

Position of Minor in India

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Abstract

The paper deals with the provision of every personal law in regard to a minor property right, the partition of property and alienation. The paper prominently deals with the Hindu law in regard to minority rights. It covers the Minor Karta and Coparcener as well the provision in regard to partition and alienation of Minor property. Similarly, the researcher had also dealt with the Muslim Minor and the provision relating to partition and alienation of property of Muslim minor as well Muslim minor wife. Finally, research paper also covered the Christian and Parsi Law in regard minor right on the property.

Keywords: Personal law, Hindu law, minor property, provision, alienation

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INTRODUCTION

“Children must be prevented from squandering away the property through inexperience, and if either or both of their parents die or if the parents disagree in matters concerning the children, provision must be made for the management of their property”

—83rd Report of the Law Commission of India

Under the Hindu Minority and Guardianship Act, 1956, Minor is the person who has not completed the age of 18 years. In general, it is to be supposed that Minor is the person who is physically as well intellectually immature and imperfect and therefore needs someone's protection. In every personal law as well in secular law, there is distinct provision for a minor which specifically deals with minor interest. Indeed, though every personal law has distinct provision and law regarding minor, but the sole concern is the welfare of a minor. In the Hindu Law, there is a peculiarity of the Joint family system which has the concept of Coparcener and Karta. The succession right of Hindus governs by Hindu succession act 1956 as well as classical law, i.e., Mitakshara Law of succession. Similarly, Muslims are governed by the Shariat law, whereas Christian and Parsi are governed by the Indian Succession Act, 1925. Though every law has

the special provision of minor but somewhere it seems that there is lacuna which shall be filled. Like, if the partition happens in which minor is also a party, and the partition was not in best interest of child then the minor can file a suit for re-opening of partition only when minor will attain the age of 18, i.e. Majority. It seems that to get justice, minor have to wait for the long duration of time which is per se injustice. Similarly, as per Muslim law, the only father being natural guardian have the right to deals with minor property, even mother does not have that authority. Also, there is the certain scenario, where the partition was held in which minor was also party and guardian represent the minor, but it's found that the partition was mostly due to the interest of minor representative rather having for the minor. There are no any laws to check and scrutinize such detrimental tasks.

HINDU LAW

Hindu Undivided Family

The joint family system is per se Patriarchal in nature. In the Hindu Law, Joint Family system can be traced from ancient Aryan, which is an indissoluble association of life. It has been thought that the main purpose behind the HUF was to maintain the strength of the group as well to keep the resource collection and keeping it ready for any threat from neighbors [1]. The moment child takes birth in HUF, acquires the right of ownership and right to

common enjoyment and common use of properties. But the peculiarity is that only son can enjoy this right of ownership [2]. In the Hindu Joint family, all the matters are represented by its Karta. In the HUF, it's composed of a common ancestor and all his lineal male descendants together with the wives and unmarried daughters [3].

Karta

In the HUF, Karta plays a crucial role within the family. Karta, being the head of the family, acts on behalf of the whole family member. From the inception, Karta had always supreme power within the family and use to manage all the affairs of the joint family, even in the traditional joint family same system were prevailing. Karta also deals with the property of the family [4]. The position of Karta in Hindu undivided family is *sui generis*. Generally, Karta is a senior most male member of the joint family [5]. Mostly Father is a Karta in the family but in the absence of a father, the male senior most members are presumed to be Karta. The position of Karta in the joint family goes by birth and is regulated by seniority. But, in a certain scenario, Minor can also act as the Karta and represent the family through the guardian. In the case, *Nopany Investment (Pvt) Ltd. v. Santokh Singh* [6], the court laid down certain circumstance when a younger brother of joint Hindu family can be a Karta. It was held in this case that, the younger male member be a Karta, whenever the senior member or the Karta is not available or when the Karta relinquishes his right expressly or by necessary implication; or, in the absence of the manager in exceptional and extraordinary circumstances such as distress or calamity affecting the whole family and for supporting the family; or, in absence of the father; or, fathers whereabouts are not known or who was away in a remote place due to compelling circumstance and his return within a reasonable time was unlikely or not anticipated [7]. Minor have to act as a Karta through the guardian till he attains the majority [8]. In the case, *Shreya Vidyarthi v. Ashok Vidyarthi* [9], it was held that, mother of male coparcener can act as the legal guardian of the minor and also look after his role as the Karta in her capacity as his (minor's) legal guardian.

There was radical change on Hindu Law in 2005, the amendment of Section 6 (1) (a), Hindu Succession Act, 1956, in 2005, empowers the daughter equal right as the son. The amendment of Hindu Succession Act entitles daughter to be the Coparcener in Hindu Joint Family who are governed by Mitakshara Law. In the case, *Mrs. Sujata Sharma v. Shri Manu Gupta* [10], Court held that eldest daughter can become a Karta after the demise of the father. Court also declared that, as being the Coparcener of Joint Family, they have right to be the Karta and even this right won't cease after marriage. Daughter as taking birth in the Joint family, have the right to be Coparcener as well Karta from birth. As, the daughter can be the Coparcener as well Karta of Joint Family, and also it settled precedent that Minor can be Karta as well Coparcener of Joint Family. Thus, it can be said that minor daughter can be also a coparcener as well Karta of Joint Family. Minor daughter will govern by the similar principle and condition as a minor son. Similar to minor son, the minor daughter will act as Karta through the guardian. Whereabouts, nowhere in the law the rights of minor widows were discussed. But it can be inferred that as there is provision for widow maybe it is applicable for widow minor too. In general, widow can't be the Karta of HUF. Similarly, minor widow won't be the Karta as well as coparcener of the HUF [11].

Coparcener

To be the Karta of HUF, he/she must be the Coparcener. No one else apart from the Coparcener can be the Karta of HUF. Coparcenary is the narrower facet within the joint family, and it consists of father, son, son's son and son's son's son. In simple word, Father and his three male lineal descendants from the Coparcenary. A Coparcener has an interest by birth in the property of the joint family, though the interest is an unpredictable and fluctuating until partition takes place. The fluctuation in the interest is mostly due to deaths and diminished by birth in the family [12]. There is certain right entitled for the coparcener, like, every coparcener has a right to be maintained including a right of marriage expenses being defrayed out of the joint family fund; every coparcener is bounded by the

alienation made by the Karta for legal necessity, and every coparcener has a right of partition and survivorship. Apart from coparcener, unmarried daughter has also right to maintenance and the right to be married out of the joint family fund [13]. Also, when the widow of coparcener adopts a son, the adopted son become a coparcener with the surviving coparcener of the adoptive father which entails acquiring the same interest which is an adoptive father would have in the property had he been living [14].

In regard to Minor Coparcener; there is a peculiarity in Hindu Law as there is no any distinction between Minor coparcener and Major coparcener in respect of their rights in the joint family property. In the Hindu joint family, the moment male child takes birth; he acquires the birthright in the Coparcenary property. The interest of the child in the Coparcenary property is equal to the interest of his father. Thus, minor and major coparceners have same right and privilege in joint family apart from having a certain restriction in regard to partition and alienation [15]. In the case, if the Karta is ill-treating to minor coparcener; or discrimination minor; or squandering the joint property to the prejudice of the minor coparcener, then minor can file a suit by his next friend or guardian on behalf of him. The notable point is that the partition must be for the welfare of minor otherwise, the court will reject the plea of partition. Also, if the partition is in benefit of the minor, then the severance of status takes place from the date of the institution of the suit. While during the pendency of the case, if minor dies and before the court is determined that, the partition is in behalf of a minor, then, though the minor dies, the suit can be continued by the legal guardian of the minor. In the case, *Chinna Venkata Reddi v. Lakshamma* [16], the mother was acting as guardian of her minor son and files a suit for the partition on his behalf. Other coparceners were brothers of the minor father. It was alleged that others coparcener was suppressing and are prejudicing the interest of the minor some properties and bringing into existence collusive deeds of partition. During the pendency of the suit, minor died, and his mother continues the suit as his legal representative. The high court found that the

partition was beneficial to the minor in the existing circumstances. So, the filing of the plaint brought about division in status and mother get a decree for the share which would have been allotted to the minor.

By keeping the interest and welfare of minor in paramount consideration, there is provision for re-opening of partition by the minor. After attaining the majority, minor can reopen the partition if the partition was unequal, unfair or prejudicial to the interest of the minor though while having partition minor was represented by his father [17]. Though the well settled law is in behalf of minor welfare but however, it seems injustice for minor, as only after attaining majority, minor can file a suit. Suppose, if partition happened at the age of 10, then minor can only challenge the partition after attaining majority i.e. 18 years old. Minor have to wait for the long duration of the period. But, if the interests of Minor are being adequately taken care of by the other coparcener or the father, then the partition sought by minor won't be affected [18]. The suit for partition by minor coparcener must be for the benefit of the minor by advancing his interest or protecting them from danger.[19] The partition of property by agreement within the coparcener is even binding for minor coparcener unless the partition is prejudicial to minor interest [20].

In regard to the partition, major coparceners have flexibility in compare to minor coparcener. Major coparcener can affect a partition at his will and Minor coparcener doesn't create any hurdle for the adult coparcener against partition. But the same condition is not available for the minor as he cannot cause partition on his own will nor can authorize anyone on his behalf. The only option available near minor is to institute a proceeding through his next friend and thereafter court can pass decree if court satisfies that partition is beneficial for the minor. It was also found that, in most of the cases, next friend of minor motivated for own interest which is detrimental for the minor [21]. In the case, *Ratnam Chettiar v. SM Kuppuswami Chettiar*, two brothers made a partition and at that time plaintiffs were minors. Under the partition deed, both

immovable and movable property was divided with the help of family auditor of one brother. Plaintiff here alleged that partition was secured by practicing fraud and undue influence and by suppressing large assets belonging to the family which was taken by their uncle by taking advantage of the weakness of the plaintiff's father who was a person of weak intellect. SC after making a detailed study also reached the same conclusion that it was an unequal partition and the silence of the father or even his acquiescence in allowing his elder brother to swallow the amount was not a prudent act and it had caused serious detriment to the interest of the minors which he had to protect, because the minors at that time were members of the Hindu Undivided Family.

Alienation

Alienation means, “*Transfer of Property from one person to another by way of a sale, gift, lease, mortgage, etc.*”. In the Hindu Undivided Family, the power of alienation is solely vested near the Karta. Though Karta has sole authority upon alienation, Karta can only alienate on the legal necessity ground, such as; Payment of Government revenue, maintenance of coparceners, marriage expenses of coparcener and their children, payment of debts binding on the family, soon. Before alienation, Karta has to take the consent of coparcener. But there are certain scenarios, when Karta can alienate the property without the consent of other coparceners, like, in the case of legal necessity; for the benefit of the Estates; and for the performance of Indispensable Religious Duties [22]. Whereas performing the marriage of joint family member is an act of necessity but performing the marriage of minor though he/she is a member of the joint family can't be said to be an act of necessity [23]. Also, there is a certain obligation for minor from which male minor can't be escaped. If the family is a trading family by birth or by vocation, then after the death of the father, the adult son can carry the business and can incur debt if needed for business. Then, the interest will be binding for other sons too even to the minor also [24].

It is not mandatory for the minor to rely on the sham nature of the transaction and after

attaining the majority he can question the sale of his property, which was alienated while he was minor [25]. In general, Section 7 of Transfer of Property Act, empower every person who is competent to contract and entitled to the transferable property is competent to transfer such property to the extent and in the manner allowed and prescribed by any law for the time being in force. Even the interest of a Co-owner or Co-sharer can be sold. Similarly, according to section 11 of Indian Contract Act, everybody who is of sound mind and who attains the age of majority is competent for any contract. But, in regard to minor, legal guardian can be made the contract on behalf of minor but the contract must be for the welfare and benefit of minors. Also, Section 8 of HMGA, 1956 empowers the power of natural guardian and devised to fully protect the property of a minor, even from the depredation if his parents. In accordance with this section, natural guardian of Hindu minor has the power to do all acts including alienation which is necessary or reasonable and proper for the benefit of the minor. Apart from this, there are certain exceptions too for the natural guardian; as natural guardian shall not mortgage or change or transfer immovable property of minor without seeking the permission of the court. In the case, Panni Lal v. Rajinder Singh [26] held that the sale of the minor immovable property will be void if it will be a sale by others apart from a legal guardian. Also, in the case, Madhegowda v. Ankegowda [27], it was held that alienation of minor property by the de-facto guardian is void ab initio. Even natural guardians except in the case of necessity of minor have to seek the permission of the court for alienation of minor property. Minor can repudiate the transfer of invalid property on attaining the majority. But if after attaining the majority, minor had rectified the transaction then the transaction will be valid. Minor after attaining the majority have the privilege of the twelve-year limitation period under article 65 of the Limitation Act, in order to claim rights over his property, alienated by a de facto guardian contrary to S.11 of the Hindu Minority and Guardianship Act. But, in regard to HUF, there is a different scenario as

we can't see section 8 of HMGA in isolation. It must be read with the section 6 and 12 of HMGA. As HUF is by itself is a legal entity capable of acting through its Karta and other adult members of the family management of the minor in the joint Hindu Family property. Thus, section 8 in view of the express terms of section 6 and 12, would not be applicable where a joint Hindu family property is sold/disposed of by the Karta involving an undivided interest of the minor.

MUSLIM LAW

Unlike to Hindu, Muslim doesn't have the peculiarity of Joint Family traditional System in the sense of Coparcener and Karta. In India, mostly Shias Law and Sunnis Law are prominently dominating in Muslim law regarding any matrimonial or family law. In the Muslim Law, Father is considered as natural guardian of the minor and also, he is considered as the legal guardian of the property of a minor. In accordance with Sunnis law, after the death of the father, the executor (wasi) becomes the guardian of the minor. But the law differs among Shias law, in the Shias law, guardianship passes on to grandfather after the death of father even in the presence of an executor. But, in regard to custody, there is a certain exception as in the case of a son, custody will be near mother till son will be 7 years old and in the case of the daughter, till she attains the puberty, the mother will have custody power. The notable point is that, in regard to property, only father have sole authority being the natural guardian.

Alienation

Similar to Hindu Law, in regard to alienation of minor property, Muslim law has also the same notion, i.e. necessity and welfare of minor is of paramount consideration. Both the father and the executor are capable to sell the minor's property in the scenario of minor necessity. Similar to Hindu law, in Muslim law too, the immovable property can be sold off only when there is a legal necessity. If there is a deficit on minor general needs and requirement then only the property can be sold off in a reasonable manner. In the case, Zeebunissa Begum v. Mrs. H.B. Danaghar, the

court laid down that, the natural guardian can grant a lease of the property of the minor if there is some benefit from that lease to the minor. Whereas in regard to movable property, powers are unlimited. The main reason behind the unlimited power on the movable property as movable property is liable to decay and the price is much more easily preserved than the article itself. For the sale of movable property, no justification is mandatory. Apart from the Natural Guardian, the guardian appointed by the court has authority to deal with the movable property of the minor as much caution as a man of normal prudence would deal with it had it been his own property. But guardian can't sell the movable property of the minor, if there is no reasonable necessity or the property is decaying or obtaining the double value or there were debts and legacies to be paid. Before selling or mortgage, the court-appointed guardian shall have to seek the court permission. If there is the alienation of minor property by de-facto guardian, then that transaction will be void. In the case, Mohd. Amin v. Vakil Ahmad [28] brother of minor has represented the deed of family settlement to which a minor is a party. As brother being the de facto guardian, the transaction of immovable property of minor by brother was held void. Similarly, in the case, Imambandi v. Mutsaddi, the Privy Council said that mother has no authority to alienate the property of the minor. In the Muslim law, the mother doesn't have the status of a natural guardian. So, the mother doesn't possess the power to alienate the property of minors. Privy Council also laid down that, the de facto guardian doesn't have power though de facto guardian may assume important responsibilities with the respect to the minor's property.

Power of Effect Partition

In Muslim law, the law of partition differs from Hindu Law. In regard to partition, an executor cannot affect a partition among the minors but among the heir, if some are majors and other minors then the executor has the right to segregate the share of majors from the share of minors. But, if the court appoints the guardian to deal with all the matters then in this scenario, the partition will be valid. In the

Muslim Law, Mother or another de-facto guardian can't proceed with the partition on behalf of the minor. Only the Natural guardian or executor or court-appointed guardians have the capacity to represent the minor in the partition. In the case, *Tikam Chand Lunia v. Rahim Khan, Ishak Khan and others* [29], the court held that, the partition in which minor is a party can't be valid though minor was represented by the minor mother as its de-facto guardian, irrespective of the consideration that the partition will benefit minor and also partition won't be binding to minor. Similarly, in the case, *S.S. Ghulam Ghouse v. S.S.A.M. Kamisul* [30], Court held that the partition of property in which minor is party and if the minor is represented by the de-facto guardian then the deed will not be binding for minor and the partition will be void not only for minor rather it will be void against all the parties. In the same case, the court has held that in Muslim law only father is a natural guardian and brother as well mother both are not a lawful guardian.

In the case of the Minor wife, the husband doesn't have authorities to alienate the property or to represent the wife in the partition. As in the Muslim law, the only natural guardian is competent to represent the minor in the partition. In the case, *Syed Dowlath Hussain v. Khatoon Bi* [31], the issue was that whether a husband can alienate minor wife property. In this case, the wife was a minor and gained immovable property from her deceased mother by the way of bequeathing. As per the Muslim law, Father or father's father or the executor of father's father is entitled to be the guardian of minor property. Apart from this, the court-appointed guardians have also an authority on the minor property. The court, in this case, held that husband can't be the guardian of minor wife and he can't alienate the minor wife property. The alienation made by the husband to minor wife property will be void ab initio.

CHRISTIAN LAW AND PARSI LAW

In regard to Christian and Parsi Law, there is no much more complexity for the minor. The succession law of Christian and Parsi is

governed by secular law, i.e. the Indian Succession Act 1925. Similarly, in regard to guardianship, Christian and Parsis have no personal law specifically. But, the Secular legislation, Guardians and Wards Act 1890, is applicable for Christian and Parsi. In accordance with GWA, Father is the natural guardian of the minor's property and in the absence of the father, mother assumes this responsibility. In regard to Succession, Section 60 of the Indian Succession Act 1925, which is applicable to Christians and Parsis deals with the nomination of testamentary guardian by the father [32]. The Indian Succession Act deals with both Intestate as well as testamentary Succession. Section 59 of the act prohibits the Minor to make the will and the will made by minor will be void. Minor can't hold the property, but guardian will hold the property on behalf of the minor. If the scenario arises where minor have to make immediate payment, then on such scenario guardian can make the payment from the minor property [33]. It seems that a testamentary trust is very useful for protection of minor and is more beneficial. Also, Section 37 of the Indian Succession Act, entitles the surviving child to hold interstate property [34-41].

In regard to the minor's property, the crucial considerable point is the best interest and welfare of the minor. The action of guardian will bind the minor only if the action is in the best interest of minors. In regard to the movable property, there is no any restriction if the guardian is found acting prudently and carefully. The guardian can alienate the property of minor if there is a legal necessity.

CONCLUSION

Every law has special provision for minor in order to protect the minor from every aspect. There should be real changes and real solutions to underlying problems. It is better to prevent disturbing issues and tragic incidents from occurring rather than applying a cosmetic to a preventable wound. Its means, there is a need of comprehensive law which deals with minor every facet of issues as well address every problem arises in regard to minors. Indeed, every personal law as well secular law

deal with the minority rights in regard to property as well the partition and alienation of minor property. In regard to Hindi Law, Minor can be the coparcener of HUF as well can be the Karta of HUF, but minor can represent family as Karta through a guardian. Also, Partition and alienation of minor property of minor can be done but it must be for the welfare of a minor. There is a certain restriction on the immovable property. Similarly, in the Muslim law, there is no concept of HUF, Coparcener, and Karta but the natural guardian, i.e. Father can alienate the minor property on necessity ground and must be for the welfare of a minor. Also, in the Christian and Parsi law, Partition and alienation can be done by the guardian but it must be on the favor of minor. In every law, the sole concern is the welfare of a minor.

None of the Law talks about the widow minor rights as well issues. In general, in Hindu law, the widow doesn't have the right to be the coparcener either to be the Karta. It is well known that widow has right upon husband property but what if the widow is minor as a well deceased husband was also minor? Every personal law as well secular have to address this issue and should have to bring provision which entitles the right of the minor widow. Similarly, in the Hindu law, minor can file a suit for re-opening of partition if the partition was not in favor of minor, but minor can't only file a suit after attaining the majority. In this case, minor will only get justice after a long period of time. Thus, the law should be enacted to address this issue so that minor can secure justice in expeditiously.

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