



Women gender issues and law

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Abstract

Gender equality means an equal visibility empowerment and participation of both sexes in all spheres of public and private life – Gender justice is a universal concern and considering its importance Convention on the Elimination of all forms of Discrimination against Women (CEDAW) has been passed by United Nation and signed by India. Elimination of gender injustice is a concern shared by nations across the globe several international conventions concluded Millions of women and girls in every country of every class live under the daily threat of physical abuse. The Indian constitutions took note of the adverse and hidebound place of women in society and have shown unique concern to make sure that the state takes positive steps to give her equal status. The principle of equality is inherent to the notion of human rights.

Keywords: gender equality, marriage, constitutional prohibition, position in personal law, maintenance, adoption, succession, and violence against women

Introduction

According to Manu, a great Hindu sage “Where women are honoured, Gods feel delighted”. The social reform movement of 19th century laid down the nation of gender justice equality. Women are there backbone of the society ensuring women dignity in society facilitating their socio-economic empowerment is the need of the hour. Gender equality means and an equal visibility empowerment and participation of both sexes in all spheres of public and private life. Neglect of women is a fact as old as human history. The women were deprived to avail equal status with men. But later on our society feels the suppression and precarious conditions of women. After independence women are availing a better status through constitution and personal law. Not only women should be accorded rights equal to those of men, but that they should be able to enjoy all their rights.

Constitutional Provision for Women

Half of the Indian populations too are women. Women have always been discriminated against and have suffered and are suffering discrimination in silence, self sacrifice and self – denials are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination^[1].

The constitution of India under clause (3) of Article 15 provides: “Nothing in this Article shall prevent the state from making any special provision for women and children”. Article (15) (3) is one of the two exceptions to the general rule laid down in clauses (1) and (2) of Art. 15. It says that nothing in Article 15 shall prevent the state from making any special provision for women and children. Women and children require special treatment on account of their very nature. Article 15 (3) empowers the state to make special provisions for them. The reason is that “Women’s physical structure and the performance of maternal functions place her at a

disadvantage in the struggle for subsistence and her physical well-being becomes an object of public interest and cure in order to preserve the strength and vigour of the race^[2]. This clause 15 (3) is an exception to general rule against discrimination embodied in clause (1) as well as clause (2)^[3]. While both these clauses prohibit discrimination on the ground of sex clause (3) enables the state to confer special rights upon women^[4]. The word ‘for’ in clause (3) signifies that special provisions can be made “in favour of” women and not against them^[5]. Therefore clauses (1) to (3) of Article 15, read together would imply that state can discriminate in favour of women against men, but it cannot discriminate in favour of men against women^[6].

Article 42 of the constitution enjoins the state to make provision for securing just and human conditions of work and for maternity relief. It would not be violative of Article 15 (1), but would be within the purview of clause (3) of this Article. In *Yousuf Abdul Aziz vs. State of Bombay*^[7]. The validity of section 497, India penal code which punishes only the male counterpart in the offence of adultery and exempts the women from punishment, even though she may be equally guilty as an abettor was held to be valid since the classification was not based on the ground of sex alone. Similarly in *Sowmitri Vishnu Vs Union of India*^[8] the petitioner challenged the validity of section 497, Indian Penal Code on the ground that it violates Article 14 and 21, because this provision recognizes only the husband of the adulteress as the aggrieved party and not the wife of the adulterer. The Supreme Court held that the law does not violate either article 14 or 15, the court follow the ratio of *Yousuf Abdul Aziz Vs. state of Bombay*.

Position of Women in Personal Law

Prior to Hindu marriage Act of 1955 the ancient Law had given more right to male, but after the Hindu Marriage Act of 1955 both sex have been given equal rights. Monogamy which

is essentially the voluntary union for life of one man with one woman to the exclusion of all others is now enforced by legislation [Section 5 (i)]. Any marriage solemnized after commencement of this Act is null and void if at the date of such marriage either party had a husband or wife living (Section 17).

The Hindu Marriage Act 1955 Sec 5 (I) has enforced monogamy. Neither party has a spouse living at the time of marriage. It has prohibited bigamy and is punishable under section 494 of India Penal code. Which speaks marrying again during lifetime of husband or wife whoever having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine. The law relating to right of the Hindu wife and husband to live in the company of each other must be examined and analysed in the light of section of 9 of the Hindu Marriage Act, 1955^[9].

Section 13 of the Act provides several grounds for obtaining divorce by either party to the marriage whether solemnized before or after the commencement of the Act. The grounds common to both the Husband and wife are mentioned in Section 13(I) They are (a) adultery, (b) cruelty, (c) desertion by the other spouse, (d) conversion by other spouse to other religion, (e) Unsound mind (f) Virulent and incurable form of leprosy to other spouse (g) suffering from venereal diseases (h) renunciation of the world by the other spouse. To these ground two more grounds common to both the husband and wife were added by an amendment made in 1964^[10] in the form of section 13 (1-A). They are:-

- (i) Non-resumption of cohabitation as between the parties to the marriage for a period of one year or upward after the passing of a decree for judicial separation and
- (ii) No restitution of conjugal rights as between the parties for a period of one year upwards, after passing of decree for restitution of conjugal rights.

A marriage may, on a petition presented by either the husband or the wife be dissolved by a decree of divorce on the ground mentioned in section 13 of the Act. In *Iswar Singh V. Smt. Hukam Kaur*^[11], it was held that mere severance of all connection with wife because of his ill-health and allowing her to remarry any person she likes cannot amount to divorce within the meaning of section 13 of the Act. Divorce can be obtained by the mutual consent of parties to marriage under the Marriage Law (Amendment) Act. 1976. This has been incorporated in the newly added section

According to section 13 B following are the three essentials.

- (i) That both the parties have been living separately for a period of one year or more.
- (ii) That both have been living separately for a period of one year or more.
- (iii) That both the parties have mutually agreed that their marriage should be dissolved.

In *Santosh Kumar vs. Virendra Kumar*^[12], the Rajasthan High Court has held that an application filed under section 13 B of the Hindu Marriage Act can be withdrawn by the parties to the

marriage or any of them till the expiry of the last day of the eighteenth months of the filing of the application.

Maintenance of Wife

According to sub-section (I) of section 18 of the Act a Hindu wife whether married before or after the commencement of the Act is entitled to be maintained by her husband during her life time under the Hindu marriage act, divorced wife or a wife whose marriage is void is also entitled to maintenance but under the Hindu Adoptions and Maintenance Act a Hindu wife whose marriage is void under section 5 is not entitled to claim maintenance^[13].

Before 1956, it was a settled law that an unchaste wife who continues to live with her husband, was entitled to starving maintenance^[14]. An unchaste wife, who left her husband but subsequently repented, performed expiatory rites and returns to live with her husband, was entitled to maintenance^[15]. The modern Hindu law lays down that a Hindu wife is entitled to be maintained by her husband during her lifetime^[16]. Where the husband denied marriage, and they were known as husband and a wife in the locality and in the village their long cohabitation gave rise to a presumption of marriage and the wife could be entitled to maintenance^[17]. Similarly, where there was plea of customary divorce and parties were living separate due to divorce by agreement, it was need not to be good ground to refuse maintenance^[18].

Section 18 of the Act recognizes absolute right of a wife to seek maintenance. The provision does not expressly prohibit the claim of interim maintenance^[19]. The court on a prima facie consideration of the matter would be at liberty to grant interim maintenance to do justice where the case justifies grant of interim maintenance^[20]. The court can resort to section 151 of the CPC^[21]. The grant of interim maintenance is implicated in the power of the High court^[22].

Adoption

Law of adoption in India is still not a uniform civil code in the sense it is available to only the majority community. Any female Hindu who is of sound mind and is not a minor has capacity to take a son or daughter in adoption. Provided that, if she has a husband living she shall not adopt a son or daughter except with the consent of her husband unless the husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind. Now any Hindu woman can adopt a child subject to section 8. It has been held in *Vijayala Kshamma V. B. T. Shankar*^[23] that where a widow adopts a child, she need not take consent of a co-widow because she adopts the child in her own capacity. A married woman has no capacity to adopt a child in her own right but under section 7 of the Act only the husband of the woman can adopt with her consent unless her consent is dispensed with in the circumstances mentioned therein. Clause (C) of this section mentions three cases in which a married woman can make adoption of a son or a daughter. If a female adopts a male child she must be senior to the child by at least 21 years^[24].

Succession

For the protection of Hindu women's property, two important

statutes were enacted i.e. Hindu Women's right to Property Act, 1937 followed by the succession Act 1956. According to the Hindu Succession Act, 1956 the right to ancestral property was not given to married women.

But it was amended on September 2005 to provide the right to parental property. After the enactment of the Hindu Succession Act of 1956, Hindu widow's limited estate was abolished and she becomes the absolute owner of the property. Before the Amendment of Hindu succession act females were members of the joint family but the daughter were not coparceners as they had no right by birth (Janmanaiinaswatva). This was the position under the Sastric Law. Sub-Section (I) of the section 6 provides that from the date of commencement of the Amending Act 2005 (w.e.f. 09.09.2005) the daughter of a coparcener by birth becomes a coparcener in her own right as the son and she would have the same rights in the coparcenary property and be subject to same liabilities in respect of the coparcenary property as that of a son^[25]. Section 14, Hindu Succession Act, introduces fundamental changes in the concept of woman's property. It abolishes Hindu Woman's estate and converts existing woman's estate (existing prior to the coming into force of the Act and over which Hindu female has possession) into her absolute property^[26]. Although Hindu Woman's limited estate has been abolished and so long as the woman is alive she has absolute power over all types of property (She is also free to dispose it off by will), yet for the purpose of intestate succession, the source of property is still material. The old Hindu Law of Succession to the property of a Hindu female (Stridhan) was extremely complicated. The modern law of succession to the property of a Hindu female is simply though it suffers from some bad draftsmanship.

Other Violence against Women

In 2005 the Protection of Women from Domestic Violence Act 2005, was brought into force by the India Government. Dowry Prohibition Act, 1961 was passed in 1961. Section 3 of the Dowry Prohibition Act speak that both giving and taking the dowry is punishable. The Medical Termination of Pregnancy Act suffers from various loopholes. So in the year 1994 the Central Government enacted the Pre-natal Diagnostic Techniques (Regulation and prevention of Misuse) Act which is applicable throughout the country to check the killing of girl child. There are other offences which, though not considered to be serious are suffered by a larger number of women than one would like to imagine. That is outraging the modesty of a woman. In adultery case a man is entitled to prosecute another as per for committing adultery with his wife but exempts the adulteress wife though she is an abettor in the act of adultery under section 497 of India penal code. By bringing sexual harassment to the level of human rights concern, a range of international standards are held up as requiring adherence and this is what are Supreme Court has rightly down in Vishaka v. State of Rajasthan^[27]. And also in Apparel Export Promotion council v. S.A.K. Chopra^[28].

Conclusion

At present there is a need for a new vision of equality between men and women. Equality can only be achieved when all human beings get involved and committed to "Reaffirm faith

in the equal rights of men and women". The women have been victim irrespective of her economic background. The rich and the poor alike are the victims of social barriers and disadvantages of varying kinds. The Law conforms ideal justice and equality of status to women after many amendments but it is matter of great regrets that but most of the women do not avail their rights. There is a gap between law and availing such right. The India freedom struggle is an unfinished mission until our mothers, sisters and daughters are restored to their social economic political, cultural dignity and gender justice in reality.

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