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BIRTH RIGHT OF DAUGHTERS TO INHERIT THE PROPERTY – A GLANCE

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ABSTRACT

Inorder to remove gender discriminatory provisions laid in the Hindu Succession Act, 1956 the Hindu Succession (Amendment) Act, 2005 (39 of 2005) was enacted. Under this amendment, in her own right the daughter of a coparcener shall by birth become a coparcener in the same manner as the son. The daughter shall now have the same rights and liabilities in the coparcenary property (ancestral property of the Hindu undivided family) as a son, in keeping with the right to equality under the Constitutional scheme. The previous scenario was, until the male heirs choose to divide their respective shares a female cannot ask for partition in respect of a dwelling house which is wholly occupied by a joint family, as Section 23 of the Hindu Succession Act disentitled female heir to ask for. Now it has been changed under this amendment. Section 24 of the Act which denied rights of a widow to inherit her husband's property upon her re-marriage has been repealed. This Act has brought about a central amendment which is applicable to all the state governments.[1]

INTRODUCTION

On 11 August 2020, a three-judge Bench of the Hon'ble Supreme Court delivered a landmark ruling in *Vineeta Sharma v Rakesh Sharma and Ors*[2], affirming the equal rights of daughters to coparcenary property. Most significantly, the Hon'ble Apex Court has clarified that irrespective of a coparcener father being alive or not on or before the Hindu Succession (Amendment) Act, 2005, a daughter would be entitled to a share in coparcenary property in

[1] Government of India, National review on Beijing +20, 2015, page 12; CEDAW/ C/IND/4-5, para. 5.
[2] Civil Appeal No 32601 of 2018

the same manner as a son simply by virtue of: (i) her birth; and (ii) her being alive as on the date of coming into force of the 2005 Amendment.

In *Prakash v Phulavati*[3], the Apex Court had held that Section 6 was prospective in nature and would apply only if the coparcener and daughter were *both* alive as on 9 September 2005. The underlying rationale in *Prakash* was based on the supposed effect of the 'notional partition' contained in the proviso to Section 6 of the 1956 Act, i.e., in the event of the predecessor coparcener's demise prior to the 2005 Amendment, there would be a severance of coparcenary property and consequently there would be no coparcenary property available for partition for a daughter claiming under the 2005 Amendment.

On the other hand, in *Danamma v Amar*[4], the Apex Court had held that Section 6 would apply retrospectively. In this case, the father had died in 2001, leaving behind two daughters, two sons and a widow. The Court had held that "*it is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by birth",* and consequently observed that the two daughters being coparceners, were entitled to equal share in the coparcenary property even though the father was not alive when the substituted Section 6 came into force in 2005.

RETROACTIVE APPLICATION OF 2005 AMENDMENT

One of the major changes brought in by the Hindu Succession (Amendment) Act, 2005 is that in a Hindu joint family, the exclusive prerogative of males to be coparceners has been changed altogether and the right by birth in the coparcenary property has been conferred in favour of a daughter as well. This radical change has fundamentally altered the character of a Mitakshara coparcenary. Before the central enactment, four Indian states had brought in a similar change, introduction of daughters as coparceners. At present, instead of only the son having a right by birth, any child born in the family or validly adopted, will be a coparcener and would have an interest over the coparcenary property. Thus the traditional concept that only males could be members of the coparcenary and no female could ever be a coparcener nor could own coparcenary property is no longer the law.

[3] (2016) 2 SCC 36
[4] (2018) 3 SCC 343

In *State of Maharashtra v Narayan Rao Sham Rao Deshmukh*[5], the major differences between the Mitakshara and Dayabhaga systems has been highlighted. Under the Mitakshara system, there is: (i) community of ownership; and (ii) unity of possession of joint family property between all the members of the coparcenary. However, in a coparcenary governed by the Dayabhaga school: (i) there is no unity of ownership of coparcenary property between members; (ii) every coparcener takes a defined share in the property and he is the owner of such share; (iii) there is unity of possession; and (iv) the share does not fluctuate due to births and deaths. Thus, under Dayabhaga law, the recognition of the right to a definite share does not militate against the owners of the property being treated as belonging to a family.

According to Sec.6: In a joint family governed by the Mitakshara Law, the daughter of a coparcener shall -

a. By birth become a coparcener in her own right in the same manner as the son.
b. Have the same rights in the coparecenary property as she would have had if she had been a son.
c. Be subject to the same liabilities in respect of the said coparcenary property as that of a son.

and any reference to a Hindu Mitakshara Coparcener shall be deemed to include a reference to a daughter of a coparcener.

According to this provision, the discrimination against daughter has been brought to an end, as her rights and liabilities are the same as that of a son. This also means that a daughter is now capable of acquiring an interest in the coparcenary property, demand a partition of the same, and dispose it of through a testamentary disposition. Further, daughters would not only be empowered to form a coparcenary along with their other siblings (irrespective of gender), but would also be competent to start a joint family herself. She can even be a karta, throw herself acquired earnings into the joint family fund, something that was not possible before the amendment. The rule that females cannot form or start a joint family on their own but can continue it even on the death of a male member in the family but provided they have the capacity to add a male member to it by birth or through adoption, stands abrogated now. In

[5] (1985) 2 SCC 321.

other words, all the prerogatives and uniqueness of a son's position in the family is available to a daughter as well.

Section 6(2) makes it very clear that a female Hindu would be entitled to hold property with the incidents of coparcenary ownership. Therefore, a distinction has been created between female members of joint family in relation to their rights over the joint family property. The two classes of females are one, who are born in the family and secondly, those who become members of this joint family by marriage to the coparceners. Females, who are born in the family ie, daughters, sisters posses a right by birth in the coparcenary property and those who become members of the joint family by amendment. Their rights over the joint family property continue to be the same, like maintenance out of its funds, a right of residence in the family house, etc.

MARITAL STATUS OF DAUGHTER

It is noteworthy that under the Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra amendments to the Hindu succession Act 1956, daughters of coparceners, who were married on the day the amendment, was enforced in each state respectively, could not become coparceners. Only daughters who were unmarried on such date could become coparceners. Besides, as the legislature provided that their coparcenary rights were identical to that of sons, their future marital status did not divest them of coparcenary rights. They continued to be coparceners even after marriage and even their children had a right by birth in the coparcenary property.

Daughters who were married on the date of enforcement of amendments did not get the benefit under the amendments. In fact, this provision creating distinction between the rights of a married and unmarried daughter was also challenged in Karnataka High court in a case, and the court had justified the distinction and exclusion of a married daughter on the ground that it was based on a sound policy of the legislature. A contrary stand would have created chaos in the society and would have disturbed settled claims and titles. Under the present amendment, a daughter of a coparcener is included as a coparcener herself without any reference or limitation with respect to her marital status. Therefore, after 6th September 2005, a daughter who was married even before this date, would be a coparcener. It is interesting to note that the

married after marriage, but would nevertheless be a member of coparcenary, with an entitlement to seek partition of the joint family property in her own right. To that nothing contained in this subsection shall affect or invalidate any disposition or alienation including an partition or testamentary disposition effected before 20th December 2004.

This was necessary so that settled rights should not be disturbed. However, a joint family where a daughter has been married before 20 December 2004, and the male members have not effected a partition, would now have to share this property with their married sisters, as the daughter, irrespective of their marital status, have become coparceners.

For example, a family comprises father F, his wife W two sons S1 and S2 and two daughters D1 and D2. D1 gets married in 1990. As the law stood before the amendment of 2005, D1 would cease to be a member of her father's joint family upon her marriage. The rest of the family continues to be joint and enjoys the joint upon her marriage. The rest of the family continues to be joint and enjoys the joint family property together. This situation continues till September 2005. Till now D1 did not have any right over the joint family property nor was even a member of it, but now not only she will become a coparcener, she would have the same rights in the joint family property as her brothers would have. She is entitled to demand a partition and would also get an equal share like her brothers at the time of such partition. If she dies without seeking partition, a notional partition would be affected to ascertain her share which would go to her heirs. Therefore, not only the unmarried daughter, but daughters in general, are benefited by this amendment.

In order to avoid confusion and give meaning to this provision, the partitions and alienation effected prior to 20 December 2004, have been expressly saved. For example in figure given above, if after the marriage of D1, a partition was effected among the family members, or the father as the karta of the family had alienated a portion of the joint family had alienated a portion of the joint family property for a legal necessity, the validity of the partition and the alienation if otherwise valid, cannot be challenged. The married daughter, even though might have been a coparcener, would not be entitled to reopen the partition already affected, nor would be empowered to challenge the alienation affected before such date, on the ground that her consent was not obtained for it.

PROPERTY HELD BY DAUGHTERS WITH INCIDENTS OF COPARCENARY OWNERSHIP

The amendment clarifies that the joint family property would be held by the daughters, as they have become coparceners with incidents of coparcenary ownership section 6(2) states:

Section 6(2) - Any property to which a female Hindu becomes entitled by virtue of sub section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded notwithstanding anything contained in this Act or any other law for the time being in force as property capable of being disposed of by her by testamentary disposition.

Thus according to S 6(2) a female would hold the property with incidents of coparcenary ownership. The legislature has not explained nor provided anywhere as to what these incidents of coparcenary ownership are. Thus the natural step would be to seek their explanation under the classical law under which there are two basic incidents of coparcenary ownership. First, that each coparceners holds the property with the incidents of unity of possession and community of interest, i.e., all coparceners jointly have the title to the property and joint possession of the property. Till the time a partition takes place, no one can predict what his share is. Secondly, all coparceners hold the property with incidents of doctrine of survivorship i.e., on the death of the one coparcener, his interest in the coparcenary property is taken by the surviving coparceners and not by his heirs. Does this mean that the doctrine of survivorship would apply in case of female coparceners and not male coparceners, as the legislature expressly provides, that the female coparceners, would hold the property with incidents of coparcenary, survivorship being one of such basic incident, or does it means that if the female coparceners would hold property with incidents of coparcenary, survivorship being one of such basic incident or does it mean that if the legislature has abolished that application of doctrine of survivorship for male coparceners, and female coparceners would hold the property and they share exactly in the same manner as the male, it stands abolished for them too. By the abolition of the doctrine of survivorship in case of male coparceners by an express provision, the legislature has created another confusion. It is a fundamental rule in laws relating to inheritance and succession that the term his does not include her. This must have been the reason why the legislature amended section 30 of the Act to add her after him. The use of the term his interest and not his or her as has been used in section 30, clearly suggests that it is only in case of an undivided male Hindu dying that doctrine of

survivorship would not apply and if a female coparcener dies, the doctrine of survivorship may apply.

CONCLUSION

Since the Hindu Succession (Amendment) Act, 2005 not only corrects historical wrongs against women but also puts to rest the controversy created by inconsistent views taken by different Courts. From a practical standpoint, this ruling could *inter alia* have the following implications:

1. More number of fresh **legal proceedings being initiated** before Civil Courts, High Courts and Debt Recovery Tribunals. Apart from male coparceners, developers, banks and financial institutions are also likely to witness a sharp rise in litigations where they are arrayed as parties, including suits in the nature of partition, declaration, cancellation and injunction, as well as challenges to the validity of mortgages in order to defeat loan recovery/ securitization proceedings;
2. **Direct impact on ongoing partition suits** - where final decree(s) are yet to be drawn up since trial Courts will have to consider afresh these significant clarifications made by the three-Judge Bench. Previously unsuccessful litigants are also likely to re-agitate partition disputes by invoking the retroactive aspect of this ruling;
3. **Re-structuring of HUF assets** - especially amongst male dominated family businesses; and

Due diligences of past or ongoing property acquisitions as well as lending transactions having to be re-visited. Future diligences will also have to be carefully examined from the prism of these clarifications.