

WOMEN'S RIGHTS TO DWELLING HOUSE UNDER THE HINDU SUCCESSION ACT, 1956

Narsimha Murty v. Susheela Bai, AIR 1996 SC 1826 — A Comment

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The three essential and basic requirements for the respectable existence of any person are food, clothing and shelter. Amongst all three, the security afforded by the roof has an unmatched importance, yet there is no denying the fact that it is hardest to obtain. The true test for economic emancipation and independence therefore lies not only in the ability of a person to earn a livelihood but also in the ability to acquire a place to live. All the more relevant and important is the case of a woman, as the foremost problem confronting her in the event of a matrimonial discord followed by a voluntary or forced decision to leave the matrimonial home is where to go? Acquisition of a temporary accommodation is comparatively easier for a man than a woman, for socio-economic reasons. Economic dependence and dependence for a shelter, remains one of the chief factors for the subjugation of an Indian woman. As inheritance does contribute a lot to the acquisition of property, it becomes necessary to analyse, how the legislature helps a woman to gain a roof over her head and how the judiciary interprets the related provisions.

It is an evident fact that there is a marked deviation between what is the reality and what is the projected image of the Hindu Succession Act, 1956 (hereinafter referred to as HSA). A common belief is, that after 1956, a daughter under the HSA is treated at par with the son and that Hindus being progressive in nature and amenable to social change with ease, Hindu women are better placed in comparison with their sisters under other personal laws. Reality however is opposite. Every conceivable effort has been made successfully by the legislatures to deny women their rightful share in the property of their parents in the presence of male heirs by providing various exceptions to the general rule of equality of the son and daughter. It has rightfully been observed.

Hindu society is a peculiar society. It says something and does something else.¹

Under the HSA, the general provision is, that the rights of the son and the daughter are equal.² It is without reference to the type of property available for

succession. An impression is created therefore, that whatever may be the type of property, be it a house, cash, clothes, vehicle, shop or even household goods, a daughter has an equal claim over it not merely of ownership but also of a right to possess, enjoy and alienate it in the same manner as a son. The reality however is somewhat different while going through section 23 of the HSA.

Section 23 of the HSA reads :

“Special provisions respecting dwelling house

Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his property includes a dwelling house wholly occupied by members of his or her family, then notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir should be entitled to a right of residence therein; provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.”

Accordingly, the right of ownership of a female class-I heir is narrowed down to a right of residence only. What they are denied is a right to have their shares partitioned and specify it, and alienate it till the male heirs choose to divide the rest of it among themselves. Where the female heir happens to be a daughter, her ownership is without a right of residence and demarcation of her share unless she is unmarried, widow, or is deserted by or is separated from her husband. The purpose envisaged by the legislature for enacting this provision is to prevent married daughters from coming back on their own to the dwelling house and to defer its actual partition until the male members occupying it choose to destruct their joint status. The reason for the inclusion of this section in the HSA was explained by the Madras High Court in *Mookkammal v. Chitravadivamma*³ in the following words :

Section 23 of the Hindu Succession Act, appearing in the chain of sections of the codified Hindu law is intended to respect one of the ancient Hindu tenets which treasured the dwelling house of the family as an impartible asset as between a female member and a male member. In order to perpetuate that memorable intentions of Hindu families, Parliament took that auspicious aspect into consideration while codifying the Hindu Law.

That it is based on an ancient tenet; and its impartibility is to be preserved only between a male and a female and not between males only is therefore

accepted and upheld by the judiciary. Out of many respected ancient tenets, this selective inclusion in a modern legislative enactment is in itself questionable.

The practical implication of this statutory interdict on a female heir to claim partition of the house, till the males decide otherwise results in the denial of any claim of enjoyment of this house. They have its ownership in paper, but no right to have the share ascertained. Married daughters claims are further watered down by taking away even a right of residence. Further, there being only one male heir, the fact of partition would never arise and the female heir has not the ghost of a chance to take her share. The Orissa High Court in *Mahanti Matyulu v. Oluru Appanawa*,⁴ observed :

In case of a single male heir there is no possibility of that male heir claiming partition against another male heir, as there is none and if in such a case the right to claim partition by the female heir is restricted it would practically destroy and deny that right forever.

Discussing the practical implication of the denial of such right the High Court further observed :

[The] legislature having given the female heirs absolute rights of inheritance in one hand could not have taken away the same by the other. In case of property descending on more than one male heir along with one or more female heirs, the female heir or heirs would get her or their share partitioned as and when the male heirs chose to divide their respective shares in the dwelling house whereas in case of a single male heir inheriting the dwelling house with one or more female heirs the latter would remain owners in pen and paper but cannot exercise and act of ownership except residing therein which right in rare cases can be rarely exercised.⁵

However, a contrary observation made by the Madras High Court shows the inclination of the judiciary to have a restrictive interpretation of the word "heirs" and thus deprive the daughters of their lawful share for giving it to the sons. In *Janabai Ammal Gunabooshni v. T.A.S. Palani Mudaliar*,⁶ the judgement was delivered by a division bench comprising of Ratnavel Pandial J. and Venugopal J. They held:

Even in cases where there is only one male heir of the intestate in a Hindu Joint Family, the female heirs cannot claim partition of the dwelling house until the male heirs choose to divide their respective shares therein. Section 23 cannot be deemed to have intended that the restriction is to operate only if there are two or more male members (heirs) in the family of the intestate and not when there is a single male heir. Acceptance of contrary view will cause gross

injustice to the single male heir and the very object with which the section has been enacted would be completely nullified. In such cases the hardship that would be caused to the female heir in not being able to claim partition is certainly relatively less than the injustice that could be done to the single male member.

What is noteworthy here is that the judiciary was concerned, that if the brother (who is the owner of half of the property only) is not allowed to use and occupy the share of his sister (who is the owner of the other half), it will cause gross injustice to him. But where the sister is not allowed at all to use, or even occupy her own share, the hardship to her is less than the hardship of the brother. Since when, is our judiciary advocating, that a person on his own should be allowed to use and occupy somebody else's property without her consent, and they have not stopped at the share of the sister. They have extended the application of section 23 to all class-I female heirs, including the mother and the widow of an intestate. Even a mother is incapable to have her own share ascertained and rent it out if she is financially not independent, without the consent of her son. The same goes for the intestate's own widow. Does the judiciary really understand the implication of this interpretation and the judgement? They are not only interpreting section 23, but are justifying the right of a brother, son or a grandson to enjoy the share and property of somebody else (sister, mother, or the grandmother) against her wishes. It is unconstitutional and violates her rights to own and enjoy her property.

Such reasoning appear to be incorrect on the face of it. The sister is not even looking at the share of the brother. She wants what rightfully belongs to her as she is also the progeny of the same parents who were the owner of the house. Yet our legislature and judiciary tell her to wait till her brother on his own decides to give her her share. The brother on the other hand has his share well protected, and is using the share of the sister also and if he is not allowed to do so, the judiciary says it is injustice to him. What is the job of the judiciary? To dispense justice or injustice, one fails to understand. Recently, in *Narashimaha Murthy v. Susheelabai*⁷, the Supreme Court had the opportunity to interpret section 23, and hopes were raised of women that the court would give an interpretation, which would do justice, and would not jealously guard the interests of men at the cost of doing injustice to women. Unfortunately the court not only adopted an orthodox approach, but went on to hold that the expression, "*Male heirs*" used in section 23 includes a single male heir, and even where the intestate has left behind a single male heir; and though the fact of partition would never arise; the sister has no option but to wait till the brother on his own decides to give her, her share. The Hon'ble judge failed to note, that the matter had come to the court only because the brother had refused to part with her share, and has been contesting on the grounds of incapability of the sister to

effect a partition. If a man refuses to give to his sister what rightfully belongs to her, and when she approaches the court for justice, contests her claim, and seeks assistance from the court to take her share, taking shelter behind section 23, should it be proper for the court to say, that she has to wait till the brother on his own decides to give her share. If he doesn't do it now, why will he do so in future? Can the court extract a promise from the brother that in future, he should give the share to the sister? To quote the court :

The purpose of law is to prevent brooding sense of injustice. It is not the words of the law, but the spirit and internal sense of it that makes the law meaningful. The letter of the law is the body but the sense and reason of the law is the soul. Therefore, pragmatic approach would further the ends of justice and relieve the male or female heir from hardship and prevent unfair advantage to each other.⁸

High sounding words do not really dispense justice when the end result is overshadowed by parochial and orthodox attitudes. Unfortunately, the court could not interpret the spirit and internal sense of law to do justice, despite claiming that a pragmatic approach would further the ends of justice. The court ended up adopting an orthodox approach taking shelter behind ancient tenets and protecting their sanctity.

The court further held that the daughter would also like to preserve the sanctity of the dwelling house, so it should not be partitioned at her insistence:

The reverence to preserve the ancestral house in the memory of the father or the mother is not the exclusive preserve of the son alone. Daughters too would be anxious and more reverential to preserve the dwelling house to perpetuate the parental memory.

By filing a suit for partition of this dwelling house, she had made it amply clear to the court that she does not want in the present circumstances to preserve its sanctity, yet the court presumes, something exactly contrary to what is intended. Further, does not the sanctity of the house get lost if two brothers partition it. How the sanctity of the house would be effected if the sister, or the mother, or the widow of the intestate seek a partition? K. Ramaswamy J. gave various examples to show how the application of section 23 as interpreted in the current case would prevent the brother from being thrown on roads. He held:

Take a case of a Hindu male or female owning a flat in metropolis or major cities, like Bombay etc. with two room tenement, left behind by a Hindu intestate. It may not be feasible to be partitioned for convenient use and occupation by both the son and the daughter and to be sold out. In that event the son and his family will be thrown

on streets and the daughter would coolly walk away with her share to her matrimonial home causing great injustice to the son and rendering him homeless/shelterless. With passage of time, the female members having lost their moorings in the parental family after marriage may choose to seek partition though not voluntarily but by inescapable compulsions and constrained to seek partition and allotment of her share in the dwelling house of intestate father or mother. But the son with his share of money may be incapable to purchase a dwelling house for his family and the decree of partition would make them shelterless.

Take yet another instance, where two room tenement flat was left by the deceased father or mother apart from other properties. There is no love lost between brother and sister. The latter demands her pound of flesh at an unacceptable price and the male heir would be unable to buy of her share forcing the brother to sell the dwelling flat or its leasehold rights interest to see that the brother and his family are thrown into the streets to satisfy her ego. If the right to partition is acceded to, the son will be left high and dry causing greatest humiliation and injustice.

Regrettably, the above observation appears to suffer from a bias against the sister from the language used in the examples, *i.e.*, *the daughter would coolly walk away with her share to the matrimonial home, to see that the brother and family are thrown on the streets to satisfy her ego*. These are prejudiced assumptions, which shows a woman (sister) as unconcerning and deliberately vindictive.

Further, in all these examples the judiciary failed to visualise one situation. What would be the outcome of the two instances, if instead of there being one brother and one sister, there were only two brothers? Would it not be inconvenient for them to partition it? Would not one demand his pound of flesh, at an unacceptable price, forcing either of them to sell the dwelling and rendering both of them homeless? Wouldn't the ego of one of them be satisfied in this manner? What solution would the court provide? Rule of primogeniture?

In the second example, the court makes a presumption, that there is no love lost between brother and sister and therefore the sister would demand her pound of flesh. When the relations are strained, who is responsible for it? The court has painted a pathetic picture of the brother, which is one sided and unrealistic. The reasoning and examples appear to be weighted from the side of the brother rather than based on rationale judgement. According to the reasoning, as the sister demands an unacceptable price, the brother would be

unable to buy her share, which indicates that if she had demanded the market price, it would have been possible for him to buy her share. What is the problem visualised in this situation then by the court? He is the owner of half of the flat and has the money to buy another half at the market price; combine the money; and buy another flat. Or even if that does not happen, being the owner of half of the flat, be content to live in that half. He should be satisfied with what rightfully belongs to him. Neither the court nor anyone else for that matter should help people to grab the share of somebody without her consent. Is there even a remote chance of the brother being thrown on the roads in any case. The answer to that is in the negative. Even by demanding her pound of flesh or by asking for her share, is the sister trying to grab the share of the brother? The answer to that is also in the negative. Rather, it is the brother who is grabbing her share in the reality.

Both the brother and sister are from the same parents and it is the property of these parents which is the subject matter of inheritance. What could be the basis of denial to the females their right to ascertain their shares. The reasons given for the inclusion of section 23 in the Act, were that the daughter leaves the house of the parents on marriage and joins the husband's household. Secondly, the son has the responsibility of maintaining the parents, while the daughter does not have the same, and that the relations between the brothers and sister would become strained if she is given a share in the property of her parents leading to unpleasantness and litigations. Some observations of the parliamentarians discussing the Hindu Succession Bill are worthy of examination here:

What we honestly feel is that when you marry your daughter she goes to another family. Spiritual sacrament means a re-birth. She is re-born and she becomes part and parcel of that family organisation. She ceases to be a part of your family organisation both in law and according to religious precepts.⁹

One has to see that once a woman becomes a wife and then a mother her allegiance is to that new family and we cannot expect that she will look back to the family from where she had gone. This is the fundamental question to be decided. If this house is pleased to find that a married woman owes more allegiance to her husband, it is dead certain that her interests either in the property or in anything else must be there and not here.¹⁰

We know that the son and the daughter; both are the citizens of India and should have equal rights, but at the same time we should also see whether their duties and obligations are also equal? In accordance with our social pattern, the duties of the daughter are towards

her husband's family after marriage and is negligible towards her parents. So the moment she marries and goes to her husband's family her rights in the father's property should cease.¹¹

A daughter should not get a share in the property of the father when she is married. ... If she is married in another family she should get the property of her father-in-law there. Why should she come back when there are brothers here? That would lead to disruption....¹²

If a share is given to the daughter in the family property what will be the result? The results would be first of all that the daughter after getting married in another family will not be able to manage the property. She will be like an absentee landlord. Apart from her being unable to manage the property, the son-in-law or the person to whom she is married will bring about trouble and dissensions in the family.¹³

If it is the fact that daughter leaves the house of her parents on marriage and goes somewhere else, why is the disability imposed on the mother of the intestate or the widow of the intestate, who not only are living here but have already spent a longer time period in the house, in comparison with the son, and have no likelihood of leaving it in future? Secondly, why is the restriction not operative on a son, who separates from his parents during their lifetime, and lives elsewhere with his family members? Thirdly, the Court recognises the duty of the daughters and imposes it on her, when it comes to maintaining her parents, on exactly the same lines as on the son, but adopts a differential treatment, when it comes to giving her the inheritance rights, in the property of these very parents, by making it subject to the rights of a son.

When it comes to acquiring a roof over ones head, the trend of the judiciary is very surprising. A married daughter has no right of residence let alone to partition and possession of the inherited dwelling house; in presence of her brothers, a married woman has no right of residence in the matrimonial home owned by the husband without his consent. In a Bombay case,¹⁴ the husband threw the wife out of the house and prevented her from re-entering it. She sought the help of the court to obtain an *ad interim* order restraining her husband and in laws from turning her out or trying to prevent her re-entry. The husband's appeal against the order of the trial court was granted in his favour. Rejecting the wife's claim that she should be entitled to live in the house, the court observed :

If this argument is accepted in all its implications, it would be impossible to prevent public disorder on a very wide scale. Today it is a case of wife entering her alleged matrimonial home. Next it

will be others, including persons with all sorts of claims, existing, bonafide, dubious and dishonest. A state subject to the rule of law cannot permit this to happen - nay not in the name of feminism nor for the protection of the deserving.

The decision is extremely relevant in the Indian context as women have been made completely dependent on the men for a roof over their heads, even in situations where they own the property. The first problem that an Indian woman is confronted with, whenever she decides or is forced to leave the household of the husband in the event of a matrimonial problem is, where to go? Many women are compelled to choose a violent home as their abode, as the other alternative for them is the roads.

It is ironical that the judiciary, while justifying the denial to the married daughters, a right of residence in her property, occupied by the brothers has come up with a totally absurd and unacceptable argument. The Karnataka High Court held:¹⁵

The object of this proviso would be defeated and it will encourage the married daughters to desert their husbands or live separately from their husbands, if it is held that the daughter living on her own accord separately from her husband is entitled to a residence.

One wonders, what possible connection the court had in mind between the two; a woman's right to possess her property and her marital relationship with the husband. It means that if a woman for whatever may be the reason decides to live separately from her husband, she is to be denied a right of residence in her own property. The judgement suggests that no alternative roof should be made available to a married woman, not even in her own property or she might be encouraged to desert her husband. With one judgement, the court here has protected the right of the husband to have the company of his wife against her wishes and by the same judgement, given to another man, *i.e.*, her brother a right to use and occupy her share in the property, against her wishes. Would the court apply the same analogy to a man? Can some similar suggestion be expected from the court to discourage a man from deserting his wife? On the same analogy, if a son deserts his wife, should he also be denied the inheritance rights in the property of the parents? Would it be acceptable to anyone? The trend shows that the judiciary is overactive to protect a man's interests, when it comes to control over property. Every conceivable effort is made to deny a woman a roof over her head in her own right. It is an extremely unfortunate situation. Another apprehension of the legislature was that the conferment of the right of residence in favour of the daughters would result in the introduction of strangers in the house. A few observations of the parliamentarians at the time of the discussion of the Hindu Succession Bill are note worthy here:

The brother-in-law and the persons who belong to the family wherein our daughters are given will pounce upon the property of the father-in-law. There are litigations because the daughter is given the property. Females are not educated and they have not had the experience of litigation.... It is but natural that the husbands of such females would like to have the loaf of the property of the family from which the female has come to the other family. This would cause a great nuisance and great unhappiness and trouble to the society.¹⁶

If the daughter and the daughter's daughter etc. are given share in the immovable property (house) it will result in new elements coming into the family, the family system would be disrupted, there will be disorder in the family, and it will breed ill will, hatred etc.¹⁷

It will have a very disturbing effect on the agrarian set up in this country. If you give the share to the married daughter, are you not making the son-in-law a co-sharer in the family property? It will have a very disastrous effect.¹⁸

The brothers, two or three may stay together for some time, but the difficulty will arise when there are two daughters and two sons and only one house.... How can the property of a man be divided among two sons and two daughters if he dies leaving one house.... How can the house be divided.¹⁹

Don't proceed on equality, otherwise you would be in trouble. It is not a question of equality, it is a question of giving the rights according to the social pattern. If you proceed on equality, everything would be spoiled.... If you give the same rights to the daughters as to a son there will be uneasiness and tensions in the country and every family will be ruined with litigation.²⁰

The present social set up having vastly changed, the apprehensions of the parliamentarians also need to be examined in a different light. Noteworthy is the fact, that presently, more sons are separating from their parents, alongwith their families for a variety of reasons ranging from considerations of employment, settling abroad, or even a desire to lead an independent life. A married daughter's status is exactly equal to that of a separated son, separated not voluntarily but due to the social custom. Yet, while the legislature chose to restrict the right of the daughter it has not put any impediments on the rights of even a separated son from partitioning the parental house. From the coparcenary property, a son is handed the share immediately, on his separation; and his rights in the separate property are also well protected. Further, if the

basic reason for the denial of this right to married daughters was only that the property will go out of the family, why is this prohibition not extended to a married daughter's son. Under the Act, a deceased daughter's (marital status irrelevant) son and daughter are the class-I heirs. The prohibition to ascertain her share and a denial of right of residence in this property is appended to a daughter, and also to a daughter's daughter, but a daughter's son does not suffer from any of such disability. For example, a man having a son and a married daughter dies and leaves behind a dwelling house, the daughter being married has no claim of residence and partition of the house even though she is the owner of half of it, but if she predeceases the intestate and is survived by a son and a daughter both these children would be the class-I heirs with the intestate's own son. Her son belonging to a different family and definitely having the capability to take the property out of the family, is capable of not merely effecting a partition of the dwelling house but also of residing in it or alienating it if he so desires, yet the daughter's daughter who along with him inherits exactly the same portion of property, is incapable to partition it, because according to section 23, a "*female*" is incapable to partition her inherited dwelling house in presence of the male members. That the restriction to have their share ascertained is on females and not merely daughters is evident as the prohibition applies to all class-I female heirs, including the widow of the intestate and his mother. The house is usually constructed by the husband and wife with their joint efforts irrespective of whether she is a housewife or gainfully employed outside her home. In case of working couples a similar pattern is followed. If a land or house is bought for construction out of mutual savings usually it is in the name of the husband for various reasons, predominant being that the owner of the house deals with the land authorities or the taxation authorities, and a man would definitely be in a better position to do that. Little does a woman know that she will be denied the right to have her share demarcated or exercise any control over the very house which was constructed jointly by the wife and husband legally, the moment the husband dies and the son takes over the control of the house. One fails to see the reason, why the widow or the mother have been denied the right to have their share partitioned, as a demarcation and partition of their share; a right to rent it or sell it can always help them economically.

The policy adopted by the legislature seems to conserve the property rather than acknowledge the rights of the deprived that is the females. Smt. Subhadra Joshi, during the parliamentary debates on section 23 of the Hindu Succession Bill had said;

For the past two hours, I have been observing with sadness that property is everything in this world. Is it more important than a human being? If the daughter or the wife gets the property, question

is raised, what will happen to the property. Nobody asks, what will happen to the daughter, to the mother or the wife. The property has become more important than a human being today. This is the time when we must realise that the property is for the human being and the human being is not for the property.²¹

An analysis of section 23 of the HSA and its interpretation shows that it was not only Manu, who advocated dependency for a woman, the present day legislature and the judiciary also not only advocate but are actually making complete dependency a rule for a woman for a roof over head on the men. During childhood on the father, during adulthood on the husband or on the brother, and in the advanced age on the son. And in doing that, they do not even hesitate to snatch what rightfully belongs to the female and give it against her wishes to the male counterpart. The constitutional guarantees of equality of law, and equal protection of laws are again meaningless for a Hindu woman so far as section 23 is concerned.

NOTES AND REFERENCES

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1. Sh B.S. Murthy, L S D (1995) Part-II at 8326.
2. See sections 8 to 13 of THE HINDU SUCCESSION ACT, 1956.
3. AIR 1980 Mad 241.
4. AIR 1993 Ori 36.
5. *Ibid.*
6. AIR 1981 Mad 62.
7. AIR 1996 SC 1826.
8. *Id.* at 1832.
9. Sh. N.C. Chatterjee, LSD, Part-II at 8142.
10. Sh. Lok Nath Mishra, LSD Part-II at 8201
11. *Id.*, Sh. S.N. Das at 8221-22.
12. *Id.*, Sh. Altekar at 8239-41.
13. *Id.*, Sh. Mool Chand Dube at 8257.
14. *S.P. Jain v. N.I. Jain* AIR 1987 Bom.
15. *Kamma v. Veeramma*, AIR 1992 Karn 362.
16. *Id.*, Sh. Bogawat at 8211-12.
17. *Id.*, Sh. Lakshmayya at 8209.
18. *Id.*, Sh. Sadhan Gupta at 8139.
19. *Id.*, Sh. Dabhi at 8322.
20. *Id.*, Sh. Thakur Das Bhargava at 8045.
21. *Id.*, Smt. Subhadra Joshi at 8086.