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MITĀKṢARĀ AND DĀYABHĀGA: LAWS OF INHERITANCE

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Abstract

This paper delves into laws of inheritance based on two schools the Mitākṣarā and the Dāyabhāga. One looks into the origin of the two schools along with their inspiration and their similarities and differences. The notion of 'daya', sapiṇḍa, will be discussed along with obstructed and unobstructed properties. Do sons have a right to property from the time of their birth or not is to be discussed. Do daughters have a right to the ancestral or the self-acquired property of the father? These are some of the questions to be discussed and pondered over in this paper.

Keywords: *Jīmūtavāhana, Vijñaneśvara, inheritance, laws, son, daughter, smṛiti, adoption, piṇḍa, puṭrīkāputra*

Introduction

The laws of inheritance and the family structure saw changes from the Gupta period onwards which could not be segregated from the political, social and economic changes that took place during the said time-frame. Importantly, a number of aspects like mortgage, land-disputes came within the purview of law of jurisdiction and it became essential to codify law. There was a revival of the Brahmanical religion along with land-grants being given to temples, *kṣetraswāmi* etc. therefore *vyavahāra* would be affected during this period.

As society was evolving new laws needed to be formulated therefore a number of commentaries on law-books were written during this time. Public was against repealing of old laws as they wanted to retain the old fabric but laws could be altered, repaired or interpreted differently as long as the foundation stone remained intact. Thus, any work that was universally accepted became the subject of commentaries. The commentators put his gloss on the ancient text which was accepted and became authority in some parts whereas it was rejected in another

part of the Indian sub-continent. For example, Vijñaneśvara's commentary Mitākṣarā on Yajñvalkya-*smṛiti* and Jīmūtavāhana's work Dāyabhāga, a commentary on Manu-*smṛiti.*

During this time-period land was being gifted or partitioned which needed to be brought within the law-books. Earlier law-books of Manu or Yajñavalkya, never refer to partition of landed property, which was mentioned for the first time in the codes of Nārada and Bṛhaspati (Sharma:1980, p. 49). This may suggest that towards the end of the Gupta period large joint families owing to large stretches of land being donated started to break off from the joint family. As joint family system was breaking therefore it was important for law-givers to take care of these new aspects in society. Two schools of law Mitākṣarā and Dāyabhāga felt the nerve of this change. Mitākṣarā, endorsed the joint family system where the son acquired interest in the family property by reason of his birth in that particular family. Dāyabhāga on the other hand speaks of independent families as this school rested on religious efficacy. If the brothers were separated then each would perform the religious ceremonies so that the ancestor would get better religious benefits.

Mitākṣarā was written by Vijñaneśvara who enjoyed the patronage of the Chalukyan king, Vikramāditya. He was the law minister in the court of Vikramāditya. Mitākṣarā is an authoritative text all over India except Bengal. Jīmūtavāhana's Dāyabhāga was conceived in Bengal after the downfall of the Pala dynasty and it was during this time that Buddhism was uprooted from Bengal and Brahmanism was resurging. Jīmūtavāhana flourished in the reign of king Vijayasena and enjoyed royal patronage. It is important to note that both these two schools did not conceive or promulgate any new idea or theory. They embodied the legal doctrines of their predecessors. Their views were those put forward by law-givers who had originated long time back.

Time of Ownership

The germs of Dāyabhāga school were to be found in the laws of Kauṭilya's Arthaśastra and Dharmaśastra of Manu and Nārada. Manu along with Kauṭilya assert that sons are '*anisvara'* that is non-proprietors. The sons have no right of ownership as long as the father was alive. According to Manu-*smṛiti* (Buhler:1920, verse 104, p.345), after the death of the father and mother, the brothers can assemble and divide the paternal and maternal estate in equal share. As long as the parents were alive the sons have no right and power over the said estate. However, if the father divided the property at his own discretion, then he could keep a greater share for himself as he would have to support his wife and any son born after partition. Even

though the rule was laid that partition should take place only if the parents were well advanced in age (Nārada, verse2).

On the other hand, Mitākṣarā spoke for joint ownership of father and son in ancestral property. The son acquired right to the property by being born in the family. This was echoed from the text of Gautam who propounded that 'one acquires ownership by birth itself'. According to Bṛhaspati (Jolly:1889 verse3, p.370), property acquired by the grandfather whether immoveable or moveable, father and son are declared to be entitled to equal share. Viṣṇu (verse 2) professes the same view saying that in the paternal wealth the share of the father and son are equal, therefore, it can be deduced that the son acquired this right by birth. Yajñavalkya (verse 27, p.41) opines that in the ancestral and paternal estate the son acquires interest by birth yet the father had independent power for disposal of property other than immoveable property except when it was needed for indispensable acts of duty prescribed by law as getting relief from distress, to support the family etc.

It is therefore clear that the two schools Mitākṣarā and Dāyabhāga were not started by Vijñaneśvara and Jīmūtavāhana for the first time but they had a respectable antiquity behind them. *Smṛitis* like Manu and Nārada had put forward the doctrine of *uprama-svatvāvada*, that is, ownership arises after the demise whereas Yajñavalkya, Bṛhaspati and Viṣṇu expounded the theory of *janama-svatvāvada*, that is, ownership arises by birth.

Meaning of '*Dāya'*

There are a few points of differences between the two schools of law which arises from different interpretations given of the same word by the two-lawgivers. For example, the definition of '*dāya'* given by Vijñaneśvara and Jīmūtavāhana are different. According to Vijñaneśvara the concept of '*dāya*'; could correspond to the English terminology meaning 'heritage' (Gopalkrishniah:1962, p. 145) because heritage has a restricted meaning. The word heritage implies the death of the owner while '*dāya*' does not necessarily refer to it. In Jīmūtavāhana's view transference occurs only after the death of the owner but Vijñaneśvara used the term '*dāya*' with a double meaning. According to Mitākṣarā, '*dāya*' was property which became the property of another due to the relationship which existed between the two. The transference of ownership arises during the lifetime of the owner except in few cases on account of their relation, example, father and son. In other cases, transference took place only after the death of the owner, this was the obstructed type of property.

'*Dāya*' covers both religious and secular inheritance. It was derived from the word, '*da*' to divide and not to give as Jīmūtavāhana believed (Derrett: 1977, p.46). It is with the commencement of this view that the '*dāyādas*' takers of wealth had some sort of *adhikāra* due to the relationship which justified their taking of property when partition of the estate took place. However, Jīmūtavāhana does not agree with this view. In his view the son enjoys a central position in the continuation and preservation of the family even though his right in property did not arise from his birth. He recognizes the strong bond between father and son but this does not amount to ownership for the son is only regarded as the first heir. Two causes were essential for the son to have a right of ownership in father's property. First was the relationship which was created by birth between father and son. Secondly, the demise of the father or the extinction of his right which was created once he renounced the world.

Property: *Apratibandha* and *Sapratibandha*

On the basis of the definition of '*dāya*' given by Vijñaneśvara, he divides the property into two sorts, namely, *apratibandha* or unobstructed and s*apratibandha* or obstructed. In unobstructed property, right arises from the mere fact of their birth in the family because they were co-parceners of the property by birth. Ancestral property is unobstructed, it is so called because the accrual of the right to it is not obstructed by the existence of the owner. *Apratibandha dāya* devolves by survivorship. *Sapratibandha dāya* is that property in which interest in the property does not arise by birth but by the demise of the owner and it devolves by succession.

The distinction between unobstructed and obstructed property is peculiar to Mitākṣarā only for the uniqueness of the unobstructed property did not arise with Dāyabhāga. The reason being that Dāyabhāga did not recognize the principle of survivorship and when interest by birth was not a part of the doctrine of Dāyabhāga the only right of inheritance left was by succession which accrued for the first time at the death of the owner.

Arising from the concept of the obstructed and unobstructed property it is evident that in the Mitākṣarā school sons, grandsons, and great-grandsons all acquire right in the ancestral property by birth. No distinction was made between the right of a father and his son except that the father could dispose of the ancestral property for relief, pious purposes, etc. with the consent of his sons. Thus, the powers of the father were limited in disposing of the ancestral property. This situation did not arise in the Dāyabhāga school because the sons did not acquire any interest by birth in the ancestral property. The father could dispose of the property by sale or gift. The sons could not even demand partition for their right emerged only with the death of the owner of the property. Another difference between the two schools were that the father

could take double share even of the ancestral property, according to Dāyabhāga (Derrett: 1977, p.202). The plight of the father in Mitākṣarā was different as the father had to distribute the ancestral property equally and he could only take two shares of the self-acquired property.

Self-acquired Property

The self-acquired properties constituted of wealth which were got as gifts during marriage or gained through learning (*vidhyādhana*) or valor, property taken as obstructed heritage etc. according to Manu-*smṛiti*, gifts made from friends, gifts made at marriage and *vidhyādhana* are separate property. According to Yajñavalkya-*smṛiti* everything acquired without affecting the paternal wealth, such as presents from friends or gifts received during a marriage, are distinct properties and are not subject to division amongst the coparceners. As far as the son's right in the self-acquired property was concerned it only arose with the Mitākṣarā. The son did acquire an interest by birth in the self-acquired property of the father but the Mitākṣarā makes it clear that the son could not prevent the father from disposing off his self-acquired property but an approval was needed to be taken. If the father would alienate the self-acquisition property without the son's consent, then he would be guilty of transgressing a *smṛiti* precept but the transaction would be valid. Even the preferential share which used to be given to the eldest was from the self-acquired and not from the ancestral property.

Distinctiveness of the Mitākṣarā and the Dāyabhāga

The differences between the Mitākṣarā and the Dāyabhāga regarding the joint family property was fundamental due to the application of different principles. While the Mitākṣarā on one hand tried to strengthen and perpetuate joint family system, the Dāyabhāga on the other hand struck a blow to the joint family system by favouring 'individual property'. The Bengal joint family system did not involve any right between a father and his son but there were joint rights between brothers. However, in the family prescribed by Mitākṣarā, joint rights were involved between the father and his sons and between different brothers. Therefore, under the Bengal law the members of the family were supposed to have their rights fastened upon one particular portion of the property. This was called 'fractional ownership' in contrast to the 'aggregate ownership' of the Mitākṣarā. In 'aggregate ownership' there was unity of ownership in the joint family system with the result that an individual was not the owner of the joint family property. The aggregate property unlike the fractional property was undefined and subject to fluctuations.

The idea of coparcenary is another subject of debate between the Mitākṣarā and the Dāyabhāga. Coparcenary was the creation of law which consists of persons who inherit the property of a male. Coparcenary could not be created by anybody except in case of adoption. The conception, formation, and constitution of a coparcenary in the Dāyabhāga were totally different from that of the Mitākṣarā school. Under the Mitākṣarā school, females were not included in the coparcenary whereas in the Dāyabhāga coparceners could consist of females but it could not commence with them. According to the Dāyabhāga coparcenary formed itself for the first time after the death of the owner of the property who left behind two or more heirs to the estate. In the Mitākṣarā school coparcenary was formed after the death of the owner only in regard to the self-acquired property. Unlike Dāyabhāga coparcenary could be formed during the lifetime of the owner also. As soon as the son was born into the family, he became a member of coparcenary. Any coparcener under the Dāyabhāga could sell or mortgagee his property because he had unlimited power over his property unlike the Mitākṣarā where the father could not even dispose of his property or mortgage it without the consent of his sons because even the father's power over the property was limited.

Sapiṇḍa

The disparity between the two schools also rests on the different interpretations of the word '*sapiṇḍa*'. The two law-givers explain this term from entirely different stand-points and due to this there is a wide gap between the two schools of law regarding the laws of inheritance especially where the cognates and agnates were concerned. Jīmūtavāhana makes the spiritual benefit the corner-stone of his scheme for determining the order of succession not only to males but also to females. '*Sapiṇḍa*', therefore, according to Jīmūtavāhana were those people who were connected by a ball of cooked rice which was offered during *śrāddha*. '*Sapiṇḍa*' for Dāyabhāga arose in the community from offering funeral oblation. These offerings which were made at *śrāddha* were to confer spiritual benefit which was the pivot around which the law of inheritance of Dāyabhāga revolved.

'*Sapiṇḍa*' was very differently interpreted by Vijñaneśvara who lays emphasis on blood relationship. *Piṇḍa* according to Vijñaneśvara was not the funeral cake but particle of the same body and persons who were connected to each other through blood and body like father and son were considered '*sapiṇḍas*'. Therefore, the Mitākṣarā traces the heirs and the order of succession from the propinquity or nearness of blood relationship.

Mitākṣarā gives equal prominence to both biological and spiritual descent (Pawate, 1975, p.199). The biological *sapiṇḍas* of a person generally belongs to the same caste and religion as the person himself, therefore, biological and spiritual relationships go together. Nearly the same view has been expressed by Gopalkrishniah (1962, pp.155-156.) about Dāyabhāga. He says that the Dāyabhāga does not ignore or rules out the possibility of propinquity and religious efficacy which went hand in hand but the difference arose due to the priority given to one over the other and to discriminate between the rival claims of contending heirs. Thus, the real point of difference between the Mitākṣarā and the Dāyabhāga was whether the oblations offered by the agnates should outweigh the value of the offerings made by cognate kinsmen. The Mitākṣarā thought that the *piṇḍa* offered by the cognate kinsmen were of a very inferior character and could hold no light to the spiritual merit conferred by the agnate kinsmen. Jīmūtavāhana was of the opinion that the cognates who gave the *paravana piṇḍa* should be excluded by the agnates of the same line. It was in the absence of agnates that the cognates of the same line were entitled to succeed and they should not be excluded by agnates of a remoter line.

It is thus seen that in both the schools, the Mitākṣarā and the Dāyabhāga, affinity created a heritable right but religious merit determined the preferable right. The points of difference between the two schools of law depended on difference in the interpretations of religious dogma relating to the superiority of efficacy between the agnate and cognate kinsmen. The principles of affinity and propinquity were the only genuine principles that indicated the direction in which the doctrine of affinity should be applied. Thus, one can see that affinity was the basis of the right of succession and religious merit was used to regulate the order of succession.

Another point on which the two schools did not strike the same chord was the time of partition. One is aware of the fact that in most of the primitive societies where patriarchal family system prevailed, the father had absolute power not only over acquisitions of the son and women but he also possessed absolute power over the son. As time passed rare instances of sons dividing the property during the lifetime of the father even against his will started occurring. By the time of the *smṛitis* and medieval legislators the time for partition was clearly demarcated. The Mitākṣarā indicates three principal times for partition, namely;

(i) at the father's desire during his life-time

(ii) when the father had lost all desire for worldly goods and mother was past child bearing, and,

(iii) partition may take place at the desire of the son and even against the wish of the father.

According to the Dāyabhāga and the other schools of Bengal the former two rules apply to the ancestral property only, moreover, 'the consent of the father was required in each and every division of the property made during his lifetime' (Jolly:1889, verse 1, p. 369). However, the Mitākṣarā is quite clear on the point that the son has an absolute right to partition the ancestral property during the lifetime of the father even if it is against the wish of the father (Kane: 1973, p.509). Under the Dāyabhāga these questions do not arise as the sons have no right by birth. There are only two occasions for partition under the Dāyabhāga and they are;

(i) on the demise of the father, and

(ii) when the father divided the property himself amidst his sons during his lifetime.

Jīmūtavāhana went so far as to hold that even if the father was dead partition should not take place till the mother was alive.

At the time of partition, the property of the grandfather, the father and what was earned by the sons with the help of the ancestral property was divisible among the claimants. The father should not remain in debt after death; therefore, all the claimants of the property should first repay the debts of the father and if he had promised to pay anything in *dāna* the appropriate amount should be taken out from it. After this, whatever wealth was left should be equally divided amongst the heirs. If any portion of the property which was stolen previously was found after partition, then it should be divided amongst all the co-shares equally (Dutt:1977, verse 129 p.84). after the death of the father. If the eldest brother multiplies ancestral wealth by agriculture or mechanical skill while the younger brothers are receiving education then the younger brothers are also entitled to the property which has been added by the elder brother to the existing property. If among the several brothers one of them dies childless or becomes an ascetic then the brothers shall divide the property, excepting the *strīdhana* (Jolly:1889 p.195, Narada *smṛiti* verse25). In case some omission of assets is discovered after partition then the discovered assets should be divided equally amidst the coparceners, according to Manu *smṛiti*, but the eldest son would not be given a preferential share from this property. Articles which were concealed by a coparcener and was discovered later should be distributed among the heirs. Whatever a man acquires after partition is not divisible along with his earning from *vidhyādhana* which was acquired without the use of family property (Kapadia:1984, p.227) or gifts from relatives, or gifts received at the time of marriage, gains from valor or gains from battle (*dhavajāhṛtam*) are not to be shared by the coparceners. Ancestral property recovered

solely by his own efforts must belong to the person who regained it. The property of the wife received either from the mother or son would not go into the common stock for division. If the father leaves behind slave girls or a well, that is, property which cannot be partitioned should be enjoyed turn-wise by the sons.

In determining the mode of devolution of property, according to the Mitākṣarā school, it is seen if the deceased person was living in a joint family, then his coparceners succeeded to the property by survivorship. If the deceased had left self-acquired property, then it would devolve by succession even if he was living in joint family. In case the deceased person had separated from his family then all his property, whether self-acquired or ancestral would pass to his heirs by succession. The property of the deceased person who was governed by the Dāyabhāga school, passed by succession to his heirs because Dāyabhāga laws did not recognize the right to survivorship between coparceners. Thus, one can say that the chief difference between the school's rest on the modes of devolution of property through succession and survivorship.

Conclusion

Thus both Dāyabhāga and Mitākṣarā both agree with the ancient writers that the wife and the son could not dispose of whatever they earn without the permission of husband or father. In ancient times this view was put forward by Manu-*smṛiti*. Mitākṣarā agrees with the statement of Manu-*smṛiti* in the sense that the son had no power to deal with the self-acquired property of the father independently. As for Dāyabhāga the question of disposal of property did not arise because the sons did not acquire ownership by birth.

In trying to explain why there was different mode of succession in Bengal Justice Saradacharan felt it was due to the influence of Buddhism. According to him the laws of property propounded by the Buddhists were dissimilar to those laid by the Brahmanical sages. It was the Buddhist ideas which helped the rise of position of women and in the conception of individual property. This view has been refuted by Kane (1973, p.559) who said that the Buddhist countries like Burma borrowed their laws of succession and inheritance from *Manusmṛiti*. Secondly, Vijñaneśvara is more liberal than Jīmūtavāhana who does not allow women to inherit unless their name is mentioned as an heir. It would be best to admit that no satisfactory explanation can be given of the peculiar doctrine of the Dāyabhāga. They both have an indigenous and independent origin and growth was influenced by local customs and usages of places of their origin. The school of Mitākṣarā was more successful than the Dāyabhāga school which got confined to Bengal. The Mitākṣarā school made a lot of comprises and brought a mixed crowd under the shadow of its umbrella.

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