In search of women’s equal right to property in India - Recent Judicial developments

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I. INTRODUCTION

Law relating to devolution of property by way of inheritance has not been settled in India even after six decades of achieving independence and having a Constitution which guarantees right to equality without discrimination on the basis of sex and religion. A survey of 2014-15 judgments of the Supreme Court and various High Courts has seen remarkable changes in recognizing the rights of female in property. These judgments significantly impact the rights of women in India as India, with its inherent diversity in personal laws due to patriarchal mindset, has refused to give up traditional ideologies in framing of laws. Recent judicial grant of property rights to tribal women, which issue had not been touched upon in the past either by the legislation as well as by the court, is a noticeable development in keeping with the equality directive of the Constitution.

Territorial jurisdiction under Portuguese Civil Code, 1867 which governs the rights of all persons with regard to succession in the State of Goa and the Union Territory of Daman and Diu was extended for determination of mandatory share even when property was situated outside the State. Further in matter of ex gratia compensation awarded by the State the personal law of succession is held to be of no consequence. The compensation provided by the State is to mitigate the financial as well as mental hurt caused to the surviving family members of the deceased. Interpretation of statutory provision giving birth right to Hindu daughter in coparcenary property, granting Hindu widow partition right in the ancestral property of husband, recognizing absolute right of Hindu women on the basis of personal obligation of husband to maintain her in property received as consideration for her consent for husband’s second marriage are steps towards securing equality of status with respect to property rights. At the same time, dismissing PIL filed by writ petition challenging constitutional validity of the Shariat Act on the ground that the issue was to be considered by the legislature, retention of devolution of property on heirs of husband on death of Hindu female dying issueless does not appear to be justified.

Despite immense positive steps taken by legislature and judiciary, the law relating to succession still leaves various voids perpetuating inequality on basis of sex much against the mandate of Constitution.

The article is an interesting read dealing with the judicial developments in the Indian law of succession whereby laws have been interpreted to grant more rights in property to women in
India be it the right granted to tribal women or to the daughter in ancestral property or right to Hindu widow in her husband’s ancestral property or giving sister right in property in presence of daughter under Hanafi law which are completely in accordance with the equality mandate of the Constitution.

II. Right of property granted to Tribal women in India

A. Inheritance Rights granted in Ancestral property

In a recent landmark judgment, the Himachal Pradesh High Court in Bahadur v. Bratiya\(^1\) has observed that tribal women too could inherit property thereby setting aside age-old customary law that allows only men to inherit ancestral property. Accepting the progressive view that laws must evolve with the time if societies are to progress Rajiv Sharma J., while dealing with inheritance right of daughters in the tribal areas in Himachal Pradesh, held that daughters in the tribal areas in the State of Himachal Pradesh shall inherit the property in accordance with the HSA, 1956 and not as per customs and usages in order to prevent the women from social injustice and prevention of all forms of exploitation.

The plaintiff had filed a suit for declaration that the attestation of mutations by the Assistant Collector, wherein the property was mutated in favour of defendants-his sisters, were null and void as under the customs governing the Schedule Tribe to which his father belonged the daughters did not inherit the property of the father. The father of the plaintiff being ‘Gaddi’ belonged to Scheduled Tribe category, where under custom the daughters did not inherit the property of their father after his death. It was not disputed that parties were Hindus and they followed Hindu customs and practices. The court looked into the consistency of impugned custom in the ‘Gaddis’ (tribals) which did not give rights to daughters to inherit their father’s property. Speaking about the binding nature of customs, the court took note of various judgments wherein it has been clearly held that customs should be ancient, invariable and established by clear evidence. The plaintiff in the present case failed to prove conclusively on the basis of oral or documentary evidence that the impugned custom was ancient, invariable and unbroken. The consistency of such custom that sons alone inherit the property had also not been judicially noted in various cases. Thus it could not be proved that the customs in the ‘Gaddis’ (tribals) deprived daughters their inheritance right in the property of their father.

Justice Sharma upheld the order passed by District Judge, Chamba in 2002 to grant legal rights to women in family property among ‘Gaddi’ (tribal) family in Chamba district. The High Court

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\(^1\) Himachal Pradesh High Court, RSA No. 8 of 2003 decided on June 26, 2015.
said that tribal belts have modernized with the passage of time, they profess Hindu rites and customs and do not follow different Gods. It added that their culture may be different but customs must conform to the constitutional philosophy. The court considered series of rulings of Supreme Court and state high courts on the issue of overriding effect of HSA, 1956 under section 4\(^2\) over custom depriving daughter’s inheritance right. Giving due weightage to constitutional requirement of equality of status to be given to womenfolk and recognizing conversion of restricted or limited right of female to absolute right under section 14(1) of HSA, 1956 the court ruled that daughters in the tribal areas in the state shall inherit the property in accordance with HSA, 1956 and not as per customs and usages. The court so observed in order to prevent the women from social injustice and for prevention of all forms of exploitation. It also clearly held that the provisions of subsection (2) of section 2 of HSA, 1956\(^3\) will not come in the way of inheritance of the property by the daughters belonging to tribal area where Hinduism and Buddhism is followed. The court speaking about constitutional commitment about prohibiting discrimination on the ground of sex and for providing socio-economic justice to women further opined:

- The women have to be advanced socially and economically to bestow upon them dignity.
- The daughters in a society, who are Hindu, cannot be left and segregated from mainstream. They are entitled to equal share in the property.
- Needless to add that gender discrimination violates fundamental rights guaranteed under the Constitution.

But it finally concluded that the observations made only pertained to right to inherit the property by the daughters under the HSA, 1956 and do not confer other privileges enjoined by the tribal in the tribal areas.

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\(^2\) Sec. 4 of HSA, 1956 - Overriding effect of Act
(1) Save as otherwise expressly provided in this Act,
(a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act;
(b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus insofar as it is inconsistent with any of the provisions contained in this Act.

\(^3\) Section 2 of HSA, 1956 - Application of Act
(1) ...
(2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.
B. Inheritance rights granted in absence of Customary law

Tribal women in the state of Tripura have the right to succeed as per general principles of codified law. In a historic judgement in *Smt. Kajal Rani Noatia v. Sri Raybahadur Tripura*<sup>4</sup> Justice Subhasish Talapatra of the High Court of Tripura declared and ruled that tribal women from all tribal groups or clan in the state of Tripura would succeed to the estate of their parent, brother, husband, son et al as heirs by intestate succession and inherit the property with equal share with male heir absolute rights as per general of HSA, 1956 as amended and of the Indian Succession Act, 1925 (ISA, 1925) which applies to the tribal Christians. The plaintiff in the instant case filed the suit for declaration of title and for permanent injunction in respect of the suit land. Plaintiff submitted that he had purchased the suit land by sale deed from the daughters of the deceased who had been allotted said land by competent authority as recorded in the public record and respondents attempted to intrude into the possession of the plaintiff which constrained the plaintiff to file the suit. On the other hand the respondents challenged the transfer on the ground that people belonging to Schedule Tribe community are not governed by section 2(2) of HSA, 1956<sup>5</sup> until a notification to the effect is made by the Union Government and therefore daughters could neither inherit and be the owners on the death of their father as per provisions of HSA, 1956 nor have right to sale the suit land. The deceased was a member of Schedule Tribe community.

The trial court examined various documents including the sale deed, death certificate and public records. As no notification of the Union Government was brought to the notice of trial court the bar in section 2(2) of HSA, 1956 was not disputable. In absence of customary law of the Schedule Tribe community of Tripura the question before the trial court was as to who would become the owner of the land after the death of a deceased who belonged to Schedule Tribe community of Tripura. While disposing of the suit by holding the sale deed to be legal and valid, the court ruled in favour of the plaintiff by observing that “the absence of an existing law both at Union or State level cannot mean that the property of the deceased male of Schedule Tribe community will become the property of State while the daughters of deceased are alive. The property will automatically go in the name of daughters in absence of male heirs by law of inheritance and the daughters shall have every right to dispose the property as per their convenience.” The findings of the trial court were challenged by the defendants in appeal.

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<sup>4</sup> High court of Tripura, RSA No.38 of 2009 decided on February 26, 2015.
<sup>5</sup> Supra Note 3
The appellate court at the time of admitting appeal held that in absence of any notification withdrawing the ban and application of HSA, 1956 to the member of the Schedule Tribe community, it was bound to uphold the non-applicability of HSA, 1956 to the deceased and his daughters for the purpose of inheritance. Reversing the judgment passed by trial court the first appellate court held that daughters being the actual legal heirs could not inherit and derive title in the property of their deceased father. Taking note of non-existence of coded customary law having legal sanction by the State of Tripura for guiding the members of Schedule Tribe Community the first appellate court made the following direction:

“the State Government either codify the customary law of inheritance of Schedule Tribe Community or the Central Government should withdraw the ban applying Hindu Succession Act to the Member of the Schedule Tribe Community in Tripura as originally they are the followers of Hindu religion.”

On appeal the major issues before the High Court of Tripura in the instant case were whether the plaintiff appellant who was the member of Schedule Tribe within the meaning of Clause 25 of Article 366 of the Constitution of India had got right, title and interest to institute the suit to resist the action of the defendant/respondents and whether the first appellate court erred in law in reversing the judgment passed by the trial court.

Justice Talapatra, while discarding the finding of first appellate court, made a significant observation that the absence of an existing law both at Union and State level cannot mean that the property of the deceased male of Schedule Tribe community would become the property of State while the daughters of deceased are alive. Property in such cases will automatically devolve on daughters in absence of the heirs by law of inheritance who shall have every right to dispose the property as per their customary laws. The court agreed with the finding of trial court to be in conformity to the principles of justice, equity and good conscience that in absence of the male successor the land would devolve to the female heirs of the male deceased ‘in terms of the customary law’.

The court relied on the Apex court judgement in Madhu Kishwar v. State of Bihar where Apex court has developed and analysed the provisions of section 2(2) of the HSA, 1956 from the constitutional vantage point and perspective of human rights. Apex Court in Madhu Kishwar observed:

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6 (1996) 5 SCC 125.
“the human rights for woman including girl child are, inalienable, integral and indivisible part of universal human rights. It is imperative for the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Article 14 and 15 of the Constitution of India. By operation of Article 2(F) and other related articles of CEDAW, the State should by appropriate measures including legislation modify law and abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women. Law is and instrument of social change as well as the defender for social change. Customs which are immoral are opposed to public policy, can neither be recognized nor be enforced. It is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental rights. The State has to step in to set right the imbalance and the directive principles, though not enforceable; mandate of Article 38, to restructure social and economic democracy, enjoins to eliminate obstacles and prohibit discrimination in intestate succession based on sex.”

Guided by the principles of changing social order as laid down in Madhu Kishwar’s case the High Court in Kajal Rani clearly declared that the scheduled tribe women would succeed in the estate of their parent, brother, husband, son et al who dies intestate as their lineal heir and inherit the property with equal share with the other male heirs with absolute right similarly to the general principles of HSA, 1956 and of ISA, 1925 which applies to the tribal Christians.

The court in Kajal Rani noted that an empirical study suggests that 40% of the tribal families practice jhuming (shifting cultivation) in Tripura (Economic Review of Tripura, 2013-14,Directorate of Economics & Statistics Planning (Statistics) Department, Government of Tripura, Page 308) and progressively they are adopting water-shed cultivation or other occupation. The court revealed that jhuming on their land or the forest land is practised more in cycle without valid permission.

The court, while affirming the judgment of trial court and quashing that of first appellate court, concluded by holding “it is high time to recognise the property right of the tribal women by inheritance as the lineal descendants of the male parent, brother, husband, son et al in the manner as provided under the Hindu Succession Act or Indian Succession Act subject to accomplishment what the Directive Principles of the State Policy under Chapter IV of the Constitution, in particular, under Article 44 cherishes”.

The decision reinforcing the daughter’s inherent right in ancestor’s property same as male counterpart, though meets the aspiration of lakhs of women in tribal district, gives rise to new dilemmas about achieving a fine balance between the customary tribal law and the right as
granted by the court. Customs denying rights to women in property could not be sustained as such customs amount to be immoral and against public policy.

III. Portuguese Civil Code 1867- Territorial Jurisdiction

Goa is the only State in India that is governed by a Common Civil Code. The rules of succession applicable in Goa, a Portuguese colony for over four and a half centuries, have been set down in the Portuguese Civil Code 1867, which has been in force since 1 July 1870 and applies to all her citizens without distinction of caste, creed or sex. After Goa's liberation in 1961, the Government of India assured Goa that the prevailing laws would remain. Parliament enacted the Goa, Daman and Diu (Administration) Act 1962, which saved all laws in force immediately before the appointed date of 20 December 1961 and allowed them to continue to be in force until amended or repealed by a competent legislature or other competent authority. The Portuguese Civil Code laws apply in matters of marriage, divorce, inheritance and succession, children and adoption to all the Goans irrespective of the community they belong.

The law of succession under Portuguese Civil Code is contained in the provisions of Article 1735 to 2166. It deals with preliminary provisions, testamentary successions, execution of Wills legitimate and unofficious dispositions, common provisions to various forms of Wills, legitimate succession, provisions common to testamentary successions and successions under the law, opening of inheritance its acceptance and repudiation, partition and also inventories. The estate of the estate leaver is divided into two parts one which the testator can freely dispose of which is referred to as a disposable part and the other which he cannot dispose of which the law terms as legitime. Article 1784 of the Portuguese Civil Code provides for legitime under which a portion of the assets of an estate leaver have to necessarily be allotted to his heirs in his straight line descendants or ascendants. The partition allotted is half of the estate of the estate leaver and any disposition to the contrary has an effect that the party benefiting has to return to the inheritance whatever the party received in excess of the right of the said descendant or ascendant. Article 1736 of the Civil Code provides that the heir is a person who succeeds to the totality of the inheritance whereas the legatee is a person in whose favour the testator disposes of a specific object or a certain part thereof. Under Article 1737 of the Civil Code, the inheritance comprises of all the property rights and obligations of the deceased which are not merely personal or excluded by depositions of the estate leaver or by law. Article 2009 of the Civil Code further provides that the inheritance opens upon the death of the estate leaver and Article 2011 of the Civil Code provides that the transmission of ownership and possession of the heirs whether
instituted or legal, takes place from the moment of the death of the estate leaver. Article 2016 of the Civil Code further provides that each of the co-heir may demand the totality of the estate to which he along with the others are entitled.

Even when the Code lays down specifically the rules of succession, the interpretation of the Code with respect to its territorial jurisdiction has often been called in question. The question before the court in Sgn. Ldn. A.P. Fernandes v. Annette Blunt Finch⁷ was whether property situated outside Goa could form part of the Inventory Proceedings initiation in the State of Goa. Parents of the appellants who were the estate leavers were domiciled and belonged to the State of Goa and their succession was governed by the law of succession as provided in the provisions of the said Civil Code. Article 24 of the Code makes a provision that immovable properties situated in Goa would be governed by Portuguese law⁸. Does it by implication leave out immovable properties situated outside Goa to be governed by local laws? Learned Single Judge of same High Court N.A. Britto, J. gave a literal interpretation to Article 24 in Maria Luiza Valentina Pereira and Anr. v. Jose Paulo Coutinho and Ors⁹ by holding that the Code clearly provides that immovable properties situated in the State would be governed by the said Code which by necessary implication leaves out the immovable properties situated outside Goa, thus the property at Mumbai will be governed by the lex situs i.e. to say ISA, 1925.

Appeal in Fernandes case was filed to challenge order whereby, Inventory Court refused to enlist some properties in inventory list for purpose of partition which were situated outside State on ground that Courts have no jurisdiction to enlist outside properties from State. Appellant submitted that the inheritance comprised of all the properties of the estate leaver, legitime of the parties could not be in any way affected by any acts of the parties and the disposable quota of the deceased consists of half of all the properties of the estate leaver under Portuguese Civil Code. Further he contended that if properties at Mumbai or located outside Goa were excluded, it would be grave prejudice to the legitime and, consequently, a disparity in the right of inheritance of the descendants. Further the appellant relied on G. Rama Rao v. Joseph de Souza¹⁰, where

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⁷ High Court of Bombay at Goa, Appeal From Order No. 82 of 2009 with Cross Objection No. 02 of 2010 decided on March 11, 2015.
⁸ Article 24 of the Civil Code reads thus:
"Portuguese citizens, who travel or reside in foreign country, continue to be subject to Portuguese laws as regards their civil capacity, their status and immovable properties situated in the country, in respect of facts which will produce effects therein. However, the external form of the acts shall be governed by the law of the country, where they were celebrated, except in cases where there is provision to the contrary."
⁹ High Court of Bombay (Panaji Branch) 2008 (6) ALLMR 160.
¹⁰ Laws(Bom)-2001-8-10. Case was later upheld by Apex Court as Leave to Appeal came to be rejected.
properties which were situated in Mumbai were allowed to be enlisted in the Inventory Proceedings initiated in the State of Goa.

The court dealt with the provisions of Article 24 of the Code, Treatise by Dr. Cunha Gonsalves Vol, 1 page 704, various commentaries in the Book - *Partilhas Judiciais Teoria e Pratica* Vol. 1, 1954 (Judicial Partitions Theory and Practice) by the jurist Joao Antonio Lopes Cardoso. It came to the conclusion that Single Judge in *Maria* case has overlooked the aspects of ‘unity of succession’ and the ‘universality of succession’ as well as the relevant provisions and the principles whilst holding that the properties outside Goa would be governed by the ISA, 1925. Dr. Cunha Gonsalves in his treatise has expressly taken note of Article 24 of the said Civil Code whilst examining the aspect of unity of succession to which the descendants are entitled to succeed to the assets of the estate leaver and observed that there is no justification not to describe the assets which an estate leaver owns beyond the boundaries of the State as the inheritance is constituted of all the assets situated within or outside the geographical boundaries in terms of Article 1737 of the said Civil Code.

Division Bench of Bombay High Court comprising of R.M. Borde and F.M. Reis, JJ. in *Fernandes* case looked into various relevant provisions of Civil Code to find out the manner in which the disposable share and mandatory share is to be entertained. Interpreting all the relevant provisions of the Code it held that the heirs of the estate leaver succeed to the totality of the estate belonging to the estate leaver. Totality of the estate would include all the assets belonging to the deceased wherever they are located. It proceeded on to hold that in order to determine the mandatory share of the deceased, which has to be necessarily inherited by the descendants and/or ascendants, all the assets of the estate leaver would have to be taken into consideration to work out such mandatory share in terms of the provisions of the Civil Code. Further it held that the rights of succession could be exercised in persona against the legal heirs within its jurisdiction, even if it was assumed that the Courts in the State of Goa did not have territorial jurisdiction over the immoveable properties situated outside the State, as it was a right which had devolved by succession over an immoveable property. The Courts in Goa thus could pass appropriate Orders regarding the properties of the deceased including immoveable properties situated outside the State of Goa as they could make the Order effective in persona. While partly allowing the appeal the court concluded by holding that in case the properties which are located outside the State of Goa are excluded from the Inventory Proceedings, the determination of the mandatory share of the estate leaver, which has to necessarily belong to the descendants or ascendants, would be severely and detrimentally affected. Thus the properties which were located outside the State of
Goa were also held to be enlisted in the Inventory Proceedings filed in the State of Goa for its distribution to the descendants and other successors in accordance with law. Under private international law devolution of property situated within the territorial limits of a sovereign country could only be according to the law of the land of that sovereign country. The interpretation given by court in the instant case is justified as *lex-situs* rule could not be applied as the immovable property even when is situated outside Goa was within the territorial limits of India of which Goa is also a part.

IV. **Compensation not to be guided by Succession Laws**

What should be the mode of distribution of compensation granted by the government in lieu of death of the deceased caused due to some natural calamity? Should the compensation be distributed or devolve according to the law of succession governing the deceased? These were some of the questions which came recently before Bombay High Court in *Gitabai v. Anusayabai and Ors.*

Due to earthquake the deceased along with her husband and all four children had died. The Government of Maharashtra had extended financial assistance to the surviving members of the families and relatives. The government had specifically set out the manner of payment of compensation and had described as to who would receive the same. An amount of compensation/financial assistance of Rs.50,000/-per deceased person was payable to the surviving mother or father of the deceased person. The mother in law of the deceased claimed the entire compensation as the legal heir of the son, daughter-in-law and grandchildren whereas the mother of the deceased submitted that law of inheritance would not be applicable as it was not related to inherited property. The issue was whether the mother-in-law of the deceased could claim the monetary assistance prescribed under the scheme.

The court considered the ration as laid down by Delhi High court in *Smt. Ganny Kaur v. The State (NCT)* which related to apportioning of compensation given to a riot victim. The Delhi High Court has concluded that the compensation awarded in respect of the death of riot victims could not be equated with the estate of an intestate which devolves as per the principles of succession and inheritance prescribed under the personal laws. Since the compensation was never part of the property held by the deceased there could not be any question of succession or inheritance in respect thereof. The court was of the view that the matter of compensation being

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11 Bombay High Court (Aurangabad Branch) Second Appeal No. 476 of 2004 decided on April 9, 2015.
12 AIR 2007 Delhi 273.
awarded by the State, does not function under any personal law as personal law of the citizen which operate mostly in the domain of citizen versus citizen contests, has little or no relevance whenever the relationship between the State and a citizen is in issue. Equating the manner of paying compensation to the persons who are entitled to receive compensation under section 357 of the Code of Criminal Procedure, 1973 in respect of offences resulting in death to be the same as is provided under the Indian Fatal Accidents Act, the Delhi High Court, therefore, concluded that when it came to the apportionment of compensation, both the persons who have lost their nearest relative in the riots, would be equally entitled to receive the compensation.

In the instant case of Gitabai, the court while endorsing the view of Granny Kaur and after looking into the government’s circular prescribing the manner of payment of compensation came to the conclusion that the mother of the deceased was rightly entitled to the compensation as being the surviving mother of deceased.

The decision of Bombay High Court of not placing reliance on personal law on succession seems to be justified as the ex-gratia amount of compensation provided by the State is not under personal law of the victim but under the secular law of the State. State is under a duty to protect the life of its citizens and to prevent loss of life of citizens due to negligence of the State or some agency of the State. Such compensation could not be equated to the estate of the deceased which devolves on heirs according to the personal law of succession but is awarded to the deceased as a compensation by the State which functions under the Constitution of India.

V. Validity of Will – Suspicious Circumstances

Strict rules for appreciation of evidence to prove the validity of Will is difficult to be laid down. Unlike other documents, testamentary instrument speaks on the death of the testator who is not available to own or disown when its validity is questioned. There could sometimes be suspicious circumstance such as induced role played by propounded, doubtful signature, frail mind of the testator, unnatural bequest etc. which could question the validity of the will. In order to prove whether the document propounded is the last Will of the departed testator the propounded is required to prove by satisfactory evidence that the will was signed by testator, that the testator was of sound and disposing state of mind at the time of making of the will, that he understood the consequences of making a will, that he with free will had put the signature on the document and that he had signed it in presence of two attesting witnesses. There could be various other circumstances which could make execution of will to be suspicious. Few decisions in
recent past viz., *Jagdish Chand Sharma v. Narain Singh Saini and Ors.*\(^{13}\), *Leela Rajagopal v. Kamala Menon Cocharan*\(^{14}\), *Ved Mitra Verma v. Dharam Deo Verma*\(^{15}\) came before the Supreme court where validity of the will was in question due to presence of certain circumstances.

The appellant in *Jagdish Chand* sought for grant of Letter of Administration in a will executed by testator. The appellant stated that testator had great love and affection for him for the services rendered by him to testator and testator was not favourably disposed towards his sons for their disagreeable conduct and activities. The trial court’s finding that the will being registered and executed by the testator in his sound state of mind was reversed by the High Court. The evidence of certain witnesses did not exhibit either denial of the execution of the Will or their failure to recollect the said phenomenon. High court held that denial of execution by the attesting witnesses and lack of animus on their part to attest the Will as well as the noticed suspicious circumstances to be perverse and opposed to the weight of the materials on record to prove the validity of will.

In the special leave petition filed against the judgment of High Court the Supreme Court clearly held that the legislatively prescribed essentials of a valid execution and attestation of a Will under the Act are mandatory in nature, so much so, that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property. It further held that the distinction between failure on the part of a attesting witness to prove the execution and attestation of a Will and his or her denial of the said event or failure to recollect the same, has to be essentially maintained. Speaking on harmonious construction of s. 63 of ISA, 1925 which deals with execution of unprivileged will and ss. 68, 71 of Evidence Act, 1872 which deals with proof of execution of document required by law to be attested and proof when attesting witness denies the execution, respectively, it went on to hold that permitting extra liberal flexibility to these two stipulations, would render the predication of Section 63 of the Act and Section 68 of the 1872 Act, otiose. Deliberating further on fine balance between s. 63 of ISA, 1925 and s. 68 and s. 71 of Evidence Act, 1872, it held:

"If the evidence of the witnesses produced by the propounder is inherently worthless and lacking in credibility, Section 71 of Act 1872 cannot be invoked to bail him (propounder) out of the situation to facilitate a roving pursuit. In absence of any touch of truthfulness and

\(^{13}\) 2015 (5) SCALE 749.  
\(^{14}\) 2014 (10) SCALE 307.  
\(^{15}\) 2014 (9) SCALE 219.
genuineness in the overall approach, this provision, which is not a substitute of Section 63 (c) of the Act and Section 68 of the 1872 Act, cannot be invoked to supplement such failed speculative endeavor. Section 71 of the 1872 Act, even if assumed to be akin to a proviso to the mandate contained in Section 63 of the Act and Section 68 of the 1872 Act, it has to be assuredly construed harmoniously therewith and not divorced therefrom with a mutilative bearing.”

Applying the principles as laid down in the instant case to the facts of the case the Apex court found the bequest to be ex facie unnatural, unfair and improbable as the materials on record were insufficient to prove that the testator preferred the appellant to be legatee by defying his wife, children and grand-children who were alive and with whom he did share a very warm affectionate and cordial relationship. The court while dismissing the appeal concluded that the suspicious circumstances attendant on the disposition militatively impacted upon the inalienable imperatives of solemnity and authenticity of any bequest.

The validity and legality of will in *Leela Rajagopal* was questioned on the grounds that there was no specific reason disclosed for excluding sons from the will, moving of respondent from her working place to stay with the testator at the time of the execution of the will, non-production of the original copy of the will, the discrepancy in the evidence of the witnesses with regard to place of execution of the will and the prominent part played by respondent in the registration of the will. The trial court found these circumstances to be suspicious and therefore concluded that will was not a valid document executed on the free will and volition of the testator. The Division Bench of High court of Madras, in appeal, reversed the consequential finding after going into each circumstances, evidence adduced in support of those and on the arguments advanced and thereby held the will in question to be a valid instrument. On appeal, the Supreme Court dismissed it as it did not find any fault with the conclusions reached by High court as to suspicious circumstances. Division Bench of Supreme Court on unnatural features and unnatural circumstances noted “the judicial verdict, in the last resort, will be on the basis of a consideration of all the unusual features and suspicious circumstances put together and not on the impact of any single feature that may be found in a Will or a singular circumstance that may appear from the process leading to its execution or registration.” In the instant case the will indicated with clear language its intention, and also the reasons for excluding sons. Apex court proceeded to hold that neither the conduct of respondent by participating in the execution and registration of the will nor summoning her friend to be an attesting witness and taking the testator to the office of the Sub Registrar were such circumstances which warranted an adverse
conclusion. The explanation tendered by the respondent for placing reliance on certified copy of
the will and non-production of the original will was accepted by the court. Since the contents of
the will were explained to the testator before registration, the lack of English knowledge of the
testator was also not found to make any fundamental change in the situation.

Circumstances surrounding the execution of will were also an issue before Supreme Court in Ved
Mitra Verma v. Dharam Deo Verma. Trial Court rejected the application holding the
circumstances surrounding the execution of the will to be suspicious which order was later
reversed by High court in appeal. The suspicious circumstances brought before the court were
absence of disclosure of basis for exclusion of other children of the deceased, the name of
daughter to have been wrongly mentioned, testator to have been suffering from ill-health,
application filed before trial court after 17 years of execution of will, disposition of the
registering officer, among other circumstances. The Supreme Court applied the principles to be
taken into consideration for accepting the validity of the will. In the instant case the exclusion of
the other children of the testator and the execution of the will for the sole benefit of one of the
sons, by itself, was not considered to be a suspicious circumstance. The acceptability of the will
to be a genuine document was then made to depend on other circumstances surrounding its
execution. Error with respect to wrongly mentioned name was not considered to be a material
error as the court accepted the circumstances which explained the error in the name of daughter
to include the dictation of the testator in writing the will and reference to her husband’s name in
the name and description of the daughter. Absence of any material to show that testator was
suffering from any other kind of physical or mental infirmity except eye-ailment was found to be
insufficient to render the testator incapable of taking decision with respect to bequest of his
property. High court’s recording of satisfaction as to the execution of will on the basis of
evidence of registering authority was affirmed by the Supreme Court.

Judicial pronouncements have made it clear that validity of will is to be analyzed on facts of each
case. What may be true in one case may not be true in the facts and circumstances of the other
case. Single circumstance raising suspicion on the execution of a will is not sufficient rather it
has to be substantiated by other doubtful factors to invalidate it.

VI. Coparcenary Property

16 Also called ‘ancestral property’ under classical Hindu law was the property one inherited from his
father, paternal grand-father or paternal great grandfather in which only son, grand son and great grand-
son, called coparceners, had right by birth. Share of property on death of any coparcener passed by
Law Commission of India in its 174th Report on ‘Property Rights of Women: Proposed Reforms under the Hindu Law’ focused on proposing reforms under Hindu law for grant of property rights to women as there exists anomalies, ambiguities and inequalities in the law particularly law governing inheritance and succession of property amongst the members of joint Hindu family. The Law Commission’s candid acceptance “discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of a Joint Hindu family. The exclusion of daughters from participating in coparcenary property ownership merely by reason of their sex is unjust. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end” reflects the state’s nexus with patriarchal psychology in not granting equal inheritance rights to Hindu women in India. Social justice demands that a woman should be treated equally both in the economic and the social sphere. The law by excluding the daughter from participating in the coparcenary ownership not only amounts to her discrimination on the ground of gender but also has led to negation of her fundamental right of equality guaranteed by the Constitution. Based on the recommendation, Parliament of India passed the HS(A) Act, 2005, thereby granting equal rights to daughters in the Hindu Mitakshara coparcenary as the sons. But this grant of right under the Amendment Act, 2005 leave number of other questions unanswered. Relying still on the classical meaning of coparcenary and coparcenary property and not defining it either under the parent Act or the Amendment Act, ambiguity prevails over it particularly due to inclusion of daughter. Oral partition or family arrangements, among others, were some very prevalent modes of partition under classical Hindu law as it avoided litigation and secured peace, happiness and welfare of the family but the Amendment Act has put an embargo for ‘partition’ by recognizing only partition by registered deed or by the decree of court. These are some of the difficult questions to answer which could be sought only by the intervention of the judiciary or the legislature.

A. Coparcenary Right of Daughter - Prospective or Retrospective Effect of S. 6 of HSA, 1956 as Amended by HS(A) Act, 2005

survivorship on other surviving coparceners. All coparceners which extended up to four generations from the last holder of property had right of ownership and possession over entire ancestral or coparcenary property. Daughters by Hindu Succession (Amendment) Act 2005 have now been conferred coparcenary rights.
The prospective or retrospective operation of S. 6 of HSA, 1956 as amended by HS(A) Act, 2005 has remained to be an issue in absence of definite stand taken by the Supreme Court. This issue of prospective or retrospective effect of s. 6 has recently come before the single judge of Bombay High Court in Ashok Gangadhar Shedge v. Ramesh Gangadhar Shedge\(^{17}\). Due to doubt in correctness of the decision rendered by Division Bench of Bombay High Court in Vaishali Satish Ganorkar and Ors v. Satish Keshavrao Ganorkar and Ors.\(^{18}\) the single judge bench of R.G. Ketkar, J. in Ashok Gangadhar Shedge case requested the matters be referred to a larger Bench. The issue was then referred to which larger bench in Badrinarayan Shankar Bhandari etc. v. Omprakash Shankar Bhandari\(^{19}\).

The issue involved in Vaishali Ganorkar was whether a daughter, who is born before 9th September 2005 could claim to be coparcener when her father remains to be alive on and after 9th September 2005 i.e., when succession has not opened. Division Bench comprising of C. J. Mohit S. Shah and J. Mrs. Roshan Dalvi held that on and from 9.9.2005, the daughter of a coparcener would become a coparcener by virtue of her birth in her own right just as a son would be and she would have the same rights and liabilities as that of a son. It further held that until a coparcener dies and his succession opens and a succession takes place, there is no devolution of interest. The Division Bench considered the later part of the section after clause (c) and observed that reference to Hindu Mitakshara coparcener which would be deemed to include the daughter is also in the future tense denoted by the words "shall be"\(^{20}\). Had the section being retrospective and was to be effective for all daughters born prior to the date the amendment or prior to the succession having opened, the reference to the daughter as a coparcener in a Hindu Mitakshara family would be shown to have been deemed "always have included" a reference to the daughter of a coparcener. Applying the principles of construction of a statute to proviso to amended section 6 it observed “that it is settled law that unless the Statute makes a provision retrospective expressly or by necessary intent it cannot be interpreted to be retrospective. It is also settled law that vested rights cannot be unsettled by imputing retrospectivity upon a legislation by judicial interpretation or construction. Making the section retrospective would wholly denude the words "on and from" in the section; they would be rendered otiose. These words are unique and clear. They express the intent of the legislature which is not far to seek”\(^{21}\). A reading of section as a

\(^{17}\) 2014 (4) BomCR 797.


\(^{19}\) AIR 2014 Bom 151; 2014(5)BomCR481.

\(^{20}\) Supra note 18 at 21.

\(^{21}\) Supra note 18 at 25.
whole would, therefore, show that either the devolution of legal rights would accrue by opening of a succession on or after 9 September 2005 in case of daughters born before 9 September 2005 or by birth itself in case of daughters born after 9 September 2005 upon them. The Division bench further held that section 6 of the Amendment Act is prospective and the specified rights and liabilities accrue on and from 9.9.2005. After considering Pushpalatha’s case the bench observed that if the Amendment Act was retrospective it could not see how daughters born only after 1956 would be entitled to claim interest in a coparcenary property and not daughters before 1956 also. As observed in Pushpalatha’s case that when a provision is substituted for an earlier provision by an amendment of the Act it would apply from the date of the unamended Act, the bench held that for HSA, 1956 it would be from 1956. It went on to hold that the analogy if from 1956 the daughter would get her interest by birth by the very retrospectivity bestowed upon the section it would apply equally to daughters born even prior to 1956 is academic since the amending Statute is made to come into effect from a specified date i.e., 9 September 2005.

Disagreeing with the view expressed by Division Bench of Bombay High Court in Vaisahali Ganokar case the single judge R.G. Ketkar, J. in Ashok Gangadhar Shedge case went on to hold:

I. section 6 of the Principal Act was substituted by section 6 of the Amendment Act. In view thereof, for all intents and purposes, amended section 6 is there from 17.06.1956, being the date of commencement of the Principal Act.

II. The daughter of a coparcener who is born before or after 17.6.1956 has by birth become a coparcener in her own right in the same manner as a son in terms of clause (a) and has the same rights in the coparcenary property as she would have had if she had been a son in terms of clause (b) and is subject to the same liabilities in respect of the said coparcenary property as that of a son in terms of clause (c) of sub-section (1) of amended section 6.

III. The rights under clauses (a) and (b) and liabilities under clause (c) of sub-section (1) of amended section 6 are recognized for the first time on and from 09.09.2005, being the date of commencement of the Amendment Act.

IV. Even if the daughter of a coparcener has by birth become coparcener in her own right in the same manner as a son in terms of clause (a) and as also she has the same rights in the coparcenary property as she would have had if she had been a son in terms of clause (b), the same shall not affect or invalidate any disposition or alienation including any partition

22 Supra note 18 at 27.
which is duly registered under the Registration Act, 1908 or effected by decree of a Court or testamentary disposition of property which had taken place before the 20th day of December, 2004.

V. The decision of the Division Bench in the case of Vaishali Ganorkar is not per in curium of Ganduri Koteshwaramma and Anr. v. Chakiri Yanadi and Anr.\(^{24}\)

Considering that the Amendment Act is for giving equal rights to daughters in the Mitakshara Coparcenary property as the sons have, R.G. Ketkar, J. ruled that 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 has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. Appeal against the order of Division Bench was dismissed by the Apex Court but at the same time the Apex Court held that the question of law is kept open for consideration, therefore there is no final determination of the Supreme Court as yet on the above issue.

Full Bench consisting of M.S. Shah, C.J., M.S. Sanklecha and M.S. Sonak, JJ was constituted in the case of Badrinarayan Shankar Bhandari etc. v. Omprakash Shankar Bhandari etc.\(^{25}\) on the reference of learned Single Judge R.G. Ketkar, J in Ashok Gangadhar Shedge case. The following questions of law had been referred before the full bench:

(a) Whether section 6 of the HSA, 1956 as amended by the HS(A) Act, 2005 is prospective or retrospective in operation?
(b) Whether section 6 of the HSA, 1956 as amended by the HS(A) Act, 2005 applies to daughters born prior to 17.6.1956?
(c) Whether section 6 of the HSA, 1956 as amended by the HS(A) Act, 2005 applies to daughters born after 17.6.1956 and prior to 9.9.2005?
(d) Whether section 6 of the HSA, 1956 as amended by the HS(A) Act, 2005 applies only to daughters born after 9.9.2005?
(e) Whether the decision of the Division Bench in the case of Vaishali Ganorkar is per in curium of Gandori Koteshwaramma and others?

The court first deliberated on questions (a) and (d) i.e., the prospective or retrospective operation of s. 6 of the HSA, 1956 as amended by the HS(A) Act, 2005 and whether its application is only limited to daughter born after 9th September 2005. The appellants contended that the Amending Act which substituted section 6 of the Principal Act is retrospective in operation and applies not

\(^{24}\) AIR 2012 SC 169.

\(^{25}\) Supra note 19.
only to all daughters born before 9th September 2005 but also gives coparcenary rights to heirs of such daughter who died before 9th September 2005. On the other hand, the respondents took the stand that section 6 has to be read prospectively and it applies only to the daughters born on or after the effective date as provided in the Amendment Act namely 9th September 2005 and the entire issue stood covered by the order of the Division Bench in *Vaishali Gaonkar*.

Full judge bench went into the history and development of Hindu Law, the Law Commission Report, Report of the Standing Committee of Parliament and the Statement of Objects and Reasons of the Bill introduced in Parliament to find out the true intent of the Parliament in amending section 6 of the Principal Act by the Amendment Act, 2005. The court ruled that the bare perusal of sub-section (1) of section 6 clearly shows that the legislative intent in enacting clause (a) is prospective i.e. daughter born on or after 9th September 2005 will become a coparcener by birth, but the legislative intent in enacting clauses (b) & (c) is retroactive, because rights in the coparcenary property are conferred by clause (b) on the daughter who was already born before the amendment, and who is alive on the date of amendment coming into force. Hence, if a daughter of a coparcener had died before 9th September 2005, since she would not have acquired any rights in the coparcenary property, her heirs would have no right in the coparcenary property. The court rejected the view canvassed by appellants that heirs of such a deceased daughter can also claim benefits of the amendment, on the ground that section 6(1) expressly confers right on daughter only on and with effect from the date of coming into force of the Amendment Act. The court laid down two conditions necessary for applicability of Amended section 6(1):

(i) The daughter of the coparcener (daughter claiming benefit of amended section 6) should be alive on the date of amendment coming into force;

(ii) The property in question must be available on the date of the commencement of the Act as coparcenary property.

Thus for the amended section 6 to apply, not only the daughter should be alive on the date of commencement of the Amendment Act, but also the property should be coparcenary property on the date of the commencement of the Act i.e. 9th September 2005 or at least on 20th December 2004, when the Amendment Bill was introduced in Rajya Sabha. Answering questions (a) and (d) the court finally held that section 6 as amended by the 2005 Amendment Act is retroactive in nature meaning thereby the rights under section 6(1)(b) and (c) and under sub-Rule (2) are available to all daughters living on the date of coming into force of the 2005 Amendment Act i.e. on 9 September 2005, though born prior to 9 September 2005 and under clause (a) of sub section
(1) daughters born on or after 9 September 2005 are entitled to get the benefits of Amended section 6 of the Act. In other words, the heirs of daughters who died before 9 September 2005 do not get the benefits of amended section 6.

The next set of questions taken up by Court was to determine as to whether section 6 of the HSA, 1956 as amended by the Amendment Act, applies to daughters born prior to 17.6.1956 and also its applicability to daughters born after 17.6.1956 and prior to 9.9.2005, the court looked into the meaning of the words 'on and from commencement’ of the HSA,1956 as amended by the HS(A) Act, 2005 found in section 6. It went on to hold that rights under the amended section 6 could be exercised by a daughter of a coparcener only after the commencement of the Amendment Act 2005, therefore, it is imperative that the daughter who sought to exercise such a right must herself be alive at the time when the Amendment Act, 2005 was brought into force. It would not matter whether the daughter concerned is born before 1956 or after 1956 as date of birth was not a criterion for application of HSA, 1956 when it came into force. Purpose by Parliament of specifically using "on and from the commencement of HS(A) Act, 2005" was to ensure that rights which are already settled are not disturbed by virtue of a person claiming as an heir to a daughter who had passed away before the Amendment Act came into force. It further held that the case of coparcener who died before 9th September 2005 would be governed by pre-amended section 6(1) of the Act and it is only in case of death of a coparcener on or after 9th September 2005 that the amended section 6(3) of the Act would apply. The court ruled that the provisions of the amended section 6(3) do not and cannot curtail or restrict the rights of daughters born prior to 9th September 2005 under sub-sections (1) and (2) of the amended section 6 of the Act. Further it held that sub-sections (1) and (2) of amended section 6 of the Act on the one hand and sub-section (3) of the amended section 6 of the Act on the other hand operate in two different fields.

In Ganduri Koteshwaramma the interpretation of word ‘decree’ as used in explanation to s.6 of HSA, 1956 as amended by HS(A) Act, 2005 was in issue. Partition had taken place between father and two sons, thereafter the father died and his interest in the coparcenary property was divided on notional partition in terms of proviso to erstwhile section 6(1) of the Principal Act between two daughters and two sons. A preliminary decree was passed in 1999, which was amended in 2003. The question was, when final decree for partition had not been passed, whether the preliminary decree passed by the trial court in 1999 and amended in 2003 deprived the appellants of the benefits of 2005 Amendment Act. Supreme court clearly ruled that the partition that the legislature has in mind is undoubtedly a partition completed in all respects and a partition which has brought about an irreversible situation. Preliminary decree which merely
declares shares which are themselves liable to change does not bring about any irreversible situation thus unless a partition of the property is effected by metes and bounds, the daughters could not be deprived of the benefits conferred by the Act. Speaking about *Ganduri Koteshwaramma* in *Badrinarayan Shankar Bhandari*, Mohit C.J held that Supreme Court applied the provisions of amended section 6 retroactively i.e. by applying the amended section 6 to a case where the rights of the parties had not become final. If amended section 6 was applicable only to daughters born after 9th September 2005, the Supreme Court could not and would not have applied amended section 6 to a partition suit pending on 9th September 2005.

Thus full judge bench in *Badrinarayan Shankar Bhandari* finally ruled as:

(I) Question (a) - section 6 of HSA,1956 as amended by the HS(A) Act, 2005 is retroactive in operation. To be more specific clause (a) of sub-section (1) of amended section 6 is prospective in operation; clauses (b) and (c) and other parts of sub-section (1) as well as sub-section (2) of amended section 6 are retroactive in operation;

(II) Questions (b), (c) and (d) - Amended section 6 applies to daughters born prior to 17 June 1956 or thereafter (between 17 June 1956 and 8 September 2005), provided they are alive on 9 September 2005 that is on the date when the Amendment Act of 2005 came into force. Admittedly amended section 6 applies to daughters born on or after 9 September 2005;

(III) Question (e) the decision of the Division Bench of this Court in *Vaishali S. Ganorkar* is *per incuriam* the Supreme Court decision in *Ganduri Koteshwaramma* case.

The interpretation given by Bombay High Court in *Badrinararyan* no doubt leads to more certainty as to the applicability of s. 6 of HSA, 1956 as amended by the Amendment Act. It will go a long way in avoiding reopening of settled divisions which have taken place before 9th September 2005 but it is questionable whether the interpretation requiring the daughter to be alive on the date of coming into force of the Amendment Act for claiming her coparcenary share is justified. With no clear indication within coparcenary of status as well as share of child of living daughter, the question remains to be answered about their standing particularly when share is to be reserved for child of predeceased daughter. The decision of Bombay High Court is highly progressive for upholding equality clause of the Constitution and it would be most desirable that the Supreme Court authoritatively pronounce on the issue.

**B. Partition - Constitutional Validity of 'Explanation' appended to Sub-section (5) of section 6 of the HSA, 1956**
The constitutional validity of the 'Explanation' appended to sub-section (5) of section 6 of the HSA, 1956 as amended by Amendment Act, came before Karnataka High Court in *Puttalinganagouda v. the Union of India*.

Explanation referred to above reads as:

“For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court.”

Section 17(1)(b) of the Registration Act, 1908 lays down that a document for which registration is compulsory should by its own force, operate or purport to create, declare, assign, limit or extinguish either in present or in future any right, title or interest in an immovable property. The amending Act clearly says that the term partition used in this section means a partition that is in writing and duly registered or the one that is affected by a decree of court. Essence of recognizing such partition was that the proof of such partition would become easy and also would do away with other modes of partition as prevalent and recognized under classical Hindu law.

Under classical law according to Mitakshara school of thought ‘partition’ had two distinct meanings - firstly - severance of joint status with legal consequences resulting there from and secondly - adjustment into specific shares the diverse rights of different members according to the whole of family property. What was necessary to constitute a ‘partition’ was definite an unequivocal indication of intention by a coparcener to separate himself from the family. This brought in severance of status and members after severance of status enjoyed tenancy-in-common rather than joint tenancy. Indication of intention to separate could have been done orally, by arbitration, notice, filing of suit and even by implied communication on conversion or marrying under Special Marriage Act, 1954. Neither registration nor decree of court was required for conclusive partition. Since partition did not amount to a transfer of property within the meaning of section 5 of Transfer of Property Act 1882, it was not required to comply with the primary formalities of transfer of property i.e., writing attestation and registration.

However the HSA, 1956 as amended by HS(A) Act, 2005 makes it clear that partition refers to only those partitions made by execution of a written partition deed duly registered under the Registration Act, 1908 or have been undertaken in pursuance to the decree of a court. It is to be noted that apart from these modes of partition the amended Act does not also include ‘family arrangement’ and ‘oral partition’ within the definition of ‘partition’. *Halsbury’s Law of England*
define ‘family arrangement’ as “an agreement between members of the same family, intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour.”

While dealing with ‘family arrangement’, Supreme Court in *Kale and Ors. v. Deputy Director of Consolidation and Ors.*, held that the family arrangements are governed by a special equity peculiar to themselves. Dealing with registration and memorandum of family arrangement through family settlement it further went on to hold:

“Family arrangement may be even oral in which case no registration is necessary. Registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between the document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of section 17(2) of the Registration Act and is, therefore, not compulsorily registrable but can be used in evidence of the family arrangement and is final and is binding on the parties.”

Indian courts have taken a liberal view of the validity of family settlement and have always tried to uphold it as the object is to avoid litigation and settle disputes regarding property amongst claimants belonging to a family and also that it would bring amity and goodwill among family members. Since the amendment failed to include oral partition and family arrangement within the definition of ‘partition’, which are common and legally accepted modes of division of property under the Hindu Law, Law Commission of India in its 208th Report has suggested for inclusion of ‘oral partition’ and ‘family arrangement’ in the definition of ‘partition’. The Law Commission recommended for amendment of Explanation to section 6 of the HSA, 1956 by taking note of low literacy and financial level of the members of a family who do not have means to bear expenditure of legal process apart from backing it with peace and happiness due to family arrangement or oral partition.

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28 (1976)3SCC119.
In *Badrinarayan*\(^{29}\) case on the submission of the appellant that since Explanation to section 6 clearly provides that ‘partition’ means any partition made by execution of a deed duly registered or a partition effected by a decree of a Court therefore, if an oral partition had taken place before 20th December 2004, such partition would not be saved either by the proviso to sub-section (1) or sub-section (5) of section 6 i.e., section 6 must be held to be retrospective with effect from 17th June 1956, the court made the distinction between an oral partition or partition by unregistered document which is not followed by partition by metes and bounds on the one hand and oral partition or partition by unregistered document which was acted upon by physical partition of the properties by metes and bounds and entries made in the public record about such physical partition by entering the names of sharers as individual owner/s in the concerned public record on the other hand. The court ruled that it is only where an oral partition or partition by unregistered document is not followed by partition by metes and bounds, evidenced by entries in the public records that a daughter would be in a position to contend that the property still remains coparcenary property on the date of coming into force of the Amendment Act.

In *Puttalinganagouda* case, pursuant to an oral partition in 1980 between the defendants there was division of the properties between them and they had been in separate possession of their respective shares. The plaintiffs themselves had produced the Record of Rights, with the list of documents, evidencing such partition however, the plaintiffs pleaded that they were coparceners by virtue of Amendment Act, 2005 and since the partition, even if effected, was not evidenced by a registered document, the said partition had no effect in respect of the share to which the plaintiffs were entitled to at a partition. Endorsing the view of *Badrinarayan* that daughter has right to contend only that property to remain a coparcenary property on the date of coming into force of the Amendment Act, where an oral partition or partition by unregistered document is not followed by partition by metes and bounds, evidenced by entries in the public records, Anand Byrareddy, J. in *Puttalinganagouda* held that petitioners were not really aggrieved as pursuant to their oral partition in the year 1980 the parties after actual partition had been enjoying their respective shares. By completely relying on the decision of *Badrinarayan* court opined that there remained no necessity to address the constitutional validity of the provision.

The concept of partition and severance of the status as under Hindu Law has no application under the amended Act. A registered partition deed could not be prepared nor antedated, similarly a final decree for partition cannot be created or manipulated hence partition by

\(^{29}\) *Supra* note 19.
registered instrument and a final decree for partition that attained finality reflects the bona fide conduct of the parties and not the conduct just to deny the daughters their legitimate share in the coparcenary property. Badrinararyan’s interpretation of the provision by allowing ‘oral partition’ or ‘partition’ by unregistered document followed by actual partition and recording the names of sharers as individual owners in the public record maintained by government, to amount to ‘partition’ as defined under the amended HSA, 1956 needs to be relooked at particularly when the partition that the legislature had in mind was a partition completed in all respects and that which brought about an irreversible situation.

C. Validity of Gift of Undivided Coparcenary Share
Based on the principle of preventing disintegration in joint Hindu family, alienation by way of will or gift of undivided share under classical Hindu law was not permitted. HSA, 1956 partially relaxed such modes of alienation by allowing a coparcener to make a will of his undivided share but did not make any provision for gifting by coparcener of his undivided share. HSA, 1956 has introduced the concept of notional partition placing a limitation on the concept of survivorship wherein after death of a coparcener it is presumed that the coparcener had partitioned before his death thereby a share is being reserved for the deceased coparcener which then passes by the rule of intestate succession under HSA, 1956 in absence of his testamentary disposition. It is to be noted that legislature being aware of the strict rule against alienation, only relaxed the rule in favour of testamentary disposition and deliberately made no changes with respect to alienation by way of gift either to coparcener or stranger. The personal law of the Hindus, governed by Mitakshara School of Hindu Law, is that a coparcener can dispose of his undivided interest in the coparcenary property by a will, but he cannot make a gift of such interest30.

The validity of gift of undivided coparcenary share recently came before the Patna High Court in Kari Singh v. Ramtanuk Singh31. Validity of undivided coparcenary share is discussed under Mulla’s Hindu Law as:

“Gift of undivided interest.- (1) According to the Mitakshara law as applied in all the States, no coparcener can dispose of his undivided interest in coparcenary property by gift. Such transaction being void altogether there is no estoppel or other kind of personal bar which precludes the donor from asserting his right to recover the transferred property. He may, however, make a gift of his interest with the consent of the other coparceners.”

30 Thamma Venkata Subbamma (Dead) by Lrs.. v. Thamma Rattamma, AIR 1987 SC 1775.
31 Patna High Court, First Appeal No.119 of 1993 decided on June 24,2015.
The obvious reason for strict rule against alienation by way of gift was to maintain jointness of ownership and possession of the coparcenary property. Also coparcener has no definite share in the coparcenary property and by gifting a coparcener could not deprive the other coparceners of their right to the property.

Based on the authoritative pronouncements of various Supreme Court and also on the text of classical Hindu law J. Jitendra Mohan Sharma of Patna High Court in Kari Singh held that it is settled principle of law that a dispossession *intra vivos* by gift of coparcenary property except either with the consent of other coparceners or between the coparceners or in exceptional circumstances is void. The court concluded by holding that gift being neither an alienation for consideration nor being a testamentary succession under section 30 of HSA, 1956 is void *in toto*. Law must change with time and society. It is neither feasible nor reasonable to adhere to strict principles of classical Hindu law in the changed society where joint family is becoming rare and nuclear family has become the norm. With the change in the concept of coparcenary by way of including daughter within coparcenary, doing away with the concept of survivorship and pious obligation, bringing in notional partition in Mitakshara coparcenary and even allowing testamentary disposition of undivided coparcenary share, sternly sanctioning against alienation of undivided share by way of gift on the pretext of avoiding family disintegration needs to be relooked by the legislature as well as by judiciary.

**D. Filing of Partition Suit - Limitation Period**

Whether suit filed to claim one’s share in ancestral property as heir and legal representative of one’s deceased father after 12 years of his death is barred by limitation? Is there a limitation period to file partition suit? Such issues came recently before the Bombay High Court in *Paresh Damodardas Mahant v. Arun Damodardas Mahant*32. The plaintiff claimed for right, title and interest of 1/5th share in the undivided suit property as one of the heirs and legal representatives of the deceased father and also as a co-owner with alongwith his brothers and sisters-defendants 1-4. Plaintiff claimed to be co-owner and that suit for partition by such co-owner could be filed at any time irrespective of the limitation period. The suit property was ancestral property. Partition suit was filed more than a decade after the death of father who had died in 2002.

R.S. Dalvi, J. in the present case referred to s. 6 of HSA, 1956 and also to section 6(3) of amended HSA, 1956 amended by HS(A) Act, 2005 which deals with succession of interest in

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joint family properties of Hindus. The plaintiff’s reference and reliance upon the judgment of *Chander Sen*[^33] was found to be inconsequential as it applied only to properties which devolved under section 8 of the HSA, 1956. It was held under *Chander Sen* that any property which devolves under section 8 of the HSA, 1956 upon the death of a Hindu male would be his own individual property incapable of partition and in this property his son or grandson would have no interest during his lifetime. *Chander Sen’s* judgement has no application to HUF or ancestral property.

The court in *Paresh* case held that if the plaintiff had acquired an interest by birth in the ancestral property of his great-grandfather and if the plaintiff was entitled to apply for and obtain partition of the ancestral property, the plaintiff could apply for such partition at any time, and the death of the father would not be material as such case was under uncodified Hindu law where property does not vest upon the death of the predecessor of the parties. Thus in ancestral property any co-owner could file for partition any time and such suit is independent of the death of earlier co-owner. If the property continued to be joint and the plaintiff applied for partition the sons and the daughter of all the parties would be coparceners and entitled to an equal undivided share of the suit property under the principle of "community of interest and unity of possession" of an HUF or ancestral property[^34].

In the case at hand neither all the coparceners were shown nor their share was computed therefore the court came to the conclusion that suit was not simpliciter partition of HUF property amongst all the coparceners upon survivorship but was for administration and partition of the suit property which was claimed to be the estate of the deceased father of the parties upon succession. The court further held that if the plaintiff claimed as an heir and legal representatives of his deceased father, suit property would devolve under Section 6 of the HSA, 1956 by succession and not by survivorship, the devolution would be complete on the date of the death of the father and the right to sue any of the heirs and legal representatives of the father would accrue on the date of the death of the father. The suit for administration of the estate of the deceased upon such succession had to be filed within three years of the death of father. The court while dismissing the suit noted that a suit for administration of estate of one’s deceased father was barred by law of limitation after three years of the death of father when the cause of action to sue accrued to plaintiff upon succession.

[^34]: Supra note 33 at 28.
E. Hindu Widow’s Partition Right in Husband’s Ancestral Property

Females were not recognized as coparceners in the family under ancient Hindu law. With the object of uplifting the status of woman in accordance with the constitutional provisions, Parliament amended HSA, 1956 granting coparcenary right to daughter. But the same constitutional mandate was not taken into consideration for granting such a right to a widow or mother who is also a woman like daughter. The object of not giving such right under classical Hindu law to widow on her husband’s death in husband’s ancestral property could be to not allow her, a stranger who comes in family by marriage, to destroy the jointness of the family or create a dispute about property. With the passage of time, Hindu Woman's Right to Property Act, 1937 (HWRTP Act, 1937) was passed which enabled a widow to file a suit for partition on her own without another coparcener demanding the partition of the property. But the right in property given to widow under the Act of 1937 was only ‘limited estate’ i.e., not an absolute property. Property on her death did not pass on to her heirs but reverted back to the family of her husband on her death. HSA, 1956 promoted the limited estate right of a women in property to absolute right.

Right of widow to claim partition of her husband’s ancestral property was questioned recently in Santosh Popat Chavan v. Sulochana Rajiv. The issue was whether the widow could file a suit on her own for partition and separate possession of the share of her husband in the ancestral property in the absence of other coparceners in the family deciding to partition the joint family property. J. A.B. Chaudhari of Bombay High Court looked into the Shastric Hindu law wherein the female had no right to claim partition of joint family property and was entitled to an equal to that of a son only on partition between the sons or on partition between father and son/s. HWRTP Act, 1937 for the first time statutorily gave enforceable right to widow to demand partition but it was a limited right subject to reversion. HSA, 1956 has completely changed the succession rules under Hindu law. For granting more rights to woman in property the right of widow was converted from limited interest to absolute interest under HSA, 1956 and widow has been placed under Class I heir of the husband in the Schedule. Discussing on the rights of widow to claim partition the court clearly held that by virtue of a widow being a Class-I heir in the Schedule under Act of 1956, she would be entitled to succeed to the entire share of her deceased husband in the joint property or ancestral property of the family with the same magnitude of estate, which her husband would have got had he been alive i.e., her right to get an estate after

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35 Bombay High Court, Second Appeal Nos. 119 and 405/2013 decided on December 12, 2014.
the death of her husband like that of other coparceners in the family has been fully recognized and accepted by the Act of 1956. It further held that the concept of limited right or the concept of reversion after her death also stood abolished upon enactment of the Act of 1956 and as a result, she can deal with the property of her husband without any threat of reversion of her estate to the family of her husband.

The appellant had argued that the Act of 1956 does not provide for a right to file a suit for partition in the absence of any demand by son or any other coparcener in the joint Hindu family property after death of her husband alike section 3(3) of the Act of 1937. The court responded by calling the argument to be fallacy on the ground that section 3(3) provides for a right to file a suit for partition because there was no right at all in a widow even for her survival to get the property of her husband and so section 3(3) was engrafted with a view to have her share or her survival or must have some source of income for maintenance, but only a limited right was given to her. As against it, the progressive reason for bringing Act of 1956 was to provide for a full right to a widow to the share of her deceased husband without any restriction of putting limited right or for dealing with share of her husband as per her choice.

The appellant claiming partition right of widow in husband’s ancestral property relied on the case Ananda Krishna Tate since deceased by Legal Heirs v. Draupadibai Krishna Tate36 passed by the same high court wherein the mother had instituted a suit for partition of ancestral property and separate possession and also for setting aside alienation made by her sons. The learned single judge while negating the maintainability of the suit had taken a view that a Hindu woman (mother, in that case) has no right to file the suit for partition under the provisions of the Act of 1956, which was earlier available as per section 3(3) of the Act of 1937. It further held that neither a wife nor a mother has a right to file a suit for setting aside alienation since she does not have right by birth in the co-parcenary property at all and right to her to have a share in the joint family property accrues to her only when the coparceners decide to partition the joint family property otherwise she is bound to be joint with her sons. Deliberating on the progression of right of women in property under Hindu law A.B. Chaudhari, J. in Santosh Popat Chavan held the decision of single judge of the same court in Ananda to be per incuriam.

Speaking on Latin proverb sui juris in terms of rights under HSA, 1956 which means ‘one’s own right’ the court opined that, right to share has been given to a widow upon death of her husband as per the Act of 1956, which was as per section 3(3) of the Act of 1937 of limited nature hence,

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36 2010 (1) BCJ 714.
she can act *sui juris*. It further held that the Act of 1956 does not carve out any prohibition on her from filing the suit independently hence, *sui juris* it must be held that she has a right to file the suit independently. On the other doctrine of jurisprudence *ubi jus ibi remedium* in terms of HSA, 1956 it held that when a right is given, the remedy has to be there namely, remedy to file a suit for partition, which cannot depend upon the desire or demand of other coparceners in the family to have a partition of the joint family property. The court further pronounced that the right having been given to a widow or mother or women under the Act of 1956, she cannot be told that though she has a right to get share, she cannot file a suit for recovery of share of her deceased husband as she has no right to file a suit. The court concluded by holding that it would amount to retrograde step if contrary interpretation was given.

VII. Property of Hindu female

A. Devolution of property of female dying intestate on heirs of husband

Devolution of property to the heirs of husband, on death of a female widow dying issueless, where property in hands of female became absolute property after enforcement of HSA, 1956 came recently before Rajasthan High Court in *Umrao Devi and Ors. v. Hulas Mal and Ors*[^37].

The limited rights of property in the hands of widow under classical law before 1956, got immediately converted to absolute right on coming into force of HSA, 1956. Thus the right in property in possession of widow which converted from limited right to absolute right also is to devolve according to rules of succession after enforcement of HSA, 1956. The Act of 1956 also lays down the rules of devolution of property of female dying intestate wherein the heirs of husband inherit her property in absence of her children and her husband i.e., in their absence the property is assumed to belong to the husband and property of wife devolves on the heirs of the husband. The Act of 1956 lays down different categories of heirs for male dying intestate as Class I, Class II, Agnates and Cognates. The property of a Hindu male dying intestate devolve firstly, upon the heirs, being the relatives specified in class I of the Schedule and secondly, if there is no heir of class I, then upon heirs, being the relatives specified in class II of the Schedule and thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased. Though the heirs are clearly named under Class I and Class II, the heirs belonging to Agnates and Cognates are open-ended and include one related through males and females respectively.

[^37]: 2015 (2) WLN 267 (Raj.)
In the present case, female widow had become the absolute owner of the property on coming into effect of HSA, 1956. On the death of her husband, she had inherited property where she enjoyed limited rights. The relatives of husband who neither fall under Class I nor under Class II claimed as heirs of female’s property on her death. Two claimants were deceased’s husband’s blood relative and other claimant was related to deceased’s husband’s brother’s family by marriage. Referring to the definition of agnates and cognates, order of succession among agnates and cognates, computation of degrees and also rules of devolution of property of female dying intestate as mentioned under HSA, 1956 the court held that two claimants of the deceased’s property were agnates of her husband and one claimant being not related by blood to female’s husband was not entitled to any share in the property. The property of female was equally divided between the agnates falling with same degree and descent even when they belonged to different sex. Existence of provision in the statute which differentiates heirs on the basis of relationship through male and female and also giving preference to ones related through males reaffirms the inequality treatment meted to women.

B. Property with restricted interest given in lieu of consent for second marriage – Whether limited estate or absolute estate

Whether an instrument allotting property prescribing restricted interest, given in lieu of consent for second marriage, would get enlarged into an absolute estate by virtue of section 14(1) of HSA, 1956 came before the Madras High Court in Jayalakshmi Ammal v. Kaliaperumal\(^3\). The husband after living together with his first wife for 26 years had no issues from her thereby wanted to marry for second time but with the consent of his first wife. After the first wife expressed her consent the husband executed a settlement deed in her favour. The recitals in the document read that as desired by the wife, the husband wanted to lend support to her for which property was settled in her favour. As per settlement deed the first wife was to enjoy property only till her lifetime and on her death would revert back to the husband if no issue was born to her. Contrary to the terms of the settlement deed the first wife alienated the property by way of sale. The second wife and her son filed a petition for declaration that the sale deed was sham and the purchaser could not claim any title over the property based on the documents and that the sale would not bind her and her son.

\(^3\) AIR 2014 Mad 185.
The first wife contended that the sale was valid as she was the absolute owner as per the settlement deed executed by her husband and the property was sold for absolute necessity whereas the purchaser contended that he was bona fide purchaser for value and he had derived title from an absolute owner and therefore, his title could not be challenged. The court had to consider whether the first wife had absolute interest over the suit property even when restrictive interest had been conveyed under the settlement deed.

The High Court took note of various constitutional provisions inhibiting discrimination on the basis of sex and provisions that provide protective discrimination in favour of women. It went on to hold that social justice demands that a woman should be treated equally both in the economic and the social sphere. It went ahead holding that 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 HS(A) Act, 2005. The High Court laid down the following principles under s. 14 of HSA, 1956:

1. that the provisions of section 14 of the 1956 Act must be liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times;
2. that sub-section (2) of section 14 does not refer to any transfer which merely recognizes a pre-existing right without creating or conferring a new title on the widow;
3. that the Act of 1956 has made revolutionary and far-reaching changes in the Hindu society and every attempt should be made to carry out the spirit of the Act which has undoubtedly supplied a long felt need and tried to do away with the individual distinction between a Hindu male and female in matters of intestate succession;
4. that sub-section (2) of section 14 is merely a proviso to sub-section (1) of section 14 and has to be interpreted as a proviso and not in a manner so as to destroy the effect of the main provision.

Applying the principles enumerated above to the facts of the case, the court held that taking a second wife during subsistence of first marriage was certainly a matrimonial injury and cruelty to the first wife who had been with him for 26 years. The act of the husband gave a right under law to seek maintenance and even divorce and conferment of property could not lessen her distress or her feelings of neglect. Consent of his wife, whether voluntary or not voluntary, would not exonerate her husband from paying her maintenance. Even if consent was voluntary, there could not be consent for illegal act of bigamy which is a punishable offence under IPC. The
conferment of property with limited right to enjoy could only offer a solace to a minimum extent that the woman need not beg for food. As the property to first wife was towards her maintenance she became absolute owner after the commencement of the Act, despite the limitations and restrictions contained in the instrument, i.e., settlement deed therefore she had every right to dispose of the property and the sale was held to be valid. The court proceeded to hold that if other interpretation that settlement deed only confers limited rights was accepted than that would amount to promotion and encouragement of more men to create broken families and indulge in illegal activities and also bring back the women from e-age to stone age.

Various Supreme Court decisions have consistently held that that a wife's right to maintenance against her husband, is a preexisting right, and, it does not depend upon the possession of the property by the husband, either self-acquired, or, joint family property. Husband is duty bound to maintain his wife irrespective of his possession of property as that is a matter of personal obligation. When a property has been given to a woman in lieu of her maintenance where her right of enjoyment over that property had been restricted till her lifetime, the limited estate enlarged into absolute estate on the date of coming into force of HSA, 1956.

VIII. Muslim law of Succession

A. Constitutional validity of Shariat Act in regard to succession – PIL not maintainable

The High Court of Kerala by a recent judgment in Khuran Sannath Society and others v. Union of India and others39 has dismissed a Public Interest Litigation (PIL) filed for seeking a declaration that Muslim Personal Law (Shariat) Application Act, 1937 (Act of 1937), applicable in regard to inheritance of Muslim women, is violative of Articles 14, 15, 19, 21 and 25 of the Constitution of India and therefore, void and unenforceable. The High Court dismissed the petition on ground that issues raised in the writ petition is for the Legislature to consider and frame laws and it could not be adjudicated in proceedings under Article 226 of the Constitution of India.

The petitioners aggrieved by Muslim succession law had made the following submissions:
(a) there is discrimination on the ground of sex in so far as inheritance is concerned regarding females in Muslim community, i.e., a female child does not get equal share to male child born to Muslim father;
(b) a female child gets less share as compared to her brother;

(c) discrimination not only between men and women but also between Shiyas and Sunnis in the implementation of the Shariat, which is a clear deviation from the Quranic principles;

(d) misinterpretation of holy Quranic edicts as now practiced in India leads to patent discrimination against female children alone, while the sons who succeed to their mother's or father's property need not share any portion of the inherited properties with anyone of the deceased's relatives other than spouse and parents of the deceased;

(e) if a deceased Muslim happens to leave only daughters, those daughters will not get a share equivalent to that of the share she would get if she was a male and will have to share the properties along with not so close relative of the deceased but if the deceased leaves only a male child he takes the entire property needing to share it only with the spouse and parents of the deceased;

(f) various Muslim countries including Pakistan, Egypt, Malaysia, etc., have introduced legislation to implement the true Quranic principles by changing the law on various subjects, thus is it perfectly permissible;

(g) while religious practices could not be altered, Shariat certainly could be made more practicable and workable to adapt itself to the changing needs of the society;

(h) Muslim Personal Law as followed in the present day carries discrimination based on gender in the matter of inheritance which cannot have the acceptance of the constitutional principles enshrined in Articles 14, 15, 19, 21 and 25 of the Constitution of India.

Petitioners submitted that since inequality meted out to women under Muslim personal law in the matter of inheritance and succession has resulted in great injustice, it is high time to take action in this regard. The respondent raised preliminary objection as to sustenance of the aforesaid issue in PIL and submitted that legislation challenging the personal law applicable to Muslims could be brought into only by the competent legislature. The respondent mentioned *Mohd. Ahmed Khan v. Shah Bano Begum and others*\(^{40}\) wherein the court had the occasion to consider the Act of 1937 in the context of sections 125 and 127 of the Code of Criminal Procedure. The Apex court after observing that there is no conflict between the Code and the Muslim Personal Law contemplated on the desire of the Government which wanted the Muslim community to take the lead and the Muslim public opinion to crystallise on the reforms in their personal law.

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\(^{40}\) AIR1985SC945.
Division Bench of Kerela High Court comprising of Chief Justice Ashok Bhushan and Justice A.M. Shaffique in Khuran Sannath relied on Maharshi Avadhesh v. Union of India\(^1\) where the Apex court considering the prayer of the petitioner in the Writ Petition that the respondents be directed not to enact Shariat Act in respect of those affecting dignity and rights of Muslim women, observed that those are the matters of the Legislature. The Supreme Court while dismissing the petition in Maharshi Avadhesh had made the following observation:

“\textit{This is a petition by a party in person under Article 32 of the Constitution. The prayers are two-fold. The first prayer is to issue a writ of mandamus to the respondents to consider the question of enacting a common Civil Code for all citizens of India. The second prayer is to declare Muslim Women (Protection of Rights on Divorce) Act, 1986 as void being arbitrary and discriminatory and in violation of Article 14 and 15 Fundamental rights and Articles 44, 38 and 39 and 39A of the Constitution of India. The third prayer is to direct the respondents not to enact Shariat Act in respect of those adversely affecting the dignity and rights of Muslim women and against their protection. These are all matters for legislature. The Court cannot legislate in these matters.}”

The Kerala High Court accordingly ruled “\textit{the issues raised in the Writ Petition cannot be adjudicated in proceedings under Article 226 of the Constitution of India in this Public Interest Litigation. It is for the Legislature to consider the issues raised and frame a competent legislation.}”

The court missed an opportunity to give its opinion on the constitutional validity of personal law. Court usually avoids giving its opinion with regard to the constitutional validity on issues related to personal law. In Mary Roy v. State of Kerala\(^2\) the Supreme court had the opportunity to consider the constitutional validity of Travancore Christian Succession Act,1092 which Act discriminated between son and daughter in devolution of property of the intestate and also whether sections 6, 3 and 2(cc) of Travancore Christian Succession Act, stood wholly repealed on extension of ISA, 1925 to the State of Travancore Cochin by Part-B States (Laws) Act, 1951. The Supreme Court superseded the provisions of Travancore Christian Succession Act, 1092 on the technical ground that, after independence, the laws enacted by princely states which were not expressly saved by Part B State (Laws) Act 1951 have been repealed, but it desisted from examining the provisions under the constitutional directive of equality.

\(^{1}\)(1994) Suppl. 1SCC713.

\(^{2}\)(1986) 2 SCC 209.
In a challenge to the constitutional validity of the Chhota Nagpur Tenancy Act, 1908, which disentitled tribal women inheritance rights, the Supreme Court upheld the discriminatory provisions but allowed the women to assert their rights without declaring that the custom of inheritance disinheriting the daughter offended Articles 14, 15, and 21\textsuperscript{43}. In \textit{John Vallamattom v Union of India}\textsuperscript{44} provision of section 118 of the ISA, 1925 imposing restriction on Christian alone in the matter of bequest to religious and charitable uses came up for consideration. The Apex court struck down section 118 of ISA 1925 as being unconstitutional on the basis that it violated Article 14 of the Constitution even when the law was a personal pre-Constitutional law. Supreme Court generally adopts a cautious approach in getting into the constitutional validity of personal laws and is yet to give its definite ruling and declare that personal laws are ‘laws’ or ‘laws in force’ under Article 13 of the Constitution of India. The court by getting into the constitutional validity of the personal laws could have set the precedent for examining gender discrimination under other personal laws.

\section*{B. Hanafi law of Inheritance – Full sisters a sharer or residuary in presence of daughter}

The right of full sisters under Hanafi law to inherit property in presence of daughter of the deceased came recently before Bombay High Court in \textit{Khairunnisabegum v. Nafeesunisa Begum}\textsuperscript{45}. The deceased left behind his widow, daughter and plaintiffs – the two sisters but no male issue. The plaintiffs claimed their shares as residuaries left after allocation of shares to widow and daughter as sharers but the defendants submitted that sisters of deceased were merely residuaries within the meaning of Hanafi law and therefore, when the deceased has left a widow and a daughter, the right of inheritance of such residuaries is extinguished.

As per Hanafi law of inheritance, heirs are classified into three classes (i) Quranic heirs or sharers - whose share is fixed in Quran; (ii) residuaries – who get whatever remains of the inheritance after the Quranic sharers have been allocated their shares and (iii) distant kindreds - when there are no sharers and residuaries, the property is inherited by distant kindreds. The share of residuaries varies as it is dependent on the existence and number of sharers. The term ‘residuary’ is thus a relative term. Further in a given set of existing sharers, while a person may be a sharer, in presence of certain sharers, the very same relative would become a ‘residuary’. According to table of sharers full sister is a sharer in case there is no child or child of son,

\textsuperscript{44} (2003) 6 SCC 611.
\textsuperscript{45} High court of Bombay (Aurangabad branch) First Appeal Nos. 1155 and 505 of 2013 decided on September 22, 2014.
however low, and at the same time shows that full sister in default of full brother takes the residue, if any, if there be a daughter or daughters, etc. As per the table it is clear that in case, no child is left by the person holding the property, then full sister would be normal sharer however, in case he leaves behind him daughter or daughters, she/they would take the residue.

Right of full sister had come for consideration before Jammu and Kashmir High Court in *Maqsooda Begum and others v. Shahnawaz Khan and others*⁴⁶. Question for determination before that court was whether a full sister is a heir under the Mohammadan Law and, if so, when. In that case, the deceased was survived by a widow, two daughters and a sister. The Jammu and Kashmir High Court looked into Mr. Imtiaz Hussain’s treatise "Muslim Law and Customs" (1989), wherein the rights of a sister to inherit the property of a Sunni Muslim is enumerated as:

"The full sister inherits in three capacities:

- **a.** She takes as sharer if there is no child, child of a son h.l.s. father, true grandfather or full brother and she is entitled to 1/3 share (or 2/3 collectively when there are two or more sisters).

- **b.** She inherits as a residuary with her full brother.

- **c.** She inherits as a residuary with daughter or sons daughter h.l.s. or one daughter and a son’s daughter h.l.s. provided there is no nearer residuary."

The court observed that sister has an interest in the property of the deceased and even if she does not get the share as a sharer, she gets it as a residuary and accordingly held that sister has residuary interest in estate even in presence of wife and children.

Supreme court also had the opportunity to decide the rights of full sister in *Newancess alias Mewajannessa V. Shaikh Mohamad and others*⁴⁷, where the deceased widow had left her two daughters and one sister. The Supreme Court looked into Mulla's Principles of Mohammedan Law, edited by M. Hidayatullah, 18th edition, observed that section 65 read with the Table at page 72A indicates that if there are no sharers, or if there sharers but there is residue left after satisfying their claim, residuaries also inherit in the order set forth in the Table. Table at page 72A dealing with residuaries indicates that where descendants like son, son’s son, and ascendants like father and grand-father are not available, then the descendants of the father takes in the order mentioned. The first is full brother, then sister; in default, a daughter or son's daughter or daughter's son. The Apex court placing reliance on the table as well as s. 65 of the Mulla’s

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⁴⁷ AIR 1996 SC 702.
Principles of Mohammandan law, held full sisters to be residuaries entitled to 1/3rd share while each of the daughters was held entitled for 1/3rd share of the estate of the widow.

Placing reliance on the clear pronouncement of law by the Supreme Court as corroborated by the observations of the High Court of Jammu and Kashmir and the ‘Principles of Mohammedan Law’ by the Mulla, the Bombay High Court in Khairunnisabegum concluded that after allocation of shares to the sharers i.e., to the widow and the daughter the residue passes on the residuary which in the present case is the full sister.

The interpretation of the court seems to be justified. Residuaries, who are also near relatives of the deceased, receive the residue as a class after allocation of shares to the sharers. Even the distant relatives of the deceased as distant kindred could claim to be heirs in absence of sharers and residuaries. A full sister under the table could either claim as sharer or residuary i.e., is placed in superior category than distant kindred of the deceased which simply means she is a near relative of the deceased and could not be considered to be distantly related to the deceased as the distant kindred. So if she could not inherit as a sharer in absence of son or child of son she being near relative and residuary has the right to get the residue share after allocation of shares to widow daughters of the deceased.

IX. CONCLUSION

Recent judicial grant of property rights to tribal women, which issue had not been touched upon in the past either by the legislation as well as by the court, is a noticeable development in keeping with the equality directive of the Constitution. Territorial jurisdiction under Portuguese Civil Code, 1867 which governs the rights of all persons with regard to succession in the State of Goa and the Union Territory of Daman and Diu was extended for determination of mandatory share even when property was situated outside the State. Further in matter of ex gratia compensation awarded by the State the personal law of succession is held to be of no consequence. The compensation provided by the State is to mitigate the financial as well as mental hurt caused to the surviving family members of the deceased. Interpretation of statutory provision giving birth right to Hindu daughter in coparcenary property, granting Hindu widow partition right in the ancestral property of husband, recognizing absolute right of Hindu women on the basis of personal obligation of husband to maintain her in property received as consideration for her consent for husband’s second marriage are steps towards securing equality of status with respect to property rights. Gift of undivided coparcenary share has been declared to be void as well as suit filed by heir for administration of the estate of the deceased beyond 3
years of the death of intestate when succession opened has been held to be barred by limitation. The right of full sister to inherit as residuary in presence of daughter of the deceased under Hanafi law of succession has been ruled in favour of full sister. At the same time, dismissing PIL filed by writ petition challenging constitutional validity of the Shariat Act on the ground that the issue was to be considered by the legislature, retention of devolution of property on heirs of husband on death of Hindu female dying issueless does not appear to be justified. Despite immense positive steps taken by legislature and judiciary, the law relating to succession still leaves various voids perpetuating inequality on basis of sex much against the mandate of Constitution.