

SUMMARY OF THIRD LEGAL WORKSHOP PAPER  
TO BE HELD ON 29TH JANUARY 2017

~~~ TOPIC ~~~

WOMEN'S RIGHT TO PROPERTY – RECENT  
TRENDS

~~~ SUBMITTED BY ~~~

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( District Judge – 1 and Addl. Sessions Judge, Akola )

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1. **HISTORICAL BACKGROUND** : -

1.1 ANCIENT TREND : -

i) “Balye pitorvashay..... – Girls are supposed to be in the custody of their father when they are children, women must be under the custody of their husband when married and under the custody of her son as widows. In no circumstances is she allowed to assert herself independently.”

ii) “Pita rakhshati..... – Since women are not capable of living independently, she is to be kept under the custody of her father as child, under her husband as a woman and under her son as widow.”

## 2. MEDIEVAL LIBERAL TREND:-

The Code of *Yajnavalkya* is in the main work founded on *Manusmriti* but the treatment here is more logical and synthesized. On a number of matters and particularly on question of women's right of inheritance and to hold property, *Yajnavalkya* although a follower of conventional conservatism is decidedly more liberal than *Manu*. The influence of Buddha 'the enlightened' and Buddhism on the *Vyavahara* part of *Dharma* of *Manusmriti* and the *Naradasmriti* cannot be minimized. Buddha's teachings and particularly his message of universal compassion naturally had effect on certain invidious and rigorous aspect of law and this is reflected on the *Smriti* of *Yajnavalkya*. *There is greater recognition of rights of women.*

### 2.1 DAYABHAGA AND MITAKSHARA SCHOOLS : -

The two systems of inheritance which are predominant amongst the Hindus in India are; Mitakshara system and Dayabhaga system.

Mitakshara recognizes two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applies to joint family property; the rule of succession apply to property held in absolute severalty by the last owner. Dayabhaga recognises only one mode of devolution, namely, succession. 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. In the Bombay State, daughters do not take as joint tenants with benefits of surviorship, but they take as tenants in common. Further, a daughter does not take a limited estate in her father's property, but takes the property absolutely. Thus, if a Hindu governed by the Bombay School dies leaving two daughters, each daughter takes an absolute interest in a moiety of her father's estate, and holds it as her separate property, and on her death, her share will pass to her own heirs as her stridhana.

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 alongwith their brothers.

### 3. WOMEN'S RIGHT TO PROPERTY :-

Historically speaking, Hindu women were never entitled to absolute property rights. Islam is the only law throughout the world which recognised absolute right of women to hold property with defined share since the earliest times. The Hindu Women's Right to Property Act, 1937 was the first legislation which created property rights for Hindu women, though limited i.e. in case the husband died, woman would step into his shoes and acquire husband's property and after her death, the same property would revert to its source or husband's heirs, known as reversioners. Hence, she had no

right to pass on the ownership in the property to anyone.

### 3.1 LIMITED RIGHTS : -

Earlier in a joint Hindu family, a woman 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. The 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). This Act brought revolutionary changes in the Hindu Law of all schools, and brought changes not only in the law of coparcenary but also in the law of partition,

alienation of property, inheritance and adoption. The Act of 1937 enabled the widow to succeed along with the son and to take a share equal to that of the son. She was entitled for the share which her deceased husband had.

#### 4. CONSTITUTIONAL ERA OF EQUALITY : -

The concept of equality and justice having its own prominence in the constitutional history of India. The Constitution of India expounds certain provisions for achieving parity between men and women. Article 14 of our Constitution declares that 'the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India'. Article 15 of our constitution directs the State not to discriminate against a citizen on grounds only of religion, race, caste, sex of place of birth or any of them.

#### 4.1 CODIFICATION OF HINDU LAW : -

The proposal to amend the Hindu legal

Code was the first ever attempt in independent India by the Constituent Assembly that seized the necessity of addressing equal rights to women. Dr. B. R. Ambedkar viewed that beyond the constitutional framework, India was in much need of a social revival. The Hindu Code Bill aimed to amend and codify certain aspects of the Hindu Law that placed severe restrictions on socio-economic rights to women. The placing of the Hindu Code Bill before the Constituent Assembly raised issues of utmost importance like gender equality, succession to property, marriage, divorce and so on. Subsequently, the Hindu Code bill was enacted on separate line that included: Hindu Marriage Act 1955, Hindu Succession Act 1956, Hindu Minority and Guardianship Act 1956 and the Hindu Adoption and Maintenance act, 1956.

##### 5. HINDU SUCCESSION ACT : -

The limited rights of women to hold property took the form of absolute ownership rights in property with the enactment of the Hindu

Succession Act, 1956. By virtue of Section 16 of the Hindu Succession Act, 1956, women have made full owners of property. Prior to the commencement of the Act, women only had the rights of maintenance and residence in the property.

Under the Scheme of the Hindu Succession Act, 1956, the daughters were also granted property rights in their father's estate. In the matter of succession of property of a Hindu male dying intestate, the Act lays down a set of general rules in sections 8 to 13. Sections 15 and 16 of the Act contain separate general rules affecting succession to the property of a female intestate.

#### 5.1 AMENDMENT IN THE YEAR 1994 :-

In the year 1986, the State of Andhra Pradesh, in the year 1990, the State of Tamilnadu and in the year 1994, the State of Maharashtra and the State of Karnataka added Chapter II-A to the Hindu Succession Act, 1956 containing Section 29-A, 29-B and 29-C, recognizing the daughter in Hindu joint family governed by Mitakshara Law as

coparcener by birth in her own right in the same manner as the son having same right in the coparcenary property as she would have had, if she had been a son, inclusive of the right to claim survivorship subject to same liabilities and disabilities in respect thereto as that of son. On partition, equal share allotable to a son is allotted to the daughters as a coparcener. However, as per Maharashtra Amendment 1994, said Chapter was not applicable to a daughter married before commencement of the Hindu Succession Maharashtra (Amendment) Act, 1994 which came into effect from 22.06.1994 and it shall not be applicable to partitions which were effected prior to 22/6/1994.. By the said amendment, the preferential right to acquire property in respect of interest in any immovable property of intestate or in any business carried on by him or her was also given to the daughter.

#### 6. RECENT TREND : -

A significant change was brought in the

law with the passing of the Hindu Succession (Amendment) Act, 2005 with effect from 9<sup>th</sup> September 2005. Section 6 of the original Act was amended and daughter was made a coparcener in her own right in the same manner as the son. This right conferred upon women the right to seek a partition in the dwelling house also, since she has an equal right to possess and own her ancestral property. In this light, Section 23 of the Hindu Succession Act, 1956, dealing with special provision respecting dwelling-houses, putting limitations on the right of women to claim partition of dwelling-houses, has been omitted. By virtue of the new provision, a daughter of a coparcener in a joint Hindu family governed by the *Mitakshara* law now becomes a coparcener in her own right and thus enjoys rights equal to those hitherto enjoyed by a son of a coparcener. The implications of this fundamental change are wide. Since a daughter now stands on an equal footing with a son of a coparcener, she is now invested with all the rights, including the right to seek partition of the coparcenary property.

## 6.1 RELEVANT PROVISIONS OF THE ACT : -

Important right conferred by the Amendment Act on the daughter of a coparcener is the birth right and not right by succession. It is germane to note that the coparcenary birth right is conferred on the daughter of a coparcener and not on all the daughters. The words “the daughter of a coparcener” are very important for interpreting the provision. Wording “ the daughter of a coparcener” is used in the provision. Only the daughter or a daughter is not used in the provision. It means all daughters shall not by birth become coparceners, but only the daughter of a coparcener shall by birth become coparcener.

## 6.2 WHO IS DAUGHTER OF A COPARCENER ?

Now the question remains who is “ the daughter of a coparcener”? For that it is to be seen who is a coparcener? Son, grandson and great

grandson of a male hindu form the coparcenary and they all inclusive of said male hindu are coparceners. 5th generation is not part of coparcenary and the person of 5th generation is not a coparcener. When the person of 1st generation dies then he ceases to be a coparcener and person of 5th generation will be included in the coparcenary and he will be coparcener. It means, as soon as person dies, he ceases to be a coparcener. The wording used in the Amendment Act is the daughter of a coparcener. It means what is contemplated in the provision is the daughter of a person who is coparcener. Unless a person is alive, he cannot be a coparcener. On his death, he ceases to be a coparcener.

Hence, the daughter of a person, who ceased to be a coparcener, is not the daughter of a coparcener. Such daughter is the daughter of the deceased coparcener. Thus, it is very clear that the daughter whose father is alive on the date of commencement of the Amendment Act, 2005 is the daughter as contemplated in the provision. The daughter whose father is not alive on the commencement of the Amendment Act, 2005 is not

the daughter of coparcener as her father ceased to be a coparcener on his death. Thus, only the daughter whose father is alive on the date of commencement of the Amendment Act, 2005 shall by birth become a coparcener and acquires birth right as coparcener.

### 6.3 EQUAL RIGHTS & LIABILITIES AS OF SON : -

As per Sub Section (I) of Section 6 of the Act, on and from the commencement of the Act of 2005, in a joint Hindu Family governed by Mitakshara law, 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 and liabilities in respect of coparcenary property as that of a son. As per first proviso, coparcenary right given to a daughter shall not affect or invalidate any disposition or alienation including partition or testamentary disposition of the property which took place prior to 20.12.2004.

Under Sub Section (2), a daughter who became coparcener and entitled to a property is

capable of to dispose of her coparcenary interest in joint family property by testamentary disposition such as will, gift etc.

Sub Section (3) states that where a Hindu dies after commencement of the Act, 2005, his interest in the property of joint Hindu family governed by Mitakshara law shall devolve by testamentary or intestate succession under this Act and not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place and daughter is allotted the same share as is allotted to a son, the share of predeceased son or predeceased daughter shall be allotted to their surviving child and share of predeceased child of a deceased son or daughter shall be allotted to child of such predeceased son or daughter. Explanation to sub-section (3) speaks about ascertaining share of deceased coparcener on the basis of notional partition on the date of his death.

Sub-Section (4) states that after commencement of amendment, no Court shall recognize the right of a creditor to proceed against

the son, grand son or great grand son of a debtor, for debts contracted by the father, grand father or great grand father on the ground of pious obligation. Its proviso protected the right of a creditor to proceed against specified heirs or any alienation made in respect of or in satisfaction of any such debt or obligation before the enactment of the Act. Its explanation clarifies son, grandson, or great grand son who were born or adopted before the commencement of the Act.

Sub Section (5) states that this Section shall not apply to a partition which has been effected before 20.12.2004. Its explanation says that partition means any partition made by execution of a registered partition deed or by the decree of a Court.

#### 6.4 RIGHT TO CLAIM PARTITION OF DWELLING HOUSE : -

As per Section 23 of the Act of 1956, a female heir specified in Class I of the Schedule was not entitled to claim partition in the dwelling house until male heir chooses to divide their shares therein

and the female was entitled to right of residence in the dwelling house if she is unmarried or has been deserted by or has separated from her husband or is a widow. By the Amendment Act of 2005, Section 23 has been omitted with effect from 09.09.2005. Therefore, a daughter who is the coparcener is entitled to claim the partition in their dwelling house whether she is unmarried or married or deserted by or separated from her husband or a widow. Similarly, as per Section 24 of the Act, 1956 any heir who is related to an intestate as the widow or predeceased son, the widow of predeceased son of a predeceased son or a widow of a brother was not entitled to succeed the property of the intestate as such widow if on the date of the succession opens, has remarried. By the Amendment Act 2005, Section 24 has been omitted with effect from 09.09.2005. So, now such widow is also entitled to succeed the property of the intestate.

#### 6.5 TESTAMENTARY DISPOSITION OF PROPERTY :

As per Section 30 of the Act, 1956 only

male Hindu was entitled to dispose of by Will or other testamentary disposition his interest or share in Mitakshara coparcenary property. By the Amendment Act of 2005, by substituting the words “disposition of by him or her” in Section 30, a right is given to the female Hindu to dispose of by Will or other testamentary disposition of her interest in Mitakshara coparcenary property.

#### 6.6 ABSOLUTE OWNERSHIP: SECTION 14 OF THE HINDU SUCCESSION ACT, 1956 : -

Section 14 of the Hindu Succession Act, 1956, has introduced fundamental changes in the Hindu Law of Woman's property. Section 14 provides that any property possessed by a Hindu female, whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as limited owner. Sub Section (1) explains further that “property” in this Sub Section includes both movable and immovable property acquired by her by inheritance, partition, gift or will or acquired in lieu of maintenance or arrears of maintenance or

acquired by her own skill or exertion or by purchase or by prescription or any other manner whatsoever, and also any property held by her as stridhana immediately before the commencement of the said Act.

It is immaterial whether it be obtained by inheritance of the deceased husband's separate property or of his share in coparcenary property by virtue of the proviso to Section 6 of the Act, or by demise of her deceased husband or gift from a relative or any other person, and whether before, at or after her marriage. But, as expressly provided by sub Section (2) of this Section, a Hindu female shall not be entitled to hold any property as an absolute owner if she has acquired the same by way of gift or under a will or any other instrument, or under a decree or order of a civil court or under an award, where the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property.

**6.7 Deemed division – Notional Partition :-**

Sub-Section (3) of amended Section 6 now stipulates that on the death of such coparcener, there shall be a deemed division of the property to which such coparcener is entitled, as if a partition had taken place. A notional partition and division has been introduced by way of a deeming fiction. A further change is that, upon such notional partition, the property referred to in the sub-section would be notionally divided amongst the heirs of the deceased coparcener, the daughter taking a share equal to that of a son, the share of the pre-deceased son or a pre-deceased daughter being allotted to the surviving child of such heirs.

## 7. RELEVANT RULINGS : -

7.1 The Hon'ble Apex Court in its current Judgment in the case of Uttam .Vs. Saubhag Singh 2017 (1) Mh.L.J. 294 while dealing with S.6 proviso [before amendment of 2005] and Ss. 4,8,19,30 of the Hindu Succession Act laid down as under:

i] When a male Hindu dies after the commencement

of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary [Vide Section 6]

ii ] To proposition (I) an exception is contained in section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

iii] A second exception engrafted on proposition (I) is contained in the proviso to section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that Class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

iv] In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all the coparceners and the male Hindu's widow get a share in the joint family property.

v] On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

vi] On a conjoint reading of sections 4,8 and 19 of the Act, after joint family property has been distributed in accordance with section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants in common and not as joint tenants.

7.5 In the case of **Prakash and others v. Phulavati and others, (2016) 2 SCC 36**, the Hon'ble Supreme Court held that amended Section 6 is not retrospective in operation. It applies only when both coparcener and his daughter were alive on date of commencement of Amendment Act i.e. 09.09.2005, irrespective of date of birth of daughter and coparcener who died thereafter.

7.7 Whether a woman can be a Karta of Hindu Undivided Family ?

In Sujata v. Manu Gupta, 226 (2016) DLT 647, the Delhi High Court observed that Section 6 of the Hindu Succession (Amendment) Act, 2005 is a socially beneficial legislation and it gives equal rights of inheritance to Hindu males and females. Its objective is to recognise the rights of female Hindus as coparceners and to enhance their right to equality apropos succession. Thus, a daughter can be a Karta of a Hindu Undivided Family in the same right as a son.

7.8 THE REPEALING AND AMENDING ACT, 2015 (ACT No. 17/2015) — Repealing of the Hindu Succession (Amendment) Act, 2005 by Act No. 17/2015 — Whether the Repealing and Amending Act, 2015 (Act No. 17/2015), which repealed the Hindu Succession (Amendment) Act, 2005 to the whole extent, has the effect of repealing amended Section 6 and restoring the old Section 6 of the Hindu Succession Act, and thereby take away the status of co-parcener conferred on the daughters giving them equal right with the sons in the coparcenary property?

Held :- In Smt. Lokamani and others .Vrs. Smt. Mahadevamma and others, AIR 2016 Karnataka 4, held that; The Repealing and Amending Act, 2015 which repeals the Hindu Succession (Amendment) Act, 2005 in whole, does not wipe out the amendment to Section 6 from the Hindu Succession Act. The existence of the Hindu Succession (Amendment) Act, 2005 since became superfluous and did not serve any purpose, the Parliament in its wisdom thought of repealing the said Amendment

Act. It is only a case of legislative spring-cleaning, and not intended to make any change in law. Further, the Repealing and Amending Act, 2015 does not disclose any intention on part of Parliament to take away status of a coparcener conferred on a daughter giving equal rights with the son in coparcenary property. Similarly, no such intention can be gathered with regard to restoration of Ss. 23 and 24 of Principal Act which were repealed by Hindu Succession (Amendment) Act, 2005. On the contrary, by virtue of Repealing and Amending Act, 2015, the amendments made to Hindu Succession Act in the year of 2005, became part of the Act and the same is given retrospective effect from the day the Principal Act came into force in the year 1956, as if the said amended provision was in operation at that time. Thus, the equal rights conferred on the daughter by Amending Act has not been taken away by the Repealing Act. The repeal of an Amending Act, therefore, has no repercussion on the parent Act which together with the amendments remains unaffected.

CONCLUSION : -

A human rights based approach needs to be adopted by the legislature while formulating any laws, policies or regulations to achieve equality as far as property rights are concerned. Improving the status of property rights of women is a matter not only of human rights and gender equality, it is a fundamental principle that underlies economic development for all the people, which envisages the principles of poverty reduction and economic growth. Not only will this help in elevating the standard of living of women, it will also enable them to become self-reliant by reducing their dependence on any family member or friend and protecting them from any and every sort of violence. Dependence on others increases the economic vulnerability of women, which might even lead to their exploitation. Owning property can act as a psychological support for a woman and it will also help her to maintain herself and her children. Achieving equal property rights for women should not remain a far dream for India anymore for this will ensure that there is an overall

development of the Country, which will further  
India's goal of emerging as a world power.

Submitted with Great Respect.

By Core Group Civil side

Headed by

( R G Waghmare )

District Judge – 1 & Addl. Sessions Judge, Akola

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