

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2015

CORAM

THE HON'BLE Mr.SANJAY KISHAN KAUL, CHIEF JUSTICE
and
THE HON'BLE Mr.JUSTICE M.M.SUNDRESH

W.P. No.14984 of 2009
& M.P.No.1 of 2009

Mr.Dr.G.Krishnamurthy ..Petitioner

Versus

1.The Union, Rep. By its
General Secretary,
Government of India,
New Delhi-110 001.

2.The Secretary to
Law Department,
New Delhi-110 001.

..Respondents

Petition filed under Article 226 of the Constitution of India, praying for the issuance of a writ of declaration to declare the Hindu Succession (Amendment) Act 2005, Act 39/2005 as ultra vires of the Constitution.

For Petitioner :: Mr.Dr.G.Krishnamurthy,
Petitioner in person

For Respondents :: Mr.S.Haja Mohideen Gisthi

O R D E R

(Order of Court was made by M.M.Sundresh.J.,)

The petitioner in person, a practitioner of law in this Court, has filed this pro bono publico seeking to declare the Hindu Succession (Amendment) Act, 2005 (39 of 2005) as ultra vires the Constitution of India.

2. On 20th day of December, 2004, the Hindu Succession Amendment Bill 2004 has been introduced, inter alia, seeking to amend the erstwhile Section 6 and to omit Sections 23 and 24 of the Hindu Succession Act, 1956. Ultimately, the Amendment Act, 2005 was passed as the Act 39 of 2005 on 09.09.2005. This Act was introduced

pursuant to the recommendation made by the Law Commission to alleviate the gender bias caused by the then existing Act. The following is the statement of object and reasons for amending the "Principal Act".

"STATEMENT OF OBJECTS AND REASONS: The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession 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 Hindu Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act-lays down a uniform and comprehensive 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 Nambudir laws. The Act applies to every person who is a Hindu by 28 of 72 SA.566.2011 religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Parathana 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 religion. 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, 1925.

2. Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognizes 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 to. 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 of 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.

3. It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act,

1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the said section so as to remove the disability on female heirs contained in that section.

29 of 72 SA.566.2011

4. The above proposals are based on the recommendations of the Law Commission of India as contained in its 174th Report on 'Property Rights of Women: Proposed Reform under the Hindu Law'.

5. The Bill seeks to achieve the above objects."

3. By the Amendment Act, not only Section 6 was amended apart from omission of Sections 23 and 24, but consequent thereon, an insertion was made by way of Amendment to Schedule in Clause-I.

4. For the purpose of convenience, the amended provisions of Section 6, unamended provisions of Sections 23 and 24 and amended Schedule qua Clause-1 are reproduced hereunder.

"6. Devolution of interest of coparcenary property.-

(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,-

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained

in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

Explanation. -For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation. -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.]

Objects and Reasons - This clause, which is new, is consequential upon the omission of clause 5(i), clause 5(i) in the original Bill was as follows:-

"5.This Act shall not apply to (i) any joint family property or any interest therein which devolves by survivorship on the surviving members of a coparcenary in accordance with the law for the time being in force relating to devolution of property by survivorship among Hindus."

It makes it clear that this Act does not in any way interfere with the special rights of those who are members of a Mitakshara coparcenary except to the extent that it seeks to ensure to a female heir, if any, who would be entitled to succeed under the provisions of this Act, to a rightful share in the property of such a coparcenary.....

23. Prior to its omission, S.23 read as under--

"23. Special provision respecting dwelling houses. - Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her 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 shall 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."

24. Prior to its omission, S.24 read as under--

24. Certain widows re-marrying may not inherit as widows. -Any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has re-married."

"THE SCHEDULE
(See Section 8)

HEIRS IN CLASS I AND CLASS II

Class-I

Son, daughter, widow, mother, son of a pre-deceased son, daughter of a pre-deceased son, son of a pre-deceased daughter, daughter of a pre-deceased daughter, widow of a pre-deceased son, son of pre-deceased son of a pre-deceased son, daughter of a pre-deceased son of a pre-deceased son, widow of a pre-deceased son of a pre-deceased son."

5. The petitioner submitted that by the amendment made to Section 6, the entire concept governing the Hindu Law is sought to be overturned in one stroke. The principle governing '"Sapinda"and '"coparcener"' as existed in the Shastric and Customary Law has been obliterated by a single stroke. Upon removal of Section 23, it is likely that a Hindu woman after remarriage would continue in the dwelling house wholly occupied by the members of a family of a Hindu intestate. There is also a possibility of a non Hindu residing therein in view of the possible remarriage of the widow.

6. Coming to Section 24, the petitioner submitted that by providing rights to the widows even after their remarriage to inherit the property of an intestate, the concept of the very fabric of Hindu Joint Family would be destroyed. The petitioner further submitted that there is a discrepancy in Class-II of the Schedule as certain legal heirs of a male member have not been included.

7. The learned counsel appearing for the respondents submitted

that the averments made in the affidavit filed in support of the writ petition are very vague. There is a presumption in favour of an enactment which has not been dispelled successfully by the petitioner. A mere hardship cannot be a ground to declare the valid legislation as ultra vires. The petitioner has not demonstrated any legislative incompetence and colourable exercise of power. The enactment has been made to remove the inequality as mandated by Articles 14, 15(2) and (3) and 16 of the Constitution of India. Thus, the Act seeks to remove discrimination against woman and provides equal treatment, as enshrined in part III of the Constitution of India.

8. Heard the petitioner in person and the learned counsel appearing for the respondents and perused the affidavit filed by the petitioner.

9. As rightly submitted by the learned counsel appearing for the respondents, we do not find any sufficient ground mentioned in the

affidavit filed to declare the Act as unconstitutional. The enactment has been made on the recommendation made by the Law Commission to remove the discrimination meted out to women. Therefore, in order to uphold the protection given under Articles 14, 15 (2) and (3) and 16 of the Constitution of India, the amendment was brought forth. It is trite that the provisions of the Act would prevail over the old Hindu Law. Though the conferment of the rights to a Hindu woman is belated, it is also gradual through different enactments.

10. By the Hindu Law of Inheritance Act 1929, inheritance right to three family heirs-son's daughter, daughter's daughter and sister was conferred.

11. The next legislation "A Hindu Woman's Right to Property Act, 1937" provided for the right of the Hindu widow to succeed along with the son of the deceased in equal share to the property of a deceased husband. Though the Hindu Succession Act, 1956, (hereinafter referred to as "the Act") came into being, under Section 6 the rights of women were restricted. Thus, the new amendment Act was introduced to bring forth an element of equality between a Hindu man and woman. As the enactment has been made to implement the fundamental rights enshrined in the Constitution of India, we do not find any force in the submissions of the petitioner insofar as amendment made to Section 6 of the Act.

12. Coming to Section 23 of the Act, it has been omitted to remove the disability on female heirs. The said decision was made keeping the larger public purpose in mind. As under Section 6, the difference between the son and daughter has been removed, Section 23

of the Act has been rightly taken away from the statute book. Section 23 of the Act is only a mere disabling provision and accordingly, it was rightly removed by the Amendment Act. Considering the scope of Section 23 of the Act, the Supreme Court in SHEELADEVI V. LAL CHAND ((2006) 8 SCC 581) has held as follows:-

"71. After referring to the Report of the Law Commission and the Statement of Objects and Reasons of the Amendment Act of 2005, the Supreme Court made the following observations in paras 25, 26, 40 & 55 :-

25. It is, therefore, evident that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act.

26. Section 23 of the Act has been omitted so as to remove the disability on female heirs contained in that Section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparcenary property is concerned has been sought to be removed, we fail to understand as to how such a disability could be allowed to be retained in the statute book in respect of the property which had devolved upon the female heirs in terms of Section 8 of the Act read with the Schedule appended thereto.

40. It is merely a disabling provision. Such a right could be enforced if a cause of action therefor arose subsequently. A right of the son to keep the right of the daughters of the last male owner to seek for partition of a dwelling house being a right of the male owner to keep the same in abeyance till the division takes place is not a right of enduring in nature. It cannot be said to be an accrued right or a vested right. Such a right indisputably can be taken away by operation of the statute and/or by removing the disablement clause.

55. Even otherwise, it is not a fit case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India as the fact remains that Section 23 of the Hindu Succession Act as it stood was to be applicable on the date of the institution of the suit.

Respondents may file a new suit and obtain a decree for partition."

13. Section 24 of the Act once again created a statutory discrimination against widows remarrying qua inheritance. This was rightly removed as a woman cannot be non suited to get a property on her remarriage. In other words, by such a remarriage, the entitlement of the widow cannot be extinguished. Accordingly Section 24 was rightly removed from the text. The petitioner has merely sought to challenge Sections 23 and 24 of the Act on mere presumption and conjunctures.

14. The petitioner has also submitted that a discrimination is sought to be made with respect to Class-II. He has also submitted that Class-I by the inclusion of certain categories of heirs has to be declared as unlawful. We do not find any merit in the said submission. In fact, the petitioner has admitted that the laudable object in treating a Hindu man and woman on par has to be appreciated. If that is so, there cannot be any challenge to Class-I of the schedule. Class-I of the Schedule is only consequent upon the amendment made to Section 6. It only qualifies the heirs, who are entitled to a property as in Class-I in consonance with Section 6. Class-I has never been amended and there is no challenge to it. Therefore, the challenge to the said inclusion made to Class-I of schedule is also rejected.

15. A challenge to the constitutionality of an enactment is to be made on the touchstone of the Constitution. It cannot be done based upon mere presumptions. Equally, a mere hardship cannot be a ground to declare a valid legislation to be ultra vires. The petitioner has not dispelled the presumption in favour of the enactment. Therefore, we do not find any valid ground to declare Act 39 of 2005 as unconstitutional. Accordingly, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

(raa)

To

1.The General Secretary,
Union,
Government of India,
New Delhi-110 001.

2.The Secretary to
Law Department,
New Delhi-110 001.

+1 CCTO MR.S.HAJAMOHIDEEN GISTHI ADVOCATE SR NO7958

W.P. No.14984 of 2009

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