

# A Blow to Gender Equality

## Supreme Court Judgement on Manushi's Case on Women's Land Rights

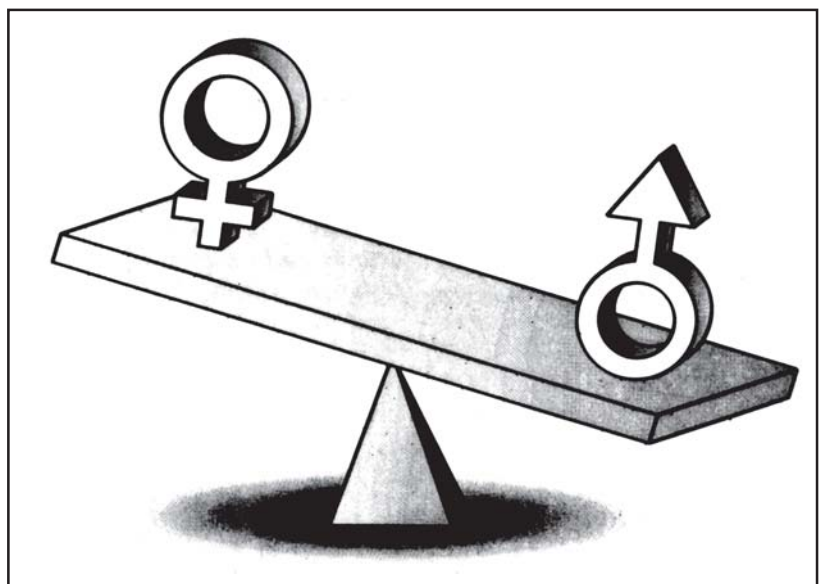
○ Vinay Reddy

**M**ANY scholars take the view that personal laws of various communities are not subject to the constitution. Thus the constitutional mandate of gender equality which is to be found in articles 14 and 15 of the constitution need not be taken note of by community determined personal laws. The effect of such reasoning is that personal laws are given a free hand to discriminate against women. This has disastrous effects on the goal of gender equality and these consequences are even more pronounced in the case of the Laws of Succession. If succession laws are biased against women, their chance of succeeding to property is lost and this further hampers them in their quest for economic independence. Of late, the Apex Court seemed to have realised the danger of exempting personal law from the mandate of the constitution and in 1996, it rendered a landmark decision in the case of *C. Masilamani Mudhaliar vs Idol of Sri Swamimathaswami*, AIR 1996 SC 1697 in which it held that all personal laws are subject to the constitutional mandate of gender equality. In that particular case, it was the Hindu Succession Act which was held to be subject to the constitution.

Following the *ratio* of the above case, it would appear that if women all over India had an equal right of succeeding to property

along with the males, this would help them in their goal of economic freedom, which would in turn make the achievement of gender equality easier. However another Apex Court decision in the case of *Madhu Kishwar vs State of Bihar*, (1996) 5 SCC 125 has caused a good deal of confusion on this aspect. In this case a three judge bench had to consider the constitutional validity of Sections 7 and 8 of the Chotanagpur Tenancy Act, 1908. This Act was applicable to the Scheduled Tribes in Bihar and it denied the right of succession to the females in favour of the males. The constitutionality of this Act was challenged as being biased against females. The Apex court had before them the rather simple

task of deciding whether the provisions of the constitution would be applicable to tribals. The judges, however, made a mess of the issue and went about the whole thing in a roundabout way. In a rather surprising decision, the Apex Court by a majority of 2:1 held that the impugned provision could not be held to be unconstitutional. They decided that the right of the male successor would remain in suspended animation until the right to livelihood of the surviving female members of the deceased male is satisfied. In effect this means that as long as the female descendants are still dependent on the land, the male successor's right does not come into operation. This is no doubt a very ingenious attempt by



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the Apex Court to uphold the constitutional validity of these sections. In effect, what the court was trying to say is that even if certain provisions are blatantly biased against women, some loophole in the law is going to be found to let such bias continue. What was forgotten by the learned judges JJ Punchhi and Kuldip Singh is that the constitution is the supreme law of the land which is applicable to each and every citizen of the country whether a tribal or not. The constitutional mandate against gender discrimination is clearly laid down and it does not leave much room for doubt. The argument of the majority that the general principles of equality as laid down in other succession laws cannot be applied to the laws of tribals is also totally out of context. This argument has no relevance whatsoever to this case as the only law which needed to be applied here was the constitution. In fact the dissenting judgement of J.K. Ramaswamy makes more sense as he says that the customs of tribals are also subject to the constitutional mandate of gender equality. He held the impugned provisions to be violative of the constitution and accordingly struck them down. This decision only reflects the general reluctance to let women be economically independent. It would also appear as if this decision is a great blow to the struggle for gender equity.

However this decision is not as detrimental as it would first seem. Even if the Court was wrong in reaching such a conclusion, supporters of gender equality can take heart as:

➤ This judgement is not in accordance with the constitutional procedure itself. Article 145(3) lays down that a constitutional matter can be decided only by

benches comprised of five or more judges. The above case had been decided by a bench of only three judges and is therefore not a valid judgement as it dealt with a constitutional matter.

➤ The judgement is *per incuriam* the Eleven judge bench decision of *R.C. Cooper* which laid down the effect test to determine the constitutional validity of a provision. The majority in *Madhu Kishwar* ignored this and went into the object of the laws of the tribals to determine their constitutional validity. They ignored the fact that the effect of these provisions was to deny women succession rights and was therefore violative of Article 15(1). As the decision has not taken into account an earlier decision which was binding on them, this is not a valid decision at all.

➤ The decision also allows the different laws of succession to discriminate between different groups of women. For example, a tribal woman is not entitled to an equal right to succeed along with her brother, but her Christian counterpart is. Thus a tribal woman is worse off than other women merely because she is a tribal. This amounts to discrimination solely on the grounds of religion and is thus violative of Article 15 of the constitution which prohibits such discrimination. The reasoning here is also unjust, unfair and unreasonable to tribal women and goes against the dictum laid down in the *Maneka Gandhi* case that all laws must be just, fair and reasonable.

As the above decision is not in accordance with the constitution, it can be safely said that it does not form the law of the land under Article 141. Thus it can be said

that tribal women are entitled to equal succession rights as are all other women in India. (After all, are tribals not human? Are women tribals not entitled to the same rights as other women?)

However to dispel any confusion that may have been caused by the decision, it is essential that a Constitutional Bench be formed with the expectation that the Bench will overrule it, and to reaffirm that the constitution is the Supreme Law of the land and is universally applicable to all. This would also be a step forward in the battle for economic independence and gender equality. To conclude, this decision is nothing more than a futile step to deny women property rights on a very flimsy pretext. □

*You are right in your assessment of the Supreme Court judgement in this case. The tardy, inefficient manner the Supreme Court dealt with the case and the problems it created for the very vulnerable petitioners on whose behalf MANUSHI filed the case left me too depressed and traumatised to go any further with it. Both Maki Bui and her daughter Sonamuni had to leave their village because of the attacks against them resulting from this litigation. They are now both dead. The Supreme Court was unable (or unwilling) to provide even minimal protection for their life and liberty. Both of them died before the judgement came. (For details see my account in MANUSHI 81).*

*However, I am still convinced that this judgement needs to be challenged. Perhaps, some of you at the National Law School would be interested in joining us in planning an effective legal strategy for such a campaign.*

**Madhu Kishwar**