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FAMILY LAW IN INDIA

K.B. AGRAWAL



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K.B. Agrawal

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Family Law in India

The Author



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List of Abbreviations

AC	Appeal Cases
AIHC	All India High Court Reports
AIR	All India Reporter
ALJ	Allahabad Law Journal
All ER	All England Reports
All	Allahabad High Court
AP	Andhra Pradesh High Court
ASIL	Annual Survey of Indian Law
Ass	Assam High Court
Beng.Sad Rep.	Bengal Sadar Diwani Adalat Reports
BLR	Bombay Law Review
Bom H C R	Bombay High Court Reports
Bom L R	Bombay Law Reports
Bom	Bombay High Court
Cal	Calcutta High Court
CPC	Code of Civil Procedure, 1908
CrLJ	Criminal Law Journal
CrPC	Code of Criminal Procedure, 1973
CWC	Calcutta Weekly Cases
CWN	Calcutta Weekly Notes
Del	Delhi High Court
DMA	Dissolution of Muslim Marriage Act, 1939
DMC	Divorce and Marriage Cases
Goa	Goa High Court
Guj	Gujarat High Court
HAMA	Hindu Adoptions and Maintenance Act, 1956
HL	House of Lords
HMA	Hindu Marriage Act, 1955
HMGA	Hindu Minority and Guardianship Act, 1956
HP	Himachal Pradesh High Court
HSA	Hindu Succession Act, 1956
Hyd	Hyderabad High Court
IA	Indian Appeals
IC	Indian Cases
IDA	Indian Divorce Act, 1869
ILR	Indian Law Reports
Ind Dec (OS)	Indian Decisions (Original Side)

List of Abbreviations

Ind. Const	Indian Constitution
IPC	Indian Penal Code, 1860
J&K	Jammu and Kashmir High Court
Kant	Karnatak High Court
Ker	Kerala High Court
LR	Law Reports
LT	Law Times
Mad	Madras High Court
MB	Madhya Bharat High Court
MHCR	Madras High Courts Reports
MIA	Moors Indian Appeals
MLJ	Madras Law Journal
MLR	Madras Law Reports
MP	Madhya Pradesh High Court
Mys	Mysore High Court
O	Order
Ori	Orissa High Court
P&H	Punjab and Haryana High Court
Pat	Patna High Court
PC	Privy Council
PMDA	Parsi Marriage and Divorce Act, 1936
Punj	Punjab High Court
Raj	Rajasthan High Court
r	Rule
rr	Rules
SC	Supreme Court
SCC	Supreme Court Cases
SCJ	Supreme Court Journal
SCR	Supreme Court Reports
Sind	Sindh High Court
SMA	Special Marriage Act, 1954

Preface

Of all the social groups within the state, according to Friedman, 'the family is at once the most closely knit, the smallest and the most enduring'. It has been recognized by philosophers, jurists, political scientists, and sociologists that the closeness and intimacy of family ties make the matter special.

The resulting diversities all over the world are reflected more in the family laws of different religious societies. Every society has its own religious and moral values, which are reflected, confirmed, and perpetuated in their laws governing the family matters that include validity of marriage, legitimacy of children, cohabitation, grounds of divorce, maintenance, succession, etc. The attitude and practices towards them vary with the religious, moral, and social circumstances of the different societies. This situation gives rise to peculiar problems in case of laws of family relationships. These problems arise not only at the international level but also in multicultural societies like India, where there are people belonging to different religions. Realizing the complexities and importance of the subject, a humble attempt has been made to write this monograph.

The subject of this book has been distinctly divided into two major divisions, viz., family and succession laws. These two divisions have further been divided into four parts:

- (1) Marriage
- (2) Divorce
- (3) Matrimonial Property
- (4) Succession.

The religious communities in India mainly comprise two major religions, viz., Hindus, Muslims, and two minor ones, viz., Christians and Parsis. All these religious communities have their own family and succession laws. An endeavour has been made to do the work on these different religious communities.

Hindu law is one the most ancient pedigree of any human system of laws, though it has now not remained ancient, because it has lost most of its moorings. Its law of marriage, specifically the law of matrimonial causes, is largely based on English law. Muslim matrimonial law among Muslims is based on the *Koran* and *hadis* except in the area of divorce. Women under this system have now been given the right to give divorce to her husband under the Dissolution of Muslim Marriage Act, 1939. So far as Christians are concerned, they are being controlled by the Indian Christian Marriage Act, 1972, and the Indian Divorce Act, 1869. These laws have also been amended time and again. The law has been last amended recently by the enactment

Preface

of the Indian Divorce (Amendment) Act, 2001, which has given a Christian woman the right to give divorce to her husband on an equal basis. Prior to this amending Act, women enjoyed a very limited right to obtain divorce from her husband. Parsis, being a very small but significant population, got their matrimonial laws first codified in the Parsi Marriage and Divorce Act, 1865. They had to make strenuous efforts in getting this enactment. This Act was subsequently amended in 1936 and 1988.

In the area of succession, the Hindus, prior to the Hindu Succession Act, 1956, were dealt with by *shastraic* law. The rules of succession were very complex and not uniform; that is, in Bengal, the *dayabhaga* law of inheritance was applicable and for the rest of the country, *mitakshara* rules were applied. *Mitakshara* recognized two modes of devolution of property, viz., survivorship and succession. The rule of survivorship applied to joint family property, and the rule of succession applied to self-acquired property. The *dayabhaga* ordained only one mode of succession; that is, succession. The Hindu Succession Act, 1956, made simple and comprehensive law of succession applicable to the whole country. Hindus, however, did not know the idea of testamentary succession under *mitakshara* until the Hindu Wills Act, 1870. Prior to that a Hindu could not dispose of his undivided interest in the joint family property so as to defeat the right of his wife and other persons to maintenance. It was only under the *dayabhaga* that the testator could dispose of all his property by will. According to the *mitakshara* school a female up until then did not have the status of coparcener and thus was not entitled to inherit joint family property. This provision has now been amended by the Hindu Succession (Amendment) Act, 2005. On commencement of this Act, in a joint Hindu family governed by the *mitakshara* law, the daughter of a coparcener shall (a) by birth become a coparcener in her own right in the same manner as the son, (b) and shall have the same rights in the *coparcenary* property as she would have had she been a son.

Muslim law of inheritance differs materially from laws of all other communities in India. As far as the inheritance is concerned, specific shares to the heirs have been provided in accordance with the *Koran* and *hadis*. However, the power to make wills under Muslim law is limited up to one-third of his property.

The Indian Succession Act, 1925, came into force on 30 September 1925, after consolidating as many as twelve statutes. The Act, though, cannot claim to be all comprehensive but it covers a variety of fields, for example, domicile, intestate and testamentary succession, bequest of legacies, powers of executors and administrators, etc. The Act is applicable to Christians, Parsis, and other communities. Certain provisions are also applicable to Hindus.

This book deals with the provisions of various laws relating to family and succession laws of all the above mentioned different communities in India. Important decisions of the Privy Council prior to 1950 and of the Supreme Court and different High Courts in India have been cited at appropriate places.

In India, at present there is no one book that can be said to be dealing with the subject of family and succession laws of all the communities, viz., Hindu, Muslim, Christians, and Parsis. It is hoped that this book will be very useful to those who want to deal with the subject at one place. The latest amendments of enactments and case laws have been included in this monograph.

I shall be failing in my duty if I do not express my appreciation to my friends, Prof. Dr D.C. Jain, former Professor of Law, Rajkot University Rajkot, and Mr B.K.

Preface

Sharma, LL.M. Advocate, Jaipur, who have made it possible to develop this monograph. I am also thankful to Mr Vidyasagar Wadhwa of M/s Bharat Law House, Jaipur, who has been kind enough to provide me with the latest literature on the subject and for giving useful suggestions in the preparation of this monograph.

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