

208TH LAW COMMISSION REPORT - A CRITICAL REFLECTION

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INTRODUCTION

The Hindu Codified law or the Hindu Code is the primary source of governance for all Hindus in India. Its constituents include four major acts viz. the Hindu Marriage Act 1955, the Hindu Adoptions and Maintenance Act 1956, the Hindu Minority and Guardianship Act 1956 and the Hindu Succession Act 1956. After their promulgation, these acts have significantly altered the Hindu way of living by providing a firm pedestal of written statutes where legal complications and issues related to marriage, adoption, and succession of the property could be properly adjudicated.

The Hindu Succession Act, 1956 or the HSA was edited in 2005 through the Hindu Succession (Amendment) Act, 2005, which revolutionized the law relating to succession or transfer of property in Joint Hindu families (or HJFs) governed under the *Mitakshara* law. Before the 2005 amendment, under Section 6 of the HSA, if a Hindu male coparcener in an HJF died prematurely, only the next male coparcener, for example, the deceased person's son, was entitled to a share in that coparcenary property. The statute purely failed to consider females as eligible beneficiaries, consequently keeping them devoid of any share in the family property. The amendment inserted a new revised Section 6, which recognized the property rights of female siblings, specifically the daughters of deceased male coparceners, and placed the value of their share in their father's property at par with their male counterparts. A daughter, now being a "Hindu *Mitakshara* Coparcener", became as much eligible to receive a share in her father's property as was a son, essentially sharing their rights as well as any liabilities that might arise concerning the said property in the foreseeable future.

The 208th Law Commission report presented on July 30th 2008, brought under sight a new deficiency in the new 2005 amended HSA. The explanation attached under sub-section 5 of Section 6 of the act defined the term ‘partition’ as “...*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.*”ⁱ

The report suggested that the act had not considered oral partitions and family arrangements while defining the ambits of “partition”. It also recognized that these methods of partition have been legally acknowledged in the numerous judgements pronounced by the Supreme Court, the various High Courts and even by the Privy Council and are accepted modes of dividing property under the Hindu law. Therefore, taking cognizance of this issue, the Law Commission, through this report, submitted a proposal to Dr. H.R. Bhardwaj, the then Union Minister for Law and Justice, to amend the section and to expand its scope to contain oral partitions and family arrangements within its purview.

ANALYSIS AND REFLECTION

The Hindu Succession (Amendment) Act of 2005 mulled the rights of the daughters in their fathers’ properties. In my opinion, this was undoubtedly the direst need of that hour, given the females in our country have always struggled with prejudices and patriarchal norms from the time they are born into a family up until their death. It is necessary to preserve the institution of the family so that everyone can live in peace.

Families are complicated in their very nature. A ‘Hindu Joint Family’ consists of all male members descended lineally from a common male ancestor together with their mothers, wives or widows and unmarried daughters.ⁱⁱ It is headed by a patriarch or the *Karta* of the family, who lays down the ground rules for effective governance of the family. In an HJF, the idea of ‘family as a unit’ is pushed forward so as to serve in the best and personal interest of the family members and to look after their welfare. In other words, the family works together as an institution, taking its most intricate decisions by indulging in active discussions among themselves.

With the change in the time, individual members of the family started recognizing the importance of their freedom and personal rights. This brought about the concept of partition of the family property and entitling the respective members with their deserved share, thus ultimately leading to the inception of the Hindu Succession Act of 1956.

The 208th Law Commission report pushed forward the need to recognize oral partitions and family arrangements as valid methods of partitions as they are proven to be some of the less strenuous ways of securing peace in families seeking a division of the joint property. It often becomes hard to ascertain a person's share in a jointly owned property; therefore, identifying and allocating each individual's respective ownership becomes crucial to avoid any disputes or bad blood.

The Supreme Court's landmark judgement in *Kale and Ors. v. Deputy Director of Consolidation and Ors.* was cited in the report where the court recognized the validity of oral partitions while stating that a special equity governs family arrangements and therefore it would be legally valid even if the settlement took place orally. However, this will be the case only if the agreements were made in good faith and with the consent of all the parties affected.ⁱⁱⁱ The court further added that oral arrangements are not required to be registered and stamped unless they have been explicitly laid down in writing. The court also stated that a plain writeup in the form of a simple memorandum need not be necessarily registered. The 208th report also enlisted a host of other cases where the courts took a similar stance of validating and upholding the principles of family arrangements based on the reasoning that if the affected parties have consensually settled a matter, then it wouldn't be wise to reopen the case and invite unnecessary litigation.

There are indeed some apparent benefits of employing oral partitions while disposing of the joint family property. It is often cheaper than producing a formal deed of settlement and getting it registered as specified under Section 6(5) of the HSA because registering it would entail payment of stamp duty and registration fees. Oral partition reached through internal family arrangements is undoubtedly more convenient because they are drafted verbally and do not require producing a formal legal agreement.

The consequences arising because of the absence of “oral partitions and family arrangements” under the explanation of Section 6(5) of the HSA were also observed in another case of *Puttalinganagouda and Ors. v. Union of India and Ors.*^{iv} that came before the Karnataka High Court. I came across this case while reading an article that questioned the validity of oral partitions in the Hindu Succession Act, 1956.^v It challenged the constitutionality of the ‘explanation’ as appended under Section 6(5) of the HSA. In the case, a man named “Puttalinganagouda” orally divided the property he received from his father amongst his sons in 1980; subsequently, in 2010, three of his daughters sent a legal notice wanting a share in their coparcenary property.^{vi} While acknowledging the importance and legality of oral partitions under family arrangements, the court stated that the exclusion of the concept of oral partition from the section has put forth severe consequences and was therefore pointless and completely arbitrary.

CONCLUSION

The courts have time and again rooted for the inclusion of ‘oral partition’ under the definition of ‘partition’ provided in Section 6(5) of the HSA. The 208th Law Commission report enlists a variety of judgement where the courts pushed for such settlements. Even after its merits, there are some instances of people facing hardships while orally partitioning their coparcenary property. Apart from the obvious lack of consideration for other female members of the HJF (except the daughters) in the family property, there is an inherent risk that if an oral partition has not been reduced to a permanent written settlement/partition deed, any party could back off and deny the existence of any such verbal settlement, thus challenging its validity later.

This, however, does not take away from the fact that even today, the most intimate and personal decisions of a family are taken by its members orally. Oral partition has always been a part of the classical Hindu law which incorporated this concept into our daily lives. Therefore, acknowledging its importance today would pave the way for smoother and conflict-free family settlements in the future.

Even though the Indian judiciary has recognized the importance of oral partition in solving property disputes, as of March 21st, 2021, the old explanation under Section 6(5) still stands unedited.

ENDNOTES

ⁱ The Hindu Succession Act, 1956, §6(5).

ⁱⁱ POONAM PRADHAN SAXENA, FAMILY LAW LECTURES : FAMILY LAW II (4th ed.).

ⁱⁱⁱ Kale and Ors. v. Deputy Director of Consolidation and Ors., 1976 (3) SCC 119 (India).

^{iv} Puttalinganagouda and Ors. v. Union of India and Ors., MANU/KA/0420/2015 (India).

^v Shyam Prasad S, *Are 'oral partitions' invalid under law?*, BANGALORE MIRROR, February 26, 2015, <https://bangaloremirror.indiatimes.com/bangalore/others/the-great-bengaluru-pedal-fest/articleshow/46374846.cms>.

^{vi} Puttalinganagouda, *supra* note 4.