



Paper Presentation on:

**ANALYSIS OF LAW RELATING TO SUCCESSION
AND INHERITANCE IN HINDUS, FUNCTIONING
OF CUSTOMARY LAW IN TRIBAL SOCIETY AND
ITS APPLICABILITY FOR ACCESS TO JUSTICE**

**DIVISIONAL JUDICIAL SEMINAR, CSJA,
BILASPUR**

ON 24.11.2024 AT

**DISTRICT AND SESSIONS COURT,
SURGUJA AT AMBIKAPUR (C.G.)**

**PRESENTATION BY:
DISTRICT AND SESSIONS COURT
SURGUJA AT AMBIKAPUR (C.G.)**

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ANALYSIS OF LAW RELATING TO SUCCESSION AND INHERITANCE IN HINDUS

01. INTRODUCTION

The law relating to succession and inheritance for Hindus in India is primarily governed by **The Hindu Succession Act, 1956** (hereinafter referred to as the 'Act') with significant amendments such as the **Hindu Succession (Amendment) Act, 2005**. This legislation codified and modernized the traditional principles of Hindu inheritance, balancing gender equality with the customary laws prevalent before its enactment.

02. SCOPE AND APPLICABILITY OF THE ACT

The Act applies to every person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Pararthana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; or to any other person who is not a Muslim, Christian, Parsi or Jew by religion¹. In the case of a testamentary disposition, this Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925². The Act lays down a uniform and comprehensive

1 Section 2 of the Hindu Succession Act, 1956.

2 Section 30 of the Hindu Succession Act, 1956.

system of inheritance and applies, inter alia, to persons governed by the

Mitakshara and Dayabhaga schools and also to those governed previously by the Murumakkattayam, Aliyasantana and Nambudri laws.

The Hindu Succession (Amendment) Act, 2005 has brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women's property. However, it does not interfere with the special rights of those who are members of Hindus Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases.

03. DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY

Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognises the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. 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. Having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975 and in 2005 sec 6 of the act has been amended w.e.f 05.09.2005.

The Hon'ble Supreme Court of India in **Rohit Chauhan v. Surinder Singh**³ explained coparcenary property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Partitioned share of ancestral property held by single person again becomes coparcenary property as soon as child is born to such holder of the partitioned share of ancestral property.

The Hon'ble Supreme Court of India in **Vineeta Sharma v. Rakesh Sharma**⁴ held that the daughter born before date of enforcement of the 2005 Amendment Act, has same rights as daughter born on or after the amendment. The Hon'ble Apex Court has defined the mode of succession.—Survivorship as a mode of succession of property of a Mitakshara coparcener, held, has been

3 (2013) 9 SCC 419.

4 (2020) 9 SCC 1.

abrogated with effect from 9-9-2005 by the substituted Section 6(3).

04. RULES OF SUCCESSION FOR HINDU MALES

The Hindu Succession Act, 1956, deals with the inheritance to: (a) the separate properties of Mitakshara male, (b) to the separate and coparcenary properties of a Dayabhaga male, and (c) to the undivided interest in the joint family property of a Mitakshara coparcener, who dies leaving behind a widow, mother, daughter, daughter's daughter, son's daughter, sons's widow, grandson's daughter, grandson's widow or daughter's son.

- **Heirs of a Hindu male**

Under the Act, heirs of a Hindu male fall under the following heads:

- (1) Class I heirs,
- (2) Class II heirs,
- (3) Agnates.
- (4) Cognates⁵, and
- (5) Government⁶.

Class I and Class II heirs are sometimes also called enumerated heirs, since the Act enumerates them. Class I heirs are also called preferential heirs, as presence of any one of them excludes heirs in all other classes. They are also called

⁵ Section 8 of Hindu Succession Act, 1956.

⁶ Section 29 of Hindu Succession Act, 1956.

simultaneous heirs, as heirs in Class I inherit simultaneously-one does not exclude the other.

Section 9 provide for order of succession among heirs in the Schedule.-Among the heirs specified in the Schedule, those in Class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in Class II shall be preferred to those in the second entry; those in the second entry shall be preferred to those in the third entry; and so on in succession.

Section 10 provide for distribution of property among heirs in Class I of the Schedule.- The property of an intestate shall be divided among the heirs in Class I of the Schedule in accordance with the following rules: *Rule 1.* The intestate's widow, or if there are more widows than one, all the widows together, shall take one share.

Rule 2. The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3. The heirs in the branch of each pre-deceased son or each pre-deceased daughter of the intestate shall take between them one share.

Rule 4. The distribution of the share referred to in Rule 3-

(i) among the heirs in the branch of the pre-deceased son shall be so made that his widow (or widows together) and the surviving sons

and daughters get equal portions; and the branch of his pre-deceased sons gets the same portion;

(ii) among the heirs in the branch of the pre-deceased daughter shall be so made that the surviving sons and daughters get equal portions.

Section 11 provide for distribution of property among heirs in Class II of the Schedule. -The property of an intestate shall be divided between the heirs specified in any one entry in Class II of the Schedule so that they share equally.

Section 12 provide order of succession among agnates and cognates. The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder-

Rule 1. - Of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule 2.- Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule 3.- Where neither heir is entitled to be preferred to the other under Rule 1 or Rule 2 they take simultaneously.

05. RULES OF SUCCESSION FOR HINDU FEMALE

Under the traditional hindu law, women had a very limited right to inherit the property. Under the Mitakshara school, a women was not regarded as a coparcener. On the other hand, the Dayabhaga School allowed widow to inherit the property of her late

husband. However, under the Dayabhaga School, if a widow died without a son, her property would be passed on to her nearest male heir, irrespective of whether she had daughters. The Hindu Succession Act, 1956 brought uniformity in inheritance law with regard to the rights of the women.

- **Coparcenary rights for Daughters.**

A women could not claim inheritance as a coparcener in the original Act. The Hindu Succession (Amendment) Act, 1956 was introduced to modify the discriminatory clause. Section 6 of the Hindu Succession Act, 1956 was amended to give equal coparcenary rights to women. It provides that the daughter of coparcener shall by birth become a coparcener in the same manner as a son and shall have same rights and liabilities as that of a son. It also provides that any reference to Hindu Mitakshara Coparcener shall include daughter of a coparcener⁷. It means that the daughters have a birthright in the ancestral property and can demand partition.

In the celebrated judgment of the Hon'ble Supreme Court of India in **Vineeta Sharma v. Rakesh Sharma and Ors.**⁸ has overruled the contrary views expressed in *Prakash v. Phulavati*⁹ and *Mangammal v. T.B. Raju*¹⁰ and partly overruled the opinion expressed in *Danamma v. Amar*¹¹ and has held that the provisions

⁷ Section 6 of the Hindu Succession Act, 1956.

⁸ (2020) 9 SCC 1.

⁹ (2016) 2 SCC 36.

¹⁰ (2018) 15 SCC 662.

¹¹ (2018) 3 SCC 343.

contained in the substituted section 6 of the Hindu Succession Act, 1956 confer status of a coparcener on the daughter born before or after the amendment in the same manner as son with same rights and liabilities. Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living on 9.9.2005.

The Hon'ble High Court of Chhattisgarh in **Smt Sonia Bai and Ors. v. Dashrath Sahu and Ors.**¹² has held that the daughters are also entitled for getting equal share in the property inherited by their parents.

- **Right to absolute property**

Section 14 of the Act provides that the property of a female hindu to be her absolute property. It provides that any property possessed by a female hindu, whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof and not as a limited owner. The explanation to section 14 describes the word "property" which includes property received by female including movable or immovable acquired by inheritance or devise or partition or maintenance or by gift or by her own skill or by purchase etc. Section 14 also provides that property received by restricted prescription in such estate shall not be covered by section 14(1) of the Hindu Succession Act, 1956.

¹² 2022 SCC OnLine Chh 468.

The Hon'ble Karnataka High Court in **Daulatarao Ramchandra Jadhav v. Smt. Janabai Anandrao Jhadha**¹³ provides that after perusal of the above said decisions as well as the provisions of Section 14(1) of the Hindu Succession Act, it is clear that Section 14(1) has a very wide and extensive application and has to be read in a comprehensive manner as the Act overrides old law governing the properties of the female. The Act confers full heritable capacity and absolute ownership on the female heir. This section dispenses with the traditional limitations of conferring limited estate on the female Hindu to hold and transmit the property. It should be borne in mind that under *Hindu Law* which in operation prior to the coming into force of this Act, a woman's ownership of property was hedged in by certain delimitations on her right of disposal and also on her testamentary power in respect of that property and also with reference to her absolute ownership. By virtue of interpretation of the provision under Section 14 of the Hindu Succession Act, in the enactment, the above said barricades have been completely removed and the Act presupposes if any property possessed by a female Hindu whether acquired before or after commencement of the Act becomes absolute property of the said lady, if the said property was given in recognition of her pre-existing right.

13 AIR 2018 Kar 62.

- **General Rules of Succession in the case of female hindus.**

Section 15 of the Act provides that the property of female hindu dying intestate shall devolve according to the rules set out in section 16 :-

- firstly, upon sons and daughters (including children of any pre deceased son or daughter) and the husband
- secondly, upon the heirs of the husband,
- thirdly upon the mother and father, and
- lastly, upon the heirs of the mother.

It also provides that any property inherited by a female hindu from her father or mother shall devolve, in absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to above but upon the heirs of the father, and any property inherited by a female hindu from her husband or from her father in law shall devolve, in absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter), not upon the other heirs referred to above but upon the heirs of the husband.

The Hon'ble Supreme Court of India in **Arunachala Gounder(D) by Lrs. v. Ponnuswamy and Ors.**¹⁴ has held that basic aim of section 15(2) of the Act is to ensure that inherited

¹⁴ (2022) 11 SCC 520.

property of a female hindu dying issueless and intestate, goes back to the source.

- **Order of Succession and distribution**

Section 16 provides for the order of succession and manner of distribution among heirs of a female hindu. It provides that the order of succession among the heirs of a female hindu shall be:-

The Hon'ble Supreme Court of India in **Bharat ram v. Teja Singh**¹⁵ held that succession to childless hindu female intestate whose property was inherited by her from her mother or father in such cases the order of succession set out in section 15(1) is not applicable and property shall devolve under section 15(2).

The Hon'ble Supreme Court of India in **Omprakash v. Radhacharan**¹⁶ has held that in case of hindu female dying intestate the succession would be governed by section 15(1) and not by section 15(2) of the Hindu Succession Act, 1955.

15 (1999) 4 SCC 86.

16 (2009) 15 SCC 66.

Functioning of Customary law in the Tribal Society and its applicability for access to justice.

06. DEFINITION OF CUSTOM

In ancient times when there was no codification of laws people were governed by customs prevalent in their particular community. According to Halsbury law “A custom is a specific principle which has existed either really or hypothetically from time immemorial and has received the power of law in a specific territory, though in spite of or not steady with the general precedent-based law of the community.” According to Austin “Custom is a rule of conduct which the governed observe spontaneously and not in pursuance of law set by a political superior.” According to Salmond “ Custom is the embodiment of those principles which have commended themselves to the national conscience as principle of justice and public utility.” According to the Black’s Dictionary “ Customs that are accepted as legal requirements or obligatory rules of conduct, practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws.”

Custom is considered as one of the earliest sources of law. Section 2(d) of the Hindu Succession Act, 1956 defines “custom” and “usage” which signify any rule which, having been

continuously and uniformly observed for a long time, has obtained the force of law among hindus in any local area, tribe community, group or family. Provided that the rule is certain and not unreasonable or opposed to public policy and that in case of a rule applicable only to a family it has not been discontinued by the family.

The Hon'ble Supreme Court of India in **Bhimashya v. Janabi**¹⁷ has observed that “A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm. A custom to be valid must have four essential attributes. First, it must be immemorial; secondly, it must be reasonable; thirdly, it must have continued without interruption since its immemorial origin, and; fourthly, it must be certain in respect of its nature generally as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect.”

07. ESSENTIALS OF A VALID CUSTOM

The essentials necessary to prove a valid custom are as follows :-

- **Immemorial (Antiquity)** – A custom must be ancient or immemorial so that it may be considered as a valid binding custom.

¹⁷ (2006) 13 SCC 627.

- **Certainty** – The custom has to be clearly defined, it cannot be vague and confusing.
- **Reasonable** – A custom must be within bounds of reason for it to be considered legally binding. Therefore, custom would be considered unreasonable if it opposes principles of justice, equality and good conscience.
- **Compulsory observance** – For a custom to be considered valid, it must have been observed since ancient times without any interruptions and must be considered by the people following it as a binding rule of law.
- **Conformity with law and public morality** – A custom must not go against public policy and law of the land. If the law makes it forbidden, it will not be considered a valid custom.
- **The unanimity of opinion** – Only a universally accepted custom will be considered valid.
- **Peaceable enjoyment** – When everyone follows and enjoys the custom in a peaceful manner, only then will it be considered valid.
- **Consistency** – There should be consistency between customs. Two customs that have opposing view points cannot be considered valid.

The Hon'ble Supreme Court of India in **Laxmibai v. Bhagwantbuva**¹⁸ observed that custom is an established practice at variance with the general law. Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it. Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence.

08. PROOF OF CUSTOM

The Bharatiya Sakshya Andhinyam 2023 provides for provisions regarding custom. Section 11 of the Bharatiya Sakshya Andhinyam 2023 provides for facts relevant when right or custom is in question. It provides that where the question is as to the existence of any right or custom, the following facts are relevant-(a) any transaction by which the right or custom in question was created, claimed, modified, recognised, asserted or denied, or which was inconsistent with its existence;(b) particular instances in which the right or custom was claimed, recognised or exercised, or in which its exercise was disputed, asserted or departed from.

¹⁸ (2013) 4 SCC 97.

Section 26(d) of the Bharatiya Sakshya Adhiniyam 2023 provides that when the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

Section 42 of the Bharatiya Sakshya Adhiniyam 2023 provides for opinion as to existence of general custom or right, when relevant. It provides that when the Court has to form an opinion as to the existence of any general custom or right, the opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant. The expression "general custom or right" includes customs or rights common to any considerable class of persons.

09. ONUS OF PROOF OF CUSTOM

The onus of proof of custom is upon the person who asserts deviation from the statutory law and not on the person who denies it.

The Hon'ble Supreme Court of India in **Saraswathi Amal v. Jagadambal and Anr.**¹⁹ held that it is incumbent on a party setting up a custom to allege and prove the custom on which he relies and

¹⁹ AIR 1953 SC 201.

it is not any theory of custom or deductions from other customs which can be made a rule of decision but only any custom applicable to the parties concerned that can be the rule of decision in a particular case. It is well settled that custom cannot be extended by analogy. It must be established inductively, not deductively and it cannot be established by a priori methods. Theory and custom are antithesis, custom cannot be a matter of mere theory but must always be a matter of fact and one custom cannot be deduced from another. A community living in one particular district may have evolved a particular custom but from that it does not follow that the community living in another district is necessarily following the same custom.

The Hon'ble Supreme Court of India in **Harihar Prasad Singh v. Balmiki Prasad Singh**²⁰ has held that the burden of proof lies on

the person who claims its existence and such a person has to prove that the custom is valid enough to be established contrary to laws.

The Hon'ble Chhattisgarh High Court in **Roopautin Bai v. Sunderi Bai and Ors.**²¹ has held that the burden to prove a custom is upon the person who asserts it.

²⁰ (1975) 1 SCC 212.

²¹ 2020 SCC OnLine Chh 768.

10. JUDICIAL NOTICE OF CUSTOM

Section 51 of the Bharatiya Sakshya Adhiniyam, 2023 provides that the facts judicially noticeable need not be proved. The Hon'ble Supreme Court of India in **Ass Kaur v. Kartar Singh**²² has held that the court can also take judicial notice of such customs in terms of Section 57 of the Evidence Act, 1872. As and when a custom has repeatedly been recognised by the courts, the same need not be proved.

11. APPLICABILITY OF HINDU SUCCESSION ACT, 1956.

Section 2(1)(c) of the Hindu Succession Act, 1956 provides that the Hindu Succession Act, 1956 shall not be applicable where it is proved that any person would not be governed by the Hindu Law or by any custom or usage. Section 2(2) of the Hindu Succession Act, 1956 provides that the said Act shall not apply to the members of the Scheduled Tribe within the meaning of Article 366(25) of the Constitution of India unless the Central Government, by notification in the official gazette, otherwise directs.

The Hon'ble Supreme Court of India in **Bharat Bhushan v. Tej Ram**²³ held that the Hindu Succession Act, 1956 is not applicable to the Scheduled Tribes and held determination of rights of parties based on customary laws contained in wajib-ul-arz.

²² (2007) 5 SCC 561.

²³ (2016) 15 SCC 655.

12. IMPORTANT JUDICIAL PRONOUNCEMENTS ON CUSTOMS

The Hon'ble Supreme Court in the landmark judgment in **Madhu Kishwar v. State of Bihar**²⁴ held that neither Hindu Succession Act nor Indian Succession Act nor shariat law is applicable to the custom governed tribals and held that denial of right to succession to scheduled tribe women would amount to deprivation of their right to livelihood under Article 21 of the Constitution of India. The Hon'ble Supreme Court observed that "It would thus be seen that the customs among the Scheduled Tribes, vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid, certain, ancient and consistent and whether it has acquired the status of law. However, as noticed above, customs are prevalent and are being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as a set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya, throughout

²⁴ (1996) 5 SCC 125.

the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as a limited owner. Widows also get only limited estate. More than 80 per cent of the population is still below poverty line and they did not come on a par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the court.”

The Hon’ble Supreme Court in **Indian Young Lawyers Association and Ors.v. The State of Kerala and Ors.**²⁵ (**Sabrimala temple case**) held that the practice of excluding women from the temple of sabrimala is not an essential religious practice and is subordinate to the constitutional values of liberty, dignity and equality and held such a custom to be violative of section 3 of the Kerala Hindu Places of Public Worship (Authorisation of Entry) Act 1965.

The Hon’ble Supreme Court of India in **Kamla Neti (Dead) through Lrs. v. The Special Land Acquisition Officer and Ors.**²⁶ held that the female member of Scheduled Tribe (ST) is not entitled to share by survivorship in compensation awarded for acquisition of

25 (2019) 11 SCC 1

26 (2023) 3 SCC 528.

ancestral land in view of non-applicability of the HSA, 1956 to STs. Her claim of equal share with male coparceners in joint family property may be supportable in equity but cannot be sustained under Section 2(2) of the HSA, 1956 as it stands. The Hon'ble Court observed that women belonging to the Scheduled tribe are also entitled to an equal share in the ancestral property just as women who belong to the non-tribal communities are entitled to an equal share in intestate succession in accordance with the relevant provisions of the said Act and directed Central Government to examine it.

The Hon'ble High Court of Chhattisgarh in **Mst. Sarwango and Anr. v. Mst. Urchamahin and Anr.**²⁷ held that in absence of any law of inheritance or custom prevailing in their caste governing the inheritance the Courts are required to decide the rights according to justice, equity and good conscience in term of Section 6 of the Central Provinces Law Act, 1875.

The Hon'ble High Court of Chhattisgarh in **Daduram and Ors. v. Tirith Kumar and Ors.**²⁸ held that in absence of any law of inheritance prevailing in Gond-caste governing inheritance, courts are required to decide right according to justice, equity and good conscience in terms of Section 6 of the Central Provinces Laws Act, 1875.

²⁷ 2013 SCC OnLine Chh 5.

²⁸ Judgment dated 06.02.2019 in S.A. 270/2003.

13. CONCLUSION

The Hindu Succession Act, 1956 provides a codified law prescribing the rules of succession for hindus. The Hindu Succession (Amendment) Act, 2005 and latest judgments of the Hon'ble Supreme Court of India has provided right of female hindus in the coparcener property. The Act has been successful in bringing the uniformity to the succession of property among hindus. The Act has also abolished disqualification in the property on the basis of disease and physical disability and instead disqualified murderers and converts and their descendants from inheriting the property.

Considering the length and breadth of India, customs vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Thus, codification of basic principles of customary laws can go a long way in guiding courts to ensure the rights of citizens of India guaranteed under the Constitution of India.
