

Law is an Instrument of Economic Justice to Tribal Women: An Experience of Madhu Kishwar v. State of Bihar

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Abstract

Some writ petitions (PIL and individual writ) were filed under Article 32 of Constitution of India against the State of Bihar to the Supreme Court. Public Interest Litigation was filed by the editor of 'Manushi' (a magazine which takes up the matters to ameliorate the socio-economic backwardness of Indian women and to secure them equal rights) Smt. Madhu Kishwar, on behalf of the tribal women of Bihar. Individual petitioners were Smt. Sonamuni and Smt. Muki Dui who were widow and married daughter of Muki Banguma, belonged to Ho tribe of Singhbhum District of Bihar who were denied of their right to succession over the property of their deceased husband and father. By challenging the constitutional validity of sections 6, 7, 8 and 76 of the Chhota Nagpur Tenancy, 1908 and customary law prevailing in Bihar and other customary law operating in other parts of parts of India which exclude tribal women from inheritance of land or property belonging to their father, husband, mother, confer the right to inheritance in favour of male heirs or lineal descendants in the male lines only, writ petitions sought declarations from the Supreme Court that the above-mentioned sections and the existing customary laws of tribal communities of Bihar and the rest of India were ultra vires Articles 14 and 21 of the Constitution of India. The tribal women toil, share with men equally the daily sweat, troubles and tribulations in agricultural operations and family management. Their discrimination based on the customary law of inheritance (reinforced also by statutory law) is unconstitutional, unjust, unfair and illegal. The above-mentioned writ petitions raise a common question of law that is whether female tribal is entitled to parity with male tribal in intestate succession. An affirmative answer to this issue would have gone a long way not only in ameliorating the socio-economic backwardness not only of tribal women of Bihar or whole India or all Indian women, but also will establish their 'Right to Equality', 'Right to Dignity' as well as 'Right to Development' as mandated in Constitution of India. However, very unfortunately, the Supreme Court in Madhu Kishwar v. State

of Bihar (1996) judgment (a majority decision of M.M. Punchhi and Kuldeep Singh, JJ, K Ramaswami J dissenting) has partially recognised the Fundamental Rights of Tribal Women of Bihar and leaving the other important issues to the Government for taking decisions. In this context, in this paper, firstly, tribal women's 'Right of Succession' is analysed from various perspectives in the larger canvas of Fundamental Rights and Human Rights Jurisprudence to find the answer why it is connected to the above-mentioned 3 rights and including Equality Clause; and secondly, Supreme Court's judgment in Madhu Kishwar v. State of Bihar which did not strike down the impugned sections of Chhota Nagpur Tenancy act is also critically analysed from different angles, in the canvas of India's commitment to the international community as reflected in resolutions/declarations of international covenants.

Keywords: Economic Justice, Tribal Women, Madhu Kishwar v. State of Bihar

Introduction

Constitutional validity of some provisions of Chhota Nagpur Tenancy Act (Union Parliament, 1908) was challenged, as being violative of Equality Clause emanating from Article 14 and 'Right to Life' under Article 21 of Constitution of India. Section 4 of Chhota Nagpur Tenancy Act, prescribes four classes of tenants, namely: (1). Tenure-holders including under-tenure holders; (2). Rayat, namely (a). occupancy raiyats i.e. Raiyats having a right of occupancy in the land held by them; (b). non-occupancy rights i.e. raiyats not having such a right of occupancy and (c). Raiyats having khunt-katti-rights; (3). Under-Raiyats i.e. tenants holding whether immediately or mediately under raiyats; and (4). Mundari-khunt-kattidars.

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According to section 6 of Chhota Nagpur Tenancy Act, a 'Raiyat' means (1) "Raiyat" means primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family, or by hired servants, or with the aid of partners; and includes the successors-in-interest of persons who have acquired such a right, but does not include a Mundari khunt-kattidar. (2) A person shall not be deemed to be a raiyat unless he holds land either immediately under a proprietor or immediately under a tenure-holder or immediately under a Mundari khunt-kattidar. (3) In determining whether a tenant is a tenure-holder or a raiyat, the court shall have regard to (a) local customs, and (b) the purpose for which the right of tenancy was originally acquired.

Who is then a 'Raiyat having khunt-khatti rights' according to CNTA? Under section 7(1) of CNTA, the term denotes a raiyat in occupation of, or having any subsisting title to, land reclaimed from jungle by the original founders of the village or their descendants in the male line, when such raiyat is a member of the family which founded the village or a descendant in the male line of any member of such family: provided that no raiyat shall be deemed to have kunt katti rights in any land unless he and all his predecessors-in-title have held such land or obtained a title thereto by virtue of inheritance from the original founders of the village.

CNTA also has defined "Mundari khunt-kattidar"; according to section 8 of CNTA, a Mundari who has acquired a right to hold jungle land for the purpose of bringing suitable portions thereof under cultivation by himself or by male members of his family, and includes (a) the heirs male in the line of any such Mundari, when they are in possession of such land or have any subsisting title thereto; and (b) as regards any portions of such land which have remained continuously in the possession of any such Mundari and his descendants in the male line, such descendants.

Chhota Nagpur Tenancy Act by its section 76, has saved the existing custom of that region from being struck down as illegal by declaring that "Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by, its provisions".

All these tenants as classified, do not own the tenanted lands, but hold land under others. A perusal of the above-

mentioned provisions, tells in no uncertain terms that the tribal women cannot be Rayats in any of its forms, Raiyat having khunt-khatti rights and Mundari khunt-kattidar under Chhota Nagpur Tenancy Act, because of prevailing custom in Bihar. Moreover, the tribal women are not entitled to inherit the property of their male ascendants, descendants and collaterals as legal and legitimate heirs under the existing tribal custom, usage or custom of Bihar, which does not recognise the tribal women's right to inherit (additional protection given by section 76 of the Act in this regard). In the context of the exclusion of the tribal women from the property of their deceased father, mother husband or others, (as the custom provides succession to property in the male line) the ramifications of which have to be looked into by delving deeper because preamble to the Constitution of India seeks to secure to all its citizens JUSTICE-social, economic and political; EQUALITY of status and opportunity and FRATERNITY assuring the dignity of the individual, where WE, THE PEOPLE includes tribal women of Bihar and the rest of India.

Right to Equality: Article 14 of Constitution of India

Equality clause (Article 14, Constitution of India) mandates that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India and Article 15 (1), prohibits discrimination on by stating that State shall not discriminate against any citizen on grounds only of religion, race, caste, sex (gender), place of birth or any of them. All people are equal in this country in the eyes of law; but that does not necessarily mean that all laws will be uniformly applicable to all; there cannot be law for a section of people- small or vast. To understand the customary law of Bihar depriving tribal women from right of inheritance, the nature and scope of 'Right to Equality' has to be explained to know whether this exclusion of tribal women lead to denial of their 'Right to Equality'. By observing that Article 14 is a pledge of the protection of equal laws, that is, laws operate alike on all persons under like circumstances, in *Re: Special Courts Bill 1978* (Supreme Court, 1979), the apex Court concluded following propositions regarding the scope of Article 14:

4. The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian Territory

or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

5. By the process of classification, the State has the power of determining who should be regarded as a class for purposes of legislation and in relation to a law enacted on a particular subject. This power, no doubt, in some degree is likely to produce some inequality; but if a law deals with the liberties of a number of well-defined classes, it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others and (2) that differentia must have a rational relation to the object sought to be achieved by the Act.

Setting the 2 criteria of reasonable classification in motion at the back, can it be ascertained that there is any intelligible differentia between tribal men, as grouped together and tribal women who are left out, as children of the deceased or that basis of differentia i.e. exclusion from succession to property of the deceased on the basis of gender of the heirs, has any relation to the object (the devolution of the property of the deceased to his/her heirs), which is sought to be achieved- either from the perspective of fragmentation of agricultural lands or alienation of agricultural lands going to the hands of non-tribals, in the present day context? The question becomes pertinent because Article 15 (1) of Constitution specifically prohibits States to discriminate against any

citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Right to Life: Article 21 of Constitution of India

Constitution, specifically its Part III has not defined the meaning of the terms of “Right to Life” or “Right to Personal Liberty” (Article 21, Constitution of India, 1950) anywhere. In a 7 judge Constitution Bench, Supreme Court in *Maneka Gandhi vs. Union of India* (Supreme Court, 1978) has interpreted the meaning of ‘Personal Liberty’, the Ratio-Decidendi of which is “*The expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19 (page 671)*”, by basing on which first time ‘Right to Go to Abroad’ was declared as ‘Fundamental Right’ within the purview of “Right to Personal Liberty” through this judgment. The Ratio-Decidendi regarding the meaning of ‘Personal Liberty’ as pronounced in *Maneka Gandhi v. Union of India* is equally applicable to ‘Right to Life’ as it is also covered by Article 21. Supreme Court in *Maneka Gandhi v. Union of India* also has developed a criteria by fulfilling of which the non-named rights are also brought with the purview of named Fundamental Right if the following criteria is fulfilled:

If a right is not specifically named in Article 19(1), it may still be a fundamental right covered by same clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed, flows or emanates from a named fundamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible, otherwise to effectively exercise, that fundamental right. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed, is an integral part of a named fundamental right or partakes of

the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named fundamental right (page 698).

Though the view was couched in the light of Article 19 (1), but fact remains that all named Fundamental Rights under Article 19 (1) of Constitution are also facets of two named Fundamental Rights of Article 21, as evident from the Ratio-Decidendi of *Maneka Gandhi v. Union of India* i.e. *“and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19”*; therefore, what is accepted for Article 19 (1), equally accepted for Article 21. The justification of the formal inclusion or recognition of non-named Rights within the umbrella of named Fundamental Right i.e. ‘Right to Life’ or ‘Right to Personal Liberty’, as its facets by premising on the Ratio-Decidendi, will be crystal clear if the basic purpose of Fundamental Rights incorporated in Part III of Constitution, as observed by apex Court in this judgment (Supreme Court, 1978) is kept in view:

When the constitution-makers enacted Part III dealing with fundamental rights, they inscribed in the Constitution certain basic rights which inhere in every human being and which are essential for unfolding and development of his full personality. These rights represent the basic values of a civilized society and the constitution-makers declared that they shall be given a place of pride in the Constitution and elevated to the status of fundamental rights. The long years of freedom struggle inspired by the dynamic spiritualism of Mahatma Gandhi and in fact the entire cultural and spiritual history of India, formed the background against which these rights were enacted and consequently, these rights were conceived by the Constitution makers not in narrow limited sense but in their widest sweep, for the aim of objective was to build a new social order where men will not be mere plaything in the hands of the state or a few privileged persons but there will be full scope and opportunity for him to achieve the maximum development of his personality and the dignity of the individual will be fully assured (p. 693).

The impugned sections of Chhota Nagpur Tenancy Act and the customary law of Bihar by denying their right of succession of tribal women, not only contravene ‘Right to Equality’ but also violate their ‘Right to Dignity’, ‘Right to Development’ and ‘Right to Livelihood’ as well. The basis of recognition of these non-named Fundamental Rights (these three rights are not specifically named in Part III of Constitution) as Fundamental Right pronounced by Supreme Court under the umbrella of named Fundamental right i.e. ‘Right to Life’ flows from the Ratio-Decidendi of *Maneka Gandhi v. Union of India*, highlighted in the preceding paragraphs.

Right to Development: Development of a person is a continuous process like a country. It is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom. Later on in *Samatha v. State of Andhra Pradesh* (Supreme Court, 1997) Supreme Court by recognising ‘Right to Development’ as inclusive of ‘Right to Life’ observed: “The tribals, therefore, have Fundamental Right to social and economic empowerment. As a part of ‘Right to Development’ to enjoy full freedom, democracy offered to them through the States that the lands in Scheduled areas are preserved for social economic empowerment of the tribals.”

Right to Dignity: When an individual’s full person-hood is not recognised, it is denial of dignity. Being children of the deceased, tribal women are not recognised as heirs; if it is not de-recognition of full personhood, then what is no person-hood? Supreme Court in *Francis Coralie v. Union Territory of Delhi* (Supreme Court, 1981) conceded ‘Right to Dignity, as inclusive of ‘Right to Life’:

The right to life includes the right to live with human dignity and that all goes with it namely the bare necessities of life. Every acts which offends against or impairs dignity would constitute deprivation pro tanto of this right to live and it would have to be in accordance with reasonable, fair and just procedure established by law which stands the test of other fundamental rights. Therefore, any form of torture or cruel, inhuman or degrading treatment would be offensive to human dignity and constitute an inroad

into this right to live and it would, on this view, be prohibited by Article 21 unless it is in accordance with procedure prescribed by law but no law which authorises and no procedure which leads to such torture or cruelty, inhuman or degrading treatment can ever stand the test of reasonableness and non-arbitrariness.

Right to Livelihood: In the same way, Supreme Court in *Olga Tellis v. Bombay Municipal Corporation* (Supreme Court, 1985) first time interpreted ‘Right to Livelihood’ as component of ‘Right to Life’, by opining that: “If the right to livelihood is not treated as a part of the constitutional right to live, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation”.

Judgment Supreme Court in Madhu Kishwar v. State of Bihar

So in *Madhu Kishwar v. State of Bihar* (Supreme Court, 1996) Supreme Court (decision of M.M. Punchi and Kuldeep Singh JJ, K. Ramaswami dissenting) by taking a very conservative approach, did not strike down sections 6, 7, 8 and 76 (for time being) and saved those from being declared as unconstitutional by appending a narrow and limited meaning to. However, it has accepted that the impugned sections in their present forms are not completely in consonance with ‘Right to Livelihood’, an interpreting Fundamental Right under Article 21 of Constitution. By observing that ‘Life is a precious gift of nature to a being and ‘Right to Life’ as a Fundamental Right stands enshrined in Constitution where ‘Right to Livelihood’ is born in ‘Right to Life’, Supreme Court referred to *Olga Tellis vs. Bombay Municipal Corporation* which recognised ‘Right to Livelihood’ as facet of ‘Right to Life’ by being integral part of it, in the following way as justification to its Ratio-Decidendi:

12. The sweep of the right to life conferred by Article 21 is wide and far-reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important fact of that right is the right to livelihood because, no person can live without the means of living, that is, the

means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life liable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life....So unimpeachable is the evidence of the nexus between life and the means of livelihood.

Article 37 provides that the Directive Principles, though not enforceable by any Court, are nevertheless fundamental in the governance of the country. The Principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens, but, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right, to life conferred by Article 21.

Supreme Court pronounced the following verdict for protection of ‘Right to Livelihood’ of tribal women by suspending the operation or enforcement of the impugned sections of Chhota Nagpur Tenancy Act as long as the immediate female relatives of the last male tenant (descendant) have to stay on holding the land so long as they remain dependent on it for earning their livelihood. So the tribal women got a restricted right over the property of the deceased, to whom they are recognised as his or her heirs. Instead of striking down or reading down the impugned sections of CNTA, Supreme Court probably

was under the impression that suspension of impugned sections from operation or enforcement till the lifetime of the tribal women or as long as they are dependent on agricultural lands of the deceased tenants, will protect their 'Right to Livelihood' (by technically disregarding 'Right to Development' or 'Right to Dignity') as evident from its Ratio-Decidendi:

13. Agriculture is not a singular vocation. It is, more often than not, a joint venture, mainly of the tiller's family members. Some of them have to work hard and the others harder still. Everybody, young or old, male or female, has chores allotted to perform; a share in the burden of toil. Traditionally and historically, the agricultural family is identified by the male head and this is what Section 7 and 8 recognize. But on his death, his dependent family females, such as his mother, widow, daughter, daughter-in-law, granddaughter, and others joint with him have, under Section 7 and 8, to make way to a male relative within and outside the family of the deceased entitled thereunder, disconnecting them from the land and their means of livelihood. Their right to livelihood in that instance gets affected, a right constitutionally recognized, a right which the female enjoyed in common with the last male holder of the tenancy. It is in protection of that right to livelihood, that the immediate female relatives of the last male tenant have the constitutional remedy to stay on holding the land so long as they remain dependent on it for earning their livelihood, for otherwise it would render them destitute. It is on the exhaustion of, or abandonment of land by, such female descendants can the males in the line of descent take over the holding exclusively. In other words, the exclusive right of male succession conceived of in section 7 and 8 has to remain suspended animation so long as the right of livelihood of the female descendant's of the last male holder remains valid and in vogue. It is in this way only that the constitutional right to livelihood of a female can interject in the provisions, to be read as a burden to the statutory right of male succession, entitling her to the status of an intervening limited dependent/descendants under section 7 and 8. In this manner alone, and upto this extent can female dependents/descendants be given some succour so that they do not become vagrant

and destitute. To this extent, it must be so held. We would rather, on the other hand, refrain from striking down the provisions as such on the touchstone of Article 14 as this would bring about a chaos in the existing state of law. The intervening right of female dependents/descendants under section 7 and 8 of the Act are carved out to this extent, by suspending the exclusive right of the male succession till the female dependent/descendant chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose.

After that, in this judgment (Supreme Court, 1996) directed the State Government to comprehensively examine these questions on the premise of Constitutional ethos of 'Right to Dignity' or 'Right to Development' or 'Right to Livelihood' or Directive Principles of State Policy and suggest for amendment the statutory law or customary law in this regard. Supreme Court also directed the State Government to examine the exclusion clause of Hindu Succession Act (Union Parliament, 1956), if it is just and necessary, for Scheduled Tribes because Hindu Succession Act, the reason for which it is not applicable to the custom, usage or tradition of the tribals and which paves the way for the continuance of those sections of Chhota Nagpur Tenancy Act in Bihar in the following way:

14. At the same time direction is issued to the State of Bihar to comprehensively examine the question on the premise of our constitutional ethos and the need voiced to amend the law. It is also directed to examine the question of recommending to the Central Government whether the later would consider it just and necessary to withdraw the exemptions given under the Hindu Succession Act and the a Indian Succession Act at this point of time in so far as the applicability of these provisions to the Scheduled Tribes in the State of Bihar is concerned.

In view of the Ratio-Decidendi of *Madhu Kishwar v. State of Bihar* (Supreme Court, 1996) which did not strike down the impugned sections and allowed the succession to property in the male line to continue (with a short interval till the lifetime of female heirs or their cessation of dependence over agricultural land of deceased), the minority view is worthy to be mentioned over here. Minority view was not in favour of striking down those

sections, though section 76 read with section 6 of CNTA gives effect to custom, usage or customary right but by keeping at the back of mind that law must keep pace with march of time with new aspirations of modern generation, by premising upon the 3 dimensions of 'Right to Life' and 'Right to Equality', by keeping those sections in conformity with Articles 14 and 21 of Constitution of India and by applying the rule of 'reading down', it interpreted the sections 7 and 8 of Chhota Nagpur Tenancy Act in a completely different way:

48. 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 so on that premise are valid.

Analysis of the Judgment Vis-a-Vis Dissenting View in the Judgment

(A). Rights of Disadvantaged Vis-a-Vis Obligation of State

The minority view of the judgment (K. Ramaswami J) in *Madhu Kishwar v. State of Bihar* (Supreme Court, 1996) seems to be more rational and sensitive towards the constitutional mandate for protection of the rights of the disadvantaged sections of the society (here in this case tribal women) and the affirmative obligation of the State to ameliorate the different types of backwardness and injustice (perpetuated by statutory law and customary law) in line with preamble to the Constitution which charters out the ship to secure social, economic and political justice, equality of opportunity, status and dignity of person:

20. By operation of Article 13(3)(a) of the Constitution law includes custom or usage having the force of law. Article 13(1) declares that the pre-constitutional 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 is 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 provision, to ameliorate their social, economic and political justice and accords them (with) 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 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.

(B). International Law and Rights of Tribal Women

The women's rights (including tribal women) in India, guaranteed as innate Fundamental Rights under Part III of Constitution of India or inalienable Human Rights protected by Protection of Human Rights Act (Union Parliament, 1993), though in many respects are not seen to be realised and ascertained by them (not because they are not willing to exercising or waiving voluntarily) are also recognised in many international laws. India being signatories to those conventions and covenants, these commitments become pledge of the country to the world community at large for its swift and real implementation.

(i). *Convention on the Elimination of All Forms of Discrimination Against Women*

Next is Convention on Elimination of All Forms of Discrimination against Women (1979) of U.N, popularly known as CEDAW (United Nations Organisation, 1979), the preamble of which reiterates that discrimination against women, violates the principles of equality of rights and respect for human dignity; it is an obstacle to

the participation on equal terms with men in the political, social, economic and cultural life of their country; hampers the growth of the personality from society and family and makes it more difficult for full development of potentialities of women. The bizarre gender-based discrimination against tribal women of Bihar magnetizes CEDAW for the following reasons:

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, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Article 3 enjoins State parties that it shall 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 lays emphasis to eliminate discrimination on the problems 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 and shall take all appropriate measures. Article 15(2) enjoins to accord to women equality with men before the law, in particular, to administer property.

(I). Right to Development: United Nations Organisation

A perusal of sections 6, 7, 8 and 76 of Chhota Nagpur Tenancy Act, noticeably narrates that these are not in tune with the Declaration on Right to Development (1986) of United Nations General Assembly (United Nations Organisation, 1986) the preamble of which recognises that all Human Rights and Fundamental Freedoms are indivisible and interdependent and emphasises that for development equal attention should be given to the implementation, promotion and protection of civil political, economic, social and political rights of the people. Repugnance of the afore-mentioned sections of CNTA with the Declaration is evident if its following provisions are perused:

Article 1 states that ‘Right to Development’ is part of an inalienable human right. By virtue thereof, every human person and all people are entitled to participate in, contribute to, and economic, social, cultural and political development, in which all human rights and enjoy fundamental freedoms would be fully realised.

Article 6(1) obligates the State to observe all human rights and fundamental freedoms for all without any discrimination as to race, sex, language or religion. Sub-article (2) enjoins that equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights. Sub-article (3) thereof enjoins that State should take steps to eliminate obstacle to development resulting from failure to observe civil and political rights as well as economic, social and cultural and cultural right.

Article 8 enjoins that “the State should undertake, at the national level, all necessary measures for the realisation of the right to development and shall ensure equality of opportunity for all in their access to basic resources, education, health service food, housing employment and the fair distribution of income”. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

Though the Directive Principles of State Policy and Fundamental Rights provide the matrix for all round development of persons and personality, these conventions add urgency for immediate implementation. As India being a signatory to United Nations Declarations of Human Rights, 1948, United Nations Convention on Elimination of All Forms of Discrimination Against Women, 1979 and United Nations Convention on Right to Development, 1986, it has become its obligation that the government amends and alters its law (including customary law) or inserts and incorporates new elements into it for the protection of social, economic, civil and cultural rights of the people, especially women and tribal or women belonging to backward classes as enjoined in Article 46 read with Articles 38, 39, other related Articles read with 'Right to Equality' and 'Right to Life' guaranteed by Articles 14 and 21 the Constitution of India.

(C). Protection of Human Rights Act, 1993

Human Right is another angle to look at sections 6, 7, 8 and 76 of Chhota Nagpur Tenancy Act (CNTA). In compliance with the Universal Declarations of Human Rights, 1948 of United Nations where India was also a party to it, the Protection of Human Rights Act was enacted in India. Accordingly, under section 2 (d) of Protection of Human Rights Act (Union Parliament, 1993), 'Human Rights' means "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international Covenants and enforceable by courts in India". Hence, Protection of Human Rights Act again comes to the fore as an innate and inalienable 'Human Right' of tribal women of Bihar, by being born as human beings, as protection from the impugned sections of CNTA.

Minority View in Madhu Kishwar v. State of Bihar

It is unfortunate that the view proposed by K. Ramaswami, J in *Madhu Kishwar v. State of Bihar* (Supreme Court, 1996) was not accepted by the majority of the judges, neither they subscribed to 'reading down' of sections 7, 8 and 76 nor did they strike down the impugned sections of Chhona Nagpur Tenancy Act, in spite of believing in a different way. Therefore Supreme Court missed a golden opportunity in bringing the impugned sections of CNTA

at par with all Fundamental Rights of tribal women. K. Ramaswami, J constructed Constitutional provisions to support the contentions of tribal women of Bihar on 'Right to Equality' as non-discrimination and 2 new dimensions to 'Right to Life', namely 'Right to Development' and 'Right to Dignity' as its integral parts, in a very erudite way (reproduced below):

26. 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 cultures heritage and tradition with dignity of person. The fulfilment 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....It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent 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.

28. Articles 13, 14, 15 and 16 of Constitution of India 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 and made them to accept their ascribed social status. Among woman, 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 are brought into the mainstream of the national life.

Consequence of depriving tribal women from their rights on land would be fatal because their economic empowerment and livelihood are integrally connected to

agriculture. According to K. Ramaswami, J: "Agricultural land is the foundation of a sense of security and freedom from fear. Agriculture is the only sources 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 (para 29)." Though the impugned sections of Chhota Nagpur Tenancy Act touch one aspect of it i.e. Right to Succession over land, nonetheless, it is ultimately connected to social and economic democracy of tribal women: "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 (para 37)."

The customs which are immoral are opposed to public policy, can neither be recognized nor be enforced by law in modern day's changed society. As far as custom and its constitutionality are concerned, K. Ramaswami J, in this judgment also focussed this dynamic nature of law by opining that:

Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in evolving society must constantly keep changing as civilization and culture advances. 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 (para 37).

Conclusion

Law in a civilised democratic country is the manifestation of principles of justice, equity and good conscience. As part of its social engineering process it is to create

an egalitarian social order by removing inequalities or disabilities from social, economic, political, cultural, educational lives of the people especially from the lives of socially, economically, educationally disadvantaged sections, by providing affirmative opportunities or actions to people-individual and collective. It is a right proposition if the function of highest law, theorised as 'Grund Norm' propounded by Hans Kelson (Hans Kelson, 1934) which validates or invalidates the subordinate laws in a hierarchical system, is to remove or strike down the subordinate laws, if become causes of perpetual social, economic, political or educational disadvantages (repugnant to 'Grund Norm') due to law, then it should be admitted as legal disadvantages. In some areas of social-political-economic and educational lives of people, legal disadvantages are the origin of other disadvantages-not other disadvantages reflected in law. To put it differently, legal disadvantage is root cause of other disadvantages or dis-empowerment of some system-made weaker sections of society (especially women or other backward communities), namely non-recognition of the full-personhood of huge chunk of people, like tribal women. If the legal impediment is removed by thwarting stiff resistance of the dominant groups, automatically the eclipse of dis-empowerment and disadvantages will wither away. From sociological perspective, law has 2 basic functions; firstly, law is an instrument of social justice and social transformation and secondly, as society changes, hence law must command the changes, to give the changes right direction. Therefore, law per se must be a catalyst in removing all gender-based discriminations against tribal women of Bihar and other places of India. Law must also work as channel in protecting their 'Right to Development', 'Right to Dignity' and 'Right to Livelihood' completely, where tribal women's equal 'Right to Succession' plays a major role on its own and with its inter-relationship of other Fundamental Rights, in the larger horizon of Constitutional trinity i.e. life, liberty, and equality, three pillars of just and egalitarian social order in modern democratic India. It must not be forgotten that substantial sections in tribal community in India (which definitely include its male sections) are also disadvantaged and under-privileged in many respects; therefore, putting stiff resistance towards tribal women's empowerment and realisation of their Fundamental Rights, by the dominant male sections of tribal society

will ultimately jeopardise whole society's interest fight for justice. In the light of this truth and reality, following conclusions are drawn:

(A). Constitutionality of Customary Laws Regarding Succession

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 (Dr. Bhupinder Singh and Dr. Neeti Mahanti, 1993). By operation of Article 13(3) (a) of the Constitution, law includes custom or usage having the force of law. Article 13(1) declares that the pre-constitutional 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 Constitutional morality and especially give primacy to Fundamental Rights. Given the contention that constitutional validity of all customary tribal laws are to be looked into, the unanimous decision of *Madhu Kishwar v. State of Bihar* did not go for complete review of the matter on the justification that it did not have enough materials before it:

46. 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, certain ancient 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. Customs became part of the tribal laws as a guide to their attitude and practice in their social life and not a final definition of law. They are accepted as set of principles and are being applied when succession is open. They have accordingly nearly occurred the status of law. Except in Meghalaya, throughout the country patrilineal succession is being followed according to the unwritten code of customs. Under these circumstances, it is not desirable to grant 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.

In no uncertain terms it can be stated that Supreme Court missed a golden opportunity in not reviewing the succession related tribal customary laws in the light of Fundamental Rights and Directive Principles of State Policy which it could have done by constituting a high-level fact-finding committee in this regard and then reviewing the customary tribal laws accordingly:

(2). *Fundamental Rights Jurisprudence to Protect the Rights of Tribal Women*

Can anybody deny that tribal women's (including all women) rights to development, dignity or livelihood within the purview of 'Right to Life' under Article 21 of Constitution of India, not to be enforceable against State and its instrumentalities by Articles 226 or 32 of Constitution or it is not an integral part to "Right to Life" and does not "partake of the same basic nature and character of the named fundamental right" or the "exercise of such right is not in reality and substance nothing but an instance of the exercise of this named Fundamental Right or are not sine-qua-non for all round complete development of them (including all women)-social, moral, cultural, economical, educational? The tribal women's rights to development, dignity and livelihood are born from the womb of their Right to Life.

Renowned jurist John Rawls propounded 2 basic principles of justice in his Theory of Justice. Accordingly, it is axiomatic truth that tribal women of Bihar and other parts of India, have an equal right to the most extensive basic liberty compatible with similar liberty and the unequal distribution of social values ultimately are not to the advantage of all in the tribal community. The 2 principles of justice of John Rawls (John Rawls, 1971) are reproduced below:

Firstly, each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty (liberty includes freedom of the person along with the right to hold personal property) for others. Secondly, social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's

advantage and (b) attached to positions and offices open to all; and (b). all social values i.e. liberty and opportunity, income and wealth, and the bases of self-respect are to be distributed equally unless unequal distribution of any, or all, of these values is to everyone's advantage. Injustice, then, is simply inequalities that are not to the benefit of all.

Recognition of tribal women's 'Right of Succession' is to be seen in the light of ancient India's feminist jurisprudence, reflected in Manu Smriti (verse 56), which enchants that "where women are revered, there the Gods rejoice; but where they are not, no rite (activity) bears any fruit". Simply the *sloka* conveys the message to the society that where women's rights are not protected and they are dishonoured in different ways-legally, socially or culturally etc., God (including Goddess) does not dwell i.e. live there. And God (including Goddess) does not dwell there means that Goddess Saraswati in the forms of knowledge and wisdom, Goddesses Lakshmi in the forms of wealth and prosperity, God Ganesha in the forms of success and good-fortune, God Kartikeya in the forms of strength and bravery disappear from the society and country, if women's rights are not recognised and guaranteed or they are not allowed to exercise and ascertain their Fundamental Rights or Human Rights.

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Section 2 (2), Hindu Succession Act, 1956: Nothing contained in the Act shall apply to the members of any Scheduled tribe within the meaning of clause (25) of Article 366 of the Constitution, unless otherwise directed by the Central Government.