

PROPERTY RIGHTS AMONG THE KOYA COMMUNITY IN ORISSA

About Koya community of Malkangiri, Orissa

Koyas are one of the 62 Scheduled Tribes of Orissa living mostly in Malkangiri. They are also spread in South Bastar of Chhatisgarh, and East Godavari and Khamam districts of Andhra Pradesh. In Malkangiri Koyas constitute the largest among the tribes; they numbered 58,730 in 1971 but increased to around 140,000 in 1991 and their present population has registered further increase. They live in low thatched houses and cultivate Tabaco leaf, Mandia, Maize and Paddy. Mahula and Salapa are their ideal drinks. They use very little quantity of milk. They rear pigs, goats, cows and hens. They practise magic and local herbs to treat their illnesses. The main festival of Koyas is "Bijapandu" festival celebrated in the month of Chaitra. The head of the Koya village is called "Peda" and the post is hereditary. Koyas are an ancient tribe credited with a unique way of community life and a common cultural heritage which have been documented by the scholars from a variety of sources like mythologies and legends coupled with the accounts by the British administrators. Koyas were once a warrior tribe. The last Queen of Malkangiri, Bangaru Devi who ruled over Malkangiri from 1855 A.D. to 1872 A.D had defeated King Ramachandra Deva III of Jeypore by her powerful and extra-ordinarily large Koya Army. During the colonial period they played a political role too by way of offering resistance off and on to the British Government, the most famous episode of which is known as Koya Revolution, that took place in 1880 led by a Koya youth Tama Dora. (Source: Website of Malkangiri District).

The Koya community in Malkangiri has however undergone a process of change from 1970 onwards, affecting thereby their ancient and traditional socio-cultural matrix to a visible degree. Such changes can be attributed to the influence of the refugees from Bangladesh rehabilitated under Dandakaranya Development Project, Oriya refugees from Burma and Ceylonese Tamil refugees on transit basis. Moreover, their habitat, economy and society at large have been subject to tremors of large scale displacements of their families due to Duduma, Balimela, Upper Kolab, Indravati hydro-electricity Projects, bauxite mining project, Hindustan Aeronautic project and the influx of people from various walks of life to the natives of the tribals. At present the Koyas are struggling to survive vis-a-vis the resettled populations, who are by far superior to them in terms of economic and political intelligence. (Source: Tribals and Their Culture : Koya Tribe in Transition, by Kornel, Das, 2006)

Law on Property Rights of Scheduled Tribes

Before one attempts to understand the property rights of the Koya community and its various nuances, one ought to comprehend what does it mean by property rights of a Scheduled Tribe in India. It ordinarily means the bulk of norms or standards recognised by the community for guiding the members of a Scheduled Tribe, both men and women in respect of such matters as inheritance, succession, distribution, partition, transfer and gift etc. of property within a family and between the families. As is well known, the entire gamut of property rights of a community belongs to that sphere of civil law, which is otherwise known as personal law or family law. The personal law also encompasses such family related legislation which bear on marriage, divorce, adoption, maintenance, guardianship and custody of children. In India, unlike Hindus, Mohemmadans, Christians and Parsis, the personal laws including the property rights of the scheduled tribes living in either 5th Schedule or 6th Schedule Areas since the British times have remained diverse i.e. un-uniform and largely uncodified, and their determination for all practical purposes has been left to the customary usage and practices prevalent in the concerned community handed down since generations. So much so that even when certain archaic practices of some scheduled tribes were expressly found to be derogatory or contradictory to the modern canons of equality and justice as enshrined in the Preamble and Fundamental Rights Chapter of

the Constitution, the Courts in general and Supreme Court in particular refrained from interfering in them on the statutory plea that the Scheduled Areas were immune from general applicability of the laws made for the mainstream, non-scheduled regions of the country. Of course a fierce debate has all along been raged in the post-independence period as to the degree of legislative autonomy that a tribal area should enjoy, especially in respect of personal laws including the laws relating to the property rights.

Constitutional Provisions

Though much space of the Constitution has been devoted to the provisions for the Scheduled Tribes, there is ironically, as the Ministry of Tribal Affairs Govt of India admits, no cogent definition offered therein. Far from a definition worth the name, what the Article 366(25) of the Constitution provides for is a typically circuitous stipulation, that reads, “Scheduled Tribes’ means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under Art. 342 to be Scheduled Tribes for the purposes of this Constitution”. Again, the criteria of declaring a community as a Scheduled Tribe by the President under Article 342 have not been spelled out in the Constitution, but certain factors are taken into account by the President while declaring a community as a Scheduled Tribe, such as primitive traits, geographical isolation, distinct culture, shyness about contact with community at large and economical backwardness. Such Orders of the President can be modified only by an Act of Parliament.

Representing about 8.5 percent of total population, nearly 700 ST groups are spread in all parts of the country except State of Haryana and Punjab and Union Territories of Chandigarh, Delhi and Pondicherry. Concentration of tribal population is found in two types of Scheduled Areas, such as 6th Schedule Areas (in the States of Assam, Meghalaya, Tripura and Mizoram) and 5th Schedule Areas (in States of Andhra Pradesh, Gujarat, Maharashtra, Rajasthan, Himachal Pradesh, Orissa and undivided States of Bihar and Madhya Pradesh). The concept of Scheduled Areas for the purpose of administration was a handiwork of the British Government and has been retained in more or less unaltered in post-Independence India in absence of a more efficacious tool of governance of the tribal areas.

Between the two types of Scheduled Areas, the tribal groups living in the 6th Schedule Area enjoy greater degree of autonomy and self-governance than their counterparts in 5th Schedule Areas. In 6th Schedule Areas, even the District Council, an elected body has the necessary power to make laws in respect of such matters as management of land, forest, water bodies, shifting cultivation, village towns, village police, public health and sanitation besides such personal laws as inheritance of property, marriage and divorce and social customs. In contrast, in 5th Schedule Areas, there exists a great degree of ambiguity as to how much autonomy and self-governance the tribal groups have been legally endowed with and do really enjoy except the statutory, unbroken tenure of 5 years for the 3 tier Panchayati Raj Institutions. The List of 29 Subjects as mentioned under 11th Schedule of the Constitution, which was added to the Constitution as a part of the 73rd Amendment doesn’t contain such Personal Law related items as inheritance, marriage, divorce or social customs and are as such solely concerned with socio-economic aspects of community development. Even after Provisions for Panchayats (Extension to Scheduled Areas) Act, 1996 was passed with the chief objective of arming more powers to Gram Sabha or Gram Panchayat in 5th Schedule Areas in terms of self-governance, little change has been effected in the role and status of these grassroots level bodies. For all practical purposes, PESA was an enabling and directive legislation, not a mandatory or enforceable Act. However, at two places, PESA contained provisions, which have strong bearing on the personal laws of a community. At Section 4(a), it mentioned, “a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management

practices of community resources; and at Section 4(c), it mentioned, “every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their culture identity, community resources and the customary mode of dispute resolution.” And towards the far end, PESA (Section-4-O) expressed the hope, “the State Legislature shall endeavour to maintain the pattern of the Sixth Schedule to the Constitution while designing the administrative arrangements in the Panchayats at district level in the Scheduled Areas”, which inter alia meant that the Zilla Parishads in 5th Schedule Areas be empowered with the legislative power in the domain of personal laws like inheritance, marriage, divorce and social customs like the District Councils in 6th schedule Areas. While the letters of PESA have remained largely un-addressed all across the 5th Schedule Areas of the country, the high spirits that lay embedded in it have ever since fuelled the aspirations and agitations of the tribal communities all over in demanding more of independence, autonomy and self-governance in every sphere including the control of personal laws.

It is worth mentioning here that that the Article 13(1) and (2) occurring in the Part-III (Fundamental Rights) of Constitution assures that no law made in the past nor likely to be made in future can go against the provisions made in this Part. As is well known, one outstanding provision made in this part is Article-14 of the Constitution (Equality before Law) that says, ‘The State shall not deny to any person equality before the law or equal protection of the laws within the territory of India’. A straightforward and honest interpretation of this provision would be like this- if, for instance, a tribal married woman argues that she too has the legitimate right to receive a share in the paternal property like a married woman of Hindu community, she should be naturally allowed by the State to have it on the basis of equality principle. But Indian Constitution being a Pandora’s box itself, and there being counter-equality provisions built into its matrix, a tribal woman is not ipso facto granted an equal status along with her Hindu counterpart. As if to circumvent the logical implications of Article-13(1) and (2), the very next provision i.e. Article 13(3)(a) maintains that ‘law’ includes any ‘custom’ or ‘usage’ having the force of law in the territory of India in addition to the other conventional, codified forms of law such as ordinance, order, bye-law, rule, regulation and notification. Let us read Article 13(3) concurrently with Article 244(1) and 244(2) occurring in Part-X of the Constitution, as per the mandate of which Fifth Schedule and Sixth Schedule have been created and built into the Constitution right since inception. As we have already seen above, the chief rationale of maintaining these two Schedules is to safeguard the ‘custom’ and ‘usage’ of a tribal community, howsoever archaic, reactionary, irrational and offensive to modern sensibility they might prove to be. Thus the Part-III of the Constitution (Fundamental Rights), which together with the high sounding Preamble supposedly constitutes the basic structure of the Constitution contains formidable elements of its self-negation. A socially detrimental, morally abominable and superstitious practice, say for instance, a mass festival around witchcraft with a woman playing the witch to the risk of her life is tolerated in the name of ‘custom’ or ‘usage’ of a tribal community guaranteed protection under the Fifth and Sixth Schedules of the Constitution.

In this backdrop, it is no wonder, though the Article 44 in Part-V of the Constitution envisaged ‘to secure for the citizens a uniform civil code throughout the territory of India’, what we witness today after 57 years of the proclamation of the Constitution is a tendency manifestly growing apace against the contemplated uniformity in civil and personal laws. Of course, one may take the excuse that the Article-44 is a Directive Principle, and as such not an enforceable or justiciable provision like the fundamental rights enumerated in Part-III. But the real cause that lies behind the ever growing disarray from the envisaged ideal of a uniform civil code is a peculiar mix of mutually contradictory provisions that were grafted into the Constitution by a group of political leaders, so-called founding fathers and subsequently carried forward, nay further reinforced by their self-aggrandizing successors, who felt more worried about their vote-

banks among the Dalits and Adivasis than how to stimulate a genuine aspiration and push forward an informed action among these subaltern masses in the direction of genuine self-emancipation. As a net result of all this, the vast bulk of tribal community in general, and more so the women among them are yet to rise above the state of abysmal poverty and backwardness in which they have remained stuck up for centuries, despite of course a welcome development that numerous leaders including women from among the Scheduled Tribes have been propped up to respectable positions in various spheres of public life thanks to the blessings of reservation, another contentious provision of the Constitution. It is simply ironical, while on one hand more and more leaders including women are being recruited from the among the tribal community through the reservation process, the multitude of mainstream tribal population remain as helpless and voiceless a lot as ever before.

Tribal Community vis-à-vis Hindu Law

Though quite some Scheduled Tribes follow fully or partially the Hindu religion, the Constitution doesn't treat them as bound to Hinduism, as is evident from the Explanation-II to Article 25 (Freedom of conscience and free profession, practice and propagation of religion), which says inter alia, '.. any reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion...'. This provision while listing the above 3 sects under the rubric Hindu religion doesn't however explicitly exclude the STs from the purview of Hindu religion. In other words it nowhere says that a Scheduled Tribe can't be considered at all as a Hindu in terms of religion. If a particular tribe is found to be practising Hindu religion or Hindu rituals, he can't be debarred from being treated as a Hindu for the purpose of law without losing his/her ST status. Similarly, if an ST person embraces Hinduism, Christianity, Islam or any other religion, he/she shall not lose the ST status either.

There reigns however a big confusion among the jurists, administrators, legislators and social activists, not to talk of common citizens as to whether the Hindu personal law is applicable to the scheduled tribes. In fact, the relevant Hindu laws also bear provisions, which have lent strength to such abounding confusion. For instance, the Section 2(2) of Hindu Marriage Act, 1955 says, "Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs". Against such a categorical stipulation there however exists two other provisions in the said Section-2, which by implication convey a different meaning. For instance, Section-2(1-c) says that the Act applies "to any other person domiciled in the territories to which this Act extends who is not a Muslim, Christian, Parsi or Jew by religion, unless it is proved that any such person would not have been governed by the Hindu law or by any custom or usage as part of that law in respect of any of the matters dealt with herein if this Act had not been passed". Plainly it means that there is a scope for application of Hindu law to any inhabitant of India, who is not a follower of above 4 institutionalised religions. The next instance of exception can be found in Section-2(3), that says, "The expression 'Hindus' in any portion of this Act shall be construed as if it included a person who, though not a Hindu by religion is, nevertheless, a person whom this Act applies by virtue of the provisions contained in this section". In a similar fashion, the Hindu Adoptions And Maintenance Act, 1956 in Section 2(2) declares that the Act won't apply to the Scheduled Tribes as defined in the Constitution, but then proposes two qualifying provisions under the Section-2 itself, by virtue of which a person of Scheduled Tribe can be considered a Hindu under certain special circumstances for the purposes of this Act. The third and fourth laws in the series, namely Hindu Succession Act, 1956 and Hindu Minority and Guardianship Act, 1956 replicate the said kind of provisions almost word by word. Thus we find that all the four Hindu laws, which have nearly identical provision under Section-2 are both exclusive and inclusive of Schedule Tribe under its purview. It all depends upon the specific circumstances that

shall determine whether the matters related to Personal Law in respect of an ST person shall be disposed of as per the Hindu Law or any other Law or as per the Custom or Usage of his/her community as already referred to under Section 13 (3) of the Constitution.

At the level of higher judiciary (High Court and Supreme Court), the Scheduled Tribes are treated as non-Hindus, but at the level of lower courts, there is a tendency among the lawyers to treat the ST persons as Hindus; otherwise it would entail arduous labour and forensic skill on their part to define the custom and usage of the particular tribe, and to articulate most of the argumentation from common sense and facts of the case without relying on any codified law or court precedents. Treating an ST person under the Hindu law offers both advantages and disadvantages for the person concerned; For instance, a tribal woman would be entitled to a share in the property of her father or husband, if her complaint is treated under Hindu Succession Act, while on the basis of their existing tribal custom or usage, she may not get anything of the sort. From another angle, say for instance, on a case around her plea to get a divorce from her husband, it would be much easier on her part to get it allowed by the Court on the basis of the custom or usage of her tribe than under the Hindu Marriage Act, 1955.

It is worth noting that the census reports of India do not treat the tribal communities as born Hindu. Appendix 'C' to the census report of 1991 gives details of Sects/Beliefs/ Religions clubbed with another religion'. According to this annexure, no tribal community has been clubbed with the followers of the Hindu religion in the report. The main part of the report shows the population, in various States and Union Territories, under eight different heads — (i) Hindus, (ii) Muslims, (iii) Christians, (iv) Sikhs, (v) Buddhists, (vi) Jains, (vii) "Other Religions and Persuasions" and (viii) "Religion not stated". The head of "Other Religions and Persuasions" is detailed in appendix 'A' to the report. In this appendix about 60 tribal religions are separately specified. In addition to these specified "Religions and Persuasions" of the various tribal communities, this appendix also includes a residuary head of "Tribal Religion" and, then, an additional head of "Unclassified" religions and persuasions, which also must be inclusive of many smaller tribes. There must have been a sound and legally tenable basis for the specification of almost all the tribal religions separately from Hinduism in the successive census reports prepared over the years on the basis of pre-enumeration empirical work and individual contacts. Indian law thus does not recognise the claim that all tribals are born Hindus. They are born into their own peculiar religions. Article 25 of the Constitution guaranteeing freedom of conscience does not exclude the tribals from its purview, and like all other Indians they have a right to embrace any other religion of their choice. At the same time, the right to propagate religion under Article 25 equally belongs to the followers of all religions.

Supreme Court on Personal Law of Scheduled Tribes:

The confusion and equivocation with which the Constitution and other legal instruments of the Union have treated the Personal Laws of the Scheduled Tribes have found their reflection in the directions and judgements that the apex court has issued from time to time. As a matter of fact, only a very few cases came up before the apex court seeking for its adjudication and direction on issues bearing on personal laws of the STs. Of these, the one that stands out in terms of comprehensiveness and in-depth treatment of the subject is the famous case of MADHU KISHWAR & ORS *versus* STATE OF BIHAR that engaged the apex court for a decade from 1986 to 1996. Yet one can't say that it could pronounce any conclusive judgement that can be worked upon and can serve as a precedent to be emulated elsewhere. As a writ petition under Article 32 of the Constitution (No.5723 of 1982 & 219 of 1986), the case was taken up for hearing on 16 Dec. 1986 by Justice Kuldeep Singh. Then it was next heard on 11 Oct. 1991 by a bench consisting of C.J. Ranganath Mishra and Justice Kuldeep Singh (No.RD-SC 264). After a

long lapse of 5 years, it was finally heard by a 3-member bench consisting of C.J. K.Ramaswamy, Justice KULDIP SINGH and Justice M.M.PUNCHHI on 17 April 1996 (RD-SC 561). The final judgement despite having made a long and persuasive intellectual discourse on the need for gender sensitivity of the personal laws couldn't however arrive at any conclusive direction as to how to end gender discrimination from the personal laws. At the end of the day the parties to the dispute were transported back to the very position where they were stationed a decade back. However, the indecision and inconclusiveness that marked the final judgement in this case were not due to lack of wit or will of the judges concerned, but reflected the split personality that our entire republic including its Constitution suffered from, especially in regard to such stock phrases as equality for all, social justice and positive discrimination for women. The failure of the apex court to stand up to the outcry of two poor tribal women of Chhotnagpur area, that sought for an equal share for the women in the ancestral property along with male heirs was in fact a failure of the system as a whole to address to the minimal agenda of gender justice. The 3 judgements read together bring out into bold relief why and how the tribes and tribal women would continue to suffer from inequality, discrimination and humiliation under the current constitutional-legal system of governance, no matter how much vociferously the Constitution talks of equality, development and positive discrimination in favour of them. It is therefore highly instructive to go through the salient facets of the case from its point of origin to that of disposal.

Ms.Madhu Kishwar, Editor Manushi, a women's magazine at New Delhi and two women petitioners, one belonging to Ho and the other to Oraon Scheduled Tribes residing in Singhbhum district of Bihar made a writ petition against the State of Bihar before the Supreme Court challenging the Sections- 7 and 8 of the Chhota Nagpur Tenancy Act of 1908 as discriminatory against women, since the said provisions confined succession to property to descendants in the male line of the Scheduled Tribes. They pleaded that the said provisions were ultra vires the equality clause in the Constitution.

The Court at an earlier stage while hearing one of the writ petitions, gave time to the respondent State of Bihar to consider the feasibility of carrying out an amendment in the offending sections so as to clearly provide that succession was not confined in the male line. In pursuance thereof, a Committee was set up by the State which came to the conclusion that a custom prevailed among the Scheduled Tribes that a female heir be excluded from succession, and that if there was any change, and the property be allowed to go into the hands of female heirs there would be agitation and unrest among the ST people who have a custom based style of living. After hearing the report of the Committee the Supreme Court held that the Scheduled Tribe people are as much citizens as others and they are entitled to the benefit of guarantees of the Constitution. It may be that the law can provide reasonable regulation in the matter of succession to property with a view to maintaining cohesiveness in regard to Scheduled Tribes and their properties. But exclusion from inheritance would not be appropriate. Since this aspect of the matter was not examined by the State, the Court ordered it to be re-examined by the feasibility of permitting inheritance and simultaneously regulating such inheritance for the purpose of ensuring that the property does not go out of the family by way of transfer or otherwise.

On 17 April 1996 a three member bench, led by Chief Justice K.Ramaswamy did the final hearing of the case. They dealt with all problematic aspects of the issue of not allowing female inheritance of the paternal, ancestral or in-laws property and brought a judgement based upon the facts and circumstances within their knowledge.

The judgement starts with the recognition that the petitions raised a common question of law, whether female tribal is entitled to parity with male tribal in intestate succession? Specifically

speaking, the petitioners sought declaration to the effect that Sections 7, 8 and 76 of the Chhota Nagpur Tenancy Act, 1908 are ultra vires Articles 14, 15 and 21 of the Constitution of India. They contended that the customary law operating in the Bihar State and other parts of the country excluding tribal women from inheritance of land or property belonging to father, husband, mother and conferment of right to inheritance to the male heirs or lineal descendants being founded solely on sex is discriminatory. The tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. The discrimination against them based on the customary law of inheritance is unconstitutional and unjust, unfair and illegal. Even usufructuary rights conferred on a widow or an unmarried daughter become illusory due to diverse pressures brought on her at the behest of lineal descendants. Further the married or unmarried daughters are excluded from inheritance, if they are subjected to adultery by non-tribals; they are denuded of the right to enjoy the property of father or deceased husband for life. The widow on remarriage is denied inherited property of her former husband. The petitioners had thus elaborated by narrating several incidents in which the women either were forced to give up their claims or became target of violent attacks or murdered.

As a sequel to the direction of the apex court, the State-level Tribal Advisory Board consisting of the Chief Minister, Cabinet Ministers, legislators and parliamentarians representing the tribal areas, met on July 23, 1988 and decided as under: "The tribal society is dominated by males. This, however does not mean that the female members are neglected. A female member in a tribal family has right of usufruct. The property owned by same becomes the property of her husband after the marriage. However, she does not have any right to transfer her share to another person by any means whatsoever. A widow will have right to usufruct of the husband's property till such time she is issueless and, in the event of her death the property will revert back to the legal heirs of her late husband. In case of a widow having offspring the children succeed the property of the father and the mother will be a care taker of the property till the children attain majority. The Sub-Committee also felt that every tribal does have some land and in case the right of inheritance in the ancestral property is granted to the female descendants, this will enlarge the threat of alienation of the tribal land in the hands of non tribals. The female members being given right of transfer of their rights would lead to origin of malpractices like dowry and the like prevalent in other non-tribal societies".

Reacting to the views of the Bihar Tribal Advisory Board, the Supreme Court observed, Article 13(3)(a) of the Constitution includes custom or usage having the force of law. Article 13(1) declares that the preconstitutional laws, so far as they are inconsistent with the fundamental rights shall, to the extent of such inconsistency, be void. The object, thereby, is to secure paramountcy to the Constitution and give primacy to fundamental rights. Article 14 ensures equality of law and prohibits invidious discrimination. Arbitrariness or arbitrary exclusion are sworn enemies to equality. Article 15(1) prohibits gender discrimination. Article 15(3) lifts that rigor and permits the State to positively discriminate in favour of women to make special provisions to improve their social, economic and political status and accord them parity. Article 39(a) and (b) enjoin that the State policy should be to secure that men and women equally have the right to an adequate means of livelihood and the ownership and control of the material resources of the community are so distributed as best to subserve the common good. Article 38(2) enjoins the State to minimize the inequalities in income and to endeavor to eliminate inequalities in status, facilities and opportunities not only among individuals but also amongst groups of people. Article 46 accords special protection and enjoins the State to promote with special care the economic and educational interests of the Scheduled Castes and Scheduled Tribes and other weaker sections and to protect them from social injustice and all forms of

exploitation. The Preamble to the Constitution is a call to the State to secure social, economic and political justice and equality of opportunity and of status and dignity of person to every one.

Then drawing attention to the outstanding international instruments for elimination of sexist discrimination, the Court observed that the General Assembly of the United Nations adopted a Declaration on December 4, 1986 on "The Right to Development" for which India played a crusading role to ensure its adoption. Its preamble cognises that all human rights and fundamental freedoms are indivisible and interdependent. All Nation States are concerned at the existence of serious obstacles to development and complete fulfillment of human beings, coupled with denial of civil political, economic, social and cultural rights. In order to promote development equal attention should be given to the implementation, promotion and protection of these rights. Article 6(1) of this Declaration obligates the State to observe all human rights and fundamental freedoms for all without any discrimination based on race, sex, language or religion. Article 8 casts duty on the State to undertake all necessary measures for the realization of right to development and ensure, inter alia, equality of opportunity for all in their access to basic resources and fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process.

The Court continued, Human Rights are derived from the dignity and worth inherent in the human person, and this was proclaimed by the Universal Declaration of Human Rights. The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and cultural, social and economical growth. Again, all forms of gender discrimination were violative of fundamental freedoms and human rights and this principle was enunciated in Vienna Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), ratified by the U.N.O. on December 18, 1979. The Government of India who was an active participant to CEDAW ratified it on June 19, 1993 and acceded to CEDAW on August 8, 1993, of course, with reservation on Articles 5(e), 16(1), 16(2) and 29 thereof. The Preamble of CEDAW reiterates that discrimination against women, violates the principles of equality of rights and respect for human dignity; and is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of the country; it hampers the growth of the personality and makes more difficult full development of potentialities of women in the service of their their respective country and of humanity. Poverty of women is a handicap. Article 1 defines discrimination against women to mean "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." Article 2(b) enjoins the State parties while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting "appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women", to take all appropriate measures including legislation, and also to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause (C) enjoins to ensure legal protection of the rights of women on equal basis with men through specially constituted tribunals and other public institutions against any act of discrimination. Article 3 enjoins the State parties to take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that "the State parties

shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women'. Article 14 calls for eliminating discrimination faced by rural women so as to enable them to play "in the economic survival of their families including their work in the non- monetized sectors of the economy..." Article 15(2) enjoins to accord to women equality with men before the law, in particular, to administer property....."

The Court further observed, the Parliament enacted the Protection of Human Rights Act, 1993. Its Section 2(b) defines human rights to mean "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international Conventions and enforceable by courts in India". Thereby the principles embodied in CEDAW and Right to Development became integral parts of the Indian Constitution. Section 12 of Protection of Human Rights Act charges the Commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms. Though the directive principles and fundamental rights provide the matrix for development of human personality and elimination of discrimination, these conventions add urgency and teeth for immediate implementation. It is, therefore, imperative for the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Articles 14 and 15 of the Constitution of India. By operation of Article 2(f) and other related articles of CEDAW, the State should by appropriate measures including legislation, modify law and abolish gender based discrimination in the existing laws, regulations, customs and practices which constitute discrimination against women.

The judgement further noted, the Article 15(3) of the Constitution of India positively protects such Acts or actions. Article 21 of the Constitution of India reinforces "right to life". Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfillment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development. Women are entitled to enjoy economic, social, cultural and political rights without discrimination and on footing of equality.

The Court again observed that property is one of the important endowments or natural assets to accord opportunity, a source to develop personality, to be independent and to achieve right to equal status and dignity of person. Therefore, the State should create conditions and facilities conducive for women to realize the right to economic development including social and cultural rights. Bharat Ratna Dr. B.R. Ambedkar stated on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part IV and the Preamble of the Constitution which constitute conscience of the Constitution. Covenants of the United Nation add impetus and urgency to eliminate gender based obstacles and discrimination. Legislative action should be devised suitably to promote economic empowerment of women as a part of the process of socio-economic reconstruction for establishing an egalitarian social order. Law is an instrument of social change as well as the defender for social change. Article 2(e) of CEDAW enjoins this Court to breath life into the dry bones of the Constitution, international Conventions and the Protection of Human Rights Act to prevent gender based discrimination.

As per the U.N. Report 1980 "woman constitute half the world population, perform nearly two thirds of work hours, receive one tenth of the world's income and own less than one hundredth per cent of world's property". Half of the Indian population too are women. Women have always been discriminated and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination. Articles 13, 14, 15 and 16 of the Constitution of India and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy. The Scheduled Castes, Scheduled Tribes and women from time immemorial suffered discrimination and social inequalities, which made them to accept the ascribed social status. Among women the tribal women are the lowest of the low. It is mandatory, therefore, to render them socio- economic justice so as to ensure their dignity of person, so that they be brought into the mainstream of the national life.

The Judgement said, "We are conscious that in Article 25 which defines Hindus, Scheduled Tribes were not brought within its fold to protect their customs and identity. We keep it at the back of our mind". However, agricultural land is the foundation of a sense of security and freedom from fear. Assured possession is a lasting road for development, intellectual, cultural and moral and also for peace and harmony. Agriculture is the only source of livelihood for the tribes, apart from collection and sale of minor forest produce. Land is their most important natural asset and imperishable endowment from which the tribals derive their sustenance, social status, a permanent place of abode and work. The Scheduled Tribes predominantly live in Andhra Pradesh, Maharashtra, Bihar, Gujarat, Orissa, Madhya Pradesh, Rajasthan and North Eastern States, though they are spread in other States sparsely. The empirical study by Anthropologists and Sociologists reveals that the customary laws of the tribes are not uniform throughout Bharat. Even in respect of intestate succession, these are not uniform. Though the customs of the tribes have been elevated to the status of law, obviously recognized by the founding fathers in Article 13(3)(a) of the Constitution, yet it is essential that the customs inconsistent with or repugnant to constitutional scheme must always yield place to fundamental rights. In *Sant Ram v. Labh Singh*, [(1965) 7 SCR 756]. this Court held that the custom as such is effected by part III dealing with fundamental rights. In *Bahu Ram v. Baijnath Singh* [1962 Supp. (3) SCR 724], it was held that law of pre-emption based on vicinage is void. In *G. Dasaratha Rama Rao v. State of A.P.* [(1961) 2 SCR 931], this Court held that discrimination based on the ground of descent only offends Article 16(2). In India agricultural land forms the bulk of the property. In most of the tenancy laws, women have been denied the right to succession to agricultural lands. The discernible reason in support thereof appears to be to maintain unity of the family and to prevent fragmentation of agricultural holdings or diversion of tenancy right. In *Atam Prakash v. State of Haryana*, [(1986) 2 SCC 249], testing the validity of Section 15 of the Punjab Pre-emption Act 1930, for the aforesaid reasons this Court held that the right of pre-emption based on consanguinity is a relic of the feudal past. It is totally inconsistent with the constitutional scheme. It is inconsistent with modern ideas. The reasons which justified its recognition, quarter of a century ago, namely, the preservation of the integrity of rural society, the unity of family life and the agnatic theory of succession, are today irrelevant. Classification on the basis of unity and integrity of either the village community or the family or on the basis of the agnatic theory of succession, cannot be upheld. Due to march of history, the tribal loyalties have disappeared and family ties have been weakened or broken and the traditional rural family oriented society has become permissible. Accordingly Section 15(1) and its clauses (1) to (3) that violated fundamental rights were declared ultra vires.

The judgement went on to argue, when male member has the right to seek partition and at his behest, fragmentation of family holding is effected, why not the right to inheritance/succession

be given to a female? On agnatic theory, she gets a shadow, but not substance. Right to equality and social justice become an illusion for her. Such denial is absolutely inconsistent with public policy, and unfair, unjust and unconscionable. The reason of fragmentation of holding or division of tenancy right would hardly be a ground to discriminate against a woman from her right to inherit the property of the parent or husband. In *V. Tulasamma v. Sesha Reddy* [AIR 1977 SC 1944 at 1961], this Court, cognizant to equality in intestate succession by Hindu woman, held that after the advent of independence old human values assumed new complex; women need emancipation; new social order need to be set up giving women equality and place of honour, abolition of discrimination based on equal right to succession is the prime need of the hour and temper of the times. In *Chiranjeev Lal vs. Union of India*, [1950 SCR 869, this Court held that the guarantee against the denial of equal protection of the law does not mean that identically the same rule of law should be made applicable to all persons within the territory of India in spite of difference in circumstances or conditions. It means that there should be no discrimination between one person and another. It is with regard to the subject matter of the legislation. In *State of West Bengal v. Anwar Ali Sarkar* [1952 SCR 869], it was held that the prohibition under Article 14 is to secure all persons against arbitrary laws as well as arbitrary application of laws. It applies to procedural and substantive law. *Menaka Gandhi v. Union of India* [(1978) 2 SCR 621, reiterates its creed on grounds of justice, equity and fairness lest law becomes void, oppressive, unjust and unfair.

Next, the judgement continued, Eugene Smith in his book on Indian Constitution has stated that secularisation of law is essential to the emergence of modern Indian State, foundation of which stands on twin principles of democracy and secularism. He further stated that "the existence of different personal laws contradicts the principles of non-discrimination by the State". Non-discrimination is based on the philosophy of the individual, not the group, as the focal point and the basic unit of the nation. The civilization, culture, custom, usage, religion and law are founded upon the community life for man's well being. The man will obey the command of the community by consent. The law formulates the principles to maintain the order in the society to avoid friction. Democracy brings about bloodless revolution in the social order through rule of law. Therefore, when women are discriminated only on the ground of sex in the matter of intestate succession to the estate of the parent or husband, the basic question is whether it is founded on intelligible differentiation and bears reasonable or rational relation or whether the discrimination is just and fair. Our answer is no and emphatically no.

In *State of Bihar v. Kameswar Singh*, [1952 SCR 889], this Court had held that in judging the reasonableness in imposing restrictions Court would take into consideration public purpose in Article 39. In *Kasturi Devi v. State of Karnataka*, [(1980) 4 SCC 1], this Court held that if law is made to further socioeconomic justice it is prima facie reasonable and in public interest. In other words, if it is for its negation, it is unconstitutional. In *Chandra Bhavan Boarding House v. State of Mysore*, [(1970) 2 SCR 600], it was held that "the mandate of the Constitution is to build a welfare society and aspirations aroused by the Constitution will be belied if the minimum needs of the lowest of our citizen are not met". In *Narendar Prasad v. State Of Gujarat* (1975) 2 SCR 317], it was held that no right in an organised society can be absolute. Enjoyment of one's rights must be consistent with the enjoyment of the rights of others. In a free play of social forces, it is not possible to bring about a voluntary harmony; the state has to step in to set right the imbalance; mandate of Article 38 to restructure social and economic democracy, enjoins to eliminate obstacles and prohibit discrimination in intestate succession based on sex.

In *Thota Sesharathamma v. Thota Manikyamma*, [JT 1991 (3) SC 506], construing Section 14 of the Hindu Succession Act 1956 and its revolutionary effect on the right to ownership of the land by Hindu woman, this Court held that the validity of Section 14(1) drawn from the pre-existing

limited estate held by a Hindu woman must be tested on the anvil of socioeconomic justice, equality of status and by overseeing whether it subserve the constitutional animation. Article 15(3) relieves the State from the bondage of Articles 14 and 15(1) and charges it to make special provision to accord socioeconomic equality to woman. The Hindu Succession Act revolutionised the endeavor to find out whether the disposition clauses in the instrument will elongate the animation of Section 14 and would permeate the aforesaid constitutional conscience to relieve the Hindu female from the Sashtric bondage of limited estate. Articles 14, 15 and 16 frown upon discrimination on any ground and enjoin the State to make special provisions in favour of the woman to remedy past injustice and to advance their socioeconomic and political status. Economic necessity is not a sanctuary to abuse woman's person. Section 14, therefore, gives to every Hindu woman full ownership of the property irrespective of the time when the acquisition was made, namely, whether it was before or after the Act had come into force, provided, she was in possession of the property. Discrimination on the ground of sex in matter of public employment was buried fathom deep and is now a relic of the past by decisions of this court. In *C.B. Methama v. Union of India* [(1980) 1 SCR 668], *Air India v. Nagesh Mirza* [(1982) 1 SCR 438], and a host of other decisions are in that light.

Speaking on the ambit of powers of Regional and District Councils in 6th Schedule Areas in respect of personal laws, the judgement noted, it is true clauses (h) and (j) of para 3 of Schedule 6 of the Constitution give power to District or Regional Councils in North Eastern States to alter the laws relating to inheritance and customs; they too are bound by the law declared under article 141 of the Constitution to be consistent with Articles 15(3), 14 and Preamble of the Constitution. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) & (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the Constitution They constitute core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as a sustaining pillar of society. Contours of law in evolving society must constantly keep changing as civilization and culture advance. The customs and mores must undergo change with march of time. Justice to the individual is one of the highest interests of the democratic State. Judiciary cannot protect the interests of the common man unless it would redefine the protections of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable.

The Judgement observed, Law is the manifestation of principles of justice, equity and good conscience. Rule of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve excellence, subject to protective discrimination. The best advantage of one person could be the worst disadvantage to another. Law steps in to iron out such creases and ensures equality of protection to individuals as well as group liberties. Man's status is a creature of substantive as well as procedural law to which legal incidents would attach. Justice, equality and fraternity are trinity for social and economic equality. therefore, law is the foundation on which the potential of the society stands. In *Sheikriyammada Nalla Koya v. Administrator, Union Territory of Laccadives*, [AIR 1967 Kerala 259], *K.K. Methew. J.*, as he then was, held that customs which are immoral are opposed to public policy, can neither be recognized nor be enforced. Its angulation and perspectives were stated by the learned judge thus: "It is admitted that the custom must not be unreasonable or opposed to public policy. But the question is unreasonable to whom? Is a custom which appears unreasonable to the Judge be adjudged so or should he be guided by the prevailing public opinion of the community in the place where the custom prevails? It has been said that the Judge should not consult his own standards or predilections but those of the dominant opinion at

the given moment, and that in arriving at the decisions the Judge should consider the social consequences of the custom especially in the light of the factual evidence available as to its probable consequences. A judge may not set himself in opposition to a custom which is fully accepted by the community”.

The Chief Justice K.Ramaswamy who wrote the present judgement observed, “But I think, that the Judge should not follow merely the mass opinion when it is clearly in error, but on the contrary he should direct it, not by laying down his own personal and isolated conceptions but by resting upon the opinion of the healthy elements of the population, whose guardians of an ancient tradition, which has proved itself and which serves to inspire not only those of a conservative spirit but also those who desire in a loyal and disinterested spirit to make radical alterations to the organizations of existing society. Thus, the judge is not bound to heed even the clearly held opinion of the greater majority of the community if he is satisfied that that opinion is abhorrent to right thinking people. In other words, the judge would consult not his personal inclinations but the sense and needs and the mores of the community in a spirit of impartiality.” As in other parts of the country, in Bihar, most of the tribes like Munda, Oraom and Ho practised shifting cultivation along with the settled cultivation as it has not been popular with the tribe to combine various modern productive technology. But, by passage of time, when the land has become scarce, they too have settled down to ploughing cultivation on fixed tenures. Due to diverse reasons which it is not necessary for the purpose of this case to elaborate, major part of the land slipped out from their holdings. Notable researchers, who spent their valuable time living among the tribes, are W.G. Archer, Dy. Commissioner Santhal Pargana during 1939-40, Prof. Christopher Von Furer- Haimendorf, a German Sociologist appointed by Nizam of Hyderabad in 1940 who spent his life with the tribals in Nizam State in Andhra Pradesh as well as Arunanchal Pradesh. Portraying the life style and customs operating among the Tribals, Haimendorf says in his "Tribes in India, the Struggle for Survival" that Chenchoo women, tribals in Andhra Pradesh, enjoy equal status with men. They can own property, but they can not inherit any substantial property. They abide by the decision of their husbands. They are equal companions with men doing as much, if not more, of the work in maintaining the common household. She and her husband are joint possessors of the family property insofar as it is acquired by the daily labour. In South India, in particular Andhra Pradesh, after the grant of ryotwari pattas to the tillers of the soil including the tribes, they acquire permanent right to fixed land holdings and there does not exist any discrimination in matter of intestate succession between man and woman. Prof P. Ramaiah of Kakatiya University, Andhra Pradesh in 'Issues in Tribal Development' said that "hereditary rights rule the property distribution arrangement. If a man dies his wife and sons get equal share of property. Widow gets her husband's share form the property". He has further stated, "land is part of his spiritual as well as economic heritage". Dr L.P. Vidyarthi in his Tribal Development Act and Its Administration, published by Concept Publishing Co., (1986 Edn.), has stated that the element of certainty and definiteness of custom in the tribal society is lacking because of divergent customs on the same issue adopted by different sections of the tribes. The element of antiquity is also of little aid in that behalf. In Tribal Society, custom is generally product of dominating mind, nurtured in the belief of super-natural forces and taboos than a source of spontaneous growth. It is mostly based upon the totem and taboos evolved in a particular family having the force of the family law. The custom in the tribal society is much influenced by the instinct of possessive authority and not on the basis of sociological origin but it has been carried, generation after generation, as being the family law. No scientific explanations are available, but if the custom is examined in detail it is found deep rooted on the element of totem and taboos. That is the reason that majority of the customs prevailing in the tribal society could not attain the status of law and there is no legal validity except in the cases of inheritance and some family laws like adoption and marriage. If the working and life of the tribal societies is minutely observed, it will be found that from morning till night, with the birth of a baby till

death, agricultural operations are the sole occupation for livelihood; all are tagged, linked and based upon certain conduct and behaviour as per the custom and it may be said that entire tribal society is based upon the rigid rules of custom and is still untouched by the influence of urbanisation exists in the phenomenon of religion mixed with magic custom.

Archer in his "Tribal Law and Justice - The Santhal View of Woman" has stated in 1939-40 that the unmarried daughter has ordinarily no right at all in land. She cannot ask for partition and if her brothers separate, some land may be kept by her father or brother for financing her marriage or maintenance, but that is to fulfill their duties towards her and does not confer upon her any rights. At the partition, she is given no share. She has a right to maintenance. If her father or brothers or father's agnates are against discharging their duties, she can claim enough land for keeping her till marriage. She can acquire the land of her own which is her absolute property. If her father dies leaving no other heirs or agnates, she will get his land until she is married. If she is married, her sisters will share equally with her. If she has no sisters, the property goes to the village community. With regard to married daughters, he stated, two to three bighas of land would be given as Stridhan "at the time of marriage". In respect of that property, rights of the father, brother or agnates are extinguished. The property given is her absolute property. Her children inherit her property. In their absence, it passes on to the father, brother, mother or her male agnates. With regard to the right of married woman, he has stated that at partition the wife and children get one share and the husband gets one share. He has given instances of one Safal Hansdeak of Tharia. With regard to the right of the widow, she is like a Hindu widow having right to maintenance. If her husband died while he was joint holder with his brothers she will continue to live in the family and the situation will not differ materially from what it was in her husband's lifetime. Her right to maintenance will continue and if her husband's family neglects her without cause, she can demand sufficient land to keep herself, If there is a complete family partition the widow and her children will get the share which would have gone to her husband had he been alive. She gets life estate like Hindu widow's estate, "The Madras and their Courts" by Sarad Chandra Roy, 14th Ed. at p.244 to 451 (1915). The Origins of Chotanagpur by Sarad Chandra Roy at p. 369 to 370 (1915 Ed.) dealt with inheritance on the same lines. So they need no reiteration. In *Doman Sahu v. Buka*, [AIR 1931 Patna 198], though Mundas and Mundari women in Ranchi District are akin to other tribals, since they regard themselves as Hindus, It was held that Hindu law of succession would apply to them. In *Ganesh Matho v. Shib Charan*, [AIR 1931 Patna 305], Kurmi Mahtons of Chota Nagpur adopted Hindu religion. The Division Bench held that it must be presumed that ordinarily they are governed by Hindu law in matters of inheritance and succession except insofar as parties prove any custom obtaining among them which is at variance with it. It was held that Mitakshara Hindu law of succession was applicable to them. They couldn't prove any special custom alleged about them. In "Law Enforcement in Tribal Areas" by S.K. Ghosh, Director, Law Institute, Calcutta, published by Ashish Publishing House it is stated that though the Hindu Succession Act 1956, Hindu marriage Act 1955 and Hindu Adoption and Maintenance Act 1956 didn't apply, because of their contracts with other advanced societies some changes have taken place among tribes in the observance of marriage, divorce, etc. In the event of any litigation, the tribal courts are unable to reach a definite conclusion as these customary codes are as such unwritten code. Therefore, it was recommended that a proper study of customary codes of the tribals should be made and the same may be codified properly. Some State governments have already taken action to codify the personal laws of important tribal groups. Ghosh explained that the Bhills living in Madhya Pradesh and Rajasthan who constitute the largest tribal group in the country still practise a custom of marriage by elopement or capture or by arrangement. However, they are very truthful people and they do not hesitate to speak against the culprits, even if the latter be their kith and kin.

The Garos, the Khasis and the Jhantias are the main inhabitants of Meghalaya State. They observe monogamy. The daughter (Nokma Dongipa Hechik) descendant from the ancestor is chosen for marriage for common ancestors. The husband goes and lives with the wife which in Hindu law known as Illatom son-in-law. The custom is that the senior-most household of the area maintains a line of inheritance from the mother to the chosen daughter and the husband of the inheritress mother, popularly known as Nokma is accepted as the constitutional head of the A'Khing. The lands are held in common ownership of the machong, the usufruct rights are granted to all the residents of the A'Khing. Mikirs, a populous tribe in Meghalaya is patrilineal. The sons inherit property and it is divided among them. In the absence of male heirs, the nearest agnate inherits that land. The daughters have been excluded. In the absence of sons and brothers, the widow retains the property provided she marries one of her husband's clan. The Gonds in Andhra Pradesh, Madhya Pradesh, Bihar and Orissa observe monogamy. Ghosh has stated that the custom is heritable and transferable and right of inheritance is patrilineal. The male heirs would succeed and the females are completely excluded. The sons take equal shares, but among the Apa Tanis and the Nactes, the system of primogeniture prevails, i.e. the eldest son only inherits the father's landed property which has been softened among Apa Tanis. In Manipur, the custom among Thandon Kukis is that the property is of the Chief of the village. The practice is of shifting cultivation and the Chief distributes the plots among the groups. The system of inheritance among the Naga group is that at the death of the last owner, the succession is by patrilineal and the rules of primogeniture prevails among them. The practice is that during his life-time the father gives some land to the younger brother as well.

In a report on Codification of Customary Laws and Inheritance Laws in the Tribal Societies of Orissa by Dr. Bhupinder Singh and Dr. Neeti Mahanti of Jigyansu Tribal Research Centre, sponsored by the Ministry of Welfare, Government of India and submitted on May 19, 1993, it is stated in last paragraph of the preface that to reduce tribal customary laws into formal, technical, straight-jacket frame is likely to rob it of its vitality and strength. It will expose the innocent, gullible tribals to the machinations of touts, middle-men etc. The customs which differ, in whatever magnitude, from one community to other would help exploitation of the tribals by application of the traditional law. Its relevance, freshness and vitality to a considerable extent, would get weakened. They concluded that "we must proceed deliberately and wirely." In Chapter III it is stated thus: "Customary law refers to rules that are transmitted from generation to generation through social inheritance. In a close-knit simple tribal society, the people themselves want to live according to customs backed by social sanctions; to save them from objection and social ridicule of the society." It is further stated that "the major areas of interest for a tribal community is inheritance of land, forest rights and social customs like marriage, divorce, desertion, child support, death, birth etc." Santhals, one of the largest tribes of India are spread over West Bengal, Orissa, Bihar and parts of Assam and Tripura. It is observed in the "Chapter: Succession to Property" that the succession is in favour of the son, in his absence to the daughter, in their absence to the relative. Even among Santhals, it is not strictly patrilineal. If they have no son, succession is open to the daughter and if they have neither son nor daughter then to the relative of the family. Some people among them preferred succession among son and daughter equally. On husband's demise, the widow gets a share in the property, as life-estate. In their conclusion they have stated that the Santhals and Soara tribals practise a patrilineal mode of succession. After detailed discussion it is stated that though there is considerable "on-going acculturation process", the tribes have not completely discarded the customs. It was mentioned that though Santhal society is predominantly patrilineal, they do not strictly adhere to it. The inheritance in favour of the daughter has been softened but Soara society is conservative and less exposed to winds of change. They preferred sons to daughters only if there is no son in the family and other relatives of the family. However, the widow inherits the estate of her husband. The working group of the 7th Five Year Plan on the tribal development recommended

codification of customary laws prevalent among the tribals in their report to the Planning Commission. Dr. B.L. Maharde, a bureaucrat of Rajasthan Civil Services, in his "History and Culture of Girjans" in the State of Rajasthan, narrated the practices of tribals stating that the property after the death of the father is equally divided among the sons by the village elders of Panchayat and in case of dispute, by the private Panchayat. The youngest son, since he lives with his father, is entitled to have an extra share. The grandson of his pre-deceased son is entitled to an equal share. Daughters are not entitled to inherit their fathers' property, but they can share the animal wealth. The son-in-law is entitled to equal share. The widow has right to property which she loses on her remarriage. We do not get any material as regards succession among the tribals in Madhya Pradesh, Maharashtra and Gujarat and in view of the general trend we assume that in those States also partilineal succession would be in vogue. It would thus be seen that the customs among the Scheduled Tribes vary from tribe to tribe and region to region, based upon the established practice prevailing in the respective regions and among particular tribes. Therefore, it would be difficult to decide, without acceptable material among each tribe, whether customary succession is valid and consistent and whether it has acquired the status of law. However, as noticed above, Customs are prevalent and being followed among the tribes in matters of succession and inheritance apart from other customs like marriage, divorce etc. Customs became part of the tribal laws as a guide to their attitude and practice in the social life and are not a final definition of law. They are accepted as a set of principles and are being applied when succession is open. They have accordingly nearly acquired the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Like in Hindu law, they prefer son to the daughter and in his absence daughter succeeds to the estate as limited owner. Widow also gets only limited estate. More than 80 per cent of the population is still below poverty line and they did not come at par with civilized sections of the non-tribals. Under these circumstances, it is not desirable to grant a general declaration that the custom of inheritance offends Articles 14, 15 and 21 of the Constitution. Each case must be examined and decided as and when full facts are placed before the Court.

The Judgement continued to observe, Section 2(2) of the Hindu Succession Act, similar to Hindu Marriage Act and Hindu Adoption and Maintenance Act excludes applicability of customs to the Scheduled Tribes as defined by clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the official Gazette otherwise directs. Explanation 11 to Article 25 does not include them as Hindus. The Chotanagpur Tenancy Act and the Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 and the Bihar Scheduled Areas Regulation, 1969 intend to protect the lands of the tribals and their restoration to them. Sections 7 and 8 of the Act regulate the right of Khuntketti Raiyats. By operation of customary inheritance, the son and lineal descendants inherit the lands held by the tribes for the purpose of cultivation by himself or male members of his family. Section 76 read with Section 6 gives effect to custom, usage or customary right provided thereunder not inconsistent with or not necessarily modified or abolished by the provisions of the Act. The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. As stated earlier, it must keep pace with march of time with the heart beats of the society and with the needs and aspirations of the people. As seen, even among the tribals in Bihar, the customs have now undergone advancement. They prefer both son and daughter alike though not uniformly. Succession is however patrilineal;

Further, Santhals practically adapted the Mitakshara Hindu law of succession. The Hindu Succession Act modified the pre-existing law and intestate succession gives right of succession to Hindu female. Section 14(1) has enlarged limited estate known to Sastric law into absolute right of property held by a Hindu female. In the Law of Intestate and Testamentary Succession (1991 Ed.) Prof. Diwan has stated that Section 2(2) does not mean that Scheduled Tribes which

were, prior to the codified Hindu law governed by Hindu law will not now be governed by the Hindu law. If before codification any Scheduled Tribe was governed by Hindu law it will continue to be governed by it. However, it would be uncodified Hindu law that would apply to them. It is settled law that the procedural or substantive law which offend the fundamental right are void. Section 7 and 8 of the Act exclude woman tribals from inheritance to the Khuntkutti raiyati rights solely on the basis of sex and confine succession and inheritance among male descendants only. In *Maneka Gandhi v. Union of India* [(1978) 2 SCR 621], this Court held that reasonableness is an essential element of equality; non-arbitrariness pervades Article 14. The Court must consider the direct and inevitable effect of the action in adjudging whether the State action offends the fundamental right of the individual. This Court sustained the validity of Passport Act by reading down the statutory provisions. Justice, equity and good conscience are integral part of equality under Article 14 of the Constitution which is the genus and Article 15 is its specie. In *Harbans Singh v. Guranchatta Singh* [(1991) 1 SCR 614)], this Court held that though the Transfer of Property Act did not apply to the State of Punjab at the relevant time, the general principles contained therein being consistent with justice, equity and good conscience would apply.

Under the General Clauses Act, male includes female. In *Jitmohan Singh Munda v. Ramratan Singh* [1958 Bihar Law Journal Report 373], interpreting Mundari Khunt Kattidari widow's right to remain in possession of Mundari Khunt Kattidari tenancy, after the death of her husband, the Bihar High Court held that the widow would have life estate in tenancy rights as they have adopted Hindu law of succession. There is no reference whatsoever to the exclusion of the widow of the particular Mundari. Therefore, in respect of Khunt Kattidari tenancy, the widow would be entitled to possession. In *Jani Bai v. State of Rajasthan* [AIR 1989 RAJ. 115], interpreting Rajasthan Colonisation Act, 1954, the Division Bench held that male descendants would include female descendants and the adult son and the daughter should be treated alike both being equally eligible for allotment under the rules under that Act. By operation of Section 13(1) of General Clauses Act, males includes females, of course, subject to statutory scheme which by now is subject to the Constitution. In Sections 7 and 8 of the Act if the words "male descendants" are read to include female descendants, the daughter, married or unmarried and the widow are entitled to succeed to the estate of the father, husband or son. Scheduled tribes are as much citizens as others and are entitled to equality. Sections 7 and 8 are accordingly read down and on that premise valid.

The question then is whether the interpretation is consistent with Sub-s.(2) of Section 4 of the Hindu Succession Act, 1956? Entry 7 of list III of Seventh Schedule to the Government of India Act 1935 provided "Wills, intestacy and succession save as regards agricultural land." Entry 5 of the Concurrent List in the Seventh Schedule of the Constitution omitted the words "save as regards agricultural lands" and provided merely "intestacy and succession; joint family and partition". In *Basavant Gouda v. Smt. Channabasawwa* [AIR 1971 Mysore 151], division Bench of Mysore High Court in paragraph 11 had held that Entry 5 of the Concurrent List of the Seventh Schedule would apply to succession of agricultural lands under Hindu Succession Act. It followed the judgment of *Amar Singh v. Baldev Singh* [AIR 1960 Punjab 666] (Full Bench) in its support. The same view was taken by a Division Bench of the Orissa High Court, in a judgment rendered by B. Jagannadha Das, J., as he then was, in *Laxmi Debi v. S.K. Panda* [AIR 1957 Orissa 1]. In *Gopi Chand v. Bhagwani Devi* [AIR 1964 Punjab 272], a Division Bench of Punjab High Court had held that Sub-s.(2) of Section 4 of Hindu Succession Act does not apply to the Delhi Land Reforms Act conferring permanent tenancy rights of Bhumidar or asami, laid down in Section 50 of that Act. If it is otherwise, it would be inconsistent with Section 4(1) of the Hindu Succession Act and would be void. In *Phulmani Dibya v. State of Orissa* [AIR 1974 Orissa 135] a Full Bench has held that exclusion of woman from succession to any Brahmottar

grant discriminates against woman on ground of sex under Article 15 and therefore, it offends Article 15(1). In *Tokha v. Smt. Samman*, [AIR 1977 Punjab and Haryana 406] a single Judge of that Court held that the occupancy rights held by a limited owner (widow) before the Hindu Succession Act had come into force, enlarged as absolute property under the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act and thereby she became an absolute owner and was entitled to gift over that land as to absolute owner which was upheld. In *Mayne's Hindu Law and Usage* (13th Ed.), revised by Justice A. Kuppaswami, commenting on Sub-section (2) of Section 4 of Hindu Succession Act, it is observed that the legislature can always provide that the devolution of tenancy rights shall be dependent upon personal law, i.e., Hindu Succession Act. The legislature can also lay down that in certain circumstances there would be one kind of succession and in different circumstances the holding shall devolve on different persons. Devolution in the case of a Bhumidari under the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, is not affected by Section 14 of the Hindu Succession Act as tenures created by the Uttar Pradesh did not create proprietary interest but only tenancy right. In *Bajaya v. Gopikabai* [(1978) 2 SCC 542], a Bench of three Judges of this Court held that Bhumiswami and Bhumidari rights are two classes of tenure-holders of lands paying land revenue to the State and are governed by the provisions of the Hindu Succession Act. The tenancy rights having been separately dealt with by the Madhya Pradesh Land Revenue Code, the devolution of the rights of an ordinary tenancy and an occupancy tenant are in accordance with the personal law of the deceased tenant.

Sub-s.2 of Section 4 of the Hindu Succession Act, to remove any doubts, has declared that the Act shall not be deemed to affect the provisions of any law in force providing for (i) preventions of fragmentation of agricultural holdings; (ii) for the fixation of ceiling; and (iii) for the devolution of tenancy rights in respect of such holdings. It is the policy of the legislature that with a view to distribute the surplus land ceiling on agricultural land has been prescribed so that the surplus land would be distributed to the landless persons etc. Therefore, the operation of such law was excluded from the purview of the Hindu Succession Act. This Court in *Smt. Soorja v. SDO, Rehli*, Civil Appeal No.1180/84 decided on November 22, 1994, has upheld the ceiling law and held that married daughters are not entitled to intestate succession of the father nor a separate holding since the definition of "family" did not include married daughter. The devolution of the tenancy rights are governed by Entry 18 to the List II of the Seventh Schedule. Therefore, the Hindu Succession Act to that extent stands excluded. As regards the prevention of fragmentation of agricultural land, it is already held that if at the instance of sons the agricultural lands are divisible and each son is entitled to hold and enjoy his share separately daughters also would be entitled to a separate share at a partition and enjoyment therein. The fragmentation in that behalf, therefore, should not stand an impediment to the daughter's claiming an intestate succession and to claim a share in the agricultural lands.

The Hindu Succession Act regulates succession of agricultural land and the word 'property' in Sections 6 to 8, 14 and 15 and other sections in that Act would include agricultural land. Thus considered the operation of Sub- s.(1) of Section 4 will have an overriding effect for Hindu female claiming parity with Hindu male for succession to the agricultural lands held by the father, mother, etc. and Sub- s.(2) does not stand an impediment for such a right of devolution.

The reasons assigned by the Bihar State level committee are that permitting succession to the female would fragment the holding and in the case of inter-caste marriage or marriage outside the tribe, the non-tribals or outsiders would enter into their community to take away their lands. There is no prohibition for a son to claim partition and to take his share of the property at the partition. If fragmentation at his instance is permissible under law, why the daughter/widow is denied inheritance and succession on par with son? In Kerala State, the Hindu Succession Act,

1956 was modified in relation to its application to the State of Kerala, by amendment of Devasthanam Properties (Admission of Temporary Management and Control and Hindu Succession) (Amendment) Act, 1958 and of the (Kullaiamma Thumporan Korilakam Society Partition) Act, 1961. Kerala Hindu Joint Family Abolition Act, 1975 brought about change bringing female into the fold for succession per capita. Equally, the Hindu Succession (A.P. Amendment) Act 13 of 1986, the Andhra Pradesh Legislature took lead and amended Section 6 of the Parent Hindu Succession Act and Section 29A conferred on the unmarried daughter the status of co-parcener by birth and has given her right to claim partition and equal share along with the sons. In the event of sale by the daughter of the property obtained at the petition Section, 29C gives right to male heirs to purchase the property on payment of the consideration. In the event of disagreement on the consideration the Court having the jurisdiction is given power to determine such consideration. In the event of non- payment by male heirs, the right has been given to the female heir to sell the Property to outsiders. Karnataka and Maharashtra legislatures have followed the suit and suitably amended the Hindu Succession Act, 1950.

Throughout the country, the respective State laws prohibit sale of all lands in tribal areas to non-tribals, restoration thereof to the tribals in case of violation of law and permission of the competent authority for alienation is a must and mandatory and non-compliance renders the sale void. The Acts prevailing in Bihar State expressly prohibits the sale of the lands by the tribals to the non-tribals and also direct restoration or recompensation by equivalent lands to the tribals. Therefore, if the female heirs intend to alienate their lands to non-tribals, the Acts would operate as a check on their action. In the event of any need for alienation, by a tribal female, it would be only subject to the operation of these laws and the first offer should be given to the brothers or agnates. In the event of their refusal or unwillingness sale would be made to other tribals. In the event of a disagreement on consideration, the civil court of original jurisdiction should determine the same which would be binding in the partition. In the event of their unwillingness to purchase the same, subject to the permission of the competent officer, female tribal may sell the land to tribals or non-tribals. Therefore, the apprehension expressed by the State-level Committee is unfounded.

The Christians in India are governed by the Indian Succession Act, 1925. It is stated that by operation of Section 1 notification issued under the Government of India Act of 1935, the operation thereof stood excluded to the tribal Christians residing in the State of Bihar. There is no such prohibition in other States. Even otherwise, though the principles of Indian Succession Act are strictly inapplicable, the general principles therein being consistent with justice, equity and good conscience should equally be applicable to the tribal Christians of the Bihar State.

Chief Justice Ramaswamy held the the view, "I would hold that the provisions of Hindu Succession Act, 1956 and the Indian Succession Act, 1925 though in terms, would not apply to the Scheduled Tribes, the general principles contained therein being consistent with justice, equity, fairness, justness and good conscience would apply to them. Accordingly I hold that the Scheduled Tribe women succeed to the estate of their parent, brother, husband, as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act, 1956, as amended and interpreted by this Court and equally of the Indian Succession Act to tribal Christian. However, the right of alienation will be subject to the relevant provisions like the Act, the Bihar Scheduled Areas Regulation 1969, Santhals (Amendmet) Act, 1958, Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 as amended from time to time etc. They would be applicable to them and subject to the conditions mentioned therein. In case the tribal woman intends to alienate the land, subject to obtaining appropriate permission from the competent authority under the appropriate Act, she should first offer the land for sale to the brother or in his absence to any male lineal

descendant of the family and the sale will be in terms of mutually agreed consideration and other terms etc. In case of any disagreement on consideration, the consideration shall be determined on an application filed by either party before the competent civil court of original jurisdiction over the area in which the land is situated and the decision of the civil court after adduction of evidence and consideration thereof, shall be final and binding on the parties. In case the brother or lineal descendant is not willing to purchase either by mutual agreement or as per the price settled by the civil court, the female tribal woman shall be entitled to alienate the land to the non-tribal but subject to the provisions of the appropriate Act.

In conclusion, the judgement however says that the writ petitions were allowed conditionally. In layman's parlance, it meant that the new principles and interpretations pronounced in the judgement may be given intellectual weight but may not be acted upon right now by the concerned authorities in view of an absence of a clear-cut provision in law favouring the plea of the petitioners.

Despite the fact that the above judgement didn't exercise any instant impact on any of the authorities of the country, legislative, judicial or executive, all of whom were fervently exhorted to heed its new message, it has nevertheless remained to this day a landmark judgement and shall ever remain so until the day when the every woman, be she tribal or not is given full and equal right along with male descendants in the succession to ancestral and intestate property. Landmark for double reasons; firstly it exhaustively exposes the glaring ambivalence, nay contradictions in the existing Constitutional and Statutory provisions in respect a woman's right to equal share in the property of the household; and secondly, it serves and shall continue to serve as a formidable advocacy tool for equal property rights for women as a key to women's emancipation.