other words, the survivorship principle in a joint tenancy presupposes that the deceased as well as surviving joint tenants had unity of possession and interest in the property. Under *Anglo-Mitakshara* law "succession" is used with reference to obstructed heritage (*saprati bandha daya*) and "survivorship" with reference to unobstructed heritage. It may be recalled that purists of *Mitakshara* law assert that the *Mitakshara* in its pristine form does not recognise succession at all.

Chapter II *A* provides three sections, *viz.*, 29*A*, 29*B* and 29*C*. According to the marginal heading, the *first* deals with equal right to daughters in coparcenary property; the *second* with "interest to devolve by survivorship on death", and the *third* with pre-emption or "preferential right to acquire property in certain cases". The thrust of the amendment is to confer coparcenary rights in favour of daughters in terms of the preamble but even the marginal notes to the provisions fail to reflect this.

Section 29*A* of the amendment is the key provision which confers on daughters rights in coparcenary. It states that notwithstanding anything contained in section 6 (of the HSA) "in a Joint Hindu Family governed by the Mitakshara law, the daughter of a coparcener shall by birth become

6. Sections 3, 4, 5 and 6 of the Kerala legislation closely correspond to sections 86 to 89 of the Hindu Code Bill, 1948 (as amended by the Select Committee). See P P. Moothath, "The Kerala Joint Family System (Abolition) Bill - A Study", *K L J* (*J*) 91 (1973).

7. Pataskar during the debates on the Hindu Succession Bill, *supra* note 4.

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 had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as the son".[8] Sub-section (2) states that at a partition of the coparcenary property a daughter shall be entitled to the same share as is allottable to a son.

The right in favour of a daughter provided under the amendment is subject to an important exception, namely that "it shall not apply to a daughter married prior to or to a partition which had been effected before the commencement of the ...Act".[9]

The policy implications of the Andhra approach need be noticed, as especially at the time of writing this paper a private member's Bill is pending before the Assembly of the State of Maharashtra which is identical with the Andhra Act.[10] *First*, the main consideration that weighed with the Rau Committee in suggesting the conversion of *Mitakshara* coparcenary into *Dayabhaga* is the uniformity in Hindu law that would be achieved thereby. Among others, as noted earlier, P.V. Kane, S. Varadachariar and K.Santhanam supported the move. As pointed out by the Rau Committee in the view of Varadachariar "the best solution, as in fact it is the simplest, is to substitute the Dayabhaga for the Mitakshara system".[11] The Andhra amendment militates against that move to achieve uniformity in law throughout India. *Second*, the preamble to the Central Act (HSA) states that it is "an Act to amend and codify the law relating to intestate succession among the Hindus". The Andhra Pradesh amendment, in the guise of amending HSA, alters the uncodified Hindu law relating to joint family partition, debts, and perhaps reunion also. In pith and substance the the Andhra legislation deals with joint family; but it follows a devious route of making amendments in HSA for achieving its objectives, instead of altering the law of joint family, as was done by the State of Kerala. To what extent can the present device be upheld and to what extent will the amendment achieve its purposes? *Third*, the elevation of unmarried daughters as coparceners reduces the share available to a widow under the law of succession. The position may be examined with respect to, (*i*) where the wife is not entitled to a share at a partition as for example in Andhra Pradesh; and (*ii*) where she is entitled to a share as in Maharashtra.

For example a joint family in Andhra Pradesh consists of father, F, his wife M, two sons and two unmarried daughters. The family possesses joint family properties worth three *lakhs* of rupees. Prior to the amendment on the death of F, F's interest under notional partition would be one-third[12] that is, Rs. 1,00,000 which would be divided among the five Class I

8. S. 29 *A* (*i*), the Hindu Succession (Andhra Pradesh Amendment) Act 1985.

9. *Id.*, s. 29*A* (*ii*).

10. I.C. Bill No. XXIII of 1986, *Maharashtra Shasana Rajya Patra*, 7 August 1986.

11. *Supra* note 2 at 17.

heirs. Thus M's share would be Rs. 20,000. After the amendment on F's death his coparcenary share will be one-fifth, that is Rs. 60,000. If this is distributed among the five class I heirs, the share of M will be Rs.12,000.

If the family is governed by the law applicable in Bombay, under the existing law, because of allotment of shares to wives at a partition, the share of F under notional partition will be Rs. 75,000 and the successional share of M will be Rs. 15,000 as per the decision of the Supreme Court in *Gurupad* v. *Hirabai.*[12a]

M would be entitled to her share on succession as well as partition, that is, Rs. 75,000 under the law of partition, Rs. 15,000 under succession. If unmarried daughters are also entitled to coparcenary rights, the share of F under notional partition will be Rs. 50,000. If this is distributed on the death of F, each of the class I heirs will be entitled and the share of M will be Rs. 50,000 on partition and Rs. 10,000 on succession.

II Constitutional issues

The Act gives rise to some constitutional issues. Prominent among these are : *first*, whether the new coparcenary unit envisaged by the Act is valid ; *second*, does the exclusion of a married daughter violate article 14 of the Constitution; and *third*, whether the distinction between a daughter by birth and adoption is valid.

When considering the first question, it is relevant to recall *Kunhikoman* v. *State of Kerala.*[14] The Supreme Court in that case invalidated the Kerala Agrarian Relations Act 1961 which imposed ceilings on land holdings and provided for vesting of lands in excess of the ceiling in the state. The Act, among other things, defined "family" as meaning husband, wife and their unmarried children or *such of them as exist.* The Supreme Court declared the Act was *ultra vires* the Constitution on several counts. Specifically adverting to the definition of the family in the Kerala Act, it pointed out that the Act adopted an artificial definition and that it did not correspond to any of the three types of families, namely, the joint Hindu family, the *Marumakkattayam* law or the *Aliyasanthana* law. This feature among

12. We may for the present purposes ignore the erratic decision of the learned single judge in *G.V. Krishna Rao* v. *State*, (A.I.R. 1987 A.P. 240). The decision brushes aside the well established distinction between the Dravida school of Hindu law and the law in the North. *Gurupad* v. *Hirabai*, (A.I.R. 1978 S.C. 1239) was decided on the basis of *Mitakshara* law applicable in the North. *A. Seethamahalakshmamma* v. *Y. Chalamiah* (A.I.R. 1974 A.P. 130), a Full Bench of the Andhra Pradesh High Court, held that a wife was not entitled to an allotment at the time of partition in Andhra Pradesh. At least judicial discipline requires that the case should have been referred to a larger bench. It is also submitted that the decision of the learned single judge is contrary to the decision of the Supreme Court in *State of Maharashtra* v. *Narayan Rao*, A.I.R. 1985 S.C. 716.

12*a*. *Ibid.*

13. The words within quotations represent the qualification stated by the Supreme Court in *State of Maharashtra* v. *Narayan Rao*, *supra* note 12 at 721.

14. A.I.R. 1962 S.C. 723.

others was held to violate article 14 of the Constitution. A Full Bench decision of the Punjab and Haryana High Court in *Sucha Singh Bajwa* v. *State of Punjab*[15] held that the statutory definition of "family" of the Punjab Land Reforms Act 1973 was constitutionally invalid.

It should be pointed out in this context that the right of daughter in coparcenary properties is not alien to the *Mitakshara* concept of property and is in fact envisaged by it. Pawate, a scintillating scholar of Hindu law, notes that Yajnavalkya gave her one-fourth share of what she would have got had she been a son and made her a co-heir with her brother.[16] He further states :[17]

> Balambhatta showed by interpretation of Yajnavalkya and the Mitakshara that a sister was entitled, not merely to a gift from her brothers, but to a share as of right of the paternal property; and that she was entitled to this share, not only when there was a partition between her brothers, but even when the brothers chose to continue to live jointly, or when the brother was only one and so there was no occasion for partition Thus a daughter was entitled to demand a share of the paternal property from her brother or brothers.

He points out that Vijnaneswara makes a distinction between males and females in that the latter were *asvatantra* or unfree; but the lack of freedom did not disentitle them from acquiring property. In other words, "women are coparceners but 'unfree' coparceners". Thus the Andhra amendment cannot be seriously assailed on the score that it contemplates a novel coparcenary unknown to the law.

Indeed, the boot is on the other leg. Granted that the *Anglo-Mitakshara* law and not the pristine *Mitakshara* law holds the field the question is whether the discrimination inherent in it is constitutionally permissible. In *Sant Ram* v. *Labhi Singh*[18] the Supreme Court held that custom or usage is comprehended under the term "all laws in force". However, the *obiter* of the Supreme Court in *Krishna Singh* v. *Mathura Ahir*[19] has thrown much confusion on the issue. Justice Sen stated : "In our opinion...Part III of the Constitution does not touch upon the personal laws of the parties". This unfortunate *obiter* was later utilised by the strident opponents of the *Shah Bano*[20] decision in support of their charge that the court was adopting double standards.[21]

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15. 76 P.L.R. 273 (F.B.) (1974).
16. I.S. Pawate, *Daya-Vibhaga* 282 (2nd ed 1975).
17. *Id.* at 283.
18. A.I.R. 1965 S.C. 314.
19. A.I.R. 1980 S.C. 707.
20. A.I.R. 1985 S.C. 945.
21. Tahir Mahmood, "Contrasting Judgements", *Hindustan Times* (2 October 1985 New Delhi).

Section 29*A*, clause (*iv*) of the A.P. Amendment Act excludes a daughter married prior to its commencement or a partition effected before it. The distinction drawn by the Act between a married and unmarried daughter gives rise to the question as to its constitutional validity under article 14. Can the discrimination be upheld as reasonable classification ? It may be recalled that ceilings legislations have drawn a distinction between an adult son and daughter in the matter of giving a separate unit of ceilings. But the inclusion of the legislations in the ninth schedule blunted the attack. The reasons for the exclusion of the married daughter could be, (*i*) that a considerable sum might have been given at the time of her marriage as dowry; and (*ii*) that at time of marriage in some communities like the *Kammas*, property is given to a married daughter at the time of marriage. A little reflection will show, *first*, that neither of these reasons warrant a blanket exclusion of a married daughter. The payment of dowry as well as its acceptance are punishable, and therefore an illegal act cannot be envisaged as a justification for the denial of a right of a married woman *Second*, the practice of giving property to a married daughter exists only among one or two communities and cannot be made the basis of a general exception If the object is to avoid payment of double portions, a suitable provision could have been made to that effect, instead of inserting a blanket provision. All in all, it is difficult to establish that the classification adopted by the Act between a married and an unmarried daughter is reasonable.

The langugae of section 29*A* will give rise to some difficult questions in the law of debts. The section says that the daughter of a coparcener with respect to coparcenary property "shall be subject to the same liabilities and disabilities in respect thereto as the son". Surprisingly, the amending legislation eschews the word "debts"; whereas the Kerala legislation not only refers to debt but also enacts a special provision dealing with debts arising out of the doctrine of pious obligation.[22]

There can be no doubt that an unmarried daughter as a coparcener is bound by the alienations made by a *karta* for legal necessity or benefit of the estate as laid down in *Hunooman Persaud* v. *Musamat Babooe*.[23] But the question is whether a female coparcener is bound by the doctrine of pious obligation to discharge the debts of the father which are neither of an illegal nor of an immoral character. The following aspects need be remembered in this context : *First*, however much moral and legal obligations were inseparable under classical Hindu law, under the contemporary concepts of this law, the doctrine of pious obligation is a moral obligation that ripened into a legal obligation. *Second*, as pointed out by Kane the doctrine was altered in some material aspects under the *Anglo-Mitakshara* law. *Third*, even in the case of a wife who belongs to the same family as

22. S. 5, Kerala Act.
23. (1856) 6 M.I.A. 393.

the husband, the view has been expressed[23a] that she is not bound by the obligation arising under the doctrine. In *Keshav Nandan* v. *Bank of Behar*[24] the Patna High Court observed:[25]

> The doctrine of pious obligation cannot apply to the wife and she, therefore, cannot be liable to the creditors on the principles applicable to the sons.

Recently the Karnataka High Court in *Padmini Bai* v. *Aravind Purandhar Murabatta*[26] took the same view.

Despite its drawbacks, the Andhra approach needs commendation on one ground, that is, it provides for an indefeasible share in favour of an unmarried daughter under the Act. The Kerala legislation while it removes the discrimination in the *Mitakshara* coparcenary, fails to protect a daughter's share from the strong possibility of depriving her of a share by executing a will. In other words, it (the Kerala legislation) did not enact restrictions on testation by means of a forced share or compulsory portion[27] as is done under the civil law systems.

The objectives of progress towards a uniform civil code, the protection of, (*i*) the rights of heirs including those of female heirs, and (*ii*) familial interests, could have been better achieved by the abolition of the *Mitakshara* coparcenary on the lines of the Kerala legislation coupled with a provision for compulsory portion. As pointed out earlier, the Andhra approach is inimical to the rights of inheritance of a widow. In opting for the latter approach the A.P. Assembly took a wrong direction.

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23*a*. Mulla, *Principles of Hindu Law* (15th ed. 1982).

24. A.I.R. 1977 Pat. 185.

25. *Id.* at 190.

26. 1988 (1) Kar. L.J. 291.

27. For a study of adopting the forced share principle in India, see, generally B. Sivaramayya, *Women's Rights of Inheritance in India* (1973).

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