

Anomalous Gender Discrimination in Jammu and Kashmir Before the Abolition of Article 370

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Abstract

The position of woman vis-a-vis man with regard to permanent resident states has always remained a matter of controversy particularly since 1927 when citizenship laws were notified by Maharaja of J&K State. The domicile of a woman remained linked to the man before and after her marriage. Unfortunately the same rule have been carried out after accession of J&K State with Indian Union even though the constitutions of the Union and that of the state guarantee equal rights to both man and woman making no discrimination on the basis of sex. This discrimination is the product of President notification of 1954 and subsequently the constitution of Jammu & Kashmir defining the permanent resident of the State of Jammu & Kashmir and the privileges provided to him/her in the matter of property, state services, voting rights etc. As a consequence woman who is otherwise a permanent resident of the state would lose her permanent resident status if she marry a non-permanent resident as a result she cannot acquire any immovable property, get scholarship and employment in the State. On the other hand a woman who is a non permanent resident of the State becomes permanent resident if she marry a permanent resident enjoys all the privileges of a permanent resident. This is blatant gender discrimination and was challenged in the Jammu and Kashmir High-Court by the sufferers. Though High Court gave a verdict in favour of woman and said that “Daughter of a permanent resident of the State of Jammu and Kashmir will not lose status as a permanent resident of the State on her marriage with a person, who is not a permanent resident of the state.” The details of the legal process and the relief given along with the inadequacy of the judgement are being discussed in the paper.

Keywords: Permanent resident, State Subject, Discrimination, Article 35 A

Introduction

The position of woman vis-a-vis man with regard to permanent resident status in the state of Jammu & Kashmir has always remained a matter of controversy particularly since 1927 when citizenship laws were notified by Maharaja of J&K State. In 1927, the Maharaja of Kashmir sought to protect the State from demographic invasion by defining the term 'State subject'. After 1950, when the Indian Constitution and the Indian Citizenship Act 1955 became operative in Jammu and Kashmir, there was no need to define 'State subjects' because all such subjects became Indian citizens. However, the President proclamation of 1954 and the Constitution of Jammu and Kashmir that became operative on 26th January 1957 reintroduced the state subject with changed nomenclature as 'permanent residents'. The concept of permanent residence is inextricably linked to ancestral connection, domicile and ownership of property in Jammu and Kashmir.

Legislations Behind Gender Discrimination

Since 1927, some element of gender discrimination has crept into the interpretation of 'State subject' and 'permanent residence' laws. One such provision is Note III of 1927 notification which provides: "The wife or a widow of a state subject of any class shall acquire the status of her husband as state subject of the same class as her husband, so long as she resides in the state and does not leave the state for permanent residence outside the state." Another such provision is Article 35A which has not been mentioned in the main text of the Constitution of India but is only Presidential order of date 14 May 1954 that is placed as Appendix-1 to the Constitution of India. As per Article 35A which empowers the Jammu and Kashmir legislature to define its 'permanent residents' and limit the rights to settlement and owning immovable property. Article 35A provides that "Savin of laws with respect to permanent residents and their rights. — Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State:¹

1. defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
2. conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—
 - employment under the State Government;
 - acquisition of immovable property in the State;
 - settlement in the State; or
 - right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this part."

Equally, the Constitution of Jammu and Kashmir ensures that all 'permanent resident' of Jammu and Kashmir State shall also have all the constitutional rights of all other Indians. But not everyone can settle in the State to claim its 'permanent resident' status. All such laws made the women who married non state subject or non state residents to lose some of their privileges including property rights.

Judicial Response

The first case challenging the woman property rights by taking the plea of state subject law came before State High Court as early in 1939. In this case the state subject of Mrs. Ghulam Kabra and her right to inherit property was challenged in the State High Courtⁱⁱ in Maharaja's time on the ground that though a State Subject by birth, she had lost that status by marrying a non-state subject. The Court held that Ghulam Kabra was legal heir of the property which she could inherit. Her status as state subject after marriage was not cancelled as there was no provision in the State Subject law to cancel a certificate once granted. The court further held that Note III only provides for acquiring of state subject by non state subject female on being married to male who is a state subject holder. Then in mid sixties the then Revenue Minister issued an executive order directing all deputy commissioners to issue certificate of permanent resident to women with the proviso "valid till marriage". Even this order which lacked the force of law was differently interpreted. When daughter of a senior bureaucrat of the state, SAS Qadri married, Mehmood-ul-Rehman, an IAS officer from outside the state, in 1973, her status as a permanent resident of the state and her right to inherit property of her father under that was declared valid by the Revenue Minister on the ground that "the constitution of Jammu and Kashmir or any other law does not provide for deprivation of a permanent resident of the state of his or her status."

However, a controversy arose in the State after a judgment of the High Court held in *Prakash v. Ms. Shahni and others*ⁱⁱⁱ, wherein the Court held that a married woman acquires the domicile of her husband if she had not same domicile before marriage. The wife's domicile follows that of her husband. So long as the marriage subsists the wife is incapable of acquiring a separate domicile of her own. The court further held that a woman who is a permanent resident of the State upon her marriage to a non-State Subject loses that status and ceases to be permanent resident of the State.

After the decision of *Sawhney's* case there have been many other occasions when the state's legal definition of domicile has been used to deny women permanent residency. The selection of a female doctor at the Jammu government medical college was quashed by a high court judge on the grounds that she was married to a non-state subject. In another legal battle a petitioner challenged the state law which issues Kashmiri women with permanent residency certificates valid only 'until marriage.' She asserted that the clause violated her fundamental rights guaranteed under the constitution of India and was discriminatory on the basis of sex. Then there was another case of a woman's admission to a postgraduate course in a government medical college which was made conditional on the production of a 'permanent resident certificate' by a stipulated date, after her marriage to a non-state resident. Comprehending that she would not be issued with the certificate, she filed a writ petition to quash the demand on the ground that she continued to be a permanent resident of Jammu and Kashmir even though she had married a non-state subject.

Because of all these cases and others were challenged, the Jammu and Kashmir high court was called upon to examine the issue of a woman's residency and therefore also her right to hold, inherit and acquire immovable property in the state following marriage to a non-resident in *Susheela Sawhney case*^{iv}. In this case Dr. Susheela Sawhney challenged the selection of Dr. Ravinder Madaan to the post of Assistant Professor in the department of Obstetrics and Gynecology, Government Medical College, which was quashed by a single Judge of the J&K High Court on the ground that she was married to a non-state subject. However on appeal, the Full Bench of this Hon'ble Court answered the important question of law by majority that the daughter of a Permanent Resident of the State of J&K will continue to hold the status of being Permanent Resident even after her marriage with a person who is non-Permanent Resident of the State of Jammu and Kashmir. As a natural corollary emerging out of the aforesaid judgment, the daughters of Permanent Residents of the States who are married to Non-Permanent Residents of the State of J&K get the status of permanent resident of the State of J&K post their marriage and are enjoying all the privileges and benefits of permanent residents of the State of J&K. The high court has given this landmark judgement in favour of state's daughter but another following important question of law still undecided is: Whether it is legally permissible to make classification between off-springs of Male Non-Permanent Residents of the state of J&K vis-à-vis female Permanent Residents of the state of J&K."

In view of the law laid down by the Full Bench of this Hon'ble Court supra, there are two conceivable categories of Permanent Residents of the State of J&K based upon their sex:-

1. Male Permanent Residents of the State of J&K married to Female Non-Residents of the State of J&K and Female Permanent Residents of the State of J&K married to Male Permanent Residents of the State of J&K;
2. Female permanent Residents married to male non-Permanent Residents of the State of J&K. There is no confusion so far as first category is concerned, but the problem comes up while bestowing the right and status of Permanent Resident on the off springs of category (ii). Whereas

sons and daughters of category (i) above are given the status of Permanent Residents because of birth, the same is denied to category (ii). This denial of status of permanent resident of State of J&K to the off springs of category (ii) viz.; female permanent residents married to non-permanent residents, is violative of Article 14 of the Constitution of India as it is purely on the basis of sex that the constitutional right is denied to a citizen. The situation in certain cases is more grave where female Permanent Resident of the State of J&K who has married to a Non-Permanent Resident of the State of J&K has to come back to permanently reside in the State of J&K for the reasons of :-

- Divorce;
- Widowhood;
- Permanent settlement for any other reason;

In any of the aforesaid situations though the female continues to hold the status of Permanent Resident but the same does not go to her lineage and as such situations arise where grave injustice is done to the off springs of female permanent residents of the State of J&K who have married Non-Permanent Resident of the State.

Non-bestowing upon the right and status of permanent residents of the State of J&K on the off-springs of a female permanent residents of the State of J&K married to Non-permanent residents, another situation also arises where the immovable property of female State subject has to necessarily gets escheated as her off-springs have no right to own the immovable property in the State of Jammu and Kashmir. Thus the fundamental rights of such persons guaranteed under the Constitution of India as also under the Constitution of the State of Jammu and Kashmir get sufficiently defeated.

But women's rights took a significant backward step shortly after the J&K High Court gave its decision in favour of J&K Women. The decision was undermined by the Jammu and Kashmir Permanent Residents (Disqualification) Bill 2004, passed by the state legislative assembly. The bill diminishes the rights of Jammu and Kashmir women even more by depriving daughters of 'permanent [state] residents' such status if they marry non-state residents – the bill basically means that female state residents also lose their status upon marriage to a non-resident. The swift and unchallenged passing of the Disqualification bill provoked strong criticism from a number of women's organisations which accused the government of adopting double standards against women. The Bill which had been passed in just ten minutes by the state legislature on 5 March, 2004 and was later returned by the legislative council without any decision thereon. The Bill was again taken up for discussion in the Legislative Assembly on 27th August, 2004 and was defeated. However once again on March 8, 2010, the Government allowed an opposition member of the Upper House belonging to the People's Democratic Party to introduce a sensitive private member's Bill pertaining to disqualification of permanent resident ship of the State in case a female resident from Jammu and Kashmir married a non-permanent resident and termination of marriage of a non-resident female with a permanent resident male. But there was high voltage drama in the Upper House and protest by Congress MLCs and the J&K Panthers party on 5th April, 2010 in consequence of which the Deputy Chairman termed the Bill as "non-existent" and dropped it. Recently in 2016 a representation was made to Governor N.N.Vohra by a lady named Suman Gupta who had got selected as teacher but was not allowed to join by Jammu and Kashmir Service Selection Board (JKSSB) on the ground that she was married to non state subject and her state subject certification was not valid anymore. Governor N.N.Vohra acted immediately on such representation and asked the state to resolve issue immediately in the light of the judgement in the case of Dr. Sushila Swahney wherein High Court had said that a woman does not lose her state subject on marrying a non-state subject. In

response to Governor direction state government constituted a committee on 22 Feb 2017, to look into the issue of validity of permanent resident certificates issued to woman married outside the state to the non-state subjects. Headed by Advocate General Jahangir Iqbal Ganai, the committee includes Commissioner/Secretary Revenue Mohammed Ashraf Mir, Commissioner/Secretary Law Abdul Majeed Bhat and Special Secretary Revenue Farooq Ahmed, Advocate H.A.Siddiqui and Advocate N.H.Shah have been included as Special invitees. The Committee has been asked to submit report within two months on four issues framed by the revenue department in consultation with law department in order to remove the difficulties being faced by the subordinate revenue officers while implementing the law on the subject.^v The four issues to be look into by the committee are :-

- The effect of endorsement “valid till marriage” on the PRC which have been issued prior to pronouncement of Susheela Sawhney judgement as the judgement is prospective in nature.
- The status of children born out of a couple where husband is a non state subject and family was holding permanent resident certificate before her marriage.
- The right of female married to a non-permanent resident with respect to disposal of property inherited by her through parents.
- Further issues regarding divorcee, Khanadamad and widow on which the law is not very clear
- It is very unfortunate that in most countries the domicile of a married woman is ascertained in the same way as the domicile of an independent person. Moreover, the status of permanent resident is quite independent of domicile. Why then must the Jammu and Kashmir state consider the position of a female permanent resident on different basis?

Indeed there appears to be no legal flexibility while interpreting a woman’s domicile in Jammu and Kashmir. It is difficult to imagine such discriminatory practice against women in today’s age but such inequality is being sanctioned through the use of international private law which states ‘the domicile of the wife faithfully follows the domicile of her husband.’ This is a system of law which many now consider defunct, and yet state ‘protectors’ claim forms the basis of the 1927 notification. Its use in the state has been hailed in the courtrooms as ‘the most barbarous relic of the wife’s servitude’ and yet this law is still robust enough to allow the state to create inequality on the grounds of gender alone and despite the fact that such practice contravenes several international laws as well as the state constitution and the constitution of India.

This raises a very important question as to whether it is constitutionally permissible to have discrimination on the basis of sex of a person only so far as bestowing upon the state subject is concerned. Whether it is permissible for the State to restrict grant of state subject to the children of the daughters of the State marrying Non state subject whereas male state subjects marrying non-state subjects does not suffer such disability and rather in their cases non-state subject women who marry State subject become the State subject of the State. This has given rise to very anomalous situation and discrimination which is of the worst kind but unfortunately the situation has not been commented upon politically so far. The years of violence which have surrounded the troubled state of Jammu and Kashmir cannot be an incentive to protect territorial rights at the cost of equality, nor should a law designed to benefit state citizens be used to discriminate against them. International covenants, such as the 1966 International Covenant on Civil and Political Rights and the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, to which India is a signatory, are accepted all over the world and now need to be applied to the female residents of Jammu and Kashmir.

However the abrogation of Article 370 in August 2019 marked a significant turning point in the legal and political landscape of Kashmir. Women’s rights activists were divided on the implications—while some believed it would lead to enhanced legal protections and economic opportunities, others feared increased militarization and erosion of local autonomy would exacerbate vulnerabilities. With the abrogation of Article 370, the Indian legal system was extended in all its vigour to Jammu and Kashmir. Women now enjoy equal rights regardless of whom they marry. Central laws such as the Dowry Prohibition Act, the Protection of Women from Domestic Violence Act, the Prohibition of Child Marriage Act, and the Right to Education Act now apply uniformly. Property and succession rights are governed by national legislation, ensuring that women are no longer at the mercy of an archaic local framework. The law does not instantly erase patriarchy in society in a single stroke. But it sets the constitutional grundnorm. This is a new beginning, however delayed, for gender justice in Jammu and Kashmir.

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