



Female Hindus as a coparcener after: The Hindu succession (Amendment) Act, 2005

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Abstract

Coparcenary owes its origin to the concept of Daya i.e. property which has been explained by Vijnaneshwara while commenting on Yajnavalkyasmṛiti in the Daya vibhaga prakranam vayavahara adhaya. Here, it was discussed by the Vijnaneshwara that Daya is only that property which becomes the property of another person, solely by reason of relation to the owner. The words solely by reason of relation exclude any other cause, such as purchase.

Narada also approves the meaning of the Daya which is a coparcenary property because according to him, sons can divide only father's property which has been approved by the learned.

Therefore, the unique concept of coparcenary is the product of ancient Hindu jurisprudence which later on became the essential feature of Hindu law in general and Mitakshara School of Hindu law in particular.

The essence of coparcenary is unity of ownership with the necessary appendage of unity of possession. No coparcenary can commence without a common male ancestor, though after his death it may consist of collaterals such as brothers, uncles, cousins nephews etc. It is a purely a feature of law and cannot be created by a contract. However, an adopted son may be introduced as a member of the coparcenary. Once the common ancestor dies, the coparcenary of the brothers can be created.

Keywords: coparcener, female Hindu, Joint Hindu Family

Introduction

The Amendment in the year of 2005 in The Hindu Succession Act, 1956 (herein after referred as the 'Act') particularly in Section 6 of the Act changes the entire idea of as to the devolution of interest in coparcenary property by giving female Hindus same rights of coparcener as of male Hindus. Prior to the Amendment of 2005 the position of female Hindus was quite different, they are not treated as coparcener and they have no right to seek partition. The rights of female Hindus are very limited prior to the Amendment of 2005, Section 23 of the Act put restrictions on the rights of the female Hindus by providing that they are not entitled to claim any right into the dwelling house until the male heirs choose to divide their respective shares but to some extent the Act of 1956 under section 23 provides some limited rights like if 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^[1]. The Act gives some rights to the female Hindus but the Act did not give the status to the female Hindus as coparcener and they are totally relying on the male counterparts of their families. The Amendment in the year of 2005 basically enlarges the rights of the female Hindus by giving them the status of coparcener and providing the status as similar to male Hindus which are governed by Mitakshara law. Now in present scenario the female Hindus have the same rights and liabilities in the coparcenary property as of male Hindus and female Hindus are also entitled to dispose of

her share of the coparcenary property or her interest thereof by way of a will.

Position of female Hindus prior to the 2005 amendment

While discussing on the position of female Hindus prior to the 2005 Amendment we should go through the provisions of the Act. Start with the preamble of the Act which says that "*an Act to amend and codify the law relating to intestate succession among Hindus*"^[2] the preamble of the Act only speaks about the law relating to the intestate succession. The Act brought some changes in the law relating to the succession in Hindus without abolishing the concept of joint family and joint family property. The Act in itself never and ever interferes with the special rights of those who are members of Mitakshara coparcenary.

"Section 6 of the Act follows as: *Devolution of interest in coparcenary property.*- When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and

¹ Section 23, before repeal by Act 39 of 2005

² Preamble, The Hindu Succession Act, 1956

not by survivorship.

Explanation I – for the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation II – Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.”^[3]

Basically Section 6 of the Act recognizes the rights upon the death of the coparcener of certain of his preferential heirs to claim an interest in the property. The section says that every coparcener is entitled to the share upon partition but on the other hand it also says that the wife is not entitled to demand partition but there is exception to this rule i.e. if partition takes place wife is entitled to get share equal to that of her son and also enjoy the same independently even from her husband. Section 6 provides for the “rule of survivorship” by going through the same we find that the devolution of interest in coparcenary property will be by survivorship. It is also pertinent to mention here that the Section 6 also provides for the proviso which says that if the deceased had left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession and not by the rule of survivorship.

The Act of 1956 under the provisions of Section 6 and 8, to some extent give rights to the female relative of a Hindu and the female was entitled to succeed the interest in the property. Section 14 of the Act is an important aspect in context of female Hindus by giving right to absolute ownership in the property acquired before or after the commencement of the Act.

The main drawbacks of the Act of 1956 is that the Act does not recognize female Hindus as a coparcener nor does it give any right to female Hindus to demand partition. The rights of the female Hindus are still limited to some extent; moreover section 23 of the Act put restrictions on the rights of female Hindus by providing that the female Hindus are not entitled to demand partition in the dwelling house until the male heirs choose to divide their respective shares. Female Hindus shall be entitled to a right of residence in the dwelling house only if they are unmarried or has been deserted by or has separated from her husband or is a widow.

The Act of 1956 to some extent provides certain rights to the female Hindus and recognizes her roles, last but not least the Act does not give the status of coparcener to the female Hindus and they are still dependent on the male counterparts in their families.

Recommendations of the 174th report of law commission of India

The Act of 1956 did not provide any type of independent right

to the female Hindus i.e. daughter in respect of partition and to demand the partition. The female Hindus i.e. daughter would only be able to get a share in father’s share and the same will be provided to them on the death of her ancestor. These all facts somehow led to gender discrimination and the female Hindus are left out from enjoying the coparcenary property being violative of Article 14 and 15 of the Constitution of India. By considering all these things and after realizing the dichotomy and gender discrimination, the Law Commission of India takes steps to study the provisions of the Hindu Law with regards to the law of inheritance and the rights of female Hindus.

The Law Commission of India submitted its 174th Report in respect of “Property Rights of Women: Proposed Reforms under the Hindu Law”. The Report starts as,

“Discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of the Joint Hindu Family. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end. Recognizing this the Law Commission in pursuance of its terms of reference, which inter-alia, oblige and empower it to make recommendations for the removal of anomalies, ambiguities and inequalities in the law, decide to undertake the study of certain provisions regarding the property rights of Hindu women under the Hindu Succession Act, 1956. The study is aimed at suggesting changes to this Act so that women get an equal share in the ancestral property.”^[4]

Keeping all these things in mind, the Hindu Succession Amendment Act, 2005 was enacted to enlarge the scope of rights of the female Hindus and to put them as similar to male Hindus of a Joint Hindu Family which is governed by the Mitakshara Law.

Basically the recommendations made by the Law Commission of India in its 174th Report for the amendment of the Hindu Succession Act, 1956 introduced two major changes in the Act i.e.

1. To promote the status of daughters to coparceners;
2. To abolish section 23 of the Act entirely.

The recommendations of the Law Commission of India are introduced in the Amendment of 2005 and the old Section 6 of the Act is replaced with the new Section and moreover the section give the rights to the daughters as equal to sons as coparceners in the Joint Hindu Family property. The amendment act also abolishes the Section 23 of the Act. Finally after a long period of struggle the right of absolute property of female Hindus was almost completed.

By way of the Amendment Act of 2005 the daughter of a coparcener has been now added in coparcenary and after the commencement of the Amendment Act of 2005, the daughter is a coparcener in her own right, means the daughter along with a son is liable for the debts of Joint Hindu Family and

³ Section 6, before subs. by Act 39 of 2005

⁴ 174th Law Commission Report: Property Rights of Women: Proposed Reforms Under the Hindu Law, 2000.

now they are also entitled to dispose of their shares of the coparcenary property or their interests thereof by way of will.

Position of female Hindus after 2005 amendment act

The Amendment of 2005 is in itself a historic step which is taken by the legislature by removing the gender inequalities in Hindu Laws regarding to the inheritance and succession. Basically this is an step to remove the gender discrimination which is contained under Section 6 of the Act of 1956 by providing equal rights to the daughters as the sons have in the Hindu Mitakshara coparcenary property and also by abolishing section 23 of the Act of 1956 which disentitles the female Hindus to ask for partition in the dwelling house which is wholly occupied by the Joint Hindu Family until the male Hindus choose to divide their shares. This is all which the Law Commission of India recommended in his 174th Report on “*Property Rights of Women: Proposed reform under Hindu Law*”.

By the Amendment Act of 2005, in a Joint Hindu Family which is governed by the Mitakshara Law, now the daughter of a coparcener shall also by birth become coparcener in her own right in the same manner as of son. The daughter has now same rights as of the son in the coparcenary property and she is now also subject to the same liabilities and disabilities as of son in respect of the coparcenary property.

Moreover the provisions are also made that where a Hindu dies after the commencement of the Amendment Act of 2005, his interest in the property of Joint Hindu Family which is governed by the Mitakshara Law shall be devolve by testamentary or intestate succession under the Act and not by the rule of survivorship and the coparcenary property of the Joint Hindu Family shall be deemed to have been partitioned as if partition take place and the daughter is given the share same as is allotted to son. Provision was also made that the share of the predeceased son or a predeceased daughter as they would have got, had they been alive at the time of partition, shall be allotted to the surviving child of predeceased daughter.

Hon’ble supreme court on the effects of the amendment act of 2005

Judicial decisions of the Apex Court and the Hon’ble High Courts are of very important, as they laid down the interpretation of the enactments and the intention of the legislature. Here some of the most important recent decisions of the judiciary for ascertaining the actual effects of the Amendment Act of 2005.

- **Ganduri Koteswaramma and another Versus Chakiri Yanadi and another:** Hon’ble Supreme Court in this case held that the new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and

from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son^[5].

- **Ms. Vaishali Satish Ganorkar & anr. Versus Mr. Satish Kesharao Ganorkar & others:** Hon’ble Bombay High Court in this case held that ipso facto upon the passing of the Amendment Act all the daughters of a coparcener in a coparcenary or a joint HUF do not become coparceners. The daughters who are born after such dates would certainly be coparceners by virtue of birth, but for a daughter who was born prior to the coming into force of the amendment Act she would be a coparcener only upon devolution of interest in coparcenary property taking place. Until a coparcener dies and his succession opens and a succession takes place, there is no devolution of interest and hence no daughter of such coparcener to whom an interest in the coparcenary property would devolve would be entitled to be a coparcener or to have the rights or the liabilities in the coparcenary property along with the son of such coparcener. A reading of Section as a whole would, therefore, show that either the devolution of legal rights would accrue by opening of a succession on or after 9 September 2005 in case of daughters born before 9 September 2005 or by birth itself in case of daughters born after 9 September 2005 upon them^[6].
- **Shri Badrinarayan Shankar Bhandari and others Versus Omprakash Shankar Bhandari:** Hon’ble Bombay High Court in this case Two conditions necessary for applicability of Amended Section 6(1) are :
 - The daughter of the coparcener (daughter claiming benefit of amended Section 6) should be alive on the date of amendment coming into force;
 - The property in question must be available on the date of the commencement of the Act as coparcenary property.

Hon’ble Bombay High Court also held that in this case that Section 6 as amended in 2005 is retroactive in nature and the court also considered the applicability of the amended provision to daughter born prior to 17.06.1956 and after 17.06.1956 but prior to 09.09.2005. The Bombay High Court held that, it is imperative that the daughter who seeks to exercise such a right must herself be alive at the time when the Amendment Act, 2005 was brought into force. It would not matter whether the daughter concerned is born before 1956 or after 1956. This is for the simple reason that the Hindu Succession Act 1956 when it came into force applied to all Hindus in the country irrespective of their date of birth. The date of birth was not a criterion for application of the Principal Act. The only requirement is that when the Act is being sought to be applied, the person concerned must be in existence/living. The Parliament has specifically used the word "on and from the commencement of Hindu Succession (Amendment) Act, 2005" so as to ensure that rights which are already settled are not disturbed by virtue of a person claiming as an heir to a daughter who had passed away before the Amendment Act came into force.

⁵ 2012 AIR(SC) 169

⁶ 2012 AIR (Bombay) 101

It was observed and laid down the Hon'ble Bombay High Court that, the Amendment Act applies to all daughters born prior to 09.09.2005 and who are alive on the date of commencement of the Act i.e. on 09.09.2005. The the case of coparcener who died before 9 September 2005 would be governed by pre-amended Section 6(1) of the Act. It is only in case of death of a coparcener on or after 9 September 2005 that the amended Section 6(3) of the Act would apply. In other words, the provisions of the amended Section 6(3) do not and cannot impinge upon or curtail or restrict the rights of daughters born prior to 9 September 2005 under sub-Sections (1) and (2) of the amended Section 6 of the Act. Sub-Sections (1) and (2) of amended Section 6 of the Act on the one hand and sub-Section (3) of the amended Section 6 of the Act on the other hand operate in two different fields ^[7].

This judgment of the Hon'ble Bombay High Court has laid down the diminutive details to be considered by all the Courts and has laid down the law in respect of the Amendment Act of 2005. The ratio has paved way to many female Hindus, who are aspiring to assert their rights in coparcenary property. It has given a vast relief to the daughters to battle with the discrimination on the ground of gender equality and the consistent tyranny and denial of their fundamental right of equality.

Conclusion

After going through the provisions of the Act of 1956 and the 174th Report of the Law Commission of India on "*Property Rights of Women: Proposed Reforms under the Hindu Law*" and the Amendment Act of 2005 by considering all these provisions/recommendation and introduction to the Act of 2005, we can it is the very crucial step taken by the Government of India for the gender justice. Though it has signed the international convention on elimination of all forms of discrimination against women in 1979, it was sensitized in 2000 by the Law Commission of India ^[8]. Further though two bills for this purpose were drafted in 2002 and 2004, the final act was passed in August 2005 on the basis of committee report, ^[9]. for this particular women's right to property.

It a very clear from the Amendment Act of 2005 that it has made daughter a member of the coparcenary and also gives daughters an equal share in the agricultural property and these all are the steps taken for the advancement of the gender equality.

"I speak not for myself but for those without voice... those who have fought for their rights... their right to live in peace, their right to be treated with dignity, their right to equality of opportunity, their right to be educated." ^[10]

"I raise up my voice not so I can shout but so that those without a voice can be heard...we cannot succeed when half of us are held back." ^[11]

–Malala Yousafzai

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⁷ 2014 AIR (Bombay) 151

⁸ Vide 174th Report of Law Commission of India, 2000

⁹ Vide Parliamentary Standing Committee Report dt. 5th May 2005.

¹⁰ <https://www.brainyquote.com/quotes/quotes/m/malalayous569373.html>

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