

MATRIMONIAL PROPERTY LAWS IN INDIA: NEED OF THE HOUR

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Abstract

In the present era of increasing awareness among people about granting equal status to women and taking steps for their empowerment, a lot is happening. But the question we need to ask is whether all of these steps address the grave issues which have a major impact over women? The answer to this cannot be affirmative. In India, we grant certain property rights to women such as absolute rights over what we call as stridhan. When a woman decides to opt out of a marital relationship, she faces major sustenance issues. In order to help such women sustain themselves, various legislations have been put in place such as maintenance laws, Protection of Women from Domestic Violence Act, 2005 etc. But even these legislations hardly suffice in providing the required resources to a woman. In India, there is no law which regulates the division of marital property after divorce. As a result, we see a prevalence of separate marital property regime in India which means that the person who has the title to the property (mostly the one who made the major financial contribution and in Indian scenario, the man) takes the property after divorce. This regime creates huge problems in India because the contribution of the homemaker (the woman in Indian scenario) gets completely ignored and she is left with

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nothing in case the marital tie breaks down. The major purpose of this paper is to bring out this problem and argue for a legislation regulating the division of marital property after divorce and based on community of property regime, as it is followed under various other jurisdictions.

Keywords: *Marriage, Property, Divorce, Family Law, Maintenance*

INTRODUCTION

‘Women empowerment’ has become a buzzword these days. While I am not denying the fact that a lot of steps are being taken in this direction and the level of general awareness among people on this issue has gone up, still there are a lot of issues which form the crux of the problem of women having lesser rights and yet these issues are constantly ignored. Women these days are getting property rights in the family of their birth. Women are also increasingly exercising their will and getting out of marital relationships which they think are to their detriment by opting for divorce. But the question to be asked is- are we really doing anything to improve the lives of the women after they have made such choices? The answer seems to be no. All we have done is given them a choice and have not really made the social conditions favourable to them after they have exercised such choices. One such important issue that we need to worry about is the issue of matrimonial property. While divorce might have become relatively easier now, what happens to a woman, who was a housewife, after she has divorced her husband? Are the provisions made by law for such women helpful enough to help such women sustain? In this paper, we will largely be looking at these questions and try to analyze the state of marital property rights for women in India and see where we stand and what needs to be done to improve the situation in future.

OVERVIEW OF THE PERSONAL LAW REGIME IN INDIA

During the colonization of British over India, many English innovations in India were influenced by the novel ideas of utilitarianism and legal

positivism. This experiment led to a violent double disruption of the organic relationship between the legal system and the society. The legal system that developed in India was actually not in response to our own society but in response to a very different English society. While England itself has abandoned or modified these legal concepts, India still upholds them. Scholars claim that the concept of religious personal laws is one of those ideas. Before the colonization took place, Hindus and Muslims used to follow their own respective laws. The complex colonization of India due to varied geographical conditions led to the gradual introduction of British laws in India, however, they selectively left the “personal” matters to be governed by the respective religious laws which the communities were following. But the random successive charters and regulations started determining what these personal laws will contain. Legislative and judicial actions further modified the substantive elements of these laws.¹

The application of religious laws over personal matters was conceptualized as the “saving” of these religious laws. The identification of the various communities was done on the basis of the religion followed by them and though the laws which the English had decided to save were community customs rather than scriptural rules, yet they were also understood as religious laws. As a result of this, the personal laws and the religious laws became interchangeable and the aspect that before the advent of British rule in India, all the laws governing Hindus and Muslims were religious was ignored. The determination of what falls under the category of a personal matter was also done by the British policies. All of this upheaval largely led to the modification of the religious laws.²

A dominant theme in the religious personal laws is that they give much lesser rights to women as compared to men. Even the history of legislative reforms

¹ Archana Parashar, *Gender Inequality and Religious Personal Laws in India*, (2008) 14(2) BROWN JOURNAL OF WORLD AFFAIRS , http://dl4a.org/uploads/pdf/bjwa_gender_inequalityreligiouspersonallaws_india.pdf (last accessed 20th January, 2015).

² *Id.*

in this area is a testimony to the fact that often political considerations overpower the issue of gender equality. Whenever this happens, the state tries to hide behind the veil of the argument of religious sanctity of these laws. An instance can be taken as an illustration. In 2005, a reform came to up to modify the Hindu Succession Act, 2005 in order to make the daughters equal coparceners with the sons. However, the rights of men and women can still not be considered to be equal. Women are still at a disadvantaged position than men in terms of rights given by the personal laws. It is in this context of unequal treatment of men and women in the personal laws that we are to discuss the issue of matrimonial property rights in India.³

EXISTING PROPERTY RIGHTS OF WOMEN IN A MARITAL RELATIONSHIP

Stridhan

Literally, stridhan refers to woman's property over which she can exercise absolute control. Women, as such, do not have any legal right to receive stridhan. However, there are obligations placed by the customary rules on the family of the woman to provide her with some property on her marriage. In Vedic literature, we can see that stridhan is classified as 'saudayika' and 'asaudayika'. 'Saudayika' property is the one over which a woman can exercise absolute rights and no one can restrain her in the disposal of this kind of property. However, 'asaudayika' property is one where a woman is required to take the consent of her husband before its disposal. However, in the case of *Pratibha Rani v Suraj Kumar*, it was held by the Supreme Court that it is only the woman who had absolute property rights over stridhan and the husband or the relatives are not allowed to exercise any rights over it. Also, if stridhan is ever placed in their hands, the only status they will be deemed to have is of the trustees. The concept of stridhan is very much affected by the notion of protection of women during hard times.

³Parashar, *supra* note 1.

Traditionally, stridhan would provide a woman with a socially acceptable access to a share in the property of her family so that she can utilize it when she experiences social insecurity. Apart from the property given to her by her family, gifts given to a woman by her husband are also normally considered as stridhan. On the question of the rights of the woman over these gifts, the courts have said that it depends on the nature of the property. If the gift is a family property, then the wife might have only limited ownership over it. But where the words are sufficient, the woman has absolute rights over the property in question.⁴

Maintenance

Whenever there is a divorce, the woman is entitled to some monetary relief in the form of 'maintenance' so that they are able to sustain themselves and maintain a basic standard of living. However, the problem with the laws relating to maintenance is that mostly, they prove to the disadvantage of the woman. In order to avail the relief the maintenance, a woman is required to satisfy the court that she, on her own, is incapable of maintaining herself. She also has to prove before the court any assertions she makes with regard to the property of her husband. In order to combat these problems, various guidelines have been laid by many courts including the Supreme Court. For example, the Delhi High Court said that the while granting maintenance, it should be kept in mind that the amount is sufficient enough for the wife and the children to maintain a standard of living which they had before the marriage broke down. Unfortunately, this principle is mostly ignored and the amount granted as maintenance is very minimal and barely enough for the wife to sustain herself. Another problematic feature of the maintenance laws is that only when a wife is not at 'fault', maintenance can be granted to her. According to Section 125 of the Code of Criminal Procedure, which deals

⁴ Jhuma Sen, *Matrimonial Property Rights: Is India Ready for a Law* (2009) 1 JILS, available at <http://jils.ac.in/wp-content/uploads/2011/12/jhuma-sen1.pdf> (last accessed on 20th January, 2015).

with maintenance for all women except Muslim women, maintenance will not be given to her if she is living in adultery or if she has refused to live with her husband or if the husband and the wife are living apart with mutual consent.⁵ This shows that the maintenance laws are biased against women and do very little good to provide economic protection and social security to the women. Other acts such as the Protection of Women from Domestic Violence Act, 2005 which provide the right to residence etc to the women, are based on the same premise of no fault.⁶

THE CONCEPT OF MATRIMONIAL PROPERTY

The concept of matrimonial property is not that straightforward a concept as it might appear at once. Infact, it is the area where lies the major differentiation in exercising property rights between men and women. The exercise and ownership of rights depends on the type of marital property regime. Marital property regime refers to the set of rules that govern the management and rights over the property during the marital relationship and the distribution of the property when the relationship is terminated i.e. on divorce.⁷ Each marital property regime has a different set of characteristics which are described below-

- 1. Separate property regime-** In the separate property regime of marital property, the property which is acquired by the spouses before their marriage and also during their marriage is considered to be the separate property of the spouse who acquired it. Another name which is given for this kind of regime is 'out of community property'. At the time of divorce, each spouse takes whatever is his/her own property.⁸

⁵ Kirti Singh, *Matrimonial Property Rights*, COMBAT LAW (23rd July 2010), available at <http://www.combatlaw.org/matrimonial-property-rights/> (last accessed on 20th January, 2015).

⁶ *Id.*

⁷ WORLD BANK, WOMEN, BUSINESS AND THE LAW 52 (Illustrated, A&C Black 2014).

⁸ *Id.*

- 2. Full community of property-** The full community of property regime is diametrically opposite to the separate property regime. In this type of matrimonial property regime, all the property which is brought into the marital relationship and all the property which is acquired during the marital relationship is considered as the joint property of both the spouses. It implies that when divorce takes place, the property gets equally divided between the husband and the wife and each spouse takes half share.⁹
- 3. Partial community of property-** This type of property regime is a hybrid between the separate property regime and the full community of property regime. In this, the property acquired by the spouse before the marriage is considered as the separate property of the spouse who acquired it but the property which is acquired during the marriage, with a few exceptions created by law, is considered as the joint property of the spouses. At the time of divorce, the joint property gets equally divided among the spouses.¹⁰
- 4. Deferred full or partial community of property-** As the name suggests, in this kind of property regime, the rules of full or partial community of property come into operation only on the termination of the marital relationship. Until then, the separate property regime operates.

These are the major types of matrimonial property regimes.¹¹ However, matrimonial property regimes which do not fit into any of the above categories also exist. But for the purposes of this paper, this understanding is sufficient.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Supra* note 7.

CURRENT STATE OF MATRIMONIAL PROPERTY RIGHTS IN INDIA AND ITS IMPLICATIONS

In India, the silence of the laws over the issue of matrimonial property shows the supremacy of the separate property regime prevailing over here. No provisions related to matrimonial property can be found in Hindu Personnel Law. The Court does not have the power to distribute the properties which were acquired before or during the marriage. The law does not acknowledge the financial and the non-financial contribution which the spouse not holding the title might make in acquiring the property.¹² This often leads to discrimination against women who do not hold the title to the matrimonial home or other property and results in hardships for women when they divorce their husbands. In order to cope up with this problem, a provision was made in the Hindu Marriage Act, 1955 in the form of Section 27 which said that the property presented to the spouses at the time of marriage will be considered as their joint property and the court has been granted the power to distribute this property in a manner that it thinks is just and proper. However, this provision does not serve as an effective solution to the issue because the definition is very limited in scope. Use of the expression 'jointly' implies that the property which was given to the spouses either at or about the time of marriage and which was given directly can be included. All of the other property is excluded.¹³

Even the Muslim Personnel Law maintains the separate property regime of matrimonial property among spouses and does not have any concept of communal property which could be put into place when the division of property takes place at the time of divorce. Under Muslim Personnel Law, whenever a divorce happens, the woman has to satisfy herself with the unpaid dower, in case where its remittance was not done earlier, and with

¹² Sen, *supra* note 4.

¹³ *Supra* note 7.

maintenance given as a meagre allowance. There is lack of judicial or statutory guidelines with respect to matrimonial property because of absence of conflicting claims, just as the case with Hindu Law. Recent past has given examples of landmark judgements being given in relation to maintenance claims on divorce for Muslim women. But none of them deal with the claims of the divorced Muslim woman over the matrimonial assets. Not even the famous Shah Bano case, where the dissolution of marriage took place after a long period of forty-five years during which the wife toiled at her household, discuss about matrimonial property rights of a woman after divorce. It is pertinent to make a point over here that though the Muslim Law in India does not acknowledge community of property regime, yet we can see that the original texts such as Baillie and Hedaya elaborately and in a detailed manner discuss the duties of the spouses in a case of dispute keeping in view the household effects. This shows that Muslim jurists were aware of the problem of conflicting claims which might come from the spouses and the household effects.¹⁴

A conclusion from the above discussion necessarily is that the personal laws do not talk much about matrimonial property regime. Using this silence as a ground to deny property to women and let the separate matrimonial property regime prevail is totally unfair. Even the women who do not earn have a substantial role to play in the maintenance and smooth running of the household. Women are often the primary care-givers in the household. The contribution of the women towards the household varies with the class, society and cultural norms but across all of these, women have a substantial role to play. They either directly play a role in the domestic work of the house by cooking, cleaning etc or they might supervise the organisation of the household. The contribution of the women to the household also depends on whether it is in a rural setting or in an urban setting. By choosing to be a homemaker, women actually sacrifice their career opportunities of working,

¹⁴D. R. SAXENA, LAW, JUSTICE AND SOCIAL CHANGE, 57 (1996).

earning, getting promoted, receiving a pension etc. But it's not the case that the women who work do not have to deal with this aspect. They actually have to bear the burden of dual responsibility. Infact, the earning of the women gets spent in household expenditures whereas the earning of the men is put aside as savings and later invested in procuring assets of which they hold the title.¹⁵

Considering the scenario, it is only fair that a legislation in India is brought to ensure fairness to women in matters of matrimonial property. A step towards this can be seen as the Marriage Law (Amendment) Bill which seeks to make amendments in the Hindu Marriage Act, 1955 and the Special Marriage Act, 1954 in this regard. Steps at state level are also taking place in this direction such as in Maharashtra, the State Women's Commission has been asked to draft a bill termed as the Married Women (Property Co-Ownership) Equality Bill. The enactment of the Bill will lead to all the property in a marital relationship getting converted into 'spouse joint property' in cases where the marriage comes to an end.¹⁷ However, all of these are just Bills yet and none of these have actually been enacted. There is an urgent need to put in place a legislation on this issue and fill the void to ensure protection to the divorced women.

PROBLEMS WITH THE LAW PROPOSED

Though the Marriage Law (Amendment) Bill is a step towards improving the current situation, yet we cannot say that it is a perfect solution. It has some inherent flaws. The principle of equality has not been properly reflected in the Bill. There is huge lack of clarity over the definition of property and how exactly division will be carried out. Under this Bill, if a case for divorce is filed under the irretrievable breakdown of marriage section, women will only get a share in the property of the man, except in the "inherited" or "heritable"

¹⁵Singh, *supra* note 5.

¹⁷*Id.*

property. The Bill is based on the “no fault” theory of divorce. The purpose of introducing the irretrievable breakdown of marriage section is to make divorce faster and easier. A woman can oppose divorce under this if she can show that it will create immense financial hardships for her. Another problem is that the Bill does not allow share to a woman in the property which is inherited or heritable. Moreover, even the definition of such property under this Bill is vague. The shortening of time period also reduces the chances of couples getting time to reevaluate their decision. The definition of “living separately” as living in different households is also problematic because there are women who live separately, being in the same household, because they lack financial resources to live in a different household. In effect, the Bill does not serve the purpose it is meant to serve.¹⁸

MATRIMONIAL PROPERTY RIGHTS UNDER DIFFERENT JURISDICTIONS

While examining the issue of matrimonial property, it becomes necessary to look at the matrimonial property regimes existing in other jurisdictions.

Scotland and Wales: Towards Rule Based Discretion in Ancillary Relief

When it comes to English Law, the issue of matrimonial property rights becomes even more complex. Principally, matrimonial property laws do not exist in English law. Property of the spouses is not influenced by the marriage at all. Hence, it has been argued that a separate property regime of matrimonial property exists in these places. In a case before the House of Lords on the issue of matrimonial property, a married woman was not given the right of acquiring family property when she did not directly invest in those assets but financed other expenses. This decision become very

¹⁸ Namita Kohli, *Law with Loopholes*, THE HINDU, (1st October 2013), available at <http://www.thehindu.com/features/metroplus/society/law-with-loopholes/article5186386.ece> (last accessed on 31st January 2015).

controversial and in response to this, the judges were given power by the legislature, from 1970 onwards, to reallocate the property among spouses by giving property adjustment orders at the time of divorce. This enables the court to even grant the property of one spouse to another. While taking decisions in this matter, the Courts have to take into consideration some factors such as the interest of the children, the actual and potential income of the spouses, financial obligations, responsibilities as well as their previous contribution towards the well-being of the family. The trend of decisions in this matter has shown that the reasonable requirements of the spouses have been protected by the interpretation done by courts. This should not be misunderstood as implying that a wealthy spouse will necessarily have to part with half of his assets and give them to the other spouse. The distribution is limited to the extent that the other spouse has the resources to be able to maintain his or her previous standard of living. When applied practically, it amounts approximately to one-third part of the property. However, this was also overruled by a decision of the House of Lords in the case of *White v. White* which proved to be revolutionary for the decision it gave. In this case, the guiding principle of reasonable requirement was replaced by the principle of equality. If the contribution made by each of the spouses is equal, then the House of Lords did not find it just to make a distinction between who earned the money and who built the assets. The view presented was that the bias in favour of the money-earner and against the homemaker and child care-taker should be done away with. However, a possibility was left by the House of Lords to make a departure from the principle of equality if a valid enough reason existed for doing so, as a result of which, the direct consequences of this decision did not become clear at once.¹⁹

On seeing the trends of the case laws which came after this, we can observe

¹⁹ KATHARINA BOELE WOELKI, PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 11 (2003).

that focus was placed on the contribution of the spouses and thus, the property adjustments in the form of 60/40 distribution became frequent. But later, clarity came in with the case of *Lambert v Lambert* where the Court of Appeal explained that this arrangement should not be considered as a general trend and resort to this should be made only in exceptional cases. The Court emphasised on the point it was unjustified to accord a greater value to the contribution made by the breadwinner and place lesser value on the contribution made by the homemaker and hence, using this as a ground to unequally distribute the property among the spouse is not right. All of this seems to give a hint towards the prevalence of deferred community of property regime in the English Laws.²⁰

Norway, Sweden and Austria: Deferred Community of Property

In Norway, community of property regime exists which means that on the termination of marriage, the assets will be equally divided between the spouses. The general principal is the rule of unequal distribution but if it is leading to an unfair and unjust result, then it is set aside. The Supreme Court of Norway in 1975 took into account the indirect contribution made by a housewife such as rearing the children, contribution in housework etc. It said that no distinction is to be made between entitlement and quantification. This case came to be famously known as the “Housewife Case” and the Supreme Court in its landmark judgement said that a housewife, who takes care of the children, manages the household etc., could become the co-owner of the house which by the husband with his own income while the marriage was still subsisting. The rule developed by this famous decision of the Supreme Court translated into a legislation called as the Marriage Act of 1991. The determination of co-ownership is done on the basis of the share of the parties in the acquisition of property. The indirect non-financial contributions of the wife such as taking care of the children, organising the household, making payments for household expenditure etc. are considered

²⁰ *Id.*

as sufficient enough for making the wife a co-owner with the husband who made direct financial contributions towards procuring the assets.²¹

In Germany, there is a prevalence of a statutory regime called as the community of gains. Under this regime, a duty is placed on the spouses to account for whatever increase or addition has happened to his/ her property during the period of the regime. After this, whatever differences which might arise in such amounts are split and the spouse whose increase is lesser than the increase of the other spouse gains a right in personam against the spouse with the higher addition or increase and is then allowed to claim one-half of the portion of increase. The only exception which allows for a deviance from this rule is if the spouse who claims the amount has culpably failed to promote the economic or any other interests of the marriage venture when the marriage was still in existence. In such cases, on the grounds of gross inequality, the claims of the spouse with lesser increase stands defeated. While giving the judgment, weightage might be given to other factors such as adultery or cruelty on the part of the spouses.²²

While in Australia, in case of failure of the marriage, the spouses are given the right to have a share in each other's wealth. If the spouses are unable to reach an agreement by themselves, then the Court is required to apply the principle of equity and decide how the division of property will take place. The criteria for division of assets are the contributions made by the spouses in the acquisition of assets, contributions made in the upbringing of children, maintenance of the house and other forms of general assistance. In order to achieve an equitable partition of property, the judge is empowered to order the transfer of property or expectant rights, of both moveable property as well as real estate. The general quota for the division of property as determined by the court is 50:50. However, there might be cases where the

²¹ Branka Rešetar, *Matrimonial Property in Europe: A Link between Sociology and Family Law* (2008) 12.3 EJCL, available at <http://www.ejcl.org/123/art123-4.pdf> (last accessed on 31st January, 2015).

²² *Id.*

division ratio is 1:2 or 1:3 depending on the financial possibilities of the spouses.²³

SUGGESTIONS

The matrimonial property exists independently of the separate property owned by the spouses. Matrimonial property also does not rest on the religion based personal laws. Keeping this and Article 44 of the Constitution which prescribes a universal civil code, the legislature should take the step of enacting a legislation regulating matrimonial property which would apply to all the couples in India irrespective of their religion, caste, creed etc.²⁴ While enacting a matrimonial property regime in India by means of a legislation, following basic principals should be incorporated-

1. The Court which grants the divorce decree or the decree of judicial separation should also be the Court which engages in property adjustments between the spouses. The diversion of matrimonial assets should be an integral part of the decree. The fact that the Indian women are still shy in claiming their share by means of a separate court should not be forgotten. Even if there is no application by the spouses for the determination of their respective shares in the matrimonial property, the court should specify the shares of the spouses.²⁵
2. The socio-economic conditions and the traditional norms of the Indian society suggest that “community of property” regime of matrimonial property would be the best suited matrimonial property regime in India. This implies that while devising laws for the division of matrimonial property, the general idea behind these laws should be that the all the household assets fall under the category of common property of the spouses and it should only be way of exception that certain property

²³ *Id.*

²⁴ SAXENA, *supra* note 14.

²⁵ *Id.*

should fall under the category of separate property of the spouses.²⁶

3. Whenever there is any divorce or legal separation among the spouses, the matrimonial assets should be equally divided among the spouses. In 1971, a Committee was appointed by the Government of India on the Status of Women in India which said that in case of a divorce or legal separation, the wife should get one-third of the matrimonial assets. This recommendation made by the Committee does not have any justification as to why the woman gets only one-third share in the property and not a share equal to that of the husband.²⁷
4. The application of “community of property” should only be done when there are proceedings for divorce or separation. During the subsistence period of the marriage, separate matrimonial property regime should prevail with the exception that the disposal of property can only be done with the consent of both the spouses. Gratuitous transfers of a spouse’s separate property while the marriage is still in existence can be allowed.²⁸
5. Household is a common venture in a marriage. This means that both the spouses should take equal liability of the household. But even if the contribution made by a spouse is lesser in financial terms or the contribution is not material, especially in the case of a housewife who in a lot of cases sacrifices her career to take care of the household, it should not be used as a factor to reduce the share of that particular spouse. The non-financial contributions by the housewife should be equally recognized by the law and should be treated as equivalent to the material or financial contributions made by the husband.²⁹

CONCLUSION

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

As observed, the need to address the issue of matrimonial property rights for women is urgent. If we are talking about women empowerment, then the discussion is definitely incomplete if we leave out the issue of matrimonial property rights. In India, the absence of legislations on this issue has created a problem and this absence proves to be a setback in the lives of many women who took the decision of coming out of their marital relationship, especially those who do not have a job. We have to recognize that claiming ownership by a spouse over some property because they made some concrete financial contribution is unjustified. The contributions and the role played by the homemaker also have to be recognized. Even the English laws and laws in other jurisdictions use this as a basis to grant equal property rights to women. The matrimonial property laws should be brought in and they should be aimed at bringing equality among the rights of men and women unlike the existing personal laws which are already biased against women. It is only then that we can say that a move towards women empowerment is actually being made.

²⁹ *Id.*