(2012) 11 BOM CK 0049

Bombay High Court

Case No: Testamentary Suit No. 86 of 2000 in Testamentary Petition No. 917 of 2000 and Testamentary Suit No. 48 of 2005 in Testamentary Petition No. 104 of 2005

Mamta Dinesh Vakil	APPELLANT
Vs	
Bansi S. Wadhwa Nirmaleben @ Nivedita Desai Vs Nivedita Dhimant Malvi	RESPONDENT

Date of Decision: Nov. 6, 2012

Acts Referred:

- Constitution of India, 1950 - Article 14, 15, 15(1), 15(3), 15(4)
- Divorce Act, 1869 - Section 10, 34
- Hindu Adoptions and Maintenance Act, 1956 - Section 10, 13, 14(1), 14(2), 18
- Hindu Succession Act, 1956 - Section 11(i)(ii), 11(iii)(iv), 14, 14(1), 15
- Penal Code, 1860 (IPC) - Section 354, 494, 497
- Succession Act, 1925 - Section 47, 48, 55, 56, 63

Hon'ble Judges: Roshan Dalvi, J

Bench: Single Bench

Advocate: Rushabh Shah assisted with Mr. Jayesh Desai, Ms. Hema Desai for Plaintiff in Suit No. 48 of 2005 and Mr. R. A. Shaikh for Plaintiff in TS. No. 86/2000, for the Appellant; Rajni Iyer with Mr. Y.V. Divekar and Ms. Gargi Bhagwat instructed by . Divekar and Co., for Defendant in TS No. 48/2005, Mr. Y.V. Divekar instructed by . Divekar and Co., for Defendant in TS No. 86/2000 and Mr. Kevic Setalvad a/w. Mr. Rohan Cama instructed by . The Solicitor General, for the Respondent

Judgement

Mrs. Roshan Dalvi, J.

Both the aforesaid suits relate to the letters of administration and probate of the Will of a deceased Hindu who died leaving distant heirs. The deceased in Suit No. 48 of 2005 is a male Hindu. The deceased in Suit No. 86 of 2000 is a female Hindu. The Plaintiff in Suit No. 48 of 2005 claims to be the paternal aunt of the deceased. Her claim of relationship is not admitted. The defendant/Caveatrix in Suit No. 48 of 2005

is the maternal aunt of the deceased. Her relationship is not challenged. The Plaintiff in Suit No. 48 of 2005 claims to be an heir nearer in the line of succession to the deceased than the Defendant/Caveatrix who is the maternal aunt of the deceased. She claims to fall in Item VII of Class II of the Schedule to Section 8 of the Hindu Succession Act. She claims to exclude the maternal aunt who is shown to fall under Item IX of Class II of the Schedule to Section 8 of the Hindu Succession Act (HSA). The Defendant filed her Caveat and challenged the relationship of the Plaintiff and also the Constitutional Validity of the aforesaid items of the Hindu Succession Act as being unreasonable and discriminatory as giving preference to the father''s relatives over the mother''s relatives. She has claimed that under Sections 8 and 15 of the HSA, which deal with the properties of Hindu males and Hindu females dying intestate respectively, are gender discriminatory.

2. She has also claimed that Section 8 of the HSA is discriminatory as it does not make any distinction between properties acquired by a deceased male from his father and his relatives or from his mother and her relatives. She claims discrimination on the ground that the source of the estate of the deceased Hindu male is not seen u/s 8 of the HSA as the source of the estate of a deceased female Hindu is seen u/s 15 of the HSA. Based upon the pleadings between the parties following issues came to be framed:

ISSUES

1 Whether the plaintiff proves that she is the paternal aunt of the deceased.

2 Whether the plaintiff is entitled to claim beneficial interest under the will of late Shri Hargovind Raja without probate being granted of such will.

3 Whether the plaintiff proves that the properties mentioned in the Schedule to the petition belonged to the deceased.

4 Whether Entry 7 of class II of the Schedule to the Hindu Succession Act is unconstitutional and unreasonable.

5 Whether the persons brought on record as legal heirs are in fact legal heirs of the deceased the original Plaintiff.

3. A further additional issue came to be framed as follows:

6. Whether Section 8 and Section 15 of the Hindu Succession Act read together show that either of these sections is discriminatory and unreasonable and hence unconstitutional.

4. The issues relating to the constitutional validity have been argued first. If the constitutional validity of the Act is upheld the Plaintiff as the paternal aunt of the deceased Hindu male in Suit No. 48/2005 would be entitled to succeed to his estate to the exclusion of the Defendant who is the maternal aunt of the deceased upon she proving her relationship with the deceased. Oral evidence in that behalf upon

issue Nos. 1, 2, 3 & 5 is recorded and may be considered after the consideration of the constitutional validity issue, if required.

5. In Suit No. 86/2000 the Plaintiff is the sister of the deceased female Hindu. She has applied for Letters of Administration with the Will of the deceased dated 15th March 1995 annexed thereto. She claims that the estate of the deceased essentially comprising one flat was the absolute property of the deceased u/s 14 of the HSA, the deceased having purchased the said property with the help of her parents, brothers and sisters. She claims that only the brothers and sisters of the deceased, who was a married Hindu female, were her heirs and legal representatives since the property left by the deceased was her absolute property u/s 14 of the HSA. She has shown five heirs of the deceased who are one brother and four sisters of the deceased including the Petitioner. The Caveator is her brother-in-law being the brother of her deceased husband. He claims the estate of the deceased sister-in-law u/s 15(1) (b) of the HSA as one of the heirs of the deceased''s husband.

6. He challenged the execution and attestation of the Will of the deceased. Based upon his claim as heir of the deceased his Caveat has been accepted. Upon the challenge to the Will the following issues came to be framed in the Suit and are answered as follows:

7. The oral evidence has been led in the Suit with regard to the execution and attestation of the Will of the deceased.

8. The Caveator claims to exclude the Petitioner as also the other brother and sisters who are the heirs of the father of the deceased u/s 15(1)(d). Upon he having filed his Caveat he has defended the Suit.

9. Upon seeing the challenge to the constitutional validity of inter alia Section 15 vis-a-vis Section 8 of the HSA the discrimination and distinction between the heirs of a Hindu female for the purpose of seeing the rules of succession of a Hindu female came to be seen. An issue with regard to the constitutional validity of Section 15 and 16 itself would arise. An additional issue is, therefore, required to be framed as follows:

4. Whether the devolution of a property of a female Hindu dying intestate u/s 15 of the Hindu Succession Act are discriminatory and unreasonable and hence unconstitutional.

10. It may be mentioned that the Plaintiff in Suit No. 86/2000 has maintained that the Caveator is not an heir of the deceased and that the brothers and sisters of the deceased who was a married female Hindu were her only heirs and legal representatives as shown in the Petition because she died leaving her absolute property u/s 14 of the Hindu Succession Act. That contention would be incorrect in law under the HSA (though it would have been correct if the deceased was governed under the Indian Succession Act, as shall be seen presently). The deceased may have

been absolutely entitled to the estate left by her including the aforesaid flat admittedly owned by her and bequeathed by her under the Will. However upon the law as it stands, the heirs of the deceased married female Hindu would have to be served a citation and would be entitled to file a Caveat and challenge the execution of the Will of the deceased. Since, as aforesaid, the Court noticed the inherent and patent distinction between the heirs mentioned in Section 15 of the HSA upon seeing the challenge to the validity of Sections 14 and 15 in Suit No. 48/2005, the Court has framed the aforesaid issue No. 4 in Suit No. 86/2000 also as arising from seeing the relationship between the parties set out in their respective pleadings.

11. Hence it would be material to determine also the constitutional validity of the devolution of property upon the Rules of Succession u/s 15 of the HSA along with determining the validity of the execution and attestation of the Will of the deceased.

12. In Suit No. 86 of 2000 in Testamentary Petition No. 917 of 2000 the deceased female Hindu had 5 sisters and one brother. She was married. She has executed a Will on 15th March 1995. Her husband was alive at the time of the execution of the Will. They had no issues. Her husband as well as she are stated to have been later murdered by a nepali servant. The husband is stated to have several brothers and sisters. One brother of the husband has filed a Caveat. He claims to be an heir u/s 15(b) of the Hindu Succession Act in preference to the brothers and sisters of the deceased Hindu female. He claims that he has other brothers and sisters who would be equally entitled. He has not given the names and addresses of those brothers and sisters. They are stated to have settled abroad. The Petitioner does not know their names or addresses.

13. The validity of the execution of the Will is required to be seen in the Testamentary Petition on merits of the claim of the Petitioner upon the issues as initially framed since the entire evidence has been recorded and the arguments heard in that behalf.

14. The Plaintiff has examined herself and one of the attesting witnesses. The Defendant has examined himself.

15. Issue Nos. 1 & 2:

The Plaintiff and one of the attesting witnesses are sisters. They are the sisters of the deceased. The other attesting witness is the brother of the deceased and their brother.

16. The Will is handwritten. It is written on a folded full-scope paper by the deceased. It is signed by the deceased as also the attesting witnesses. The first page of the fold shows the date of the execution of the Will. It also shows the evening time. It essentially deals with the flat of the deceased. The flat was self acquired property. It stood in her name. She lived there with her husband. The sole beneficiary of the flat is the niece of the deceased who is the daughter of another

sister of the deceased, the Petitioner and the attesting witness. The niece lived in Dubai. She had lived with the deceased whilst she was in Mumbai. The deceased had nominated her niece and two others in respect of her flat in the records of the co-operative society in which the flat was. Under the Will she bequeathed the flat to her after the death of her husband. She bequeathed her flat at MMRDA plots and shares and cash equally amongst her 5 sisters. The bequests under the Will are essentially under two sentences - one relating to the flat and the other relating to her movable and immovable properties. She has signed thrice under the bequests on page 2 of the fold. After her three signatures she has further written that she has to make her Will on a stamp paper, but if anything goes wrong, then this would be her Will. She has again signed thereunder. She has also signed to the right of the writing on fold 3.

17. On such a Will the P.W. 2 as well as her brother have signed as attesting witnesses. On the 4th fold of the will she has mentioned that it was a Will made by her and again signed thereunder. It is this Will that is sought to be probated. The Plaintiff herself was not present at the time of the execution. No executor is appointed under the Will. The Plaintiff has applied for Letters of administration with the Will of the deceased annexed thereto. She has identified the signatures of the deceased as also the attesting witnesses. She has also identified the handwriting of the deceased. She has deposed about the nomination made by the deceased. She has clarified that the nomination was made in favour of her niece who was then Soniya and later Krutika. She has deposed that she was aware of the Will of the deceased during the life time of the deceased. Her brother gave her a copy after the death of the deceased. She had seen the original Will when the Petition was filed.

18. She has been cross examined on irrelevant aspects aside from her identification of the handwriting and the signatures on the Will. A copy of the Will is shown to be verified by a bank officer. Her cross examination on that aspect is immaterial as the court is not concerned with the copy of the Will. Her cross examination about the nomination and relationship is also only of an informative value. Whether or not she knew about the Will before or after the death of the deceased makes no difference. She was not present at the time of the execution.

19. The evidence of the attesting witness is the only material evidence with regard to issue No. 1. She is a sister of the deceased. She has deposed that the deceased had come to the house of the brother, who is stated to be "at King''s Apartment". She used to come there daily. The two attesting witnesses and the deceased alone were in that flat on that day at the time of the execution of the Will. She desired to make a Will. The brother of the deceased took that aspect lightly.

20. However, she wrote out her Will on a folded full-scape paper. She signed the Will twice. Thereafter the attesting witnesses signed. The Will shows two signatures below which there is one more sentence which is also signed. The attesting witnesses have signed to the left of the last sentence in the margin. She has

deposed that her brother signed first and thereafter she signed. She has also deposed that her sister put six signatures on the Will. She thought that that was because her sister thought that it would be more authentic. Nevertheless her evidence shows that the sister had signed twice before her brother and she attested the Will. The third signature is to the left of the first two signatures on the will. The signature by the side of the last sentence is to the right. There is yet another signature on the third fold. There is one signature on the reverse of that page being the 4th fold. The witness has identified all the six signatures which are identical. She has deposed that two signatures were put before her signature. The juxtaposition of the signatures fully corroborates her evidence; the two signatures of the deceased followed by the last sentence. The two attesting witnesses have had to sign towards the margin on the left because the second fold was completely used up by the deceased executing her Will. The other signatures of the deceased are on the left as well as right of the page such as to show that the Will was executed and thereafter those signatures were put.

21. The cross examination of the attesting witnesses shows the circumstances of that evening when the Will was executed. The deceased came to the house of the brother in the evening at 5 p.m. She came alone and not with her husband as she did each day. She told the brother that she needed to make a Will. Only the two sisters and the brother were present. They had a family talk. She told her brother and sister that she wanted to make a Will. The brother told her not to talk nonsense. She stated that she was highly diabetic and anything may happen to her. Hence she wanted to make the Will and wrote down her Will. The witness has deposed that the brother of the deceased could not refuse to sign the Will.

22. Her further cross examination shows that her brother may have given her the paper or she may have herself taken the paper from the table on her own. She had not seen the deceased writing the Will because she had gone in the kitchen to prepare tea whilst the deceased wrote the Will. So she could not say how the deceased took or got the paper. The kind of the paper of the Will fully corroborates this evidence also.

23. Her evidence shows that the deceased told the attesting witness that she wanted to make the Will and in fact executed the Will of herself in her handwriting at the same place and during the same incident. The attesting witnesses have executed thereafter in her presence and in the presence of one another. The brother attested before the sister. The signatures of the attesting witnesses are at the most natural place by the side of the last sentence of the Will.

24. Her cross examination shows whether within 4 hours the Will was prepared, executed and attested which she has answered in the affirmative. The kind of Will that is sought to be probated would required even lesser time.

25. She has been cross examined as to whether she had talked with her husband about the execution of her Will. Though not required to do so, the sister has deposed that she did talk with her husband on the telephone. She did not listen to the entire conversation, but she could make out that it was on that account. That part of the evidence is also not material to consider the valid execution of the Will. She did not require her husband''s permission to bequeath the property which belonged to her. In any event the Will makes a reference that the husband would live in the flat bequeathed to her niece during his life time by the words "till my husband is there and after that the whole and sole flat will belong to Soniya". It so transpired that she as well as her husband lived in the flat together until their death together.

26. She has been asked which signatures were put in her presence on the Will. She has deposed that there were two signatures put in her presence. That evidence confirms to the execution of the Will showing two signatures before the last sentence of the Will. Signatures could be put anywhere on the Will. She attested after two signatures were put. She has, however, identified all the signatures on the Will. She has been cross examined on one sentence which has been scratched out. She has deposed that she had not seen the deceased scratching out that portion. However when she signed, the portion was scratched out. This evidence corroborates her evidence that her sister talked about the making of the Will and actually made the Will, but when she was not present because she was preparing tea in the kitchen. She saw her sister signing the Will and thereafter her brother and she signed as they could not refuse it. Her further evidence is that her brother''s signature was already there, which confirms her case that her brother signed first and she signed later as attesting witness. Further as to the signatures of the attesting witness she has confirmed that there was no blank place available on that place when they signed as attesting witnesses. It has been suggested to her that there was a wider margin on the lower part of the Will. That does not matter as she could naturally not explain why the deceased left a larger margin. In fact the larger margin shows that the deceased kept space for the signatures of the attesting witnesses.

27. She has deposed that the sister was in a fit state of mind when she executed her Will. The fact that she went to her brother''s house and has executed the Will by writing it down in her handwriting fully itself corroborates this fact. The first sentence in the Will is also in that behalf.

28. Due and valid execution of the Will is made out from not only her evidence in chief, but her cross examination.

29. In fact the evidence of the Defendant himself is a pointer to the valid execution of the Will and the effort of the deceased after the execution to effectuate the bequest herself. Aside from the nomination which was also in favour of the sole legatee of her flat, her niece Soniya, the deceased gave a copy of the Will to the

Society. After the death of the deceased and her husband the Caveator, who was the brother of the husband of the deceased admittedly made inquiries in the Society office. It was then that he first came to know of the Will as also the nomination. This aspect lends the strongest credence to the execution of the Will by the deceased.

30. She has also been cross examined on certain irrelevant aspects. One such is whether she took advice from her sister Mamta Vakil who was an Advocate before finalising the Will. That does not matter.

31. She has been cross examined about when she had seen the Will last. That aspect is immaterial. Her evidence further shows that the brother also executed his Will, but after the execution of the Will by the sister. We are not concerned with the brother''s Will also.

32. The aforesaid evidence shows due execution and attestation of the Will of the deceased as required u/s 63 of the Indian Succession Act. Issue No. 1 is, therefore, answered in the affirmative.

33. Issue No. 2:

The Defendant has examined himself. It is for him to prove forgery claimed by him. The Will has six signatures. The Defendant must prove that all the six signatures are forged by another. His evidence shows that he was not familiar with the signatures or the handwriting of the deceased or the attesting witnesses. He has been shown the passport of the deceased. He has accepted that it would bear the specimen signature of the deceased. He has deposed that he could only say that the Will was forged because "it looked like it". No particulars of forgery is given. No attempt at showing another specimen signature of the deceased is made. His only deposition is that he was not informed by the deceased or his brother about the execution of the Will. It is not known why he had to be informed. The deceased bequeathed her self acquired property. He had no role to pay in her decision.

34. He has taken exception to the nomination made by the deceased. However, he came to know of the nomination as also the Will after the death of the deceased when he inquired from the society. This shows that after the death of his brother and his sister-in-law he inquired as to the position of the flat which was their most valuable property. Until that time he had no knowledge of the title to the flat or its nomination. He saw the copy of the Will in the Society office. This aspect rather than create suspicion would show the due execution of the Will by the deceased and her effort afterwards in making it known to the Society. It would also be a pointer to the sound mind of the deceased which resulted in that action of the deceased. His evidence does not prove any forgery at all. Hence, issue No. 2 is answered in the negative.

35. Issue No. 3 :

The letters of administration with the Will annexed of the deceased are required to be granted.

36. The issues relating to the constitutional validity of the aforesaid provisions in both the suits need be decided together. Notice to the Solicitor General was required to be issued so that the Union of India can be heard with regard to the aspect of the constitutional validity. Notice has been issued upon the office of the Additional Solicitor General of India in Suit No. 48 of 2005. The Additional Solicitor General of India has been heard in both the Suits. Similarly Counsel for the Plaintiff in Suit No. 48 of 2005 and Counsel for the Defendant/Caveator in Suit No. 86 of 2000 have also been heard as they support the legislation. Similarly Counsel for the Caveatrix in Suit No. 48 of 2005 has been heard in support of the challenge to the legislation.

37. The Honourable Chief Justice has directed the Court to hear the issue relating to the constitutional validity in both the above suits and to proceed with the trial in Suit No. 48 of 2005 if the legislation is found to be constitutionally valid and to refer the issues relating to the constitutional validity to a Division Bench of this Court if the legislation is found to be discriminatory, unreasonable or unconstitutional.

38. Issue relating to the Constitutional Validity:

The Hindu Succession Act 30 of 1956 (HSA) came to be enacted in 1956 along with the Hindu Minority and Guardianship Act 32 of 1956 (HMGA) and the Hindu Adoption and Maintenance Act 78 of 1956 (HAMA). These legislations were enacted as three installments of the Hindu Code to amend and codify the laws relating to succession, minority and guardianship and adoptions and maintenance amongst Hindus.

39. The statements of objects and reasons of the aforesaid three legislations dated 17th June 1956, 25th August 1956 and 21st December 1956 show the installments of the Hindu Code dealing with the respective subjects.

40. The initial statement of objects and reasons showing the part of the Hindu Code dealing with the subject of adoptions and maintenance amongst Hindus makes a specific reference to the equal treatment for sons and daughters in matters of adoption with the passing of the Hindu Adoption & Maintenance Act, 1956 (HAMA). Accordingly it shows the simplification of the law of adoption of boys as well as girls amongst Hindus. It shows no justification for allowing a husband to prevent his wife from taking a child in adoption after his death and makes a reference to the adoption to be made by a Hindu widow in her own right. The relevant parts of the statement of objects and reasons of HAMA run thus:

Statement of Objects and Reasons. - This part of the Hindu Code deals with the subject of adoptions and maintenance among Hindus.

2. With the passing of the Hindu Succession Act, 1956, which treats sons and daughters equally in the matter of succession, it has now become possible to simplify the law of adoption among Hindus. The Bill provides for the adoption of boys as well as girls. There is no longer any justification for allowing a husband to prevent his wife from taking a child in adoption after his death. The adoption made by a Hindu widow will hereafter be in her own right. No person need be divested of any property which has vested in him by reason only of the fact that subsequent to such vesting an adoption has been made. This rule of divesting has been the cause of many a ruinous litigation.

The HAMA shows the departure from the old uncodified Hindu Law towards gender equality and neutrality. The requisites of the valid adoption u/s 6 of HAMA relates to the "person" adopting, giving in adoption or being adopted and not a Hindu male only.

41. Section 10 of HAMA showing who could be adopted sets out any "person" who is a Hindu who could be validly adopted by the term "he or she" in the 4 items mentioned in the said section. Further u/s 11(i)(ii) the compliance of conditions for a valid adoption are also similar for the sons as well as daughters so that a Hindu person can adopt only one son or only one daughter.

42. Similarly the age of adoption of the father as well as the mother u/s 11(iii)(iv) is the same. Further Section 13 of HAMA grants the same right of disposal of their properties to the father or the mother as adoptive parents. Of course, the reference to only the adoptive mother in Section 14(1) of HAMA is made only because at the time of the enactment of the Act in 1956 the capacity of a Hindu male to take in adoption was absolute and of a Hindu wife to take in adoption was not. Similarly Section 14(2) of HAMA dealt with more than one wife in view of the prevalent polygamy in the Hindu Society at the relevant time without the corresponding provision in case of more than one husband since there was no polyandry even then in the Hindu Society.

43. The enactment of the Act went thus far. Though it referred to the exemplification of HSA under which sons and daughters were treated equally in matters of succession, it failed to go the full length. The capacity of a Hindu male and a Hindu female to adopt set out in Sections 7 & 8 were hugely distinct, different and discriminatory. u/s 7 of HAMA any male Hindu of sound mind and not being a minor had the capacity to take a son or a daughter in adoption albeit with the consent of his wife or wives. u/s 8 of HAMA only a Hindu female of sound mind, not a minor and not married or whose marriage was dissolved or whose husband had renounced the world or was declared of unsound mind had the capacity to take a son or daughter in adoption. The gender discriminatory provision u/s 8 of HAMA has been amended by Act 30 of 2010 under which a female Hindu of sound mind and not a minor would have the capacity to take a son or daughter in adoption albeit with the consent of her husband.

44. Similarly u/s 9(2) of HAMA the father was alone entitled to give in adoption albeit with the consent of the mother except if she renounced the world or Hinduism or was of unsound mind, but u/s 9(3) of HAMA the mother was entitled to give in adoption only if the father was dead or had renounced the world or Hinduism or was of unsound mind.

45. Section 9 enacted in 1956 was also gender discriminatory in that it allowed the mother to give in adoption only after the death of her husband, whilst the husband could give in adoption during the life time of his wife. Those provisions also came to be amended under Act 30 of 2010 by which it was specified that the father or the mother, if alive, would have equal right to give their son or daughter in adoption albeit with the consent of the other. The provision relating to the eligibility to give in adoption only upon the death of the father came to be deleted in 2010.

46. The distinction between the sexes or the equality between the sexes under the aforesaid legislation was seen in terms of Article 15 of the Constitution which runs thus:

15. Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth. - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -

(a) access to shops, public restaurants, hotels and places of public entertainment; or

(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children. [(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.]

47. The gender discrimination under Article 15(1) of the Constitution of India which prevailed until then came to be thus remedied.

48. Sections 18 and 19 of HAMA provided for maintenance of the wife and the daughter-in-law. The provisions being positive discrimination under Article 15(3) of the Constitution have not been challenged as gender discrimination.

49. Under Sections 20, 21 and 22 of HAMA the aged parents and dependents who were entitled to qualify for being granted maintenance were not discriminatory as against their children or the estate from whom they would claim maintenance.

50. The second installment of Hindu Code which came to be codified and legislated dealt with minority and guardianship law under the Hindu Minority and Guardianship Act, 1956 (HAMA). It classified guardians in three classes:

1. Natural Guardians.

2. Testamentary Guardians.

3. Guardians appointed under the Guardians and Wards Act, 1890.

The Act deals with the first two classes of guardians. u/s 6 of the Act the natural guardians of a Hindu minor in respect of the minors'' person as well as property were shown to be the father, and after him, the mother ..... Whereas under the uncodified law the mother could not be the guardian the codified law made her so after the father. The disparity in the equality between the sexes came to be narrowed. The disparity that remained came to be challenged in the case of Ms. Githa Hariharan and Another Vs. Reserve Bank of India and Another, . The Supreme Court interpreted the section recognizing gender equality and neutrality. The Supreme Court held that the words "after him" meant "in his absence". Hence whenever the father was absent, even temporarily, the mother ipso facto took over the guardianship of the child.

51. A similar amendment by codification of the old Hindu law came to be made with regard to the succession of the properties of the Hindu males and females.

52. u/s 8 of the HSA the general rules of succession for devolution of the property of an intestate Hindu male came to be classified in classes I and II of the Schedule to the said Section in the HSA. Whereas in class I there is absolutely no gender discrimination and sons as well as daughters as also the sons of predecessor''s sons as well as daughters share equally, only the widow and the mother share along with them, but not the father. The basic analogy in the said section to make an absolute discrimination in favour of the widow and the mother was to bring about gender parity by power balancing leading to affirmative action contemplated under Article 15(3) of the Constitution. This was upon the premise that a mother would be more dependent upon the estate of a deceased son than the father would be.

53. The classification of the other heirs in Class II showing 9 specified items is yet seen to have fallen short of the gender equality towards which strides were made by legislation in 1956. Item No. I in Class II show the father topping the list, but only after the heirs in class I though not taken to be gender discriminatory as against the mother, and though has not been challenged, has been debated to be requiring to succeed amongst the class I heirs as shall be shown presently.

There can be and has been no complaint with regard to items II, III and I V.

Father''s father and father''s mother in item V take precedence over mother''s father and mother''s mother in item VIII. Similarly father''s brother and father''s sister in

item VII take precedence over mother''s brother and mother''s sister in item IX.

It is here that gender inequality still persists.

54. The rules relating to the succession of Hindu females for the items specified in Section 15 are wholly distinct and different from those relating to succession of Hindu males in class I of the Schedule.

The codification of the old Hindu law has not kept pace with the constitutional mandate of gender equality and in removing gender disparity completely.

55. For a similar succession the rules of intestate succession applicable to persons who are not Hindus, Mohammedans, Budhists, Sikhs, Jains or Parsis (essentially being Christians) set out in Chapter V of Indian Succession Act 1925 (ISA) relating to intestate succession are wholly gender neutral and gender equal.

56. Where the intestate has left no lineal descendants, his mother or father his or her property devolves on his/her brothers and sisters and their children also on those who are kindred to him as per the rules of distribution under Sections 47 and 48 of the ISA, which run thus:

47. Where intestate has left neither lineal descendant, nor father, nor mother. - Where the intestate has left neither lineal descendant, nor father, nor mother, the property shall be divided equally between his brothers and sisters and the child or children of such of them as may be have died before him, such children (if more than one) taking in equal shares only the shares which their respective parents would have taken if living at the intestate''s death.

48. Where intestate has left neither lineal descendant, nor parent, nor brother, nor sister - Where the intestate has left neither lineal descendant, nor parent, nor brother, nor sister, his property shall be divided equally among those of his relatives who are in the nearest degree of kindred to him.

Hence u/s 47 when the intestate leaves neither lineal descendants, father or mother his property is to be divided equally between his brothers or sisters and their children. u/s 48 when the intestate has died without leaving even his brothers and sisters his or her property is to be divided equally amongst those of relatives who are nearest to kindred to him.

57. It would be interesting to see the classification of the successors in class II in the schedule to Section 8 of the HSA enacted in 1956 and the successors under part II of schedule II of the ISA enacted in 1991.

58. The rules relating to succession amongst intestate Parsis under Chapter III of part V of the ISA as they were prior to the amendment Act 51 of 1991 also left much

to attain gender equality amongst parsis. By the Amendment Act each successor, irrespective of his/her gender, shares equally under Chapter III of Part V.

59. Sections 55 and 56 are analogous to Sections 47 and 48. They run thus:

55. Division of property where intestate leaves neither lineal descendants nor a widow or widower, nor [a widow or widower of any lineal descendant] - When a Parsi dies leaving neither lineal descendants nor a widow or widower nor [a widow or widower of any lineal descendant], his or her next-of-kin, in the order set forth in Part II of Schedule II, shall be entitled to succeed to the whole of the property of which he or she dies intestate. The next-of-kin standing first in Part II of that Schedule shall be preferred to those standing second, the second to the third, and so on in succession, provided that the property shall be so distributed that [each male and female standing in the same degree of propinquity shall receive equal shares.]

56. Division of property where there is no relative entitled to succeed under the other provisions of this Chapter, - Where there is no relative entitled to succeed under the other provisions of this Chapter to the property of which a Parsi has died intestate the said property shall be divided equally among those of the intestate''s relatives who are in the nearest degree of kindred to him.

Hence u/s 55 the division of property where a Parsi intestate leaves behind neither lineal descendants nor widow, widower of any lineal descendants, his or her next-of-kin would succeed to the whole of the property of the intestate without distinction of gender as set forth in part II of Schedule II to the ISA. u/s 56 where there is no relative entitled to succeed the intestate his property would be divided equally amongst his kindred.

60. The gender equality towards which the legislation of 1956, which applied to Hindus went only thus far. Whereas gender equality was brought out amongst the successors in class I of the schedule, it fell short amongst items V to IX of Class II of the schedule. The ISA of 1925 had made greater strides towards gender equality in this regard.

61. It is, therefore, unmistakably clear that there is gender discrimination when father''s father and father''s mother would be preferred over mother''s father and mother''s mother, they all being grandparents.

62. Similarly there would be gender discrimination when father''s brother and father''s sister would be preferred over mother''s mother and mother''s sister when they are maternal and paternal grand parents'' children.

63. The discrimination that obviously prevails is not denied; it is justified. Justification is patriarchy at the center-stage. It is argued by the learned Additional Solicitor General Mr. Setalwad that a Hindu family is essentially based upon family ties in one''s patriarchal family. He argued that the woman, upon marriage, goes into the

family of her husband; the converse is not true. A woman gives up her maternal / paternal ties upon her marriage assumes marital ties. Hence, intestate succession for Hindus takes into account this ground reality and is the other reason for the difference is the family ties are sought to be maintained and strengthened by the distinction in the rules of succession relating to Hindu males and Hindu females aside from their sex.

64. A male belongs to but one family. An unmarried Hindu female also belongs to but one family. A married female belongs to her parental family and later to her marital family upon marriage. Consequently in case of married females the maintenance and strengthening of ties would apply equally to her parental family and her marital family. It would have to be seen whether that at any stage in the history and culture of Hindus only the ties of the marital family have been endeavoured to be maintained, preserved or strengthened, whatever be the cause of that endeavour. The distinction between the rules of succession for Hindu males & females u/s 8 and Section 15 respectively on the ground of sex alone would tantamount to discrimination under Article 15(1) of the Constitution of India unless the difference is seen to be based upon "family ties" as the other factor.

65. In the first of the cases relating to the discrimination on the ground of sex in Article 15 of the Constitution, the Division Bench of this Court consisting of Yusuf Abdul Aziz Vs. State, considered the constitutional validity of the offence of adultery as set out in Section 497 of the Indian Penal Code (IPC). Section 497 which made the act of having sexual intercourse with the wife of another man knowing it to be so punishable for the person committing adultery upon such wife but not upon the wife as abettor came to be considered. In para 4 of the judgment it was observed that it is apt very often to be overlooked that Article 15(1) speaks of discrimination "only" on the ground of religion, race, caste, sex, place of birth or any of them but if the legislature has discriminated on any other factor it would not tantamount to discrimination. It was observed that they were good grounds for the difference in the legal position. The Hindu Law propounded by Manu, the principles of Muslim Law as also the European system of law has evolved and took an enlightened, humane view of the position of women in the country at the time the law was framed (which was one and half century ago). They observed that the position of women was in a shocking state. Women were married as children, they were married to much older men, they were married to men who had a number of wives, they were to live in seclusion. They were deliberately put down. They were not equal to men in any walk of life. Women were mere passive tools in the hands of men and could not resist their blandishments. Divorce was not allowed amongst Hindus of most states. Hence the Court concluded that the only reason for discrimination was not sex; it was the social system. The discrimination in favour of the women for not punishing her as an abettor was, therefore, in fact held to be covered by the positive discrimination under article 15(3) (though that law was enacted about a century before the constitution of India came to be in force).

66. The discrimination against women (and not in favour of them) would have to be viewed also from the stand point of whether such negative discrimination is only on account of sex or whether it is also on account of some other factors by which women not as a class in its entirety but women falling within those factors may be differentially treated upon showing a reasonable nexus with such factors.

67. In the case of Anjali Roy Vs. State of West Bengal and Others, the rules relating to the admission to a Government College required female candidates not to be admitted to a certain college within the consortium of colleges. In the judgment of the Calcutta High Court, soon after the framing of the constitution, the concept of the expression "only" in Article 15(1) came to be considered and explained alongside the expression "discrimination". In para 16 of the judgment it was held that what is forbidden in the article is discrimination solely on all or any of the grounds mentioned in the Article. If the discrimination was based on one or more of these grounds and also on other grounds would not be hit by Article 15(1).

68. In that case certain women students were not admitted to Mohsin College though prior to the rejection of their admission at least 8 women candidates had been admitted to the first and second division of that college and there were other women students earlier admitted. Thereafter the women''s college was founded and admission of women candidates was made to that college upon certain departmental arrangements after which admission of women students in Mohsin college was stopped. It was, therefore, held that the refusal of admission was not solely on the ground that the candidate was a women and as such had no place in Mohsin college but on the ground that she was qualified and hence was admitted to the women''s college so that the admission to the other male students in Mohsin college could be easier made. Even after the women''s college was founded some women students reading for the Honours could attend the Honours classes in Mohsin college. It was observed that the reason was not that her sex was taboo for the admission to that college but the reason was the introduction of a comprehensive scheme for the provision of education facilities to both male and female students at that place upon a separate women''s college being established so that crowding in Mohsin college could be reduced.

69. This judgment is the most apt for determining whether the mere difference in the rules of succession between male and female Hindus would tantamount to such discrimination as is frowned upon by the Constitution. The discrimination is sought to be made because of a reason or a justification. The reason may be individous or because of certain characteristics which take resort to the umbrella of culture, tradition, ties or the like. Every such discrimination is abhorred in the constitution. Only if a discrimination is made on the ground of sex, caste, religion etc. and also on another ground, where the former grounds become secondary in importance, that the discrimination would be upheld as not infringing the mandate under article 15(1).

70. Similarly in the case of Girdhar Gopal Vs. State AIR 1953 M.B. 147 the discrimination under Article 15(1) not only on the ground of sex, race, etc. but also on consideration of propriety, public morals, decency, decorum and rectitude came to be considered. In that case the offence of outraging the modesty of a woman u/s 354 of the IPC came up for consideration. The petitioner was convicted for the offence under the aforesaid section and sentenced. The accused contended that the section required criminal force to be used only upon a woman. It was contended that the legislature discriminated in favour of a woman only on the ground of a sex and hence section 354 offended Article 15(1). It was observed that there was nothing like "outraging the modesty of a man". It is also observed that not granting protection to a man against assault or criminal force with intent to "outrage his modesty" is really an objection to a policy in law in defining a particular offence but not an infringement of Article 14 of the Constitution. It was held that in classifying women separately for the offence of outraging their modesty the law took into consideration the propriety, public morals, decency, decorum and rectitude so that the discrimination was not only on the basis of sex alone. It was observed that the offence u/s 354 was based on the principle of morality not to allow women to be injuriously affected by "chartered libertines".
It may be mentioned that Courts would not have come across cases where a man''s modesty, if any, could have been outraged by a woman though, such a case, it was observed in that judgment could result in grave provocation which was punishable as another offence under the Code.

It may be mentioned that though the law allows special treatment to be given to women under Article 15(3) of the Constitution and the law u/s 354 could be read as falling within that umbrella, in view of the reason for the law being also public morality and decorum it was held that the law did not violate Article 15(1) itself.

71. It is not only one of the grounds e.g. sex but even more than one of the grounds e.g. sex and religion or sex and age or caste and religion which would come under the mischief of Article 15(1) and would have to be declared ultra vires on the ground that the legislation discriminated only on the grounds mentioned in Article 15(1).

72. A stark case of discrimination only on the grounds enumerated in Article 15(1) of the Constitution came up for consideration in the case of State of Rajasthan & Ors. Vs. Thakur Pratap Singh AIR 1969 SC 1208. In that case upon apprehension of trouble between landlord and tenant by harboured dacoits and receivers of stolen property resulting in serious riots in certain localities, an additional police force was required to be stationed. This additional complement was allowed at the cost of the public except persons from the Muslim and Harijan communities. It was held that their exemption from payment of additional costs for the additional police force was upon the assumption that everyone of them was peace loving and law abiding and hence it was held that the exemption discriminated against them only on the ground that they belonged to that caste or religion and, therefore, the notification

was struck down.

73. It was observed that it was not the case of the state that there were no persons belonging to other communities who were peace loving and law abiding though that would very well have been, and hence it was found that there was no other ground on which the notification allowed exemption to the 2 communities alone.

74. Even though the law allows special treatment to scheduled castes and scheduled tribes and special provision to be made for them under Article 15(4), the special provision of exemption for them in the notification was not allowed to operate, it not being for their advancement but only giving them a discriminatory privilege.

75. This could very well be on par with learned Additional Solicitor General''s argument of "family ties" - the ties to the paternal family could not be put on a higher pedestal to his maternal family as it could not be presumed that all Hindu females were expected to keep their family ties in their marital families more than they would keep in their maternal/paternal family.

76. The discrimination in favour of the residents of certain localities and in favour of persons of Indian Missions posted abroad came up for consideration as discrimination on the ground of place of birth in the case of Kumari Chitra Ghosh and Another Vs. Union of India (UOI) and Others, . In that case certain seats were reserved for admission to a Government college for the residents of Union Territories other than Delhi as well as for the children of certain Indian Government servants posted abroad in Indian Missions. It was observed that the residents of Union Territories were given preferential treatment in admissions not only because that was their place of birth, but because those areas were comparatively backward and all those areas, except one, did not have a similar college of their own. It was, therefore, held that the discrimination was not "only" on the ground of place of birth but also upon a classification made on a reasonable basis being territorial or geographical. Similarly it was held that children of Central Government Servants posted in Indian missions abroad faced special difficulty in the matter of their admission besides having reciprocal arrangement of educational nature in other territories. It is also observed that students of Jammu & Kashmir faced problems of a particular nature for want of adequate arrangement for medical education of that state for its residents. Hence it was held that a classification made for them by giving preferential treatment was based on intelligible differentia which distinguished them from the others so that it did not tantamount to discrimination under Article 15(1).

The Court also considered Article 29 of the Constitution which protected interest of minorities against denial of admission "only" on the ground of religion, race, caste, language or any of them. The emphasis upon the expression "only" even in that article was read alongside Article 15(4) which allowed the State to make a positive discrimination for advancement of backward communities.

The Court held that not only was there no discrimination against others on the ground "only" of religion, race, caste, sex, place of birth or any of them, but that there was no denial of them seeking admission to the educational institutions "only" on the ground of religion, race, caste, language or any of them.

The Court observed that a classification can be made by grouping together persons on intelligible differentia such that they are distinguished from those who are left out of a group.

The Court observed that unlike the cases cited by the petitioner therein which constituted favourism and patronage for making a classification, the classification having the reasons which served as a rational nexus to the object of advancement of specified backward classes was a factor other than mere caste or place of birth.

In the later case of D.N. Chanchala Ors. Vs. The State of Mysore and Others, "university-wise" distribution of seats was upheld because the discrimination was made not only on the ground of place of birth but also upon the criteria of university having a prescribed standard.

77. The very fact of grouping on intelligible differentia would rule out discrimination only on the grounds enumerated in the aforesaid articles. The grouping would constitute discrimination made on another ground as well. In this case there is no grouping of specified Hindu females who may have the rules of succession different from those of Hindu males because of their specific group. Had that been the case the Court would have seen the other special factor accounting for the discrimination. The persons classified as "Hindu females" in Section 15 of the HSA itself militates against a classification based on any differentia other than sex.

78. In the case of Pujari Narasappa & Anr. Vs. Shaik Hazarat & Ors. AIR 1960 MYS 59 the Hyderabad Prevention of Agricultural Land Alienation Act, the agricultural classes belonging to particular communities like Muslims, Hindus or Christians were sought to be safeguarded. It was held that the basis of the legislation was not religion but the classification was according to avocation in life being agriculture for whom special protection was needed so that they may not be deprived of the little agricultural land they may own or possess. The safeguard accorded to the agriculturist was challenged on the ground that the protection was given to the backward classes whose profession was agriculture. The concept of discrimination solely on the grounds mentioned under Article 15 was considered and the grounds of agriculture was held to be the predominant reason for the discrimination. It was argued that certain communities were essentially commercial communities and not agriculturists and, therefore, the classification was essentially based upon religions or communities. The arguments on the ground that some backward communities were always agriculturists. was repelled the protection and safeguarding of the interest of whom was specifically needed. Accordingly it was held that the legislation was not hit by Article 15.

79. Similarly in the case of K. Ramakrishna Vs. Osmania University AIR 1962 Andhra Pradesh 120 the classification which was geographical was held not discriminatory of Article 14 or 15(1) even if it preferred persons from a particular community who hailed from that geographical area. In this case Rule 6 of Osmania University which classified candidates into 2 groups being from Telangana area and others came up for challenge. The University was started for the purpose of affording educational facilities to the students from Telangana area. The proof of place of birth was required for securing admission. The candidates were required to submit a certificate to show that his parents were domiciled in Telangana region of Andhra Pradesh. The candidates were required to show their place of residence and domicile and not their place of birth. The Court made a distinction between the concept of place of birth and place of domicile being the place where the candidate was born and where the candidate or his parents resided respectively. Since the distinction was made with regard to the place of domicile, it was held not to offend against the principle in Article 15 of the Constitution. Consequently though the candidates from Telangana area were sought to be preferred on the ground that they were domiciled in that area, since the classification was not only on the ground of place of birth but was of the entire geographical area it would stand the test of non discrimination.

80. In this case there is no specific provision for particular Hindus, for Hindus belonging to a particular school of thought, for Hindus who required particular protection for their upliftment. The distinction in the rules of inheritance and succession governing simplicitor Hindu males and Hindu females is distinctly hit by the principles embodied in Article 15(1) of the Constitution as being a discrimination only on the ground of sex.

81. The Full Bench of the Madras High Court in the case of Srimathi Champakam Dorairajan & Anr. Vs. The State of Madras AIR (38) 1951 Mad 120 was called upon to consider whether the system of admission in colleges granting certain preferential treatment to certain backward tribes e.g. to Harijan, Mohammedans etc. discriminated against Brahmin Hindus whose seats for admission were consequently limited as a discrimination which offended Articles 14 & 15(1) of the Constitution. In 3 separate judgments of the Chief Justice and two other Judges and after considering the law relating to the discrimination in the United States against the Negroes in certain cases, the Court considered whether discrimination was on the sole ground of religion, race, caste etc. The Court per majority held that even if the word "only" was omitted from Article 15(1), the article would be wholly unaffected. It held that the word "only" meant "solely" or "for this reason alone" and hence held per majority that the State was at liberty to do anything to achieve the objects under the Directive Principles of State Policy under Articles 46 & 39 and that if a law and even a subordinate legislation was in furtherance of that article then the law could not be offensive of Article 15(1). If that was not so, it would follow as a matter of corollary, that it would be offensive. In that case, perhaps the first of its

kind, among many to follow in all States, the communal government order for admission to Govt. Medical College at Madras in MBBS course regulating the qualification and suitability of the candidates applying for admission on the ground of their marks which were different for candidates of different castes was directed to be enforced such as not to exclude any student with higher marks for admission only on the ground that he/she was a Brahmin.

Hence the criterion being the minimum marks required to be obtained for the sake of eligibility and qualification for admission by candidates of different castes by which the applicants who belong to the Hindu Brahmin community could not obtain admission though having higher marks than the candidates of certain backward communities like Harijan or Mohammedans were held to have been discriminated against only on the ground of caste.

The State contended that the paucity of seats and the necessity to make due provision for weaker sections of the citizens was the reason why the discrimination was sought to be made and hence the discrimination was not "solely" on the ground of caste, race or religion. The State argued that the discrimination was not only because the applicant belonged to Brahmin caste. The Court considered that it would not be only because of their caste but also because it would not enable them to compete with other Brahmin candidates for the limited number of seats allotted to the Brahmins. If the applicants had secured more marks, they would have been included in the list though they were Brahmins and a candidate of another caste could have secured admission on the same marks on which the Brahmin would have been denied admission. The learned Chief Justice considered 4 specific cases of candidates with specified marks where the Brahmin candidates who obtained higher marks could not secure admission whereas 2 Harijan candidates could, upon lower marks. The Court observed that it would be impossible for the State to contend that there was no discrimination.

The Court observed that the State did not deny the fact of discrimination but only justified it on the ground of public policy as necessary to do social justice by promoting the interest of educationally backward sections under Article 46 of the Constitution because injustice would result if no discrimination was made between the 2 candidates of the 2 castes upon the ideals of social justice in the Constitution. The learned Chief Justice directed that the applicants should be considered for admission without discrimination made against them on the grounds of religion, race or caste.

The concurring judgment of Justice Sashtri did accede to the fact that there cannot be absolute equality amongst human beings as was the case in the United States which made a distinction for Negroes. He, however, questioned that distinction, classification, gradation or differentiation in legislative practice or administration can be only designed to enure for public health, safety and convenience - styled as "police power" in the American decisions. Hence he observed that if the power was

exercised bonafide even though legislation might trench upon the freedom of individual citizen it would not be offensive of Article 14. He observed that the fundamental rights rested upon a steel frame on which the government could build. But since the economic resources of the State were limited, it would be impossible to provide seats for all students seeking admission to Government Colleges and some students had to be winnowed out. Hence some qualification and standards prescribed for admission based upon physical fitness, marks etc. could be made. They must, however, be the same for all citizens seeking admissions to the educational institutions irrespective of their caste, community or religion though special advantage could be enjoyed by a particular caste or community which is not taken away by Article 15(1). Hence it was held that if a student belonging to a certain caste and specified the prescribed requirements he cannot be shut up on the score of marks.

The other concurring judgment laying more emphasis upon the expression "only" held that even if one of the Counts of discrimination was caste but it involved other criteria which was in accordance with the preamble of the Constitution for working out equality of opportunity in the matter of education upon various circumstances, it would not be hit by Article 15(1) in view of Article 46 of the Constitution which enjoined the State to promote educational and economic interest of weaker sections of the people in particular, specified castes for reducing social injustice and exploitation, and hence would not offend Article 15 when Article 15(1) and Article 46 are read together.

82. It would, therefore, come to pass that on the ground of caste alone, of a candidate being a Brahmin or a Harijan, admission cannot be refused. But on the ground of caste and social justice by promoting educational and economic interest and qualification, admission could be given against the persons belonging to specified castes. The requirement under various circulars of the Government qualifying the candidates of scheduled, castes and tribes upon marks less than others would, therefore, be accepted as a discrimination made not only on the ground of caste but also on the ground of social justice under the Directive Principle of State Policy.

83. As in that case, in this case Mr. Setalwad would argue that the discrimination is not only on the ground of sex for the rules of inheritance for the Hindu males and females but on the ground of family ties which must be maintained. As observed by the learned Chief Justice in this case, the argument is more to justify discrimination than to contend that there was none. That justification is not even based on social justice. It does not emanate from any of the Directive Principles of State Policy. It is, in fact, directly against the constitutional scheme. Though it may be the reason why the discrimination was made, but it is a reason that cannot stand the test of the sublime equality enshrined in the Constitution. It falls foul of the other provisions in the various legislations of the same era - nay the same year - in which such

discrimination was sought to be eradicated and when it still fell short was sought to be amended later to bring about complete equality between the sexes being Hindu males and Hindu females under the aforesaid legislations.

84. Thereafter in a series of judgments from the case of Minor P. Rajendran Vs. State of Madras and Others, reservation for seats in a State Medical College on the ground of certain castes was upheld under Article 15(1) as the castes were socially and educationally backward falling under Article 15(4). It was observed in para 7 of the judgment that if the reservation was only on the ground of castes and had not taken into account the social and educational backwardness of the castes in question, it would have been violative of Article 15(1). But a caste is also a class of citizens and if as a whole it is backward the consideration for reservation would not be the caste as the sole consideration. They would require to belong not only to the specified listed caste, but also be required to be socially and educationally backward citizens.

In the same judgment classification for reservation for seats upon permanent residence based on district-wise criteria was found to be a camouflage for the discrimination only on the ground of place of birth and hence held to be violative of Article 15(1) on that ground.

85. The judgment would show how a distinction for a specified reason upon a specified criteria can be made upon one or more of the grounds under Article 15(1) and some other ground as well; not upon a mere justification of the sole ground of distinction which then would be cloaked with the vice of discrimination.

86. In the case of Dr. Narayan Sharma and Another etc. Vs. Dr. Pankaj Kr. Lehkar and Others etc., the rule for reservation of 4 seats for candidates of the North Eastern States as recommended by the North Eastern Council (NEC) was held not unconstitutional as it was for the reason that there was only 1 Medical College in one of the 7 States and was not only on the ground of caste or place of birth, but on the ground that students of these states are handicapped in getting medical education.

87. The contentions of Mr. Setalwad are derived from the judgment of the Single Judge of this Court in the case of Sonubai Yeshwant Jadhay Vs. Bala Govinda Yadav and Others, in which Section 15 of the Hindu Succession Act came up for consideration upon a challenge to Section 15(2) thereof as discriminating between the heirs of the husband and the heirs of the wife by providing for and giving preference to the heirs of the husband of married Hindu female dying intestate.

In para 15 of the Judgment it was observed that the constitution does not posit totally unguided non-classified equality. However laws only solve specific problems and achieve definite objectives and absolute equality and total uniformity is impossible of achievement. It was accepted that the law should be equal amongst equals and discrimination amongst persons similarly circumstanced is provided.

However it is observed that if the persons are rationally classified, accepting the long standing position of the personal law, then the law can reach them differently and would not result in discrimination. Hence if there is intelligible differentia in the classification and a rational relation to the object of the legislation it cannot be challenged as discriminatory. It is conceded in the judgment that if there is discrimination only on the consideration of difference of sex it could be challenged. However it is observed that the codification of Hindu law which then needed uniformity and statutory stability was derived from traditions, customs, sastras and the judicial interpretation thereof. It is also recognized in the judgment that Hindu law developed adapting to the situation and assimilation of divergent elements as a live mix. The law of succession earlier had classified branches upon the concept of family, marriage, property etc. It recognizes male and female heirs for that purpose. It is observed that the object of the legislation was to retain property with the joint family upon marriage which brought males and females together forming one institution. It, therefore, accepted that in recognition of that position when the wife''s succession opened, the class known as heirs of the husband were permitted to succeed as a result of initial unity in marriage upon which the female merged in the family of her husband.
The judgment observed that if the property accrued from that family, it was imperative that it should remain in that family recognizing the socio-economic unity of the family in the institution of marriage. Hence in para 20 of the judgment it is held that in achieving the objectives of the integral unity of the family, the closer relations of the wife being the heirs of the husband were preferred to the other distant group.

What is striking is that whilst the property inherited by a female Hindu from her husband or her father is legislated to remain within that family, the property of a male Hindu under the schedule to Section 8 of the Hindu Succession Act is not legislated to remain in that line itself. Class II of the schedule shows the heirs to be not only the sons but also the daughters, not only the brothers'' sons but also the sister''s sons, not only the brother''s daughters but also the sister''s daughters. Hence the rules of succession for males and females from the same family desirous of maintaining the same extent of unity and family ties are wholly different. The reasonableness, if any, in the classification u/s 15(2) is, therefore, absent in Class II u/s 8 of the HSA.

88. Hence while, due to parity maintained u/s 8, a female succeeds equally and along with a male Hindu without discrimination between the sexes, her own succession is riddled with discrimination only on the ground of sex. Hence the observations in the judgment that this succession is much like the succession under Class II of the schedule to Section 8 of the Hindu Succession Act seen to be incorrect.

89. It is held that merely the words "heirs of the husband" does not exclude "heirs of the wife". This is expressed thus:

By describing the heirs of husband, the heirs of wife are not excluded for being a wife she is the member of her family.

90. Though therefore the heirs of the wife may not be wholly excluded as heirs, since they are her mother and father or their heirs who take after the heirs of the husband, they would stand excluded if the married Hindu female leaves behind any heir of her husband as in the above suit No. 48 of 2005.

91. Further it is observed in para 22 of the judgment that the object of keeping the close knit unity of the family requires closer blood relations to be preferred to distant blood relations. The classes of persons u/s 15(1)(a)(b)(c)(d) & (e) do not even show that fact. Aside from the heirs u/s 15(1)(a) who are the closest blood relations of the deceased female Hindu, the heirs of her husband would not be her blood relations and who are preferred to her closest blood relations being her mother and father or their heirs who would essentially be her sisters and brothers.

92. Consequently though there may be rationality between Section 15(2)(a) & (b) read together with regard to the property inherited by a married female Hindu from either of the 2 sources, the rationality would end there. A similar rationality is absent from properties inherited by a Hindu male whether from his wife, mother, father or otherwise. This has led Ms. Iyer to contend that the sources contemplated u/s 15(2) being absent from the rules of succession u/s 8, Section 8 would be hit as arbitrary and discriminatory. Though that argument may be difficult to accept and the source of inheritance by a person may not be the criteria for the rules of his own inheritance, as shall be seen presently, the rationality, if any, between Section 15(2)(a) & (b) cannot be accepted with regard to Section 15(1) which deals with not only the properties inherited by a female Hindu either from a father or mother or from a husband, but also the properties inherited by her from any other person or acquired by herself.

93. The learned Additional Solicitor General also contended that the legislation of 1956 was enacted essentially to provide gender equality which did not prevail prior thereto under the uncodified old Hindu law. He also argued that even the daughter''s heirs are provided for in class I including a great granddaughter. There is, therefore, no discrimination in class I.

94. He further argued that putting the father in class II whereas mother in class I is reverse discrimination and there has been some thought in amending that situation. It may at once be mentioned that the distinction between the mother and the father having been put in class I and II respectively is not reverse discrimination, but positive discrimination by affirmative action to bring about parity in the situation in which the mother and the father would find herself or himself upon the death of their son. It is common knowledge, and judicial notice is required to be taken, that the mother would be more unable to maintain herself after her son''s death than a father would be. She would, therefore, require to be provided a share in his estate

which a father would not require upon the ground reality that prevails in our society and the father having his own means of livelihood which may not be available to the mother. Of course, after the situation which prevailed in 1956 largely changes itself, an amendment may be required which act would be within the realm of the legislation and which is not even an issue in either of the above Suits.

95. Mr. Setalwad argued, and that is correct, that there is no discrimination also in items II, III and IV of class II. Since that is so it would require some good reasoning to make a specific distinction in items V and VIII and items VII and IX. It is argued by Mr. Setalwad that in the family having a common ancestor with children, an outsider is legitimately kept at bay to preserve ties of a marital home. The result is that it preserves the family property within the family. In fact this is factually incorrect. Putting a father''s brother and father''s sister in item VII would not result in preserving the family property within the father''s family away from the outsider because the father''s married sister would have gone outside the father''s family. In Suit No. 48 of 2005 that has actually been the result given the number of heirs that have sought precedence over the mother''s sister being the lineal descendants of the father''s sister and hailing from another family. A family property would, therefore, not be preserved within the family despite the purported aim of such gender discrimination. Consequently, the argument of Mr. Setalwad that the classification in class II though showing a distinction does not result in a discrimination because the distinction is not arbitrary is difficult to accept.

96. Mr. Setalwad himself tried to show the distinction between the agnates and cognates; the agnate being the person related by blood or adoption wholly through males under definition 3(1) (a) of the HSA and the cognates being related by blood or adoption, but not wholly through males under definition 3(1)(c) of the HSA. It is suggested that a reasonable classification is made for giving precedence to agnates over cognates. Agnates would occupy items V, VI and VIII. Cognates follow them in items VIII and IX. However, the inclusion of the widow would rule out that classification in the group of items V, VI and VII. Neither the father''s widow nor the brother''s widow would be an agnate of the deceased since she would not be related by blood or adoption wholly through the father of the deceased. In fact the classification of agnates and cognates itself would also be gender discriminatory. If a person is related by the blood or adoption he would be entitled to succession whether he is so related wholly through males or even through females. That succession is accepted in class I of the schedule to Section 8 of HSA in putting on par the son of a predeceased daughter, daughter of a predeceased daughter and such other family relatives who are not agnates including a daughter of a predeceased daughter of a predeceased daughter.

97. The only classification that is apparent is, therefore, between males and females.

98. The argument of Ms. Iyer that the mother''s brother cannot share equally with a father''s sister in this case which makes succession wholly gender discriminatory is

as simple as it is correct. When a male Hindu dies there is no legitimate reason to assume that his paternal aunt or uncle should be preferred to his maternal aunt or uncle.

So much for Hindu class II heirs.

99. Ms. Iyer''s contention goes further as she contends that the general rules of succession in case of males u/s 8 and in case of females u/s 15 are different and therefore, discriminatory. Indeed they are different. Section 8 runs thus:

8. General rules of succession in the case of males. -

The property of a male Hindu dying intestate shall devolve according to the provisions of this Chapter -

(a) firstly, upon the heirs, being the relatives specified in class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

100. Under these rules of succession class I and the first part of class II contained in items II to IV pose no threat to discrimination. Item No. I in class II is positive discrimination. The specified agnates and cognates in class II are classified such as to prefer agnates to the cognates which show clear gender discrimination. The further agnates and cognates who may be more distant relatives then those in the two classifications in class II would suffer from the same malady.

101. The general rules of succession amongst females u/s 15 of the HSA is wholly different. Section 15 runs thus:

15. General rules of succession in the case of female Hindus. - (1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16, -

(a) firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) secondly, upon the heirs of the husband

(c) thirdly, upon the mother and father;

(d) fourthly, upon the heirs of the father; and

(e) lastly, upon the heirs of the mother.

(2) Notwithstanding anything contained in sub-section (1), -

(a) any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the father; and

(b) any property inherited by a female Hindu from her husband or from her father-in-law shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

102. The items (a) to (e) show the successive successors.

Item (a) leaves no cause for complaint as it is wholly gender neutral in the immediate family.

Item (b) which gives the heirs of the husband precedence even upon her own mother and father in item (c) reeks of discrimination that is acclaimed to be an account of the close family unit of a Hindu female as the reason/justification.

Items (d) and (e) also show discrimination though in several cases it may be watered down as the heirs of the mother and the father may usually be the same being the brothers and sisters of the deceased. If not, and if distant relatives are to be considered, a similar gender discriminatory result would ensue. Mr. Setalwad would argue that the rationale was not gender, but family ties; there need be no family ties with the closest relatives of the mother. That is not so. Even upon the traditions of a Hindu family, the mother''s brother would occupy a place of pride and a place of importance in various female rituals including marriage of the same family. Such are then the types of family relations held preferential to grant succession upon one and to refuse succession upon another.

103. Further, Section 15 of the HSA does not show rules of succession different for married females and unmarried females though, of course, Section 15(1)(a) & (b) would not apply to an unmarried Hindu female. In her case the discrimination is only amongst the classes of heirs in Section 15(1)(d) and (e) if they be different. Whatever that be, the heirs of the husband before the mother and father as also the heirs of the father before the heirs of the mother would constitute gender discrimination. The egalitarian bluestocking that the Hindu society may have become, in consonance with the constitutional mandate, it has still left untouched perhaps the last discriminatory corner of the Hindu Society which has otherwise come of age and which would have to be looked upon as wanting in an equal society.

104. Section 15(2) which is wholly different and distinct from Section 8 of HSA is sought to be brought into play in Suit No. 48 of 2005. Ms. Iyer has placed tremendous emphasis upon the worthiness of the Section. She claims that whereas

it rightly applies to females it fails to apply to males in view of Section 8 having only the aforesaid rules of succession of heirs of class I followed by class II followed by agnates and then cognates. In section 15(2) the source of the property is considered as the prime moving factor. The property of a female Hindu is divided into two specific parts depending upon from whom she inherited the property. It is presumed therefore, that all properties of Hindu females are inherited and never self acquired. It may be mentioned that the property may be acquired by a person - male or female - by any of the five modes of transfer under the Transfer of Property Act, 1882 inter vivos being by sale, lease, gift, mortgage or exchange. There is no provision for any of those whilst the source of inheritance is considered. All properties left by a female Hindu are taken to have been only inherited by the female from either of these two sources mentioned in Section 15(2) of the HSA. It may be mentioned that that may have been a prevalent position in the Hindu Society in 1956 when the initial Act was enacted; it is not the position today. Nevertheless Ms. Iyer would support the theory of succession upon inheritance from a given source. The sources are two - (1) from a father or mother and (2) from a husband or father-in-law. In the absence of a son or a daughter it would revert back to the heirs of the father, but not to the heirs of the mother and (2) to the heirs of the husband. This would be discrimination in consonance with the discrimination u/s 15 (1)(d) and (e).

105. Ms. Iyer takes exception to the fact that the sources of succession from a brother, sister, uncles, aunts or grandparents is not considered in the legislation. In Suit No. 48 of 2005 the male Hindu intestate indeed inherited the property from his maternal uncle. That however would constitute a lacuna by omission which Courts are ill-equipped to fill in. Indeed in that case the property of a maternal uncle devolved upon the deceased Hindu by testamentary succession. He having died intestate and a bachelor, his maternal aunt claims his property, being the sister of the original owner whom the deceased succeeded, in preference to his father''s sister and her lineal descendants who were the original Plaintiff and the present Plaintiffs respectively. The case of the Caveatrix in Suit No. 48 of 2005 is, therefore, that the father''s sister cannot succeed at all and would be excluded by his mother''s sister after the source of the property of the Hindu male intestate was his mother''s brother. This contention is uncontemplated by legislation. This does not constitute any form of discrimination. The omission, therefore, cannot be challenged as unconstitutional. Being a classification itself it will be open to the legislature to consider this rare and unusual phenomenon.

106. What however, can be considered is that a mother''s sister, the Caveatrix, cannot be differentiated from and excluded by the father''s sister upon intestate succession. The exclusion would constitute discrimination. The inclusion could have been with the father''s sister, as under Sections 47, 48, 55 and 56 of the Indian Succession Act r.w. Part I of schedule II thereof. To that extent the claim of the Caveatrix in Suit No. 48 of 2005 can be considered.

107. Just as it has been argued by Mr. Setalwad that the property must remain within the family - the family having only the males at the center-stage to the total exclusion of the females who constitute the family - it is argued by Ms. Iyer that the property inherited by a male from any source must revert back to that source. Just as it is not possible to accept Mr. Setalwad''s contention, it is impossible to accept Ms. Iyer''s contention. Reverting a property to the source in all cases of inherited property by succession by males and females including the sources such as from a brother, sister, uncle, aunt or grandparents would grant them only a life estate. Only the properties acquired by a male and a female inter vivos would form a subject matter of the Hindu Succession Act. Aside from the fact that such a situation cannot even be contemplated and may beget chaos in the Society, it is not for this Court to even consider the proposition of such academic importance alone.

108. It would rather be for a party to contend that though the source of inheritance by a Hindu male intestate is not considered anywhere in the HSA, it being considered only for a female Hindu intestate would constitute gender discrimination, but that is not this case. The case of Ms. Iyer only partly falls for consideration of discrimination under Article 15 of the Constitution. That part is only contained in the distinction of the succeeding items amongst class II heirs in Section 8 of the HSA.

109. The other object for the specific provisions u/s 15(1) or Section 15(2) is the keeping up of a continuity so that the property of the husband remained "in his line", while the property of the parents followed "their line". It would therefore be that reading Section 15(2)(a) & (b) the classification thereunder may be termed reasonable. However u/s 15(1) the property of a female Hindu which has to devolve as mentioned therein relates also to self acquired property. If the preference of the heirs u/s 15(1)(a)(b)(c)(d) & (e) are to be considered even for self acquired property, there would be no question of continuity of the property in the husband''s family. All the property would devolve upon the heirs specified in the order mentioned in Section 15(1). Consequently even for self-acquired property of a woman the heirs of the husband would be preferred to her own mother and father or their heirs as in the above Suit No. 86 of 2000. Similarly if the heirs of the husband as also her mother and father were not alive, the heirs of the father would be preferred over the heirs of the mother but would not take equally.

110. Even if it was not the self-acquired property of a Hindu female but the property which devolved upon her from her husband, the provisions u/s 15(b) would leave her only a life interest without the power of alienation of the property inherited by her, a concept which was frowned by jurists and consequently done away with u/s 14(1) of the Hindu Succession Act under which a property possessed by her during her life time was legislated to be held by her as full owner thereof and not as limited owner. The malaise of limited ownership or life ownership would remain the lot of a married Hindu female u/s 15(2)(b) though there is no contemporaneous provision

for such life interest for a Hindu male.

111. Mr. Setalwad sought to rely upon the reports of the law commission accepting such a situation to be deserving of legislative change. It would not be necessary to go into the aspect which the legislature would require to and is amenable to undertake.

112. It may be mentioned that though indeed in Suit No. 48 of 2005 the distinction between the rules of succession amongst male and female Hindus is the gravamen of the charge of discrimination, and Section 15(1) does not come into play in that suit, it squarely applies in Suit No. 86 of 2000, the facts which shall be considered presently.

113. The stark gender discrimination in the Suit No. 86 of 2000 is u/s 15(1) cited above. It relates to succession of a female Hindu dying intestate. She left behind her own self-acquired property; she did not inherit the property from her father or mother, husband or father-in-law. It would also be argued and that she falls within a vacuum created by a lacuna by omission. Mr. Setalwad drew the attention of the Court to a debate that has arisen to consider the position of an intestate Hindu female. Mr. Setalwad would argue that the provision relating to the succession of intestate female Hindus who die leaving self acquired properties would be considered as an additional provision incorporated as Section 15(2)(c) hitherto not legislated. That, of course, does not fall for the Court''s consideration. What is to be seen is whether upon a legislative provision that prevails today in the case of the deceased in Suit No. 86 of 2000, the order of the heirs shown in Section 15(1) would stand the Court''s scrutiny for gender equality enshrined therein.

114. The deceased in the Suit died testate. Her Will is sought to be probated. It was her self acquired property. We are not concerned with how she acquired it. She has sought to dispose it off by her Will. To probate the Will Testamentary Petition No. 917 of 2000 has been filed. Citation is to be served upon those persons who would be heirs of the deceased had she died intestate. Under the rules of this Court those heirs would have to be mentioned in the Petition. The deceased was a married Hindu female. She had one brother and four sisters. The Petitioner is one of the sisters. In her petition she has shown her brother and three sisters along with her as the only heirs of the deceased sister. Though the deceased was a married Hindu female she had not shown any of the heirs mentioned in Section 15(1) of the HSA. The deceased was not survived by sons, daughters or husband. Hence, heirs u/s 15(1)(a) would not come into play. The heirs u/s 15(1)(b) would otherwise succeed to her estate. She did not show them as heirs. She did not serve citation upon them. She has not been survived by her mother and father. Hence the heirs u/s 15(1)(c) also do not come into play. Her brother and sisters are the heirs of her father as well as her mother u/s 15(1)(d) & (e). She has shown them as heirs. u/s 15(1) as it now stands legislated, the heirs of the husband would have precedence over the heirs of the father and the mother of the deceased married female Hindu.

115. One brother of the husband of the deceased sought to file the caveat. He has contested the execution and attestation of the Will left by the deceased in Suit No. 86 of 2000. He has claimed that there are other brothers and sisters of the husband of the deceased. He has not given the names and addresses of those brothers and sisters of the husband of the deceased. The Petitioner does not know them; at least the Petitioner does not know their addresses. Some are stated to be residing in the US. Even the Court has not been informed about the names of those heirs of the husband as also their addresses. The Caveator has been cross examined on these points, yet the particulars have not been shown during the entire trial. The Court is, therefore, left to contend with only that one heir of the deceased aside only from a knowledge that there may be other heirs of the deceased who have yet not contested the suit by filing a caveat despite their own brother having contested. In this scenario upon the evidence being recorded and arguments being heard, the claim of the Caveator as the heir of the husband seeking precedence over the Petitioner as the heir of the father and mother of her deceased sister came up for consideration.

116. Though the entire case on facts about the validity of the execution and attestation of the will has been heard and considered as aforesaid, the seminal case of gender discrimination which would grant or reject the right of the Caveator to file a Caveat in the first place should be decided. Hence, thereafter this Suit was placed on board along with Suit No. 48 of 2005 to decide the issue of constitutional validity of the relevant provisions of the HSA together. Consequently, the office of the Additional Solicitor General of India was given notice of the issue. Though the notice has technically being sent in Suit No. 48 of 2005, he has been heard with regard to all the aforesaid provisions.

117. His arguments to justify the heirs of the husband of a married intestate Hindu female taking precedence over her own mother and father and their heirs is the principle of the close unity of the deceased with her husband. It is argued on behalf of the Caveator as well as the Government that once a female marries into a family, she ceases to belong to her own family and though this may not be taken as a traditional rule any longer, for the purpose of succession the concept must prevail. It is argued that therefore, the heirs of the husband must come first. It is, therefore, argued that the discrimination is reasonable. Consequently, with the succession growing more remote also, the same family ties continue. Mr. Setalwad argued that the same trend runs, therefore, in the entire intestate succession and if there is interference with one, the others would be affected so as to collapse like a pack of cards. He took exception to such kinetic effect, which he called the domino effect.

118. Indeed all the rules of intestate succession for males as well as females u/s 8 including the schedule (except Class I) as well as section 15 have the same streak of gender discrimination. It was only amongst the close relatives that the discrimination which prevailed prior to the legislation of 1956 was sought to be

removed. That was indeed the stepping stone which has, however, not gone the full length.

119. In fact, there have been amendments to the HSA to tone down or remove gender discrimination that prevailed even after the HSA was enacted in 1956. These are in respect of Section 6 which came to be amended, which dealt with the devolution of coparcenary interest of a Hindu male Section 23 which dealt with a dwelling house which came to be repealed and Section 24 which came to be deleted by the Amendment Act 39 of 2005 with effect from 9th September 2005.

120. It may be mentioned that these amendments sought to do away with other gender discriminations that prevailed until 2005 and were much required to be corrected.

121. Whatever be the concept of family ties upon patriarchy, the Act of 1956 u/s 6 as it was then enacted also did consider the provision that would prevail when a Hindu male died surviving him a female relative or a male relative who claimed through a female relative. Section 6 of the HSA as enacted in 1956 ran thus:

6. Devolution of interest in coparcenary property. - When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act;

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1. - For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2. - Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

The relevant part of amended Section 6 runs thus:

6. Devolution of interest in coparcenary property. - (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall, -

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

For the devolution of interest in coparcenary property, the female coparcenors who were recognised in 1956, were elevated to an equal status as the male co-parceners since 2005.

122. This was specifically expressed in the statement of the objects and reasons of the Amending act of 2005 which runs thus:

STATEMENT OF OBJECTS AND REASONS [The Hindu Succession (Amendment) Act, 2005]

Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognises the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution having regard to the need to render social justice to women, the states of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property,. The kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975.

It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have.

123. Section 23 of the HSA which made a special provision with regard to the dwelling house was derided as gender discriminatory. It ran thus:

23. Special provision respecting dwelling houses. -

Where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective

shares therein; but the female heir shall be entitled to a right of residence therein:

Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

124. The underlying reality was recognised; if the class I heirs were only 1 son and daughter, as is usually the case in families since the last half Century, the son would never claim partition and the daughter would never get her share in the dwelling house which may be the only property. Hence though the Section was enacted so that a dwelling house may not be partitioned upon the claim of a married daughter, the legislature later recognised that whatever be the position of the dwelling house, a law which discriminated the daughter only on the ground of her sex could not stand the test of equality of the males and females; it is no longer justified on the ground of "family ties". It came to be repealed by the amending Act of 2005.

125. Section 24 which prevented remarried widows from inheriting also caused gender discrimination since widowers remarrying were not disinherited. It ran thus:

24. Certain widows re-marrying may not inherit as widows. - Any heir who is related to an intestate as the widow of a pre-deceased son, the widow of a pre-deceased son (is son) or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens, she has remarried.

(Bracketed portion incorrectly omitted)

The settled discrimination by incorporating that Section in the initial Act of 1956 without the corresponding similar provision for widowers came to be deleted to eradicate the gender discrimination and the consequent impediment upon widow remarriage which, need not be stated, was the first of the enlightening principles of reformation of the Hindu Society propagated by Maharshee Dr. D.K. Karve.

126. Why then should the gender discrimination to inherit by succession differently by both males and female Hindus be not considered gender discriminatory ? If males and females could be equal survivors (under Section 6 of HSA), why could they not be equal successors (under sections 8 and 15 of the HSA) ? Why would there be a constraint upon granting gender equality in succession to Hindus u/s 8 class II, agnates and cognates and u/s 15? as has been successfully granted to Christian and Parsi males and females as seen in Sections 47, 48, 55 and 56 of the ISA since 1925 and 1991 ? If some of the near Hindu male and female successors could be equal successors (as class I heirs) why not the more remote Hindu male and female successors (as class II heirs)?

127. The gender considerate law of succession contained in the HSA as enacted in 1956 is, therefore, seen to merit still further change as it has yet fallen fell short of full gender equality.

128. The length to which the 1956 legislations have gone in codifying the Hindu law and the amendments and interpretation made thereto as also the other parallel legislation being the Indian Succession Act demonstrates clearly that this one corner has been left out from the virtue of gender equality and accordingly, is seen to suffer from the debilitating gender discrimination, it being without any rationale and only on the ground of sex.

129. It is argued that it has been held in various legislations that personal laws are outside the purview of the Court''s consideration of discrimination. Each community is covered by its own personal laws. That is correct. The challenge is not towards the Uniform Civil Code. The challenge is not even made to contend that the provisions of Sections 47, 48, 55 and 56 of the ISA be made applicable to Hindus or precisely those provisions be incorporated in the HSA. The aforesaid sections are seen as a guide to understand a legislation already enacted which has stood the test of time and which would be an exemplification to follow within the parameters of the Hindu law applying to Hindu Society which has made great strides towards the egalitarianism. It would, therefore, be rather a blemish that the Society striving towards equality in a country which under its very constitution grants, inter alia, gender equality to all its citizens, can fall short in cases such as the above only on the ground of gender.

130. Mr. Setalwad''s argument is that personal laws fall wholly outside the mischief of discrimination. This argument proceeds on a footing that since all the communities of India are yet governed by their personal laws which are wholly different from the laws of other communities, making law for one community to the exclusion of the other would not come up for challenge. That is indeed true despite the constitutional requirement of the Uniform Civil Code (UCC) being the ultimate goal of bringing about social equality. Indeed, therefore, for matters which are legislated for particular communities the courts are held not entitled to legislate or to even review those legislations. Hence each community is granted its own separate gradual pace for social welfare and reform upon such community being ready for such reformation. [See. Maharshi Avadhesh Vs. Union of India, 1994 Supp (1) SCC 713 , Ahmedabad Women Action Group (AWAG) and Others Vs. Union of India, , Pannalal Bansilal Patil and others etc. Vs. State of Andhra Pradesh and another, and Monogamous Marriages Act.]

131. Mr. Setalwad relied upon the case of Chennamma Vs. Dyana Setty AIR 1953 MYS 136 in which though the law relating to maintenance was different for the Hindu women governed by Mitakshara system and the women governed by other Hindu system, it was held that such laws could not be applied universally and, therefore, the universal application was not the test of criterion to label it as discriminatory. Consequently though that law did not apply to other communities, it was held that it could apply to women governed by the Mitakshara system.

This is the applicability of personal laws inter communities but not within it.

132. In the case of The State of Bombay Vs. Narasu Appa Mali AIR (39) 1952 Bom 84 it was held by the Division Bench of this Court that the law relating to the Hindus could not be assailed on the ground that it was discriminatory because it did not also govern Mahomedans or that what the law sought to prevent was not prevented amongst Mahomedans.

In that case the constitutional validity of the Bombay Prevention of Hindu Bigamous Marriages Act was challenged on the ground that polygamy was accepted amongst Mahomedans and its prevention amongst Hindus discriminated them from their Mahomedan brethren and hence contravened the fundamental rights under Articles 14, 15 & 21 of the Constitution.

133. After considering the evolution of Hindu law where initially the institution of polygamy was recognized upon necessity of a Hindu obtaining sons for religious efficacy, it was observed that the large volume of people of the world admitted that monogamy was a more desirable and trustworthy institution. It was a measure of social reform. It showed the State policy. It was not prevalent amongst other communities like Christians and Parsis. Muslim was a separate class to which that law then did not apply as the institution of marriage itself was differently looked upon by Hindus and Muslims as a sacrament and a contract respectively. Its dissolution was also differently tackled by the two religions by way of easy divorces and by indissolubility of marriage. The law considered the educational development of the 2 communities; one might be prepared to accept and work out a social reform; another may not yet be prepared for it.

Consequently the Court concluded that promoting polygamy in any case did not offend against Article 15(1) and that legislation was, therefore, not void. The Court considered that by way of that legislation the evil of bigamy was sought to be more effectively brought down as under the Act the offence was made cognizable and the punishment was more severe than the offence of bigamy u/s 494 of the IPC. The Court, therefore, concluded that the legislation did not discriminate against Hindus only on the ground of their religion, but was enacted for social reform.

134. The Division Bench of the Madras High Court in the case of Srinivasa Aiyar Vs. Saraswathi Ammal AIR (39) Mad 193 similarly upheld the constitutional validity of the Madras Hindu (Bigamy Prevention and Divorce) Act, 1949. The judgment observed that the Act made no discrimination between the Hindus and Mohammedans. It would only recognize the classification already in existence that the section of the people was subject to a particular system of law peculiar to them.

135. This however does not mean or include that a particular legislation by itself governing only a particular community could never be challenged on the ground of discrimination if it discriminates between males and females of that community. Accordingly Section 10 and Section 34 of the Indian Divorce Act (IDA) came to be amended and omitted respectively to remove gender inequality which was

demonstrated therein and on the ground of which a part of Section 10 and Section 34 dealing with distinctive types of adultery as grounds of divorce different for male and female Christians were held ultra vires in Ammini E.J. and etc. Vs. Union of India (UOI) and Others, and N. Sarda Mani Vs. G. Alexander AIR 1988 AP 157.

136. The Hindu Society has been a forerunner with female education being given positive impetus by renowned Social Philosophers and reformists of the genre of Jyotiba Phule since the last decade of the 19th Century and well before the legislature sought to keep pace with social equality in the three specified fields of the 1956 legislations including succession. Hence the state need not cry foul for the Hindu Society on that score.

137. The contention of Mr. Setalwad that the aspect of discrimination is outside the purview of all personal laws because all communities in India are governed differently by their respective personal laws does not mean that anything relating to personal laws can be legitimately discriminatory between sexes as much as between castes and religions. Though the personal laws are for different religions, there are no personal laws for different sexes. The personal law relating to a given community would govern both males and females of that community. Such personal laws after the enactment of the Constitution must follow the mandate of absolute equality of the Constitution within that community subject to affirmative action in favour of women and children as allowed under Article 15(3) though the personal laws of the Hindus may be different from those of Muslims and others, the personal laws of Christians may be different from Parsis and others. The analogy does not even apply to persons of two sexes from a single community.

138. Mr. Setalwad also relied upon judgments in which the rules of succession under the usage of particular communities of Hindu came to be upheld. In the case of Gurdial Kaur Vs. Mangal Singh, it is held that the rights of succession varying as belonging to different sexes was held to be determined according to the personal law and usages specially if the usage was recognized as valid since long. In that case the usage was established since 1891. Mother''s succession to her son''s property was allowed only until she did not remarry; such an injunction not being upon the father. A custom in a community came to be upheld and the argument of discrimination on the ground of sex came to be repelled upon the usage.

Despite this old law of 1968, we may refer to the amendment to Section 24 of the HSA cited above. In view of the deletion of the Section the disparity is fully removed. Besides, ours is not a case of usage of custom which could be upheld by the Court. It is a case of specific legislation after the constitution was enacted frowning upon any discrimination on the ground of sex.

139. In the case of Lekshmana Iyer Krishnaiyer Vs. Ponnu Ammal Lekshmi Ammal & Anr. AIR 1952 Travancore-Cochin 317 another custom under Hindu (Mitakshara) Law, for devolution of the property upon a female only during her lifetime and

thereafter to the last male holder was upheld.

That was prior to 1956 when the HSA came to be enacted and when the uncodified Hindu Law was in force. It is the legislation which was enacted after the constitution came into effect that is challenged in the above petitions.

140. Section 15(1) of the HSA for devolution of self-acquired property of a married Hindu female came up for consideration in the case of Omprakash & Ors. Vs. Radhacharan & Ors. 2010 (1) MR 453 in which Section 15(1) was applied but in which the constitutional validity was not challenged and hence not considered.

141. Mr. Setalwad contended that the aforesaid provisions of HSA are not discriminatory as being wholly different for males and females with regard to the rules of their respective succession because certain other legislations were held not discriminatory. The case of R.K. Garg and Others Vs. Union of India (UOI) and Others, dealt with the constitutionality of the Special Bearer Bond (Immunities and Exemptions) Act, 1981. It was argued that the exemption under the Act favours black money holders and was consequently discriminatory on the tax payers and destroying the morality of the taxation system. It was held that the economic activity and matters were best left to be legislated as they were matters where even economists would differ and hence Courts could not even opine. It was also held that the basis of classification could not be held to be not intelligible or arbitrary. However it was also observed that unless such economic legislation touched upon civil rights such as the freedom of speech, religion etc. under Chapter III of the Constitution, it could be left unchallenged as legislation enacted under Chapter IV of the Constitution.
The challenge to the basic freedom of speech and religion cited as examples in that judgment could be equally applicable to the discrimination on the grounds mentioned in Article 15 of the Constitution.

142. Similarly in the case of Sanjeev Coke Manufacturing Company Vs. Bharat Coking Coal Limited and Another, a legislation with regard to a scheme of nationalization of certain coal mines came to be challenged on the ground that only such mines in particular regions were covered. The Court held that Article 31-C of the Constitution was not violated. The essence of the reasoning was the laws giving effect to the Directive Principles of State Policy (DPSP) under Article 39 Clauses (b) & (c). These were held not discriminatory as infringing Article 31-C of the Constitution. If there is a rule and substantive connection between the provision of the law and a Directive Principle, the pith and substance to give effect to the Directive Principle would accord protection to the law under the amended Article 31-C.

Section 15 of the Hindu Succession Act is not enacted for the enhancement of Article 39 or any other article under Chapter IV of the Constitution. The article which is infringed is also not relating to proprietary rights as under Article 31. The passing of the legislation for the socio-economic upliftment of the country under Chapter IV

may not have to be circumscribed by the proprietary freedom under Article 31-C, but even such socio-economic legislation would not be able to sustain itself if it infringed the basic freedom such as the right to life and liberty of an individual as much as the right to have no discrimination on ground of sex, colour, caste, class, age etc.

143. Conversely in the case of Murthy Match Works and Others Vs. The Asstt. Collector of Central Excise, and Another, , it was alleged that a sub-classification within a class was not made even if it could have been reasonably made so that non equals were treated equally. In that case excise duty on matches was sought to be levied upon small manufacturers of matches at the same rate as was levied upon the larger producers. It was challenged on the ground that the classification between the smaller and the larger group of manufacturers could have been legitimately made but was not made. The Court refused to interfere on the ground not only that the lack of classification did not render the statute arbitrary but the question of classification was a matter of legislative judgment being a subject of taxation and hence did not become a judicial question. Consequently the argument of hostile discrimination by treating dissimilar things similarly whilst maintaining a facade of equality was repelled.

Such legislation would indeed survive the test of constitutionality unless it discriminated upon the matters forbidden for discrimination. Since that was not the case, the constitutionality was maintained.

144. Similarly where the sales tax exemption granted to certain traders was modified to grant benefits to all traders, it was held to be outside the purview of constitutional challenge. [See. Central Areca Nut and Cocoa Marketing and Processing Cooperative Ltd. Vs. State of Karnataka and Others,].

145. Mr. Setalwad also relied upon judgments to show the most basic constitutional jurisprudential principle of presumption of constitutionality for which there could be no debate; There is a presumption of constitutionality unless unconstitutionality is clearly established. [See. State of Bihar and others, etc. etc. Vs. Bihar Distillery Ltd., etc., ; Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, and R.K. Garg and Others Vs. Union of India (UOI) and Others,].

146. A purposeful interpretation of a legislation must be made to effectuate its intention. [See. State of Kerala Vs. Mathai Verghese and Others,].

147. I do not see how the analogy in any of the aforesaid judgments would be of any help in a case where the legislations were not enacted upon a Directive Principle of State Policy or for matters of taxation and does not leave the basic freedom and aspects of equality under the Constitution untouched.

148. The provisions in Sections 8 and 15 show discrimination between Hindu males and females. They show discrimination only on the ground of gender. The family

unit or the tie may be a justification, but the discrimination is not upon family ties. The classification made is not upon family ties. The classification is wholly and only between males and females. The female acquiring property by her own skill and exertion would deprive herself of allowing it to succeed to her own heirs being her mother and father or their heirs in preference to the heirs of the husband u/s 15(1)(b) as was the lot of the Petitioners in the case of Omprakash Vs. Radhacharan 2010 (1) All MR 453 in which the Constitutional Validity was not brought up for consideration. Years of toil and skill would, therefore, be watered down as would be seen in Suit No. 86 of 2000. Conversely a Hindu female who would otherwise hope to succeed to an estate of another Hindu female as an heir would receive a setback from the distant relatives of the husband of the deceased not even known to her or contemplated by her to be her competitors except upon claiming precedence as class II heirs u/s 8 or as preferential heirs u/s 15(1) (b) as in the Suit No. 48 of 2005.

149. Such discrimination cannot stand the principle of equality as the basic feature of the Indian Constitution. It is, therefore, required to be declared ultra virus the Constitution. Hence the following order.

ORDER

1. The issue relating to constitutional Validity in both the above suits are answered in the affirmative to declare Sections 8(b) (c) and (d) r/w the Class II of the Schedule of the HSA as also Section 15(1) of the HSA unreasonable as discriminatory and, therefore, unconstitutional and ultra vires as being violative of Article 15(1) of the Constitution of India.

2. The further issues, if any, in Testamentary Suit No. 48 of 2005 in which oral evidence to prove the lineage of the Plaintiffs has been led shall be decided after the adjudication by the Division Bench of this Court on the constitutional Validity of the aforesaid provisions.

3. The case on merits has already been considered in Testamentary Suit No. 86 of 2006.

4. The Letters of Administration with the Will of the deceased dated 15th March 1995 is granted. The Prothonotary and Senior Master of this Court shall issue the Letters of Administration.

5. Drawn-up decree is dispensed with.

6. However, until the Constitutional Validity of Section 15(1) is finally determined by the Division Bench of this Court, the estate of the deceased cannot be depleted.

7. The flat of the deceased which has been bequeathed under the Will is lying vacant and locked. The Society has not allowed either of the parties to occupy it. It would be inequitable and unjust to keep the flat locked pending the determination of the constitutional validity of Section 15(1) of the HSA under which the

Defendant/Caveator claims his rights and under which any of the other heirs of the husband of the deceased may claim. Since on merits the Will is seen to have been validly executed, interest of justice demands that instead of keeping the flat of the deceased locked and unmaintained, the Plaintiff be allowed to enter upon and/or use the flat subject to her written undertaking that she will not dispose of or sell or transfer the said flat pending the final determination of the constitutional validity of Section 15(1) of the HSA.

8. The Honourable Chief Justice directed this Court to decide the issues in the above suits relating to Constitutional Validity of the aforesaid provisions with a rider that if they are to be declared unconstitutional by this Court as a single Judge, the issue be referred to the Division Bench of this Court. The issue of constitutionality in both the above suits, shall, therefore be referred to the Division bench of this Court.

9. The Prothonotary and Senior Master of this Court as also any party may place the Suits before the Honourable Chief Justice for assignment of the suits to a Division Bench of this Court for consideration of the issues relating to the Constitutional Validity.