Chapter – 12

Daughter's right to property in Coparcenary Post Independence: Inheritance to property past and present Challenges under Hindu Succession Law

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"I like the religion that teaches liberty, equality and fraternity."—Dr Bhimrao Ramji Ambedkar

ABSTRACT

In India, majority of the community follow Hindu religion and are governed by Hindu Law based on set norms and traditions. Mainly Mitakshara system of inheritance and property distribution we followed provided coparcenary rights to male descendants and daughters were not considered coparceners in coparcenary or Hindu joint family. After independence, also we followed Mitakshara inheritance and succession when it came to ancestral property. This was discriminative to daughter in the family. Indian Constitution that we adopted after independence had provided us right to equality and no discrimination on grounds of gender and sex. Nevertheless, when it came to property our societies were discriminative and negated equality to daughter to inherit ancestral property. The position of women remained like this until the amendment enacted in 2005 to Hindu Succession Act (HSA), 1956. Even though amendment came, still inconsistency was seen in while interpretation of sec. 6 under HSA.

Key Words: *Hindu, Inheritance, Rights, property and succession*

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Introduction

In traditional Hindu law, definitions of inheritance practices can be traced back to ancient texts, the Dharmashastras, in particular, the legal doctrines of the Mitakshara and Dayabhaga dated around the 12th century A.D[1]. Hindus were governed by two diverse school of inheritance i.e. Mitakshara and Dayabhaga system of inheritance. Both this system of governance of inheritance were fundamentally different in application. Mitakshara system was followed throughout India and Dayabhaga in Bengal and Assam. Under the Mitakshara consider the property belonging to Hindu is not his individual property but coparcenary property that were shared equally amongst all male decendants. All the male decedents of Hindu joint family has right to coparcenary whereas female do not inherited. Under the Mitakshara system, 'a community of interests and rights was recognized in the joint family property, held jointly by four generations of male members - a man, his sons, son's sons, and sons' son's sons - who became coparceners at birth and this ensured that property stayed with the patrilineal family[2]. By birth, the coparcener gets right to property after the death of male member in hierarchy by survivorship he gets share in property. The rules of survivorship applies to joint family property, and the rules of succession applies to [private] property held in absolute severalty by the last owner[3]. If a coparcener were to be born or die, his share would diminish or be added to the shares of others accordingly and a son could at some point sue for a partition and receive his share in the joint property prior to the death of the father[4]. Women were not the considered coparceners nor did they had the right to demand for partition. Under Mitakshara, women's rights in the joint family property included only the right of maintenance as

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1 Patricia Mohammed, "Gender Negotiations among Indians in Trinidad 1917-1947", ISBN: 978-1-4039-1461-3, Palgrave, 2002. Pg. 21

2 Ibid Pg. 21

3 Rachel E. Brule, "Women, Power, and Property The Paradox of Gender Equality Laws in India", First published 2020, Cambridge University Press, Pg. 63. DOI: 10.1017/9781108869287

4 Chandra Mallampalli, "Race, Religion, and Law in Colonial India Trials of an Interracial Family", ISBN 978-1-107-01261-5, Cambridge University Press, 2011. Pg. 191

wives or widows and in practice, there were various loopholes that allowed women some access to property, if only in their lifetime and under restricted conditions[5]. She had restrictions on the enjoyment of the property and can use the property for pious or religious purpose but did not had right to gift, mortgage or sale if she want. In practice, a woman's ability to inherit a share of ancestral property under Mitakshara law was tied to a number of factors, including the existence of other male heirs, her place within established "*orders*" of succession (as determined by relevant texts), how those texts were interpreted, and customary observances of different regions[6].

In Dayabhaga system after the death of father, son's right will arise and rule of devolution to the property will arise, when it comes to inheritance to property. Dayabhaga recognized the widow and her daughters as heirs even when the husband had not legally separated his share from the joint family estate before his death[7]. West Bengal, where succession for Hindus follows the Dayabhaga system, under which daughters can get far larger portions of property than under the more prevalent Mitakshara system (Diwan 1991, 347–49)[8]. Both schools had difference when came to distribution of property. Mitakshara followed survivorship and Dayabhaga by inheritance or devolution. Women had to face discrimination and were treated differently not only under Hindu schools, but also under other personal law like Muslim, Parsi, Christian law etc.

Post-independence, Hindu Code Bill was introduced by Dr. B. R. Ambedkar in Constituent Assembly on 11th April 1947 and the Bill was moved for referring to the Select Committee on 9th April 1948[9]. Law must be stable and yet it must change to answer the felt needs of changing times'[10]. The Hindu Code contained in this Bill adopts

5 Supra foot note no. 2. Pg. 24
6 Supra foot note no. 5. Pg. 191
7 Supra foot note no. 2. Pg. 24
8 Srimati Basu, "She Comes To Take Her Rights Indian Women, Property, And Propriety", ISBN 0791440958, State University of New York Press, 1999. Pg. 75
9 Vasant Moon, "Dr. Babasaheb Ambedkar Writings and Speeches", Vol. 14 (Part-I), ISBN (Set) : 978-93-5109-064-9, M/s. Tan Prints India Pvt. Ltd., Re-printed 2014. Pg. 5.
10 Ibid Pg. 4

the Dayabhag rule, under which the property is held by the heir as his personal property with an absolute right to dispose it of either by gift or by will or any other manner that he chooses[11]. Code removed six discrimination against women when it came to inheritance to the property in India under different enact that were during British era. According to code, she was recognised as heir in the property and had full right to enjoy the property based on Dayabhaga system of inheritance. Women only had limited right to estate under the governing law of inheritance at that point of time when Hindu Code bill was proposed in Constituent Assembly. Hindu woman had right to property not as heir in ancestral property but was having limited right i.e. firstly her 'stridhan' that she got from her maternal as gift during or after marriage and secondly 'women's property'. Shrimati Hansa Mehta said, 'a daughter who is recognised an heir inherits the property, but she inherits half the share of the son and this violates the principle of equality on which we have again and again said that our new Constitution is going to be based—a Constitution which aims to secure for the people of this country justice, social, political and economic[12]. During the debate Shri N. V, Gadgil said that the bill is a revolutionary undoubtedly. However, "the main point is, has the time not come for the codification of the Hindu law ; has the time not come for the introduction of certain reforms in the system of marriage, adoption, inheritance and all other things which go to constitute what is generally known as the Hindu Law[13]. The sources of Hindu Law are so many and I do not want to dilate on this and I do not want to take much time of the House, but there is a clear case established that there must be some uniformity, some definitions about the interpretation of the law[14]. Constituent assembly debate show some positive response from some members of the assembly in favour of the Code. Shri K. Santhanam said that, "Why in point of inheritance and succession alone should we have any kind of stigma based on sex? I think the sooner we voluntarily give it up, the greater

11 Ibid Pg. 5
12 Ibid Pg. 27
13 Ibid Pg. 432
14 Ibid Pg. 432

will be the strength of the country[15].

During debates on bill, strong opposition against the bill was raised and during the entire session of bill in constituent assembly, some members of cabinet and committee remained absent deliberately. One of strong objection was raised Shri H. V. Pataskar, stating , "that objection is not for political or social reasons but because if you open the inheritance to a daughter the result is that the whole social structure based on the joint family system will be broken"[16]. Just by giving, the right of inheritance and equality to women would have affected the societal structure he emphasized. This shows the reluctantness of members for giving equal right to woman in society even though in constitution we incorporated right to equality. Some members were prospective, supported the bill, and on of such member was Prof. K. T. Shah. He said, "the attempt made in this bill to place women on a position of equality in regard to family relationships, in regard to inheritance, in regard to property, in regard to marriage or divorce, is an attempt not only in consonance with conditions now prevailing all over the world and coming into vogue in our society as well, but are conditions, which in my opinion are dictated by a full realization of the actual conditions and observed trend of events everywhere[17]. With changing time, change is need and we should be at par with other counterpart of the world which evident everywhere across world. Further, certain member had strong objection based on customary law, as people want to have their rules of governance in their provinces without changing it and following age-old practices for their convenience and objects. Sardar Hukam Singh was the one who contested that, " in all matters like divorce, marriage, succession, inheritance, wills etc. custom is the first rule as is laid down in the Punjab Laws Act and they have those customs which they observe from a long time and everybody village understands what that rule is which he is to observe[18]. There have been judicial pronouncements on these customs and they are ordinarily understood by every villager, wherein is no dispute about that and therefore, I feel that

15 Ibid Pg. 595
16 Ibid Pg. 604
17 Ibid Pg. 735
18 Ibid Pg. 742

this change would bring about a fresh phraseology and would create complications for simple peasants who have all along understood their laws well[19].

Shri Sarwate stressed on Sanatana Vedic Dharma and inheritance right and emphasized on the words said by Dr. Ambedkar. If the sons are to inherit because they are born of the parents, it follows that the daughters also having been born of the parents they should also take the inheritance[20]. He quoted Art. 44 of the Constitution wherein State shall endeavour to secure for the citizens a uniform Civil Code throughout the territory of India[21]. Further stated that Dr. Ambedkar should be the first person to accept my amendment rather having Hindu code to have a Civil Code as per Art. 44 that will be uniform to all religions. Different views came across, some even supported that married daughter should also be entitled to inheritance in her father-in-law property with her husband. Such kinds of view at that point of time was indeed a progressive step in direction of women to make her financially sound when during that period women were dependent for basic needs on their husband, and family members. Further, it was contest that why women should be given dowry during marriage when she gets a right to inheritance. Some rationale was there in the proposition because dowry was prevalent and still it is being followed in many communities across in India. In dowry all the money and valuables, property in movable or immovable form was paid to her in-laws in marriage and she did not had right over that property except her stridhan. It is very necessary that everyone should have equality before the law and in the matter of inheritance and other things[22]. There was also view that Hindu code was imitating the Muslim law of inheritance when it comes to daughter inheriting property of father. Clause 4 of Hindu Code had an overriding effect of Code, which was debated from different perspectives and opposed by members who suggested for

19 Ibid Pg. 742
20 Vasant Moon, "Dr. Babasaheb Ambedkar Writings and Speeches", Vol. 14 (Part-II), ISBN (Set) : 978-93-5109-064-9, M/s. Tan Prints India Pvt. Ltd., Re-printed 2014. Pg. 808
21 Ibid Pg. 808
22 Ibid Pg. 952

making amendments.

During entire debate on Hindu Code, that brought strong objections based on scriptures, customs, personal law and was criticized. Nothing new was there in bill as it had provisions from different personal laws and specifically inheritance, which was from Muslim law they emphasized. The debate on the bill continued for 4 years in the Constituent Assembly but without any conclusive result. Leaving the debate inconclusive bill was not passed. Even though Dr. Ambedkar brought a revolutionary movement for the protection of women, providing rights to property and inheritance to women at that point of time, which was strongly criticized, and sharp reaction he had to face during the debates for the period of 4 years. When he felt, that the government is not inclined to pass the Bill he resigned from his post in 1951. Dr. Ambedkar said in his explanation to his resignation that, "*after a life of four years, it was killed and died unwept and unsung, after 4 clauses of it were passed*"[23]. The Prime Minister agreed to pass the part bill dealing with marriage and divorce and omitting inheritance from Hindu Code, that gave great wrentch to Dr. Ambedkar, but still he accepted to the same. He referred here the proverb, "*it is better to save a part when the whole is likely to be lost*[24]", after few days, the members came with the proposition of dropping the entire bill which was shock to Dr. Ambedkar because of which he resigned. While explaining significance of the Hindu Code he said, "*To leave inequality between class and class, between sex and sex which is the soul of Hindu Society untouched and to go on passing legislation relating to economic problems is to make a farce of our Constitution and to build a palace on a dung heap and this is the significance I attached to the Hindu Code*"[25]. Dr. Ambedkar had visualized the right to inheritance to woman immediately after independence so he brought the Hindu Code crapping the limited rights to property to woman. Due to personal laws in different religion under Hindu's, conflicts amongst different communities influenced the debates because of which the code for uniform inheritance law

23 Ibid Pg. 1323
24 Ibid Pg. 1324
25 Ibid Pg. 1326

was not passed for Hindu.

As we did not had uniform code for marriage, divorce, inheritance, etc. they were bifurcated under personal laws on the basis of particular religious practices and usage incorporated that were interpreted differently based of usages and customary practices and interpretation by courts on such issues. Within personal law, I concentrate on the topic of inheritance (an area which is able to bring together economic and ideological issues) and on three principal fields in which I see this decoding and recoding occurring:

1. ways in which women are persuaded that claiming their legal inheritance is not seemly;
2. legal maneuvers by families challenging the claims that women have made; and
3. criteria created by judges in adjudicating inheritance claims[26].

Norms about property inheritance are frequently intertwined with institutions that dictate social obligation in other domains – familial organization and care – and confer social worth based on the fulfillment of such duties[27]. India, which has followed the male patriarchy through the Mitakshara system, wherein eldest male is the Karta of family and he has the reins of entire joint Hindu family under his controls. He could dispose-off the property of Hindu joint family. This system was followed over a centuries. It is being observed, that sons who remain with the family after his marriage and take care of them, support parents, usually get the share in property or inheritance it continued to happened after independence for decades together. Moreover, daughters who are wedded do not get any share in the property and right of inheritance. Family system in India has changed over period, but we can see the tilt towards having male progeny that is followed and however the son may be he gets property rights discriminating the right to daughters in India. Therefore, individuals renegotiate on basis of such traditional obligations and claims of inheritance. Daughter was considered as burdens, as hefty dowry was

26 Gerald James Larson, "Religion and Personal Law in Secular India A Call to Judgment", Indiana University Press, 2001. Pg. 165

27 Supra foot note no. 4. Pg. 10

required for her marriage, which becomes cumbersome in families, so they did not had right to share in property as a usage. Likewise, absent substantial legal rights to inherit property, women widely accept their traditional "*share*" of inheritance: monetary dowries given at marriage, whose illegality has not stemmed their use[28]. Once a dowry is paid, it is assumed a woman has received her portion of inheritance, and it becomes improbable if not impossible to ask for more because to do so would violate a strong social norm[29].

Hindu Succession Act (HSA) was the first enactment passed dealing with inheritance of Hindu post-Independence. Hindu Succession Act, 1955 offered Hindu women limited rights over inheritance, especially over ancestral property, and it has been demonstrated that in practice Hindu women were often deprived of these limited rights through a variety of legal and social pressures (Kishwar 1993)[30]. In 1955, Hindu women's restricted property rights was met with opposition in the Constituent Assembly, with members arguing that it would destroy Hindu society, and create discord between brothers and sisters[31]. National reform of women's inheritance occurred through the Hindu Succession Act of 1956, which provided an only weak buffer for matrilineal inheritance[32]. HSA was an unbalanced and unequal law doing discrimination because of gender wherein inheritance rights of women or daughter considered were unequally. HSA, 1956 gave daughter notional share of her father's land after his death with the son wherein the father died intestate or without making any will/codicil.

In the patriarchal system that practice in India made the position of son better because firstly son became coparcener by birth in coparcenary which gave him independent share in coparcenary property and he also get independent share of his father property as well. Notional partition under sec. 6 of HSA shares are allocated. Let

28 Supra foot note no. 4. Pg. 11

29 Ibid

30 Kenneth M. Cuno and Manisha Desai "Family, Gender, and Law in a Globalizing Middle East and South Asia", ISBN: 978-0-8156-3235-1, Syracuse University Press, 2009. Pg. 35

31 Ibid

32 Supra foot note no. 4. Pg. 78

us take an illustration here, now if a family consist of father, mother, two sons and two daughters and family has joint properties worth of three lakh. So as per HSA 1956, on the death of father, his interest under the coparcenary would be one-third share, i.e., Rs 1,00,000, that would be divided among the Class I heirs i.e. wife, two sons and two daughter. So each of the heirs in class I get Rs. 20,000. Herein we need to understand that property was joint family property it was divided amongst coparcener's first i.e. father and two sons, whereas daughter did not had share in coparcenary. Out of three lakh of joint family property 1 lakh, each was share by father and two sons. Thereafter-notional partition, applied to father share wherein father's share of one lakh shared amongst five class I heirs which means 20, 000/- each. The position of son is better they got independent share of 1 lakh in coparcenary and notional partition 20, 000 each whereas daughter got only 20,000 as part of notional partition. So son got one lakh as coparcenary share and 20,000/- through notional partition which altogether is Rs. 1, 20,000/- whereas daughter got only notional partition share of 20,000/- only.

HSA, 1956 enactment was important when it comes to right to property of son and daughter post-independence and inheritance. Daughter under this legislation was not treated equally in right to property only notional partition they got family property, as if partition had taken place just before paternal death. One of the salient features of the act was the abolition of the concept of "*limited estate*," besides awarding widows an absolute right over property inherited upon the death of their husbands[33]. HSA gave them right to dispose of the property by sale, gift or deed. Property rights are so crucial to one's place in society that the HSA has the potential to modify many aspects of a woman's life and by giving inheritance rights to daughters and widows this act proposes a radically different organization of the ideal household, which is commonly referred to as 'the Indian joint family[34]. Another feature of HSA was that discriminative based on gender, only son in the Joint family property could demand partition.

33 Supra foot note no. 31. Pg. 28

34 Karine Bates (2004) The Hindu Succession act: One Law, Plural Identities, The Journal of Legal Pluralism and Unofficial Law, 36:50, 119-144, DOI: 10.1080/07329113.2004.10756581

Feminists have pointed out that laws relating to marriage, divorce, inheritance, succession, guardianship preserve the family as it exists, that is as 'a system based on male dominance and control of female sexuality and reproduction' (Haksar nd, 2)[35]. Most claimed to have retained many of the customs of their ancestors, including their inheritance practices[36]. The Hindu Succession Act, passed in 1956, ostensibly improved the situation because it gave widows the right to absolute (as opposed to usufructuary) maintenance and made provision for daughters to be heirs in cases of intestate succession of self-acquired property[37]. Under the Hindu Succession Act (1956), Hindu women theoretically acquired equal rights to the "*self-acquired*" property of their parents in cases of intestate succession only; that is, they could be disinherited through wills, and got at best minimal portions and usually nothing of ancestral family land under Mitakshara succession[38]. The Act was far from being a testimonial to gender equity: it did not challenge the greatest privileges such as the Mitakshara coparcenary or the exemptions to equal inheritance for agricultural land (Agarwal 1994)[39]. While all property is alienable and wills or gifts can easily be made to deprive female heirs, and while daughters can receive only minuscule shares of "ancestral" property compared to sons under the Mitakshara system, in case of intestate succession women are equal heirs of self-acquired property[40]. The bottom line is that at best the Hindu Succession Act (1956) improved the situation for some women, particularly widows, in some communities, thereby emphasizing that women's best economic options lay within marriage[41]. Numerous studies show that the inheritance provision for daughters are rarely availed of, that women generally turn down shares of natal inheritance[42]. Even though the inheritance rights given under HSA, but many cases they did not know about their rights due to illiteracy or even though they

35 Supra foot note no. 31. Pg. 8
36 Supra foot note no. 5. Pg. 172
37 Supra foot note no. 27. Pg. 165
38 Supra foot note no. 8. Pg. 3
39 Supra foot note no. 27. Pg. 166
40 Supra foot note no. 8. Pg. 10
41 Supra foot note no. 27. Pg. 166
42 Ibid Pg. 167

know, but under family pressure, they signed the relinquishment deed waiving their right to property. One of the most common devices for disinheriting daughters is to bypass testamentary succession altogether and leave the property directly to sons as premortem gifts[43]. When marriages are done dowry is prearranged to the daughter which was equivalent to inheritance but on that she did not had any right but her in-laws had possession and control over such property. Moreover, in Indian family structure, such practices are prevalent and because of such practices she is under pressure and under influence of family whether maternal or in-laws house. In Ladli Prasad Jaiswal,[44]SC emphasized on the Common Law principle and stated:

> *"The Indian Enactment is founded substantially on the rules of English common Law.....a transaction may be vitiated on account of undue influence where the relations between the parties are such that one of them is in a position to dominate the will of the other and he uses his position to obtain an unfair advantage over the other..*[45]*"*

Post-Independence law did recognized right of the women for inheritance but based on coparcenary basis which was imbalanced. When cases were filed for women's right to inheritance they were interpreted but that created anomaly in decisions in different courtrooms. In *Gurupad Khandappa Magdum*,[46] Khandappa's interest in the coparcenary property would devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the provisions of the Act, but, since the widow and daughter are amongst the female relatives specified in class I of the Schedule to the Act and Khandappa died leaving behind a widow and daughters, the proviso to section 6 comes into play and the normal rule is excluded[47]. Therefore, in this case as per section it devolved according to proviso

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43 Supra foot note no. 8. Pg. 71

44 Ladli Prasad Jaiswal vs Karnal Distillery Co., Ltd., & Ors, 1963 AIR 1279

45 Available at https://indiankanoon.org/doc/735030/ accessed in May, 2021

46 Gurupad Khandappa Magdum vs Hirabai Khandappa Magdum And Ors, 1978 AIR 1239. Available at https://indiankanoon.org/doc/1090707/ accessed May, 2021

47 Available at https://indiankanoon.org/doc/1090707/ accessed May, 2021

and not by survivorship. In *State Of Maharashtra*[48], in this case there was question relating to the status of females, who inherits a share of joint family property because of the reason of death of family, whether she ceases to be member of family. The court observed under sec. 6 that, 'it is no doubt true that the right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member under section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs'[49].

In many cases the testamentary succession of female members of joint family that was challenged in courts. In *Sushila Bala Saha,*[50] case Sushila executed her will and appointed Saraswati who was her daughter as executrix of her will. In the will, Sushila left her estate in favour of her daughter Saraswati. She was the only legatee under the said will, the will was challenged by the only son. The court observed that, '*it will appear from the Will in question that the testatrix stated in the Will that her son, Sachidulal Saha, the caveator and also the appellant before us, did not look after her and did not perform his duty as a son to the testatrix and also bore ill-feelings on the testatrix and tried and was still trying to grab her properties in a fraudulent way*'[51]. It was proved in the court that the will that was executed by Sushila mentioned that how her son made her life miserable and compelled her to leave her house for safety reasons and how her son filed cases against her in various civil and criminal matters and removed all her ornaments. Looking the vulnerable position of women in India, coparcenary was always challenged on the grounds of religious aspects and how male members had exploited the women. In countries with the custom of father to son passing of inheritance, it is often women who lose their homes, lands and livelihoods when

48 State Of Maharashtra vs Narayan Rao Sham Rao Deshmukh & Ors, 1985 AIR 716. Available at https://indiankanoon.org/doc/1485199/ accessed in May, 2021.

49 Ibid

50 Sushila Bala Saha vs Saraswati Mondal, AIR 1991 Cal 166. Available at https://indiankanoon.org/doc/1803547/ accessed in May, 2021

51 Ibid

their husbands die[52].

Laws that disallow women equal marital property rights or the equal right to initiate or oppose divorce similarly subordinate women to men, making them more vulnerable to violence[53]. The evolution of property rights in a patriarchal system has contributed to the subordinate status of women[54].The aforementioned experiences of women who litigated their claims and won is borne out by my survey of appellate cases on succession reported in the *All India Reporter journal* between 1988 and 1991[55]. Of a total of 159 succession and inheritance cases, of which 119 or 74.8 percent were considered to have significance for issues of gender, women won in 66.4 percent of the cases and lost in 29.4 percent[56]. They were setting new precedents for these communities through which women's right to property was being eroded, at a point in history when the debate about the reform in Hindu law and women's rights of inheritance was raging in the country[57]. Hindu Law, in its 174th Report (May 2000), the Law Commission of India was of the view that the gender reforms were called for to ensure equality[58]. The Law Commission recommended that the daughter should be made coparcener by birth and that she should be entitled to get a share on partition and/or on the death of the male coparcener[59]. The Commission also recommended that a daughter who is married after the commencement of the Amendment Act, should be entitled to a share in the ancestral property as she has already become a coparcener prior to her marriage[60]. We discussed our fundamental rights in our Constitutional law, but because of 1956 Hindu Succession Act, due its gender differentiation, a daughter is

52 Pradip Kumar Bose and Samir Kumar Das, "Social Justice and Enlightenment West Bengal", ISBN: 978-81-321-0064-5, SAGE Publications India Pvt Ltd, 2009. Pg. 389

53 Ibid

54 Ibid Pg. 428

55 Supra foot note no. 27. Pg. 175

56 Ibid

57 Supra foot note no. 31. Pg. 49

58 Shri Badrinarayan Shankar ... vs Ompraskash Shankar Bhandari on 14 August, 2014, available at https://indiankanoon.org/doc/147510934/

59 Ibid

60 Ibid

deprived of participation in a joint family ... till today no one ever protected their equal rights[61].

Women had to struggle for their rights enforcement, female representation and equal rights to inherit in ancestral property for decades post-independence too. Even though laws were dealing with property rights and inheritance they did not gave equal treatment to women while sharing property with males in the Indian family structure. Reforms were needed in the HSA, which could give economic stability and financial support to women by inheritance in property that could give them social security. This could made their position better in society and not vulnerable because of dependency on family for economic and financial support. Due to various reports and feminist movement for equality, rights of inheritance in 2005 HSA enactment that was amended and enacted state-by state brought national change for Hindu inheritance in India dealing with coparcenary arrangement? Inheritance under HSA was to create gender equality and equal property rights and in India 90 per cent population are Hindu who follow Hindu Law, which is a huge population. If we see HSA, 1956, it gave right to inherit the share of father property to daughter but no share in coparcenary was provided to women whereas the position of son was dual share i.e. share in coparcenary property and additional share in father's property.

In 2005, amendment was done to HSA, 1956 that substituted Sec. 6 and after amendment, it dealt with devolution of interest in coparcenary property. The Joint Hindu family those who were governed by the Mitakshara law, from the 2005 amendment daughter shall be coparcener in the ancestral property by birth like sons. They equalized the rights upon birth of roughly 400 million daughters to inherit a share of joint family property (Agarwal, 1994; Agnes, 2000)[62]. This amendment has brought substantial increase in daughter right to inheritance and equal right to property whether coparcenary or self-acquired property. Amendment gave right to property by births same manner as the son had. Same rights in the coparcenary as the son if she was son would have got. She also got same liabilities that

61 Supra foot note no. 4. Pg. 92
62 Ibid Pg. 20

were subject to coparcenary property and gave affect and invalidating any disposition or alienation or partition which took place prior to 20th December 2004. She became entitle and held in her ownership, in such case of property she considered capable to dispose of it by codicil or will as per her desire. Further, wherever a Hindu dies after 2005 amendment it can be devolved by will or codicil or by intestate succession. Amendment to sec. 6 brought clarity on any contracted debt position, wherein no court shall recognizes any right to proceed against coparceners for recover of debt of his father and so on. Lastly, sec. 6 made clear that this section shall apply to partition that has been effected prior to 20th December, 2004.

In *Ms. Vaishali Satish Ganorkar & Anr*[63], the Bombay HC has extensively explained sec. 6 amendment, 2005 by doing a dissection of section and interpretation the position of daughter right to property. This case had cleared all the confusion that was there relating to Coparcenary property and daughters rights to property pre and post amendment and its applicability. The court emphasized on that, 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 and 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 a devolution of interest in coparcenary property taking place[64]. The future tense denoted by the word "*shall*" shows that the daughters born on and from 9 September 2005 would get that right, entitlement and benefit, together with the liabilities[65]. The section contains a proviso that prevent mischief of application while interpreting the section and proviso provide for non-applicable cases, and therefore the section has limited effect. Under the proviso any disposition including a testamentary disposition and any alienation including a partition made prior to 20 December 2004 (presumably when the Act was tabled in Parliament and which was

63 Ms. Vaishali Satish Ganorkar & Anr vs Mr. Satish Keshaorao Ganorkar & ... on 30 January, 2012, available at https://indiankanoon.org/doc/91947579/ accessed in May, 2021

64 Ibid

65 Ibid

only about 9 months prior to the coming into force of the amendment Act) were saved from the effect of the section[66]. Hence, for such disposition and alienation made prior to 20 December 2004 the daughter of the coparcener would not be entitled to claim her interest in the coparcenary property[67]. The amendment Act, clarified that when from which date they shall be coparceners in property and how they shall have same rights and liabilities when referring to Mitakshara wherein daughter got. Court emphasized that, it is settled law that unless the Statute makes a provision retrospective expressly or by necessary intent it cannot be interpreted to be retrospective.

Moreover, it is well settled that whatever vested rights those cannot be unsettled by giving it retrospective interpretation by courts or giving it new construction. The words in the amendment act is clear and unique when it comes to application of sec. 6. Under the previous section prior to 2005 devolution used to take place by survivorship in case of only male heirs and by succession, if there were female heirs also[68]. Since amendment now both son and daughter get alike right when devolution of interest in coparcenary property. The court further stressed that, '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[69]. The court referred to Constitution that provided equality to all, but in reality, there was discrimination done to women when it comes to inheritance of property. It applied to all Hindus belonging to any coparcenary and laid down special provisions for the daughters of a coparcener upon devolution of interest under Section 6 of the Act removing the discrimination on the ground of gender against such daughters and to render social justice to women[70]. Even though Vaishali case explained the position of women under coparcenary, but there was constructive interpretation that created confusion whether the section need to

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66 Ibid
67 Ibid
68 Ibid
69 Ibid
70 Ibid

applied prospective or retrospective. Usually all enactment are given a prospective effect and applied in future. Different courts created more confusion by giving different interpretation to sec.6 dealing with right in coparcenary property. This confusion was cleared in 2014, by the court looking into the interpretation given in Vaishali case. Further development of inheritance and interpretation of sec. 6 expounded in *Shri Badrinarayan Shankar*,[71] herein, court observed that '*they are compelled to reach the conclusion that the principle enunciated in Vaishali S. Ganorkar's case (supra) 1 was erroneous and it must be corrected*'[72]. Section 6 would, thus, clearly show that the legislative intent in enacting clause (a) is prospective i.e. daughter born on or after 9 September 2005 will become a coparcener by birth, but legislative intent in enacting clauses (b) & (c) is retroactive, because rights in the coparcenary property are conferred by clause (b) on the daughter who was already born before the amendment, and who is alive on the date of Amendment coming into force[73]. Hence, if a daughter of a coparcener had died before 9 September 2005, since she would not have acquired any rights in the coparcenary property; her heirs would have no right in the coparcenary property and since Section 6 (1) expressly confers right on daughter only on and with effect from the date of coming into force of the Amendment Act[74]. Further, the court clarified the interpretation of sec. 6, that was based on two conditions that are necessary for application of Amended of sec 6(1) and those conditions are as follow:

1. The daughter of the coparcener (daughter claiming benefit of amended Section 6) should be alive on the date of amendment coming into force;
2. The property in question must be available on the date of the commencement of the Act as coparcenary property[75].

Further, the court observed that, 'Section 6 is entirely new

71 Shri Badrinarayan Shankar ... vs Ompraskash Shankar Bhandari on 14 August, 2014, available at https://indiankanoon.org/doc/147510934/ accessed in May, 2021

72 Ibid

73 Ibid

74 Ibid

75 Ibid

provision, which confers new rights on a daughter of coparcener without contemplating death of the coparcener'[76]. In Bhandari case the court emphasized that, the correct legal position is that Sec. 6 as amended by 2005 Amendment Act is retroactive in nature meaning thereby rights under Sec. 6(1)(b) and (c) and under sub-Rule (2) are available to all daughters living on the date of coming into force of 2005 Amendment Act i.e. on 9 September 2005, though born prior to 9 September 2005.[77] The heirs of daughters who died before 9 September 2005 do not get the benefits of amended Sec 6[78]. The court cleared the error of Vaishali case stated that Sec 6 of HSA, 1956 that was amended by the Amendment Act, 2005 is retroactive in operation. How it is retrospective was clarified, clause (a) of sec. 6 (1) has prospective application that is by birth she has right in coparcenary property. Whereas, clauses (b) and (c) of Sec. 6 (1) & (2) are retroactive in application dealing with same right if she was son, same liabilities if she was son and testamentary disposition of property. Base on the finding the court ruled that Vaishali S. Ganorkar case is *per in curium*. In *Nathu S/O Ratiram Karemore*[79]court held that, '*ratio laid down in case of Bhandari is perfectly applicable to the facts of this case also and in view of this ruling, it is crystal clear*'[80]. The Supreme Court once again in *Danamma @ Suman Surpur*,[81] court 'hold that according to Sec. 6 of Act when a coparcener dies leaving behind any female relative specified in Class I of Schedule to Act or male relative specified in that class claiming through such female relative, his undivided interest in Mitakshara coparcenary property would not devolve upon surviving coparcener, by survivorship but upon his heirs by intestate succession'.[82] Advanced that, for finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and same shall

76 Ibid

77 Ibid

78 Ibid

79 Nathu S/O Ratiram Karemore vs Smt. Kamal W/O Ramkumar Hatwar And ... on 2 July, 2018, available at https://indiankanoon.org/doc/196205671/

80 Ibid

81 Danamma @ Suman Surpur vs Amar on 1 February, 2018, available at https://indiankanoon.org/doc/88759498/

82 Ibid

devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition[83]. Herein also, court referred Bhandari case, and affirmed the decision and interpretation of clauses of sec. 6 grounded on Bhandari case.

After the 2005 amendment, it is settle rules that daughters are coparceners in the coparcenary property. Since the amendment, many HC gave different interpretations on the applicability of sec. 6 where prospective or retrospective that created a confusion in interpretation that was resolved by the decisions given in Bhandari and Danamma case laid down settle principles of interpretation of sec. 6 of HSA. The fundamental changes brought forward about in the Hindu Succession Act, 1956 by amending it in 2005, are perhaps a realization of the immortal words of Roscoe Pound as appearing in his celebrated treaties, '*The Ideal Element in Law*', that "*the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change*"[84]. Now stability is brought by the HC and SC decisions in this regard, when it comes to devolution of interest of daughter in coparcenary property. Over the period, inheritance right of daughter has brought gender equality by amending the HSA in 2005. Roy (2015) notes that a daughter's "*notional*" portion of her father's share in the joint family property was determined on a per capita basis, calculated according to the hypothetical partitioning of a given Hindu Joint[85]. For e.g. we take a family who has three members which consist of father, son and daughter. Following the father's death post-HSA, the son inherits a three-fourth share – including one-half by "*virtue of right by birth*" that is, as a member of the coparcenary and "*one-fourth by succession under the Act – while the daughter gets only one-fourth*" (ibid., xvii)[86]. For daughters, inheritance granted them circumscribed access to a limited estate, which meant that while

83 Ibid
84 Ibid
85 Supra foot note no. 4. Pg. 257
86 Ibid

they could enjoy profits from the family property during their lives, they were not allowed to alienate (sell) their share, unlike brothers[87]. In recent decision on inheritance on sec. 6 SC in 2020 in the case of *Vineeta Sharma*[88], held that, 'Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005'[89]. Now the rights of a coparcener have been enlarged, and the provision has disabled it from defeating the right of a daughter from being treated equally[90]. Sec. 6 brought in true sense right to equality as per Indian Constitution. Further, it gave them economic safeguard and financial support. Daughters had to struggle for decades for coparcenary right which could have been achieved post-independence if Hindu code bill was passed at that time. The positon of women would have been considerable improved.

Conclusion

Property rights of daughters was and is a burning issue on gender justice point. Still larger part of the society in India practice the traditional and conventional Hindu joint family structure based on age-old customs. Even though after the amendment of 2005, to HSA, gave equal right to the daughter in coparcenary property still they have to fight for the right to property in court. Invoking the HSA provisions against their male descendants who do not want to share the property because she got married or is going to be married and will go to another family. Daughter had to fight for their rights against the discrimination they faced from the time of 1956, HSA enactment till the amendment came into existence. Since 2005, still we can see there are certain controversies on sec. 6 interpretation in different courts whether to interpret prospective or retrospective. Through various landmark cases, the court had laid down strong footing about sec. 6 interpretation and ruling of sec. 6 is settle after the decision in Danamma case. Even the recent Vineeta case elucidated analysis of

87 Ibid

88 Vineeta Sharma vs Rakesh Sharma on 11 August, 2020, available at https://indiankanoon.org/doc/67965481/

89 Ibid

90 Available at https://main.sci.gov.in/supremecourt/2018/32601/32601_2018_33_1501_23387_Judgement_11-Aug-2020.pdf accessed in May, 2021

sec. 6 in pith and substance.

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