State Amendments to Hindu Succession Act and Conflict of Laws : Need For Law Reform

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By Nilima Bhadbhade*
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Five States in India have amended the law relating to coparcenary property. Four States, viz., Maharashtra, Andhra Pradesh, Tamil Nadu and Karnataka, have conferred upon daughters a birthright in coparcenary property.1 Kerala has abolished the joint family system among Hindus.2 The object of this article is to explore the conflicts which may arise due to operation of different laws in different States in India.

The State amendments of Maharashtra, Andhra Pradesh, Tamil Nadu, and Karnataka

The language of these amendments is identical. The amendments of Tamil Nadu, Andhra Pradesh and Karnataka are prospective. The Maharashtra Amendment though published in December 1994, operates retrospectively from 22-6-1994, when the Government of Maharashtra declared its policy for women. The discussion is confined to the provisions in the Maharashtra Act, and the comments would be applicable to the identical laws of the other three States.

The Maharashtra Amendment adds to the principal Act (the Hindu Succession Act) a new Chapter II-A entitled "Succession by Survivorship". Despite its incorporation in a law relating to succession (i.e., the Hindu Succession Act), and reference to "succession" in the title of the Chapter, the Amendment confers rights upon daughters inter vivos and deals with matters of property irrespective of death of any person or of succession.

Under Section 29-A added by the Amendment, the daughter of a coparcener shall by birth become a coparcener in her own right in a joint Hindu family governed by Mitakshara law, and shall have the same rights and be subject to the same liabilities as if she would have been a son.3 In the event of partition, she shall be allotted the same share as that of the son, and if she is dead at the time of partition, her children will be allotted her share.4 She shall hold such property with incidents of coparcenary ownership, and shall be entitled to dispose of it by will.5 A daughter married before 22-6-1994 (the date of operation of the Act) has been excluded from these benefits.6 Nor are partitions effected before 22-6-1994 to be reopened.7 And partitions effected on or after 22-6-1994 and before 15-12-1994, if not effected according to the provisions of the Amendment, shall be rendered null and void.8

Under Section 29-B, if such daughter having share in Mitakshara coparcenary dies leaving behind a child or a child of a predeceased child, the share in coparcenary property held by her at the time of her death shall pass by testamentary succession if she has made a will disposing it, else by intestate succession.9 If she does not have these relatives, the share shall pass by survivorship to other coparceners.

Section 29-C deals with the right of pre-emption, referred as "preferential right to acquire property". After 22-6-1994, if any heir on whom property devolves under Sections 29-A or 29-B desires to transfer his/her share, other heirs shall have a right to acquire the interest proposed to be transferred.10 If the heirs cannot agree upon the amount of consideration for the share, the amount shall be determined by the court.11 As discussed above, the amendments of Tamil Nadu, Andhra Pradesh and Karnataka make same provisions.

The policy of these State Legislatures to confer upon daughters the hitherto denied right in coparcenary property has been lauded widely, yet the amendments have been criticised for ambiguous language and interpretational difficulties.12 Doubts have also been expressed regarding their constitutionality, particularly in the exclusion of daughters married before each amendment came into force.13

The State amendment of Kerala

The Kerala Joint Hindu Family System (Abolition) Act, 1975 abolishes joint family system among Hindus in the State of Kerala. This is an independent statute and not an amendment to the Hindu Succession Act. This Act has come into force from 1-12-1976. It abolishes joint family system in respect of a tarwad or thavazi, a kutumba or kavaru, an illom and an undivided Hindu family governed by the Mitakshara law. The Act declares that on and after its commencement, birth in a family would not give rise to rights in property.14 Every member of an undivided Hindu family governed by Mitakshara law holding coparcenary property will hold his share in it as if the property has been partitioned, and as a tenant-in-common.15 The right to maintenance, marriage/funeral expenses or residence of any member of the family other than the one holding such share shall not be affected.16 The rule of pious obligation of a Hindu son has been abrogated.17 The members of the joint Hindu family shall be liable for the debts contracted by the karta.18

The extent and applicability of these State laws

The Kerala Act is an independent legislation, whereas the other four States have incorporated State amendments in a

Central legislation - the Hindu Succession Act. For example, the Maharashtra Amendment Act inserts the whole Chapter into the Hindu Succession Act, 1956, "in its application to the State of Maharashtra".19 None of these amendments indicates the persons to whom or the properties to which it is applicable.

Although the provisions about coparcenary property have differed in different areas of India according to schools of law applicable,20 well-established rules and presumptions about migration have solved questions about application of the law. Every Hindu is presumed to be governed by the law of the school which prevails in the locality or territory in which he resides.21 When one family migrates to another province governed by another law, it carries its own law with it. Thus the migrated Hindu and his descendants are presumed to be governed by the law of the school to which he belonged before migration.22 Such presumption can be rebutted by proof that the individual or his ancestors have adopted the law, usages, and religious ceremonies of the new place of residence.23 In the present context, a question arises whether the same principles can be applied, and whether the State amendments apply to "all Hindus" residing in the State irrespective of their original domicile, or only to Hindus domiciled in that State irrespective of residence or location of property.

The legislative power of a State

Under the Constitution, a State may make law on any matter referred to in List II of Schedule VII of the Constitution; and, subject to any law made by Parliament, on any matter referred to in List III of Schedule VII of the Constitution. Parliament can make law having extraterritorial operation, i.e. having effect on matters or persons or events situated or occurring outside the territory of India.24 The States have no such power. This power of Parliament is, of course, subject to the well-established principle that Parliament may not pass a law affecting rights to immovable property situated abroad.

Can a State, under this system, make a law to affect property situated or persons outside the territory of that State? The laws made by a State must be for the purposes of the State.25 In the absence of a "territorial nexus", laws enacted by State Legislatures cannot have extraterritorial operation.26 The nexus theory has been applied in some cases. The Supreme Court has held that the Bihar Religious Trust Act, 1951 applied to all trusts in Bihar, even if any part of property of the trust was situated outside.27 It was held that if trustees function in Bihar, the connection was real and not illusory. But if the trust was situated outside the State, a State could not legislate in respect of such a trust only on the basis that it held property in the State.28 Under the Gujarat Ceiling Act, 1960, land held in any other part of India could be taken into account for computing permissible area of land in the State of Gujarat. This provision was upheld on the ground that "mere consideration of some factors which existed outside the State would not make the law extraterritorial".29 In the above cases, the issue of territorial application of State laws arose in the context of legislative power of the State under Article 245 of the Constitution. Issues did not arise between private parties, and did not lead to conflict of laws situations.

The question of extraterritorial application of State law arose before the Supreme Court in a case between private parties in Kavalappara Kottarathil Kochuni v. States of Madras & Kerala.30 A Madras law provided that "every sthanam shall be deemed to be and shall be deemed to always have been the property belonging to tarwad", which meant that members other than the sthanee got rights in the property of the sthanam. The question was whether this law governed the properties of the sthanam situated at Cochin (outside Madras State). The Supreme Court held that it did not so apply. The Supreme Court has not given the reason for so holding. But the principle that a State law cannot extend to properties situated outside the State is clear. The same principle can apply by analogy to properties of a joint Hindu family.

The reason for conflict

Joint Hindu families or their members may migrate from one State to another, or some of them may reside in more than one State. A single member of a family may reside in more than one State. Also a family may possess properties, moveable and immovable, in a number of States having different laws relating to coparcenary property. Such situations raise issues of conflict of laws. Situations of conflict: some examples

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(1) The presumptions that a Hindu is subject to the law of the place of residence, and that a migrant family may take its law with it to the new place of migration, may not provide an answer to the problems. If a Hindu son migrates to Maharashtra from Uttar Pradesh having a share in coparcenary with his father and two brothers who still remain in Uttar Pradesh, will the law of Uttar Pradesh apply to him (by virtue of the above presumption) and thereby deny his daughters a share in the coparcenary, or will the new law in Maharashtra apply and give his daughters shares in that property? If one of his daughters claims her share in a suit of partition, the court would face the problem of determining the law applicable. This problem would remain, whosoever may have filed the suit for claiming the share.

(2) The question may also arise in suits between the coparcenary and third parties. If K, a daughter having a share under the Maharashtra law and claiming therefore to be a karta, alienates property of the joint Hindu family (whether situated in

Maharashtra or outside), and in a suit challenging this alienation her authority to alienate is challenged, the court may have to search for the law applicable.

(3) Under the land ceiling laws, land held by a person in any part of India can be taken into account for determining ceiling area. Where land, therefore, is situated in various States, sharers in the land in each State may differ. Will the authorities under the land ceiling laws recognise laws of other States for computing ceiling limits?

(4) Peculiar is the situation of a daughter who has married after commencement of the four State amendments giving her a share. If she is married into a family settled outside these States, will she be entitled to a share under these amendments? Assuming her share were vested on the date of commencement of the amendments, would her children, particularly her daughters, be entitled to benefit of these amendments? The second question becomes vital if one accepts the view that having married into a family outside the four States, she has acquired a "domicile" in the State of her husband's residence; in such a case can the arm of a State amendment extend outside the State to confer shares on her daughters?

(5) Suppose a joint Hindu family with sons and daughters has immovable properties in Uttar Pradesh, Maharashtra and Kerala. If it belongs to Maharashtra, will the daughters be entitled to a share in the properties in Uttar Pradesh? Will then the properties in Kerala be considered coparcenary properties? If yes, which members will be sharers and what will be their shares? Applying the Kochuni31 principle the law of each State should apply to properties in that State. The concept of community of ownership and unity of possession would then be effaced, as the body of sharers in different properties of the same family would not be identical.

(6) Suppose husband and wife are settled in Maharashtra. The wife's father is the karta of a joint Hindu family located in Uttar Pradesh and having properties inter alia in Maharashtra. The husband and the wife break up and the wife claims maintenance from the husband. The property of the wife's family in Maharashtra will have a bearing on the amount of maintenance. Would she have a share in the properties of the joint Hindu family?

Such situations of conflict may arise not only in proceedings between members seeking to enforce their rights within the coparcenary, but also in proceedings between the family/member of the family on the one hand and a third party on the other. Conflict of laws issues may also arise as incidental or collateral questions in matrimonial matters, succession matters and other proceedings.

The three questions in conflict of laws

In a case relating to coparcenary property involving different laws of different States, a "foreign element" may thus arise on account of coparceners being domiciled in or residing in different States, or properties of a family being located in a number of States where different laws are applicable.

A case with a foreign element involves all or any of the following three questions: 1. Does the court have jurisdiction to decide the matter in a case involving a foreign element? (in the present context an element connected with another State)

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2. If yes, what law should it apply? (i.e. the determination of the lex cause)

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3. Will the court enforce a foreign judgment determining the issue between the parties? (in the present context, the judgment of a court in another Indian State)32

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The first and third questions

The Civil Procedure Code, 1908, applicable throughout India, requires that a suit for partition of immovable property shall be instituted in the court within the local limits of whose jurisdiction the property is situated.33 If properties are situated within jurisdictions of various courts, it can be filed in any one of the courts.34 If the properties of a joint Hindu family do not involve immovable property, the suit would have to be instituted either at the place where the defendant resides or at

any of the places where the property is situated, being the place where the cause of action arises.35 Moreover, no suit shall lie challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing.36 In view of such express provisions of the Civil Procedure Code, the first question may not arise in a case involving a coparcenary or any coparcenary property with elements located in different States.

Is the court in one State bound by the judgment/decree of a court in another State? The Civil Procedure Code contains various provisions about this. Firstly, no suit shall lie challenging the validity of a decree passed in a former suit between the same parties on any ground based on an objection as to the place of suing.37 Further, any question, arising between parties to a suit in which a decree is passed, relating to execution, discharge or satisfaction of decree shall be determined by the court executing the decree and not a separate suit.38 Provisions relating to stay of suits,39 res judicata40 and bar to further suit41 ensure that parties cannot reagitate the same issues in different courts or different proceedings. A decree may be executed by the court which passed it, or such court may transfer it for execution to another court.42 Where decree is sent for execution to another State, it shall be executed in the manner prescribed.43 The provisions of the Civil Procedure Code ensure that no court can refuse to recognise the decree of a court situated in any other State in India. The third question is also therefore not likely to arise in the present context.

Thus the questions of jurisdiction and of recognition of judgments do not pose much difficulty. However that may not be the case with the second question.

The second question: the determination of the lex causae

It is for the court seized of the case to determine the lex causae, i.e., which law to be applied and to which aspect of the case. This search takes a complicated route. Indian courts have been following rules of conflict of laws applied by English courts. But the concept of coparcenary being peculiar to Indian law, rules of any other system of law cannot provide any readymade solution.

The first step is to identify whether the applicable laws themselves provide for their applicability. As discussed above, the State laws provide no answer except that they are applicable within the respective States.

The next step is to classify the laws into their real category. Classification of a rule of law is the identification of the department of law under which a particular legal rule falls, in order to ascertain whether it falls within the department with regard to which the chosen law is paramount.44 Dicey and Morris refer to this technique as characterisation.45 The State laws relating to coparcenary property affect personal relations, right to property and succession. Do the State laws relate to property, or to personal relations, or to succession?

If the laws deal with property, the law of the place where the property is situate, i.e., the lex situs would vie for importance, especially so if the property is immovable. The general rule is that the lex situs is the governing law for all questions that arise in regard to immovable property.46 The Supreme Court has also recognised this principle in Kochuni case.47 Each State amendment would then apply to (a) all properties, whether moveable or immovable, within the State; or (b) to immovable properties within the State, leaving issues of moveable property to be decided by the law of the family's domicile.

If the State laws are classified as laws governing personal relations (or succession), the well-established principle that law of domicile governs personal relations would apply in such a situation only when one assumes a "State domicile" for the purpose. Even then, questions may remain, for domicile is an abstract concept, "an idea of law",48 and litigations may be resorted to and lengthened over the determination of domicile.

Whose domicile would determine the application of the law of a State? The domicile of the karta, or that of all members, or that of majority of coparceners? The domicile of the karta seems a logical answer, but then who shall be a karta would be determined according to the law of the State involved. For, under the law applicable in the four States, even a daughter can be a karta. Unless the law applicable (lex causae) is identified, the karta cannot be identified; and unless the karta is identified, the lex causae cannot be determined. If the lex causae is to be determined on the basis of domicile of majority of the coparceners, one again revolves round in circles, for it is the lex causae which will provide an answer to the number of coparceners in a joint Hindu family. The domicile of all the coparceners may not always be the same. Members of a Hindu family having properties in different States may want to agree amicably about the division of properties, yet their domicile for the purpose of application of one or the other law of a State may elude them.

The need for certainty

There is no rule of conflict of laws which can provide any direct and immediate solution in a case involving different laws relating to coparcenary property in different States in India. Nor does any of the four State laws provide any answer. Nor have any rules been established by decisions of courts, Indian or English. Until these rules are formulated, various courts in different States would be free to decide cases based on their own interpretations of the rules of conflict of laws and of the State legislations. Decisions would vary, thereby increasing uncertainty, and providing inducements for "forum-shopping". Law must be definite particularly in this area to enable interested parties in planning and managing affairs

relating to coparcenary property. There is therefore urgent need for certainty in law.

Conclusion and suggestions

The Kerala Act and the amendments to the Hindu Succession Act by Maharashtra, Andhra Pradesh, Tamil Nadu and Karnataka, have all been hailed as progressive in their own way. But these can create situations of conflict of laws, since laws in the States in India relating to Mitakshara coparcenary property differ. Resolution of these situations of conflict and formulation of rules by the courts would take some time. Hence there is urgent need for:

(1) having one law relating to Mitakshara coparcenary throughout India; or

(2) clear definition of applicability of the State laws/amendments; or

(3) immediate enactment of rules of conflict of laws for resolving conflicts.

*Â Â Â Lecturer, ILS Law College, Pune 411 004. Return to Text

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- Clause (i) of Section 29-A inserted by the Hindu Succession (Maharashtra Amendment) Act, 1994 (hereafter "the Maharashtra Amendment"). Return to Text
- Ibid., clause (ii) of Section 29-A. Return to Text
- Ibid., clause (iii) of Section 29-A. Return to Text
- Ibid., clause (iv) of Section 29-A. Return to Text
- Ibid., clause (v) of Section 29-A. Return to Text
- Ibid., Section 3 of the Maharashtra Amendment. Return to Text
- Ibid., proviso to Section 29-B inserted by the Maharashtra Amendment. Return to Text
- Ibid., Section 29-C(1). Return to Text
- Ibid., Section 29-C(2). Return to Text
- See (i) G.M. Divekar: "Some Doubts and Queries on Maharashtra Hindu Succession Act, 1994", (1995) 1 Mah LJ Jour 21; (ii) B. Sivaramayya: "Coparcenary Rights to Daughters, Constitutional and Interpretational Issues", (1997) 3 SCC (Jour) 25. Return to Text
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- Ibid., Section 4. Return to Text
- Ibid., proviso to Section 4. Return to Text
- Ibid., Section 4(2). Return to Text
- Ibid., Section 6. Return to Text
- Section 2 of the Maharashtra Amendment. Return to Text
- The Dayabhaga school prevailing in Bengal and Assam, the Mitakshara school throughout India; in the Mitakshara school, the Benares school, the Mithila school, the Madras or Dravida school and the Bombay or Maharashtra school. For details, see S.V. Gupte, 1981, Hindu Law, Vol. I, All India Reporter Limited, Nagpur, Art. 7, pp. 39-41. Return to Text
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- State of Bombay v. R.M.D. Chamarbaugwala, AIR 1957 SC 699; R.S.D.V. Finance Co. (P) Ltd. v. Shree Vallabh Glass Works Ltd., (1993) 2 SCC 130 Return to Text
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- Section 16 of the Code of Civil Procedure, 1908. Return to Text
- Ibid., Section 17. Return to Text
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- Ibid. Return to Text
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- Dicey and Morris: Conflict of Laws, 1993, 12th Edn., Sweet and Maxwell, London, p. 34. Return to Text
- Ibid., p. 939. Return to Text
- Supra fn 30. Return to Text
- Bell v. Kennedy, (1868) LR 1 Sc & Div 307, 320 Return to Text