

FAMILY LAW LECTURES – FAMILY LAW II. By Poonam Pradhan Saxena. New Delhi: Lexis Nexis Butterworths, 2004. Pp. lvii+685, Rs. 395/-, ISBN 81-8038-070-X.

Hindu law, as it is now generally agreed, has the most ancient pedigree of any known system of jurisprudence. In this connection John D. Mayne in the preface to the first edition of his *Treatise on Hindu Law and Usage* observed that “Hindu law has the oldest pedigree of any known system of jurisprudence, and even now it shows no signs of decrepitude”. Hindu law as is commonly understood is a set of rules contained in several Sanskrit books which the Sanskritists consider as books of authority on the law governing the Hindu.<sup>1</sup> Mr. J.H. Nelson, in his book *A View of the Hindu Law as Administered by the High Court of Judicature at Madras* is disposed to characterize Hindu law as “a mere phantom of the brain imagined by Sanskritists without law, and lawyers without Sanskrit”. The later portion of the observation is to some extent justified in view of several changes effected in the ancient law by English judges having no knowledge of Sanskrit, but the former position of it is either due to ignorance or partial or perverted view of the real nature of the law that has been governing the Hindus for centuries. Hindu law, though believed to be of divine origin, based essentially on immemorial customs, and is admixture of religion, morality and law. The concept of Hindu law is deeply rooted in Hindu philosophy and Hindu religion. The book under review is a great work about some important issues concerning Hindu law and Muslim law.

The book has been divided into seventeen chapters and includes Annexures also. To start the work, “Law of Intestate and Testamentary succession in India” which is an introductory chapter, the author has very cogently elaborated the non- uniform character of law or multiplicity or successional laws. In the words of the author:

A variety of different laws are in vogue and their application depends on multiple factors like the religion or tribe of the parties, domicile, community, sect in the community, marital status of the parties, religion of the spouse, and the type of marriage the parties have undergone.<sup>2</sup>

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<sup>1</sup> *Vannia Kone v. Vannichi*, 54 M.L.J. 174 (F.B.)

<sup>2</sup> Ponnam Pradhan Saxena, FAMILY LAW LECTURES, 2004.

The first chapter deals with the sources of Hindu law. Hindu law has shown remarkable adaptability despite the fact that before the advent of modern era there was no direct law-making machinery. The study of sources of Hindu law is the study of various phases of its development which gave it a new drive and vigour, enabled it to conform to the changing needs. Six sources enumerated by the author are followed by the Hindu law writers and judges to administer Hindu law.

In chapters second, third and fourth the creator of the work has dealt with Hindu joint family, coparcenary and females as coparceners. There are two main schools of Hindu law; viz: The Mitakshara School and Dayabhaga School or Bengal School. The Mitakshara joint family is a unique contribution of Hindu law which has no parallel in any ancient or modern system of law. Whatever the sceptic may say about the future of Hindu joint family, it has been and continues to be the fundamental aspect of the life of Hindus. Despite the judicial and legislative onslaught, the Hindu society still recognises the joint family.<sup>3</sup> Coparcenary is a narrower institution within a joint family comprising only male members who can offer spiritual ministrations to the deceased ancestor. It signifies a relationship. The dominant objective rooted in relationship is currently understood to ascertain the rights and obligations of the members of the family in the joint family property. The coparcenary is limited to three generations of lineal male descendants of the last holder of the property only. Under Mitakshara law, women cannot be coparceners.<sup>4</sup> But State of Andhra Pradesh brought in a revolutionary change in the classical concept of coparcenary. It conferred a right by birth in the coparcenary property in favour of an unmarried daughter.<sup>5</sup> The Act provided that on the date of the promulgation of the Act i.e., September 5, 1985, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son.<sup>6</sup> Inspired by the Andhra model, some other states namely, Tamil Nadu in 1989, Maharashtra in 1994 Karnataka in 1994, came up with similar enactments and introduced daughters as coparceners. The 15<sup>th</sup> Law Commission headed by B.P. Jeevan Reddy

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<sup>3</sup> *Id.* at 70.

<sup>4</sup> *Pushpa Devi v. Commissioner of Income Tax*, AIR 1977 SC 2230.

<sup>5</sup> Section 29A, The Andhra Pradesh Hindu Succession (Amendment) Act 1985.

<sup>6</sup> Section, 29A(i), *id.*

J., in the 174<sup>th</sup> report, dated May 4, 2000, has also suggested conferring equal rights to daughters in the coparcenary property. The Hindu Succession Amendment Bill 2002 has also incorporated changes identical to the Andhra model for introducing daughters as coparceners in a Mitakshara Coparcenary<sup>7</sup>. The author has intelligently and with great clarity highlighted the primary changes introduced in the classic law of coparcenary and Hindu joint family, which will serve guide to present and future legal luminaries.

In chapter five of the book, there is a brief discussion on Dayabhaga joint family, a system of law prevalent in Bengal and Assam.

Chapter six deals with the categorization of properties. Property under Hindu law can be classified under two heads: (1) coparcenary property, and (2) separate Property. The rule of Hindu law is well settled that the property which a man inherits from any of his three paternal ancestors namely his father, father's father and father's father's father is ancestral property as regards his male issues and the doctrine of survivorship applied to it<sup>8</sup>. But the Apex Court held that the son inheriting the property from his father, grand father or great grand father under section 8 of the Hindu Succession Act, 1956, would take it as his exclusive or absolute property, with no right of his male descendants over it<sup>9</sup>. Seven reasons have been highlighted by the author to justify the decision of the Supreme Court, ignoring the fact that there is no provision as to the character of the separate property inherited by a son in the Act. Neither section 6 nor section 8 of the Act, deal with the character of the property of a Hindu when it devolves on his son by inheritance under proviso to section 6 or under section 8. Section 8 merely provides the mode of devolution of separate property and also specified the heirs of Hindu dying intestate. Under the Act, a new set of heirs has been laid down, but nothing in section 8 or any other provision the Act lays down as to what will be the character of the property.

It is further submitted that if we say that when a Hindu inherits his father's property under section 8 of the Hindu Succession Act, 1956,

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<sup>7</sup> *Supra* note 2 at 136.

<sup>8</sup> *Attar Singh v. Thakur Singh*, 35 I.A. 206; *Muhammad Husain Khan v. Babu Kishva Nandan Sahai*, AIR 1937 PC 233.

<sup>9</sup> *Commissioner of the Wealth-tax v. Chander Sen*, AIR 1986 SC 1753.

he holds it as his separate property, we are led to inevitable conclusion that no new Mitakshra Hindu joint family can come into existence after coming into force of the Hindu Succession Act, 1956. This amounts to saying that the Hindu Succession Act has abolished the joint family which obviously is not so<sup>10</sup>.

Chapter seven of the book deals with Karta. His position is *sui-generis*. Such unique is his position that there is no office or institution in any system of the world which can be compared with it. The author writes that the female coparceners after legislative amendment in some states fulfill the requirements of becoming Karta and therefore, they can become Karta. Do they continue to be Karta even after they get married and become member of the family in which they are married and ceased to be the member of their father's family? It would have been more beneficial to the readers had the author expressed her opinion on this issue.

In chapter eight, there is a good deal of discussion on trading families in relation to old and new business of the joint Hindu family. Chapter nine deals with alienation of joint family property. According to the original text of Mitakshara, ordinarily neither the Karta nor any other coparcener singly possess full power of alienation over the joint Hindu family property. It is now well settled that Karta can alienate joint Hindu family property in exceptional circumstances, e.g. for legal necessity and benefit of estate without the consent of the other coparceners. The author has discussed this subject skillfully in a detailed manner.

Chapter ten describes the law relating to the son's liability to pay father's debts. Chapter eleven deals with partition in a joint Hindu family. It is very interesting and illuminating to read the view of the author that on marriage of a coparcener under the Special Marriage Act, 1872, his status is automatically severed from membership of the coparcenary and joint family. The religion of the spouse was immaterial. But the same couple, if they married under the traditional Hindu law, continued to be members of the joint family. Presently, it is not the performance of the marriage of the coparceners under the Special Marriage Act, 1954, that

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<sup>10</sup> Paras Diwan and Peeyushi Diwan, MODERN HINDU LAW (2003) at 244.

would effect his severance from the coparcenary, but his marriage to a non-Hindu under this Act would operate as an automatic partition from the coparcenary. Some females who are entitled to a share, if there is a partition in the family has been highlighted with the help of figures/diagrams, which is a unique contribution of the author. It helps in understanding the law in a simplistic manner.

Chapter twelve deals with the law relating to intestate succession for Hindus under the Hindu Succession Act, 1956. The author opined that this Act provides comprehensive and uniform scheme of intestate succession for Hindus. Prior to the enactment of this Act, different religious communities were governed by different succession laws, and within the Hindu community itself, there was a wide divergence with respect to application of inheritance laws. The basic feature has been highlighted very clearly by the author. It is interesting to note that according to author the inclusion of the daughter in the class I category of heirs, alongwith the son had raised maximum eyebrows at the time of the passing of the Act, as majority of the Hindus did not want to give her a share. Section 14 (1) of the Act which provides absolute ownership to females in property, was challenged in the Supreme Court on the ground of hostile discrimination against men, as it benefited only one section of the community, viz. the women<sup>11</sup>. This proves author's point. The analysis of the decision of the Guwahati High Court<sup>12</sup> on section 15(2) of the Act is well founded. Similarly, the opinion of the author on *Kanna Gounder's* case is correct and educative<sup>13</sup>. The author has very skillfully and impressively discussed the provisions of the Hindu Succession Act, 1956 which will give new insights to the readers.

Chapters thirteen to seventeen deal with the Muslim law. The author has rightly said that the Muslim law is divine in nature as against man made laws that are passed by competent legislature, and are guided by the principles of western system of laws. After introduction to Muslim law, the law relating to gifts and wills has been elaborately discussed by the author. The law relating to inheritance to the property of Muslims is the most

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<sup>11</sup> *Partap Singh v. Union of India*, AIR 1985 SC 1695.

<sup>12</sup> *Dhanistha Kalita v. Ramakanta Kalita*, AIR 2003 Gau. 92.

<sup>13</sup> *C. Kanna Gounder and Sagadeva Gounder v. Arjuna Gounter* (2003) ILW 408 (Mad. HC).

complicated and technical branch of law. The author, with his skill, has discussed it in a most systematic and simplistic manner. The added attraction in the work is annexures.

The book, indeed is a scholarly presentation of specific issues relating to Hindu law and Muslim law. It has been published in a flawless fashion and written by the author in a very precise and legalistic language, which is rarely to be found. The reviewer has no doubt that the book is a useful literature for the student in general and lawyers, judges and academic scholars of Hindu law and Muslim law in particular. This is highly recommended for all law libraries being a good reference work with strenuous research contents from the original sources of works in the fields of Hindu law and Muslim law.

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