

FOOTHOLD OF WOMEN ON THE PEDESTRIAN OF LEGACY LAWS BY NIKITA SEHGAL *

Introduction

Girls are supposed to be in the custody of their father when they are children, women must be under the custody of their husband when married and under the custody of her son as widows. In no circumstances are they allowed to assert themselves independently.

Manu's contributions ushered the strategic development of Hindu edicts. Words of wisdom from the much accredited texts seem to have formed the foundation of our populace. They have casted tremendous influence upon Hindus while leading them to the doors of palpable patriarchy. Women were incontrovertibly respected, but at the same time were entangled in a chain of restrictions.

As per the Vedic Era, position of women was astonishingly placed on a better footing. Men still maintained a superior status, but women were blessed with religious rights. They were considered a form of divinity. Yet, they were not given the status of an independent and self-reliant human being. Women were left at the constant clemency of men ranging from their fathers to husbands and finally to sons. Not only were their abilities doubted upon, but were also denied the bare minimum prerogatives. All this was simply on account of the prevalent sex menace. Strict adherence of the females to the prescribed code of conduct was called for.

Ancient texts have narrated different schemes for diverse rights of women. Since the onset of archaic and patriarchal turbulence, women's position in Hindu society has been on a gradual rise. Various schools have been prevalent in making remarkable contributions to the various aspects governing the Hindu Edicts.

Background

Joint Hindu Family: JHF is composed of a common ancestor¹, all his male descendants up to any generation together with the wife/wives/widows, and unmarried daughters. It is assumed that every Hindu family is a joint one unless proved contrary.

Coparcenary: The traditional concept of coparcenary consisted of Last Holder along with his three male linear descendants. There is unity of possession and community of ownership when it comes to the family property. Under the Mitakshara law, on birth, the son acquires a right and interest in the family property i.e. a right over the golden spoon. Hence, a son, grandson and a great grandson constituted a class of coparceners. No female was to be counted as a member of the coparcenary. The Mitakshara law also recognizes inheritance by succession but only to the property separately owned by an individual, male or female. Females were included as heirs to this kind of property. The scope of the aforesaid concept

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¹ Mulla, Principles of Hindu Law 168 (17th ed. S.A. Desai Publications, 1998)

has been broadened in the modern era. Now², daughters have also found a place in the structure of coparcenary.

The concept of coparcenary is not recognized under Dayabhaga School, as father is the sole head of the family and has exclusive say in every matter of the family property. One remarkable feature of this school is that both sons and daughters get equal shares when partition is put to motion by him. It lays down only one mode of succession and the same rules of inheritance apply whether the family is divided or undivided and whether the property is ancestral or self-acquired. Succession rather than survivorship is the rule. If one of the male heirs dies, his heirs, including females such as his wife and daughter would become members of the joint property, not in their own right, but representing him.

Different schools of thought have drawn different heritage peripheries while establishing the position of Hindu women in the society. Some entitled them with bare minimum maintenance and marital expenses, while some were liberal and granted them a specific share of inheritance. The cases varied distinctively. However, one similarity pertinent since time immemorial is that, framing of all the property laws have done good to men folk exclusively, and women have been treated as subservient, and dependent on male support. Women could barely enjoy absolute rights over property³. Property acquired by women can be classified into- Stridhan⁴ and Non-Stridhan/Women's Estate⁵(now abolished). Stridhan includes the property in the form of marital gifts; self acquired property, investments and the like. Women's Estate comprises of the property inherited by the female (during partition and succession). Now Women's estate forms a part of her absolute property.

The right to property is important for the freedom and development of a human being. Prior to the Act of 1956, Hindus were governed by Shastric and Customary laws which varied from region to region. Consequently in matters of succession also, there were different schools, like Dayabhaga in Bengal, Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India with slight variations. The wide range of laws made the stance of inheritance even more mystified.

There is no dispute about the fact that the interpretations and selective pickings of several provisions and the influence of customs placed severe impediments on women's right to own property. The issue of chastity was emphasized repeatedly in all the texts. But by virtue of special texts, as discussed further, specific female heirs were given the right to inherit.

The Hindu Law of Inheritance Act, 1929:

Prior to this legislation, Hindus were governed by the rule of survivorship when it came to the principles of inheritance. As laid down by the Arthashastra of Kautilya, the rule gave authorization to the surviving coparcenary members to claim any and every right over the property. Hence, upon the death of a coparcener, his interest devolved, not upon his legal heirs, but upon the remaining coparceners, uniformly. Hereinafter, the society witnessed a series of legislations. Act of 1929 was the pioneer legislation which got females into the

² 39 Hindu Succession (Amendment) Act (2005)

³ Dr. Paras Diwan, Family Law 340 (10th ed. Allahabad Law Agency)

⁴ GOORODAS BANERJEE, *HINDU LAW OF MARRIAGE AND STRIDHANA*, (3rd ed. 1878)

⁵ 30 Hindu Succession Act, 1956.

system of inheritance.⁶ It conferred inheritance rights on three female heirs i.e. son's daughter, daughter's daughter and sister. This created a basic restriction on the rule of survivorship.

The Hindu Women's Right to Property Act, 1937:

The Act of 1937 gave absolute rights to all Hindu women over a certain portion of Stridhan. The part of Stridhan, acquired by the female independently or the part that was gifted to her by her parents gave her an absolute right over the aforesaid portions. She became the absolute owner of such Stridhan. However, the form of Stridhan, acquired by her from her in-laws, gave her only a limited right over such variety. On her death, the latter portion went to her reversioners (the lot which would have acquired the property had the female not existed in the first place). As per the provisions of this Act, if a male member of a Mitakshara Joint Hindu family died and was survived by his widow then the latter could claim a share of the deceased coparcener subject to certain conditions. Under this Act, the widow was also conferred the right to demand partition and claim the share that the deceased coparcener was entitled to⁷. This legislation was later repealed by the Act of 1956.

The Constitution of India, 1950

Our Constitution is the guarantor of basic fundamental rights like the Right to Equality (Article 14), No Discrimination (Article 15), Protection of certain sections of Society (Article 16), Freedom of Life and Liberty (Article 21) and the like. These, along with Directive Principles of State Policy strive to bring parity amongst the two sexes at every plausible level. The constitution makers were well versed with the growing atrocities against women of our country. Such provisions highlight and indicate the necessity of liberating women from such shackles. They advocate the fight for neutral laws and continue to be effective under almost all state of affairs.

Codification of Hindu Laws (The Era of 1950s):

Pandit Jawaharlal Nehru, the then Prime Minister of India expressed his unequivocal commitment to carry out reforms to remove the disparities and disabilities suffered by Hindu women. Consequently, despite the resistance of the orthodox section of the Hindus, the laws were codified and enacted hereinafter. These include: The Hindu Marriage Act, 1955; Hindu Succession Act, 1956; The Hindu Minority & Guardianship Act, 1956; The Hindu Adoption & Maintenance Act, 1956; The Hindu Disposition of Property Act, 1916. They apply to all the Hindus including Buddhists, Jains and Sikhs. They lay down a uniform and comprehensive system of inheritance which apply to those governed both by the Mitakshara and the Dayabahaga Schools and other systems of Hindu Law. As an upshot of the said amends, women gained a greater say in the society.

The Hindu Succession Act, 1956:

On 17th June 1956, The Hindu Succession Act, came to the rescue of women at large. It gave them an absolute right over all kinds of property which were owned/ acquired by them.

⁶ MAYNE'S, TREATISE ON HINDU LAW & USAGE 1065 (14th ed. 1996).

⁷ M. INDIRA DEVI, WOMAN'S ASSERTION OF LEGAL RIGHTS TO OWNERSHIP OF PROPERTY" IN WOMEN & LAW CONTEMPORARY PROBLEMS 174 (L. Sarkar & B. Sivaramayya,1994)

Limited ownership was done away with. The Act expressly took care of the female law of inheritance by providing exclusive provisions for them i.e. Section 14, 15, 16. The manner of legacy surplus is elucidated below:

Partition:

All females, including wives, daughters, widows were out-rightly excluded from the class of coparcenary under the provisions of Hindu Succession Act, 1956. Hence they could not ask for partition, but nonetheless a few of them deserved a share when partition opened.

Females: Not entitled to ask for partition but deserving a share in partition on its occurrence:

1. Father's wife.
2. Windowed mother
3. Grandmother
4. Coparcener's widow

Succession:

Previously, if a Hindu male died intestate, then his property was succeeded either by Rules of Survivorship or by the provisions of HSA. If a female belonging to class 1 category existed, then the act would apply, or else the property would be inherited by survivorship. On application of the act, the first step is to go for notional partition with the underlying assumption that the deceased person asked for partition right before his death.

Current Rules of Inheritance (Women's Property):

Section 14, authorizes all Hindu women to be the absolute owners of properties that were owned /acquired by them. Limited ownership of property goods owned by the womenfolk was done away with in 1956. Property under the said provision includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of arrears of maintenance, or by gift from any person, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhan immediately before the commencement of this Act. In *V Tulasamma v. V Sesha Reddy*⁸, the Hon'ble Apex Court held that:

“Besides possessing an existing right of maintenance, a woman in the Hindu family is also conferred right in the family property. It cannot be said that partition deed is something creating a new right in her in so far as the property is not concerned; nor it amounts to acquiring of the property by her by virtue of partition deed when the facts are so, there would be the application of sub-s. (1) Of s.14”

To avail the benefits of this section, the female should⁹

- Have a legal title;
- Should be in possession of the property (actual/ constructive)

⁸ *Tulasamma v. Seshareddi*, 3SCC99 (1977)

⁹ *Gumpha v. Jaibai* 2 SCC 511 (1994)

If she alienates the property (eg. legal necessity) this section will have no application. An analytical look at the section reveals that the female Hindu is conferred the absolute right to her property. In a recent judgment¹⁰ The Madras High Court observed that:

“mere possession does not attract Section 14. No evidence was led to substantiate the plea that the appellant was occupying the premises in lieu of maintenance and hence the Appeal by the wife stands dismissed.”

Section 15(1) refers to the order of distribution wherein a female dies intestate.

“(1) The property of a female Hindu dying intestate shall devolve according to the rules set out in section 16-

- (a) firstly upon the sons and daughters (including the children of any pre deceased son or daughter)
- (b) secondly, upon the heirs of the husband
- (c) thirdly, upon the mother and father
- (d) fourthly, upon the heirs of the father; and
- (e) lastly, upon the heirs of the mother.

Section 15(2) refers to the process of succession of the property inherited by the female dying intestate. In case the female has inherited the property from her father/mother (in the absence of a child as well as children of pre-deceased child) the property is devolved upon heirs of the father. And if the property is inherited from her husband/ father-in-law, (in the absence of a child as well as children of pre-deceased child), the property is devolved upon the heirs of the husband.

A workmanlike look at this section suggests that not only a distinct framework of succession is provided in case a female intestate but there is further divergence which is in nexus with the roots of acquisition of property and based upon factors such as her marital status, and whether she dies leaving behind children. It is worth mentioning that the principles of inheritance are based on the criterion of nearness in relationship and affinity. The considerations like religious efficacy or spiritual benefit of the intestate are done away with. However, the legislative presumption that the entire group of heirs of the husband are near in relation to a childless widow, in comparison to her parents and brothers and sisters, is unreasonable, impractical and irreverent. The entire framework of succession and the rule of preference yet again reflect the ever going patriarchy and orthodox outlook.

Where provision is made in this manner, by giving a life interest in property for the purpose of residence, that provision is made in lieu of a pre-existing right to maintenance and the Hindu lady acquires far more than the vestige of title which is deemed sufficient to attract Section 14(1). Section 15(2) provides that the property inherited from the father, would revert to the heirs of the father in case the Hindu female dies issueless. It also provides that where she inherits the property from her mother, it would also revert to her father's heirs and not to

¹⁰ G.Rama v. T.G.Seshagiri Rao (D) Lrs, -2-L.W. 385. (2009)

her mother's heirs. It can be argued that the provisos aim at preserving the property and reverting it back to the source of its acquisition.

It is most respectfully submitted that if the sole objective of the legislature was to safeguard the property within the family from where it had come, the pertinent provision should have been that where the property was inherited from the father, it would revert to the father's heirs and where it was inherited from the mother, it would revert to her mother's heirs as both categories are distinctive from each other.

Hindu Succession (Amendment) Act, 2005:

Thanks to the Amendment Bill, 2000 along with recommendations enshrined in 174th Law Commission Report¹¹, HSA was driven to the doors indispensable amendments. On one hand, Legislature in its power gave a momentum to the property rights of women, Judiciary, on the other hand, took the legacy forward by appreciating the alteration in law and making it applicable to pending property disputes in courts. One of the major contributions of HSAA, 2005, is that it gives daughters the status of a coparcener. It is a well acknowledged fact that any coparcener is entitled to ask for partition. Thus, post 2005, daughters can ask for partition. They are no more entitled to maintenance and marital expenses, but deserve an adequate share in the joint family property. Since daughters have acquired the status of a coparcener, they can even act as a Karta (Head) in exceptional circumstances.¹²

Changes:

Studies¹³ have indicated that the amendment in 2005 has resulted in a complete overhaul with regard to the position of Hindu Women. The various changes brought by The Hindu Succession (Amendment) Act, 2005, are highlighted as follows:

Section 6 of The Hindu Succession (Amendment) Act 2005:

Section 6(1): It states that daughter of a coparcener shall:

- a. become a coparcener by birth in the same manner as that of a son.
- b. have same rights in the joint family property in the same manner as that of a son.
- c. be subject to the same amount of liabilities as that of a son.

Section 6(2): It refers to daughters being entitled to all the incidents of coparcenary such as right to property, right to ask for partition, right to get a share in partition, community of ownership, unity of possession and the like. Furthermore, it gives daughters a right to make a will of their share of property by testamentary disposition.

Section 6(3): It states that when a Hindu dies post 2005, his/her interest in the joint family property shall be taken care of by this Act and not by Rules of Survivorship. It further states that the daughter needs to be allotted the same share as is allotted to a son.

¹¹ GOVERNMENT OF INDIA, LAW COMMISSION OF INDIA, Report on Property Rights of Women: Proposed Reforms Under The Hindu Law. (174th Report, 2000)

¹² Smt. Savitra Babu Shinde And Ors v. Rau Rama Shinde And Ors. 3 AIR Kant R (NOC 319) 18. (2006)

¹³ Lawyers Collective Women's Rights Initiative, *Mapping Women's Gains In Inheritance And Property Rights Under The Hindu Succession Act, 1956*, LAWYERS COLLECTIVE (Mar. 25, 2015, 3:35 PM) <http://www.lawyerscollective.org/files/LCWRI%20INHERITANCE%20REPORT.pdf>

It is inferred in Assistant Commissioner of Gift Tax vs. C. Krishnan and Ors¹⁴:

“...the difference between daughter and son of the Mitakshara Hindu Family is removed and the daughter is conferred the coparcenary rights in the joint family property by birth in the same manner and to the same extent as the son. In view of the new provisions, daughter is entitled to claim partition of the Hindu undivided family.”

Annulment of Section 24 of HSA:

Previously, Section 24 of HSA, 1956 led to the disqualification and deprived certain widows of their fair share of inheritance. Prior to the amendment of 2005, the law asserted the fact that the widow of a pre deceased son/ widow of a pre deceased son of a pre deceased son/ brother's widow could inherit only if she had not re-married at the time of opening of succession. If re-married, she would be disqualified from inheriting her former husband's family property. In V Tulasamma v. V Seesha Reddy¹⁵ the Hon'ble apex Court held:

“that a widow is entitled to maintenance out of her deceased husband's estate, irrespective of whether that estate is in the hands of his male issue or other coparceners.”

This legislation has been repealed. The widow shall have a right to succeed the estate of male Hindu dying intestate even if she has remarried on the date of the opening of succession.

It is humbly submitted that the deletion is not only valuable and favorable to a particular section of women in the society, but also heads the doors of contemporary and extensive outlook. It respects women and gives them the liberty to lead their lives in the desired manner. It undermines the notion that after marriage the daughter belongs only to her husband's family. If her marriage breaks down, she is no longer left to face the atrocities of social ridicules, but can now return to her birth home by right, and not on the societal sufferance. This will bless her with her self-esteem and social worth and provide her with greater bargaining power for herself and her children, in both parental and marital families.

Annulment Of Section 4(2) Enhancing Gender Equality:

Removal of Section 4(2) from the HSA, 1956 is unquestionably an adequate step towards removal of gender inequalities in the inheritance of agricultural land. Earlier, Section 4(2) had exempted females from inheriting agricultural land holdings. Inheritance was subject to the devolution rules specified in State Level tenure laws. In states where these laws were hushed on inheritance HSA was made applicable. But, in Delhi, Himachal Pradesh, Punjab, J&K and UP the tenure laws specify inheritance rules that were highly misogynist. There, the primary preference was given to male lineal descendants in the male line of descent and the women came very low in the order of preference of heirs. However the alterations mentioned in the Amendment of 2005 brought agricultural property at parity with all other kinds of properties and made Hindu women's inheritance rights in agriculture land holdings legally and legitimately equivalent to men's across the nation, superseding contradictory state laws.

Repletion Of Section 23 Aggravating Gender Equality:

¹⁴ Assistant Commissioner of Gift Tax v. C. Krishnan and Ors, 109 Ttj 516.

¹⁵ Tulasamma v. Seshareddi, 3 SCC 99 (1977)

In a historic judgment¹⁶, the Apex Court opined:

“Maintenance, as we see it, necessarily must encompass a provision for residence. Maintenance is given so that the lady can live in the manner, more or less, to which she was accustomed. The concept of maintenance must, therefore, include provision for food and clothing and the like and take into account the basic need of a roof over the head. Provision for residence may be made either by giving a lump sum in money, or property in lieu thereof. It may also be made by providing, for the course of the lady’s life, a residence and money for other necessary expenditure.”

Prior to the amendment of 2005, the right of female class I heirs was limited only to a right of residence in a dwelling house under Section 23. If the female heir was married, then she did not even have a right of residence unless she was unmarried, widowed or deserted by her husband. The joint status of the household could be destructed only by the male members and the female heirs did not have the right to ask for a partition. However, with the amendment of 2005 stepping into the scenario, the said proviso wherein, “if a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the Schedule and his or her property includes a dwelling-house wholly occupied by members of his or her family, then, notwithstanding anything contained in the Act¹⁷, the right of any such female heir to claim partition of the dwelling-house shall not arise until the male heirs choose to divide their respective shares therein; but the female heir shall be entitled to a right of residence therein: Provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling-house only if she is unmarried or has been deserted by or has separated from her husband or is a widow”, has been repealed in its entirety. It gives the daughters a prerogative to demand partition in the dwelling house. Furthermore, children of daughter and her pre-deceased daughter, in case of their death, that is to say son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son are also entitled to get their share in dwelling house if partition is affected.

Direct Impact on Social Issues:

According to a latest publication of World Bank¹⁸:

“The findings of a significant increase in girls’ educational attainment after the HSAA suggest that the Act led to wholesome improvement in women’s socio-economic status, rather than a substitution away from human capital to physical capital transfers by parents to their daughters following the legislative amendment.”

¹⁶ Komalam Amma v. Kumara Pillai Raghavan Pillai and Ors. AIR SC 636 (2009)

¹⁷ 30 H.S.A, § 23 (1956)

¹⁸ Klaus Deininger, Aparajita Goyal, Hari Nagarajan, elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5338,
WORLDBANK (Mar 28, 2009, 10:30 AM)
<http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5338>

Hence, HSA has led to a series of desired social outcomes. Not only is there a significant rise in girls' educational attainment, but is also accompanied by a reasonable delay in their marital onset.

Persisting Anomalies:

According to Law Commission's Report¹⁹:

“In spite of the constitutional mandate for gender equality, gender bias and discrimination continue to be prevalent in the Indian society in one form or another. Though there are distinct signs of gradual reduction of inequalities on the basis of sex, yet these could not be eliminated altogether.”

There is no doubt about the gradual extinction of sex-based inequalities. For the purpose of accomplishing absolute extinction, cognizance of certain anomalies must be taken:

Firstly, There Is Lack Of Awareness:

Enacting legislations alone will not meet the ends of justice. In order to remove the existing gender biases, the law must be made known to all. There must be quick access to legal aid, awareness amongst females about their prerogatives, and a sense of support both moral and financial to encourage the womenfolk to stand up for what is rightfully theirs. The legal processes for realizing women's claims must also be reworked so as to remove any psychological and social barriers to women who want to approach the law²⁰. The desired change will be bought about once social legitimacy is established. For this purpose, programs have to be developed and sustained.

Secondly, Agricultural Property:

Repeal of Section 4(2) of HSA, has arisen certain ambiguities. Unquestionably, it is a progressive step towards removing the prejudices, yet the very basis of repeal of this provision is under scrutiny. Central government has made attempts to bring in uniform laws of Succession and Inheritance with the underlying presumption that after amendment the HSA would apply to all kinds of property including rights over agricultural land. Agricultural laws, however form a part of State list, hence granting states the powers to legislate upon entries therein. Central legislation over an entry in the state list is a matter of dispute. Although Constitution of India²¹ provides that in case of a conflict, the laws made by Central Government shall prevail subject to its competency over the matter legislated. The competency is the very basis of the discrepancy, hence threatening the position of the womenfolk yet again.

Thirdly, Position Of Mother And Status Of Coparcener's Widow:

In the cases of the aforesaid categories of Hindu women, the stance of coparcenary remains unchanged. Not forming a part of the coparcenary structure, they will not get a share at the time of the notional partition. The mother will be entitled to an equal share with other Class I

¹⁹ GOVERNMENT OF INDIA, LAW COMMISSION OF INDIA, Proposal to Amend the Hindu Succession Act, 1956 as amended by Act 39 of 2005, (204th Report, 2008)

²⁰ REENA PATEL, HINDU WOMEN'S PROPERTY RIGHTS IN RURAL INDIA 121 (2007)

²¹ INDIA Const. (1950) Art.256

heirs only from the separate share of the father computed at the time of the notional partition. In effect, the actual share of the mother will go down, as the separate share of the father will be less as the property will now be equally divided between father, sons and daughters in the notional partition.

Fourthly, Execution Of Son Favoring Wills:

In most cases, the terms of the will would favor the son. The equal sharing of the father's property applies in cases where he dies intestate, that is, without making a will. Given the bias and preference for sons and notions of lineage, discrimination against daughters in inheritance through wills is bound to remain. Perhaps the share of property that can be willed by a person could be restricted, as a step towards greater gender equality. For example, Islamic jurisprudence states that a person can only will one-third of his property. Provisions to check the prevalent practice of persuading daughters to give up their share in joint family property is another area that requires attention. Need of the hour is to keep up the momentum for further reforms to reduce gender inequities and move towards a more equal society.

Concluding Remarks:

There is a magnificent swell in the number of legislations enacted to bring the status of women at parity with the opposite sex. Out of the various enactments, Hindu Succession Act, 1956 along with the Amendment Act, 2005; have contributed immensely to the field of propertied goods. Blessed with prerogatives over the property holdings, women have achieved a sense of satiation that they are not at the mercy of menfolk anymore. Extending a sheath of financial as well as moral support, the enactments have driven the status of women to the doors of remarkable proficiency.

Women have had a lucid trail of inheritance. However, justice cannot be secured for one category of women at the price of another. Boons and banes form two sides of the very same coin. On one side, the 2005 amendment serves justice to (i) the status of daughters who are now coparceners with a birth right over family property, (ii) protects the interests of widows, giving them an adequate share in the family property, (iii) curbs the menace of social quandaries such as education, early marriages and many more, (iv) allows daughters a fair prerogative over a) dwelling house, b) agricultural holdings. Such inclusions ensure fair prospects for both the sexes. On the other side, the (i) share of others in the family is diminished, coupled with a variety of ambiguities, (ii) There is far less awareness as is supposed to be, (iii) execution of wills in favor of sons and the like.

The persistent legal battle has lit a candle of hope. It can be fairly stated that the process is well ushered and, the tools are put to work. Hereinafter, the ends can legitimately be expected to get accomplished.