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REMEDIES OF AN HEIR UNDER HINDU AND MUSLIM LAW: AN ANALYTICAL STUDY

UDITANSHU MISRA

NATIONAL LAW UNIVERSITY AND JUDICIAL ACADEMY, ASSAM

UJJWAL MANI TRIPATHI

NATIONAL LAW UNIVERSITY AND JUDICIAL ACADEMY, ASSAM

ABSTRACT

Several years have gone by and the same has resulted in some radical changes in the area of laws pertaining to succession for both Hindus and Muslims as they arise from increase in the process of litigation and judicial interpretation. Though in India, we see that religions are heterogeneous and same is the case with caste, birthplace and marriage, the laws pertaining to succession are humongous in terms of volume as well as interpretation and implementation. This article covers various situations that may arise when a property is distributed. The article defines an heir and discusses testamentary and intestate succession. Moreover, the article discusses at length, the situations for partition and reopening of partition in regards to both Hindu and Muslim Law. We have seen as to how the law in regards to woman and their succession shaped with time for both Hindu and Muslim women. Lastly, the article discusses at length, the laws pertaining to women's rights in the property belonging to the family as per the Hindu and Muslim believes. This article is a wholesome attempt at discussing various situations and laws in regards to the remedies that an heir has under both, Hindu and Muslim Laws.

Keywords: Coparcener, Succession, Legal Heir, Hindu Law, Muslim Law

INTRODUCTION

Testamentary and intestate succession laws vary according to different personal law since they are not uniform. People of different religion are treated by different succession laws. Many different succession laws are applicable in India according to religion besides this Scheduled Tribes are treated differently as they are governed by their customary laws. In India there are people of five different religions out of which Hindu and Muslim forms 95% of the total population. Each Hindu and Muslim has their own different laws further these laws are divided based on sex of intestate, their domicile, and the type of marriage they might have undergone.

There have been some radical changes in both the Hindu as well as the Muslim succession laws because of the various and different kinds of issues or disputes that has arose over the period. Hence this article deals with the different kind of issues that may arise for an heir in distribution of property. This article deals with the finding of the remedies that is available for these heirs in the situation where he has been devoid of his rightful share. This article also deals with the increasing rights of women in family property.

WHO IS AN HEIR?

The person who is legally entitled to inherit some or all the property of someone who died intestate without making a will is known as an heir. In that situation the heir receives the property according to the law of the state. Children, relatives, or other close family members usually come under the purview of heirs.

When there is more than one heir with a similar relationship to the deceased, for example, the situation when there are two siblings, those people regularly split the estate equally. The bit of a deceased individual's estate that is given to an heir is known as a legacy or inheritance[1].

[1] Julia Kagan, *Heir*, INVESTOPEDIA (Sept. 29, 2019, 10:04 PM), https://www.investopedia.com/terms/h/heir.asp.

When Hindu male dies intestate: Under Hindu Succession Act legal heirs are well defined. Two classes which categorize all the different kinds of relations are class I and II. Class I heirs enjoys the first right over the property of the intestate. The property devolves on the heirs of Class II only when there is not even a single Class I heir available. When heirs of both these classes are not available then the property devolves upon cognates and agnates.

When Hindu Female dies intestate: The intestate property of the female devolves according to following rules:

1. Daughters and Sons which includes the children of pre-deceased daughter and pre-deceased son.
2. Husband's heirs
3. Father and Mother
4. Father's heirs
5. Mother's heir[2]

The principal classes of heir under Muslim law are sharers or Quranic heir, Residuaries or agnatic heirs and Distant kindred or Uterine heirs.

HINDU LAW

RIGHTS OVER SEPARATE AND ANCESTRAL PROPERTY

Separate Property

A person owns exclusively a separate property and therefore has an absolute right to dispose it. The separate property may be obtained from several sources. Mitakshara says regarding self-acquisition that: "Property which a coparcener acquires as a gift from a friend or any nuptials that is without any use or loss to the estate of father, does not devolve upon the co heirs[3]. He can mortgage it, sell the estate[4], gift it to someone else[5], bequeath it by making a Will[6]in favor of

[2]B.M. Mehta, *No Will? Legal Heir Under Hindu Succession Act to Inherit Property*, FINANCIAL EXPRESS, (Sept. 29, 2019, 10:04PM), https://www.financialexpress.com/money/no-will-legal-heirs-under-hindu-succession-act-to-inherit-property/1212610/.
[3]1 DR. ASHOK KUMAR JAIN, LAW GUIDE FOR JUDICIAL SERVICE EXAMINATION, 117 (Ascent, 2018).
[4]MuddunGopal v.RamBuksh, (1863) 6 WR 71.
[5] Rao Balwant Singh v. Rani Kishori, (1898) ILR 20 ALL 267.

anyone, or bestow it for charitable or religious purpose or for the benefit of public in general. This property can be disposed of by the owner in any manner he can even gift this property to anyone who is even not the part of his family. No one can ask for its partition or control its alienation. On his death if he has made any will then in that case the property will devolve according to that will. The testate can even disinherit his own children and wife from his separate property. In such a case where the heirs are denied any right in the property they stand with no remedy since they had mere a *spessuccessionis*.

Ancestral Property

The word ancestral in ancestral property ordinarily means an ascendant in the material as well as paternal line. Property which descended to father from his father or male ancestor such property is called as ancestral property[7].

Ancestral property is a property which is held jointly by the members of the family, all members have some or the other rights over it. Coparcener owns such ancestral property whereas there is right to maintenance of non- coparcener out of the joint family property[8].

Separate property can be merged in the joint family property voluntarily by the coparcener in case there isn't a property which is collectively owned by the joint family, it can be done by putting such property in common stock to an extent which makes it difficult to distinguish it from the ancestral property with the intention to completely deprive himself from enjoying personal and absolute control over it[9].

Separate property cannot be thrown into common stock by non-coparcenary male members and female members,[10] but from the property which is thrown in common stock by the coparceners, they areallowed to enjoy their maintenance rights which includes expenses occurring in marriage and expenses of residence.

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[6]Bishen Prakash Narayan Singh v. BawaMisser, (1873)20 WRPC. 137.
[7] Md. Hussain v Babu Kishva, AIR 1937 SC. 233.
[8]*supra* note 5
[9]K.V. Narayanan v. K.V. Ranganadhan, AIR 1976 SC 1715.
[10]Pushpa Devi v. Commissioner of Income Tax, AIR 1977 SC 2230.

Owner Dying Intestate and Testate

When a property is conferred via a will then that property can be transferred only if the person has claim on the property, which is proved beyond the reasonable doubt. It is the duty of the executors of the will of a dead person, who left behind a will, to ensure that the will is administered and executed as per the wishes of the dead person as stated in the will, given that the contents of the will are legal and nothing in there is with any contradiction with the law.

Testator by making a will leaves or bequeaths his property to the person of his own choice. A Hindu person by will can bequeath all his property. However, his interest in coparcenary in the undivided family property cannot be bequeath.[11]

Partition

In very general terms Partition is nothing but fixing the exact share of every single coparcener of the property. In a Hindu Joint Family, every single coparcener has a right to seek partition and to get his/her share of the entire property or assets. Partition can be initiated in two ways and they are as follows:

- When any coparcener demands that the Karta does a partition and inform him of his portion, or
- All the family members give consent to it.

In the cases where the actual physical partition of the property is not possible in case of the property of HUF then it is the duty of the court to order the sale of the family property in question and distribution of the sale proceeds amongst the coparceners. But this situation is only applicable when the property cannot be partitioned by metes and bound.

It is therefore suggested that all the properties of the family should be stated as HUF property so that if the disposition of these properties are done by a *Karta* without keeping in mind, the interests of other coparceners and the same does something which is not in favor of even a single coparcener, they have a remedy in law.

Whether a coparcener can alienate his share from property of joint family, can a suit for partition be filed by an alienee for not the whole property but a specific property?

[11]Ritesh Agarwal, *Wills and codicils*, LEGAL SERVICE INDIA (Oct. 03, 2019, 7:30PM), http://www.legalserviceindia.com/wills.html.

On this issue the decision varies amongst the different high courts. As per the Madras high court and Bombay High Court, the buyer does not have any right to claim the particular property that has been sold to him in a legal manner. The only protection that can be taken by health is that of a general partition of the interest of his alienor. The only refuge that can be taken by him is that of general partition of his alienor's interests.The explanation for the coparcenary property's unity is that the alienor coparcener cannot be made to have entitlement over a particular property without taking into account the other coparceners. Moreover, the HCs of Allahabad and Calcuttaopine that general partition is not needed.The partition of the interest of alienor's property that have been bought by him in a specific manner, can be demanded by the buyer. The partial partition is the best alternative that is available to the purchaser as he cannot file a suit for partition of a property that he has no interest in. The coparcener, who is not alienating, can also bring a suit for partial partition of the property transferred, against the purchaser. In such a case, general partition is not mandatory. It has been opined that a partition can be demanded by the purchaser not only during the vendor's lifetime but also after he has deceased.[12]

Right to challenge an unauthorized alienation

Alienation can be defined as "it comprises any disposal of joint family property by theKarta, father, sole surviving coparcener or the coparcener of a portion or the entireportion with the help of any omission or act, involuntary or voluntary, envisioned taking part in present or future. It means the transfer of such property without any explanation which leads to annulment of such transfer[13].

The decision-making power of Hindu joint family vests with the Karta. But whenever it's property that is in question, he cannot take all the decisions of alienation of property by himself this is because of the fact that he is not the sole owner of the property and it is jointly owned by every single coparcener of the HUF. The powers given to Karta under Dayabhaga School and

[12]Ria Jain, Alienation of Property, LAWCTOPUS (Oct. 03, 2019, 9PM), https://www.lawctopus.com/academike/alienation-of-property/.
[13]Anubhav Pandey, *Unauthorised Alienation And Its Consequences*, BLOG IPLEADERS (Oct. 03, 2019, 9PM) https://blog.ipleaders.in/alienation-of-property/.

Mitakshara School are same. Karta of the HUF can alienate property on his own only under the following three circumstances:

- necessity (Apatkale),
- benefit of the estate, or
- for performance of indispensable duties.

If certain rights are given to Karta of HUF, then some rights are also given to the coparceners of the HUF, this is done so that there isn't the presence of a power void between Karta and coparceners, i.e., there is no constant power struggle happening between them. The coparceners have three remedies in the alternative:

- Coparcener can seek partition and get separated from joint family when the Karta isintending an alienation although it is not actually affected. The moment he separates himself, his share cannot be sold by Karta.
- Where Karta's act is equivalent to a waste or an ouster[14], restraint can be given to him by an injunction which has been granted by the court in regards to committing such waste. However, while restraining the karta from alienating a joint property a coparcener cannot obtain an injunction.[15]
- Alienation can be challenged by the coparcener on the ground that it is not binding on their shares and is invalid when the alienation of the property is already done.[16]In such cases the burden of proof will lie on the alienee to prove that Karta was well within his power to sell the property.[17]

Before it becomes time barred alienation can be challenged and set aside. A son can challenge the alienation done by his father in 12 months[18] whereas alienation done by karta can be challenged by coparceners within 6 years[19].

Re-opening of Partition

[14]Kailas Chand v. BajrangLal, (1997) HLR. 342.
[15]PethuReddiar v. Kanda Swami, AIR 1950 MAD560.
[16]*supra* note 14.
[17]PethuReddiar v. Kanda Swami, AIR 1950 MAD. 560.
[18]The Indian Limitation Act, 1963, art.126, No. 36, Acts of Parliament, 1963 (India).
[19]The Indian Limitation Act, 1963, art. 144,No. 36, Acts of Parliament, 1963 (India).

Manu under the **Shastric law**, states that '*once a gift and partition is made, once in a marriage a damsel is given is irretraceable and irrevocable*[20].' A partition once effected, unless there is mistake or subsequent recovery of family property or fraud, is final andcannot be reopened on the ground only of inequality of shares.[21] When the shares are not identical and a partition has been done without any malafide intention, or these shares are not properly in harmonyaccording to those established by law then in that case reopening of partition is not available.On following grounds reopening of partition can be initiated:

- **Fraud**

  Partition can be re-opened in case when an unfair advantage is obtained by a coparcener on fraudulently dividing the property on other coparceners. For example,the partition was re-opened in a case where the joint family property was concealed bya coparcener at time of partition so that to attain the undue advantage over the others.

- **Son in womb**

  If the pregnancy is known then till the birth of the child who is in womb the partition should be delayed, but in case the coparceners are against any kind of delay, then the share should be reserved which is equal to the share of the coparceners?A son in the womb can get a partition reopened if the partition was done without the knowledge of him being in the womb and without reserving a share for the same. If such a partition was backed by fraud, then it will be void in nature.

- **Adopted son**

  An adopted son has entitlement over the re-opening of the partition since similar to the rights of a natural son; the adopted son also has the right to claim partition irrespective of whether after his adoption a natural son is born to the father.

[20]ASHOK KUMAR JAIN,*supra*note 3 at 118.
[21]Moro Vishvanath v. Ganesh Vithal (1873) 57BOM HCR 444.

- **Absentee coparcener**

  If a coparcener is absent at the time of partition and no share is allocated to him, he will get the partition reopened.

- **Disqualified coparcener**

  After recovering from his disqualification such as insanity, unsoundness of mind, etc. the disqualified coparcener can call for the reopening of partition after recovering from his disqualification.

- **Minor**

  A decree can be obtained by filing a partition suit by a minor where his close friend can establish the benefit of minor from that partition. Where one member is a minor, partition can be done between family members even without filing a partition suit. Minor can get the partition re-opened if he can show that partition was unfair, pre-judicial or unjust then such partition will be set aside by the court.[22]

MUSLIM LAW

Will is defined by Tayabji as "Conferment of a right of property in a specific thing or in a profit or advantage or in a gratuity to take effect on the death of testator[23]".The absolute authority of disposition by will is not possessed by a Muslim. Under the Shariat law, Muslim can only do away with his net assets to the extent of one-third after the charges of funeral and debts have been paid. The consent of others is required if the property that has been bequeathed, exceeds the one-third. A bequest is void when the entire property is given to one heir and others have been excluded.[24].One-third bequest of a property to an heir requires the consent of other heirs in Sunni Law but not in Shia Law, while for the bequeath of property to a non-heir does not require the

[22]Bishundeo v. SeogeniRai, (1951) 2SCR 548.
[23]ASHOK KUMAR JAIN, *supra* note 3 at 119.
[24]Husaini Begum v Mohd. Mehdi (1927) 49 ALL. 547

consent to be taken under both laws. In case, the marriage of a Muslim takes place as per the provisions of the Special Marriage Act, 1954, the one-third rule is not applicable.

The following are the grounds on which the Court can entertain a challenge of bequest by a legal heir-

a) If a bequest has been made to an heir without the consent of other heirs under Sunni Law
b) Challenge can be given without a justified legal standing if the bequest has been made to a non-heir.
c) A gift made as Marz-ul-maut during the lifetime can be challenged by an heir; as in such cases, more than one-third property cannot be bequeathed.
d) If the rights of a non-heir have been violated and the property has been taken away by the legal heirs for a gift made during the lifetime.
e) If a living legal heir who has an entitlement over the two-third property and has not received the same.

Intestate Death of an Owner

The division of Muslim law can be done into two sects- Laws of inheritance pertaining to Shias and Sunnis. The rules in regards to ineritance are different in both the sects.

Sunni Law

Categorization of Sunni Law can be done as[25]-

A) Primary Heirs
   a) Spouse who survives
   b) Daughter
   c) Father
   d) Mother
   e) True Grandmother and Grandfather How High So Ever
   f) Daughter of Son How Low So Ever

[25] 2 DR. POONAM PRADHAN SAXENA, FAMILY LAW II, 518 (3rd ed., Lexis Nexis, 2011).

g) Daughter of Son's Son
h) Uterine Sisters and Brothers
i) Full and Consanguine Sisters

B) Residuaries
a) Descendants
b) Son of Son How Low So Ever
c) Ascendant Residuaries
d) Father's Descendants
e) True Grandfather's Descendants How High So Ever

C) Distant Kindred
D) Uterine Relations

Under Sunni Law, legal heirs get property in the aforementioned order. Any heir can seek adequate remedy from the court if he/she has the knowledge that his/her due share in the property has not been disposed adequately.

Shia Law

The division under Shia Law is laid down as heirs by consanguinity as well as heirs by marriage. The division of heirs by consanguinity is as follows[26]-

A) Class I Heirs is inclusive of Parents and Lineal Descendants How Low So Ever
B) Class II Heirs is inclusive of True or False Grandparents, Sisters and Brothers and Sisters' and Brothers' Descendants How Low So Ever
C) Class III Heirs is inclusive of Uncles and Aunts How High So Ever and Descendants from both paternal and maternal sides.

Some general rules are followed for doing the distribution-

a) Class II is excluded by Class I and so on.
b) There is always a share for spouse irrespective of Class I, II and III.
c) The remoter in degree is excluded by the nearer in How High So Ever and How Low So Ever.

[26] *Id*. at 519.

d) Simultaneous entries are taken in one class.

Hence, the heir can challenge before the court if such rules have not been followed in the process of the bequest of the property and any specific discrepancy arises.

WOMEN'S RIGHTS IN A FAMILY PROPERTY

Hindu Law

As a part of an undivided Mitakshara, the wife of a coparcener who died before 1937 was entitled to only the right of maintenance from the joint family property under the Hindu Women's Right to Property Act, 1937.When the doctrine of survivorship became applicable, the surviving coparceners took away the share of the coparcener who had deceased under the same doctrine and out of the coparcenary property that the deceased held during his lifetime, nothing was given to his widow. The legislation primarily aimed at giving maintenance rights to the window by conferring upon her, the right of inheritance. The recognition of her maintenance as per the old Hindu law, was only because she was excluded from share in the coparcenary property. Due to the fact that the Act did not extend to agricultural property, a widow who did not have an entitlement over such property maintained her maintenance rights.[27]

The aforementioned Act of 1937, brought changes to the traditional aspects of coparcenary, where the aforementioned doctrine used to be applicable in a strict manner and on the death of a coparcener in an instant manner. As per the Act's provisions where a coparcener has succumbed as a Mitakshara Hindu Joint Family member and left his surviving widow, his widow took his role[28]and as per the application of the doctrine, prevented his undivided interest to go to the surviving coparceners.Though she was not a coparcener precisely, she took the deceased coparcener's share that was subjected to fluctuations and variations with other coparceners in the family dying or being born. As per s. 3(2) of the Act, the right to demand partition of the property was also granted to the widow of the deceased coparcener as she could have claimed the entitled share of the deceased coparcener. The only difference that can be highlighted is that she did not enjoy an absolute ownership like her deceased spouse but had limited ownership which

[27]SarojiniDevi v. Subramayam, ILR (1945) MAD 61.
[28]The Hindu Women's Right to Property Act, 1937, S. 3 (2), No. 18, Acts of Parliament, 1937 (India).

would be terminated upon her death or remarriage.[29]After the partition had taken place, the ownership of the woman was limited which meant that she had an entitlement over the same during her lifetime and the income coming out of it could be appropriated by her for her own use, but the same could not be alienated by sale, gift or will. The interest would descend to her deceased husband's heirs upon her death or remarriage in a manner as her husband would have succumbed on the same day as to when her interest reached termination. A necessary aspect of the Act was thatpost the coparceners' death though his place was occupied by his widow, the coparceners' death and his widow taking his role, signified no contrary or adverse effect on the joint family's status as such.

The Amendment of 2005 removed the discrimination based on gender under Mitakshara coparcenary and providing equal status to female members of Hindu joint family and hence ensured equality enshrined under the Constitution. It gave right of birth equal to that of son, to Females in the ancestral property who are having the status of coparceners. All the daughters whether married or unmarried, have been included under the Amendment of 2005. In order to enable all the daughters, reside or demand partition of the parental dwelling house section 23 was omitted.

Muslim Law

If inheritance rights of women under Muslim law are analyzed in the context of marriage, then it can be understood in the best way. Right of Dower/Mehr is available with Muslim women. It is a payment in property or in cash as which is promised to wife by her husband. If after marriage the husband denies paying Dower, the woman can deny to satisfy her marital obligations and if she lives separately then she can claim maintenance. Talaq-tafwiz is also available for her as a remedy. According to Shia law, wife, mothers and daughters can inherit property as Class I heirs. According to Sunni law, Wife, Mother and Daughter take as Primary heirs. When there are children a widow is authorized to 1/8th share of the property of her husband's property and when there are no children then 1/4thshare. A daughter is entitled to gets half the share of the son. She is entitled to take half the property if there is no son. A mother is entitled to receive 1/3rd share of

[29]The Hindu Women's Right to Property Act, 1937, S. 3 (3)No. 18, Acts of Parliament, 1937 (India).

the property of her son in case where there are no children and when there are children the 1/6thshare.

Remedies Available to a Legal Heir

Suits can be instituted in courts which are either in local limits of proper jurisdiction or which is in local limits of whose jurisdiction the defendant resides voluntarily, carries business or works for gains, if such suit is filed within the limitation period prescribed under Section 16 of Civil procedure Code, 1908. Heir can claim property if he is not satisfied by following the above-mentioned procedure. It can be done for:

- Recovery of immovable property.
- Partition.
- Sale, redemption, or foreclosure in the case of a charge or mortgage.
- Compensation for wrong.
- Determination of any other right.

According to the Limitation Act, 1963, 12 year is the time limit set to file a suit for possession for imposing a right concerning to an immovable property.

CONCLUSION

All these years there has been radical changes in laws related to intestate succession under the Hindu Law however on the other hand there has very less disputes related to the testate succession. Both the intestate as well as testate succession under the Shariat law, can initiate a few debates since the scope of heirs who are able to guarantee succession are wide and these laws are classified. To guarantee an offer to everyone the Muslim law provides for ample chance. Furthermore, over the period, the rights of female have prolonged. It is more just in Muslim law when it is compared with Hindu law. Prior to the amendment the females under Hindu law, couldn't get an offer in the family property and it is only after the Hindu succession Amendment Act, 2005 their situation has altogether improved.

Heir can claim property if he is not satisfied under Section 16 of the CPC. Furthermore, it will depend on the Court to assess his claim and take up the issue over the property in accordance with the rules of Succession, though it is significant that an heir should institute the proceeding

within the period of 12 years. Thus, for the heirs the final place for claiming the share that they are entitled to, is the court. But always the question remains how share that is entitled should be determined since contrary to laws pertaining to Muslims, Hindu laws are quiet on the issue of share that each heir should getand the interest one possesses is changing interest since it is affected by the death and birth of heirs in the family.