

Title: Female as Coparceners in Joint Hindu Family

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ABSTRACT:

The patriarchal Indian society disregards women's right to property and considers her inferior in social and economic aspects, even today. It is also stipulated in the Manusmriti that "A woman must be dependent upon her father in childhood, upon her husband in youth and upon her sons in old age. She should never be free". But with the development of the society, we have realized that every human being should be treated equally in every walk of life. It is also guaranteed by the Indian Constitution but the struggle over the property rights of women has been a protracted one and discriminations is still faced by them. So, to abide by constitutional mandate and make women economically empowered, a landmark legislation namely the Hindu Succession Act was passed in the year 1956 which conferred some ownership rights on women. Eventually after 50 years a revolutionary change was brought by the Hindu Succession Amendment Act, 2005 through which they were made coparceners by birth in their own right. The daughters were given the same rights as male coparceners (sons). This gender reform legislation tries to empower women economically and socially and also enhances their security by giving them birthright in property which cannot be willed away by the patriarchal society, if it is properly implemented.

Keywords: Female coparcener, Hindu Succession Act, daughter's right, Property, Patriarchal society

INTRODUCTION:

Unlike the general notion that an individual is the smallest unit of the society, in the Hindu religion, 'family' has always been considered as the smallest unit of the society. This implies that the Hindus have immense respect and importance for family as a unit in the society. A Joint Hindu Family consists of a male ancestor, his wife, and their sons and so on. Joint Hindu Family or a Mitakshara Joint Hindu Family is basically a patriarchal set up where the presence of a common 'male' ancestor is mandatory. The word 'male' is emphasized because generally without a male member who eventually becomes the ancestor, a joint Hindu family cannot be initiated; however, his presence is not mandatory for the continuation of the Joint Hindu Family. In the case of

Commissioner of Income Tax vs. Laxmi Narayan¹, it was held that if the male ancestor died leaving behind a son, his wife and his mother then they could still continue the Joint Hindu Family proving thereby that the presence of the male ancestor is not necessary for the continuance of the Joint Family. Even in the case of CIT v. Sarwan Kumar², the Hon'ble Supreme Court held that upon the death of the last surviving male member, the other family members can continue to be a Joint Hindu family. It was also settled in the case of Attorney General of Ceylon v. Arunachalam Chettiar³, that if the ancestor is survived by pre-existing females, for example the widows, the Joint Family shall not come to an end as long as the female members have a capacity to add a male member in the family by way of birth or adoption. Despite it being a remarkable contribution of Hindu jurisprudence as it reflects the fundamental aspect of the lives of the Hindus, the law has undergone a historic change with respect to the women. Throughout the Indian history, it has been observed that the women had been considered as subservient and dependent on the male members of their family. They have faced and to some extent, are still facing discrimination and dominance in their own natal families as well as in their matrimonial families. Even today, despite having several pieces of legislations and statutes enacted, the discrimination persists. Bringing complete gender justice is next to impossible even for the legislatures because India is a country of diverse religions which are governed by their own personal laws and these laws are itself discriminatory against women. Therefore, the legislature cannot forthrightly override the religious freedom as enshrined under Article 25 of the Constitution. In the case of Surjit Lal Chhabda v. Commissioner of Income Tax⁴, it was held that the Joint Hindu Family consists of all the male members descended lineally up to any generation from a common ancestor together with their mothers, wives, widows, and unmarried daughters. The following list exhaustively states who all the members of a Joint Hindu Family are:

- i. Common male ancestor
- ii. His lineal male descendant along with their wives
- iii. Unmarried daughter
- iv. Divorced daughter

¹ (1935) 37 BOMLR 692

² 1945 13 ITR 361 All

³ 1967 AIR 657 1967 SCR (1) 965

⁴ 1976 AIR 109, 1976 SCR (2) 164

- v. Children of male descendant
- vi. Widows of male descendant

However, in the case of Gur Narayan Das v. Gur Tahal Das⁵, it was held that even an illegitimate son of a male descendant is a member of the Joint Hindu Family in a similar manner as the children of void or voidable marriages are considered legitimate. As it is stated that the presence of a common male ancestor is essential for the commencement of a Joint Hindu Family but his presence is not essential for the continuance of the Joint Hindu Family. So, if the common male ancestor dies, the Joint Hindu Family revives with the birth of his children. There must be at least 2 members to constitute a Joint Hindu Family. If the family consists of one common ancestor, two sons and their wives and if all the male members die, the Joint Hindu Family can still persist but only as long as the widows of the sons of the common ancestors have a capacity to add a child to the family. The members of a Joint Hindu Family share a joint household, joint property, joint income and joint rights, food, worship, shelter etc. The eldest male member of the Joint Hindu Family acts as a trustee of the family and takes economic and social decisions on behalf of the other family members. In the Hindu religion, it is considered as an empowered form of family and one of the best patterns of living as it is beneficial to the growth of the individuals. It also reflects the principle of fair economy in a sense that it imposes an implied discipline that those members who are more stable financially shall share at least some of the burden of those who are not. There is a spirit of oneness in the Joint Hindu Family. This arrangement of family and its legal incidents are codified in the Hindu Succession Act of 1956. A Joint Hindu Family consists of one common ancestor and his lineal descendants together with their wives up to any generation. Whereas, a term 'coparcenary' is used to denote the person at the topmost line of descent who is also known as 'propositus' and three successive generations or his three lineal descendants- son(s), grandson(s), great grandson(s). So, if a newborn is in the fifth generation of the line of descent, then he will not become a coparcener until the top most common ancestor i.e. his great-great grandfather passes away and consequently the coparcenary progresses from one generation to another. It can be reiterated that a Coparcener is a person who takes up a legal right in his ancestral property by birth in the family. Basically, the concept of coparcenary is related to the spiritual ministrations of a

⁵ 1952 AIR 225, 1952 SCR 869

person's father or forefathers. It has been traditionally followed in the Hindu customary law that only the male members within four generations can offer spiritual ministrations or 'pind-daan' to their ancestors. According to the Hindu belief, Pind daan is a spiritual ritual which is performed only by the Hindu male members of the family to offer a reverence to their departed ancestor's soul. Pind is a ball of kneading rice or barley flour and is offered to the departed soul during his 'Shradh karma'. It is believed in the Hindu mythology that when Pind daan is offered, it brings peace to the departed soul and helps them in attaining *Moksha*. The presence of ancestral property is essential for coparcenary. Ancestral property is that property which is acquired by great grandfather and is passed down from generation to generation without being divided or partitioned by the family. The rights in ancestral property are determined per stripes and not per capita. Per stripe means that the share of each generation is first determined and then it is subdivided in successive generations. Initially, only the male members had a birthright in the ancestral property of the Joint Hindu Family as a coparcener as the members intended that the property should remain within the family and the daughters, though being a member of the Joint Hindu Family were deprived of this right because of the age old notion which considers daughters as *paraya dhan*⁶. Earlier, the property could be inherited by the coparcener sons only by way of survivorship. Upon the death of a coparcener, his share in the ancestral property gets merged with the shares of the male survivors in the Joint Hindu Family. This custom was preserved even after the enactment of the Hindu Succession Act, 1956 which aims to amend and codify the laws relating to intestate succession and tries to remove the inequalities between men and women with respect to property. The same can be comprehended from the proviso clause to section 6 of the Act which preserves the interest of the daughters, widows or wives of the surviving coparceners. It states that if the deceased coparcener is left behind with female relatives as mentioned under Class I heir in the Schedule appended to the Act or a male relative claiming through such female relative, then his share in property would devolve upon the aforementioned people by testament or by way of succession and not survivorship. It was only by the Amendment in the year 2005 to the Hindu Succession Act, 1956 which brought a cosmic change in the traditional coparcenary law by declaring the daughters in the Joint Hindu Family as coparceners. Although the coparceners have a birthright in the ancestral property, their shares keep on

⁶Available at [Inheritance Rights Of Daughters Are Equivalent To That Of A Son Under The Hindu Law \(legalarmor.co.in\)](http://legalarmor.co.in) last accessed on 11/07/2021

fluctuating with the addition of new members i.e., births and with the deaths in the Joint Hindu Family.

CREATION OF COPARCENARY AND SOLE SURVIVING COPARCENER

Presence of ancestral property is an essential ingredient for the creation of coparcenary because nobody can claim any right or even partition in the self-acquired property of their father or grandfather. Coparcenary is created for the first time when any property is left behind by the father, grandfather or great grandfather. When a male acquires any property from his self-earned money, it is called his self-acquired property and his son does not have any right in that property. Though they are the members of a Joint Hindu Family but so far, coparcenary has not been created. The property of such male will devolve upon his son only by way of succession after his death. Now, when the son gets married and has his own son (son's son), he will be having a birthright in the property received by his father by way of succession. It implies that for a son's son, such property becomes an ancestral property. The moment the son's son acquires a right in the aforementioned property, coparcenary is created for the first time. In a layman language, it can be stated that creation of a coparcenary for the first time is a conversion of self-acquired property into ancestral property. Whereas, the ancestral property converts into separate property when all the coparceners die barring one. This situation is called 'sole surviving coparcenary' and the ancestral property which had been travelling within the four generations becomes his absolute property and he is free to dispose of the property in whichever manner he wishes to until he adds a new member to the Joint Hindu Family by way of birth or adoption. The same was also reiterated by the Hon'ble Supreme Court in the year 2013 in the case of *Rohit Chauhan v. Surindar Singh*.⁷

After the enactment of the Hindu Succession Act, 1956 by virtue of section 14, the status of the women had been converted to an absolute owner giving a blow to the traditional patriarchal society set up by giving the females a share in the property and making them the owner of that property with. Another puff was made with the Amendment in the year 2005 to the Hindu Succession Act, 2005 which straightaway declared that the daughters (married, unmarried both) shall also hold the position of a coparcener in her own right in the same way as Sons and shall also share all the legal

⁷ (2013) 9 SCC 419

incidents of a coparcener like joint ownership, right to claim partition, common tenancy, undivided coparcenary interest etc. It was the need of the hour to keep a pace with the progressive society and the fundamental rights of the women. This Amendment brought a substantial change which turned out to be a milestone in the history of women's right with respect to property. The main aim of this Act was not to bring large scale socio religious justice but to do proprietary justice to the females by bestowing upon them coparcenary rights by birth. The 2005 Amendment substituted the entire section 6 of the Hindu Succession Act, 1956 which is related to the Devolution of interest in a coparcenary property. Section 6 contains 5 subsections and each subsection holds its own relevance. Section 6 (1) is a declaratory clause which declares that from the commencement of the Hindu Succession Amendment Act, 2005 i.e., 09.09.2005, the 'daughters of a coparcener' in a Joint Hindu Family governed by the Mitakshara law, shall by birth become a coparcener in the same manner as Son and shall also be subject to same liabilities with respect to the property. It also contains a proviso which saves any valid disposition of property or partition which had taken place on or before 20.12.2004. Section 6 (2) entitles the coparcener daughter to absolute ownership of the coparcenary property with all the legal incidents and declares the property to be capable of being disposed of by way of testamentary disposition. Section 6 (3) abolishes the age-old doctrine of survivorship and declares that henceforth, the devolution of the share of a Hindu Coparcener who dies after the commencement of the Hindu Succession Amendment Act, 2005, shall be either by way of testamentary or intestate succession and the coparcenary property's share shall be calculated *as if* a partition had taken place in the Joint Hindu Family. This subsection also contains an Explanation clause which explains that the legislature's intention to use the words "as if a partition had taken place", is to create a fiction of partition. This is also called as notional partition or deemed partition which means that in actuality, no partition would be done but only a fiction of partition would be created solely for the purpose of ascertaining the shares of the members in the coparcenary property had the deceased been alive at the time of partition. Section 6 (4) abolishes pious obligations of the sons to pay the debts of his father. Section 6 (5) exhaustively defines the meaning of the term 'partition' as- partition made by

execution of a deed of partition duly registered under the Registration Act, 1908 or a partition effected by a decree of a court.

CONTENTIONS UNDER SECTION 6 OF THE 2005 ACT

1. Though the legislature has declared the daughters to be coparceners by birth but Section 6 (1) of the Hindu Succession Amendment Act, 2005 starts with the words 'on and from the commencement of the Act' which brings to us an ambiguity with respect to the date from which the daughter shall be considered as a coparcener i.e. whether she is considered coparcener from 09.09.2005 or from the time of her birth. This issue was resolved by the Hon'ble Supreme Court in the year 2016 in a 2 judge bench decision of Prakash vs. Phulavati & Others⁸ which held that section 6 (1) should always read with section 6 (3) which contends that when a daughter has to be made a coparcener, his father should be alive on the date of commencement of the Act i.e. 09.09.2005 concluding thereby that, the living daughter of a living coparcener shall become a coparcener on 09.09.2005 irrespective of the date when such daughter was born. The interpretation given by the Hon'ble judges in this case was that the Legislature expressly declared this Act to be prospective in nature and therefore it made the Hindu Succession Amendment Act, 2005 to be applicable upon the daughters from its commencement i.e., 09.09.2005. They stated that if the daughters are made coparceners from their date of birth, it would give a retrospective application of the Act and there would be immense hue and cry of those daughters whose fathers have died before 09.09.2005 transferring his coparcenary status to his sons and thus the statement 'daughter of a coparcener' would not have had any relevance. So, for the daughter to become a coparcener, his father should have been alive at least on 09.09.2005. This position of law was contradicted in another 2 Judge Bench decision of the Hon'ble Supreme Court in the case Danamma v. Amar⁹ decided in the year 2018. In this case, it was held that the daughters shall become coparceners by birth and in her own right like a Son. However, they did not consider the applicability of section 6 (3) with respect to whether the Father of the coparcenary claiming daughter should be alive or not. They

⁸ (2016) 2 SCC 36

⁹ (2018) 3 SCC 343

stressed upon the genesis of coparcenary and asserted that coparcenary is created by the very factum of birth and therefore the right of a coparcener emanates from his birth. So, even the daughters should become coparcener from their birth by the virtue of the enactment of the Hindu Succession Amendment Act, 2005. However, in yet another 2-judge bench judgment of Hon'ble Supreme Court in 2018 in the case Mangammal v. T.B Raju¹⁰ The court held that Prakash v. Phulavati is a good precedent on the issue of the death of a coparcener for the purpose of the right of a daughter in the ancestral property.

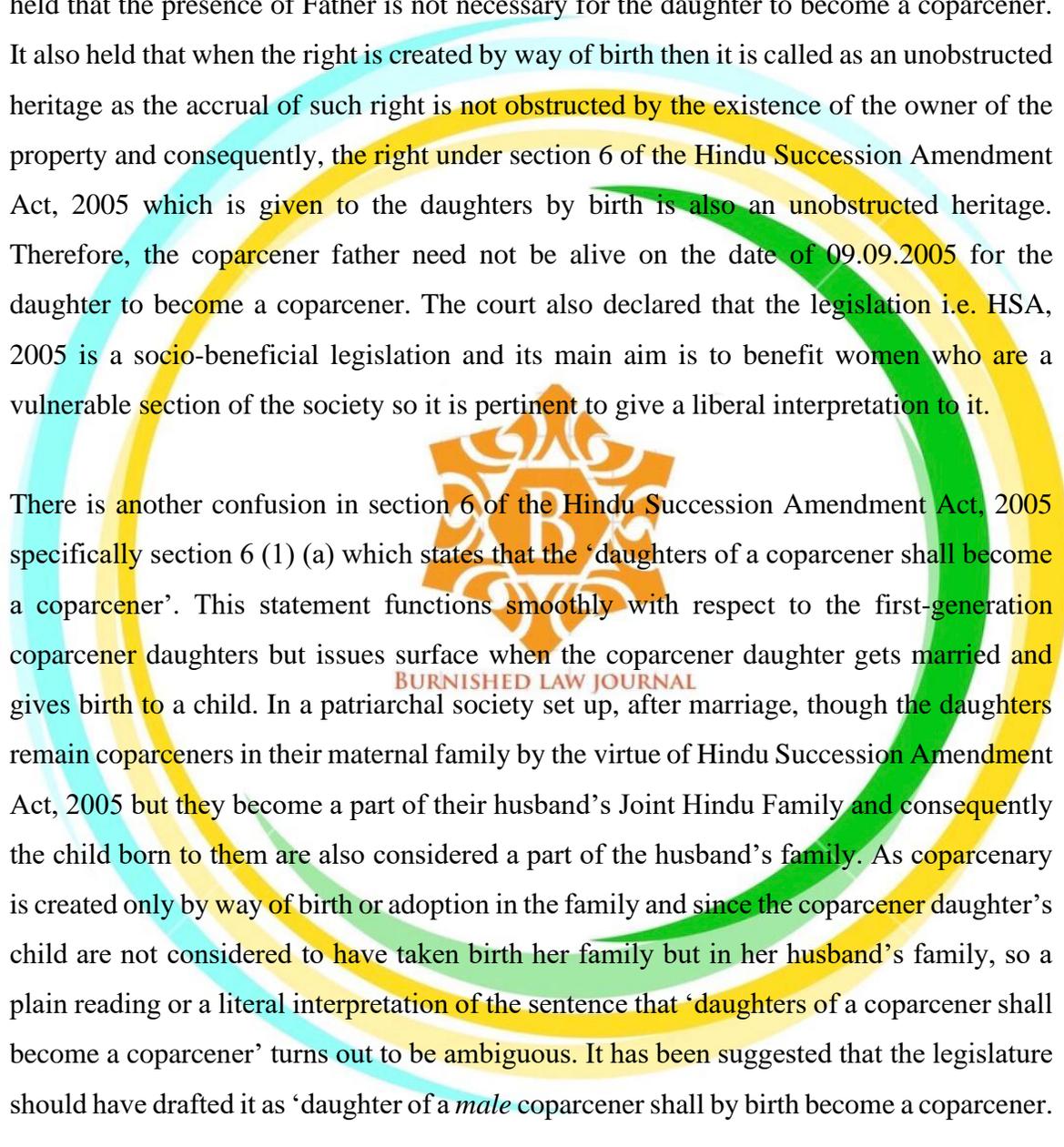
2. Another issue was with respect to the date i.e., 20.12.2004 which had been selected to prevent the concerned Act from functioning retrospectively. The reason behind the same was that on this day only that the bill of the Hindu Succession Amendment Act was tabled in the Parliament and the discussions were initiated. In a democratic country, when any bill is tabled in the legislature, it is flashed in the news channels to bring it to the knowledge of the general public. So, there was a high probability of the father or brothers of the female entering into sham or bogus partition deeds or forged transactions to exclude the daughters from getting a share in the property. This is why the legislature made sure that the women's right to protected from these forged transactions by invalidating any partition in the duration of 20.12.2004 i.e., the date on which the discussions were initiated to 09.09.2005 i.e., the date of the commencement of the Amendment Act, 2005. The same was also reiterated by the Hon'ble Supreme Court in the year 2016 in the case of Prakash vs. Phulavati & Others¹¹.
3. The aforementioned issue with respect to the daughters becoming a coparcener was finally settled in the year 2020 in a 3-judge bench decision in the case Vineeta Sharma v. Rakesh Sharma¹². It pointed out the discrimination against the women solely on the basis of 'sex', despite the fact that it is expressly written in the section that the daughter should become a coparcener in the same manner as Son. The court in this case observed that a son could become a coparcener even if his father was not alive after his birth but for the daughters to

¹⁰ (2018) 15 SCC 662

¹¹ (2016) 2 SCC 36

¹² MANU/SC/0582/2020

become a coparcener, her father had to be alive on 09.09.2005. It was on this issue that this case overruled the judgment in Prakash v. Phulavati as it settled the conflicting views and held that the presence of Father is not necessary for the daughter to become a coparcener. It also held that when the right is created by way of birth then it is called as an unobstructed heritage as the accrual of such right is not obstructed by the existence of the owner of the property and consequently, the right under section 6 of the Hindu Succession Amendment Act, 2005 which is given to the daughters by birth is also an unobstructed heritage. Therefore, the coparcener father need not be alive on the date of 09.09.2005 for the daughter to become a coparcener. The court also declared that the legislation i.e. HSA, 2005 is a socio-beneficial legislation and its main aim is to benefit women who are a vulnerable section of the society so it is pertinent to give a liberal interpretation to it.

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4. There is another confusion in section 6 of the Hindu Succession Amendment Act, 2005 specifically section 6 (1) (a) which states that the 'daughters of a coparcener shall become a coparcener'. This statement functions smoothly with respect to the first-generation coparcener daughters but issues surface when the coparcener daughter gets married and gives birth to a child. In a patriarchal society set up, after marriage, though the daughters remain coparceners in their maternal family by the virtue of Hindu Succession Amendment Act, 2005 but they become a part of their husband's Joint Hindu Family and consequently the child born to them are also considered a part of the husband's family. As coparcenary is created only by way of birth or adoption in the family and since the coparcener daughter's child are not considered to have taken birth her family but in her husband's family, so a plain reading or a literal interpretation of the sentence that 'daughters of a coparcener shall become a coparcener' turns out to be ambiguous. It has been suggested that the legislature should have drafted it as 'daughter of a *male* coparcener shall by birth become a coparcener.
5. The explanation to section 6 (3) which states that "the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him *as if* a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not" summons another set of challenges as to whether a notional partition or deemed partition amounts to an actual

partition and consequent to knowing his or her share in the property, can a member separate from the Joint Hindu Family? In the case of Vineeta Sharma, the court observed that the notional partition does not amount to actual partition as the former is done solely for the purpose of calculating the shares of the deceased coparcener to transfer his share in succession according to the provisions of the Hindu Succession Amendment Act, 2005. In a coparcenary set up, the shares of the coparceners keep on fluctuating with each addition and exclusion of members in the Joint Hindu Family until it is settled by an actual partition. So, treating notional partition as actual partition upon the death of every coparcener is not logical as then no Joint Hindu Family would survive. However, the above-mentioned contention holds an exception with respect to the widows of the male coparceners. In the case of Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum¹³, decided in the year 1978, the issue was whether the widow of a male coparcener has a right to separate from the Joint Hindu Family after her share is determined by way of notional partition. The other coparceners contended that since notional partition doesn't amount to actual partition, the widow of a male coparcener cannot separate from the Joint family and also because the widow, not being coparcener, does not possess any right to claim partition. But the court pronounced its verdict in favour of the widow observing that the widow gets a share in the property just because she is the wife of the top most coparcener and she could only get this share by way of succession after a partition in the Joint family but if there is no partition in the family till she is alive, her share would devolve upon her sons. Earlier, she had to wait until actual partition was done but now after the enactment of the Hindu Succession Amendment Act, 2005, her share can be determined after the death of the male coparcener i.e. her husband, with the idea of notional partition. Since the widows have always been dependent on their male counterparts or their sons or any other male relative and as the aim of the Act is to do proprietary justice to the women, the court allowed her to separate from the Joint Family after having her share determined by way of notional partition.

6. The last issue that remains in section 6 is with respect to the exhaustive definition of the term 'partition' in section 6 (5) which states that partition includes partition made by

¹³ 1978 AIR 1239, 1978 SCR (3) 761

execution of a deed of partition duly registered under the Registration Act, 1908 or a partition effected by a decree of a court. There are different types of partition applicable in the Hindu law. These include- Partition by court, written and registered, only written, oral partition, family arrangement, and notional partition. In India, the most prevalent form of partition is done either orally or by family arrangement which is not required to be registered, but the legislature restricted the definition of partition to only registered partition and that which is affected by a decree of court. So, how could the daughters question the oral partitions or family arrangement which have not been included under section 6 (5) in the definition of partition. The legislature gave this right to the daughters as the sole aim of this Amendment Act was to protect the coparcenary rights of the daughters from the frivolous defense of these partitions which were done deliberately to exclude and bar the daughters from claiming their right in the property. Thereby the daughters could question such partition and as a consequence it casted a hefty burden of proof on the opposite party to prove that the partition was valid and not malafide. If it is proved that the partition was valid, the daughters could not open it. The intention of section 6 (5) of the Act is to accept only the genuine partition and exclude the frivolous claims of malafide partitions and therefore, the pleas against such duping oral partitions by the daughters were allowed and the opponents were casted with a heavy burden of proof.

CONCLUSION

Though the 2005 Amendment Act was made with an intent to make the daughters a coparcener in their father's coparcenary property but when we talk about the practical scenario, it can be observed that the daughters have not been made a coparcener in the true sense and the discrimination on the ground of 'sex' still persists. This discrimination is deeply rooted in the *Shastras* and other Hindu religious texts itself which till today considers daughters as *paraya dhan* and thus bringing the daughters to an equal level with the sons is a far distant dream in this country. Despite the fact that the legislature gave her the coparcenary rights just like a son, but personal laws are majorly governed by the customs and practices prevailing in their respective societies which even today does not consider the married daughters as a part of their Joint Hindu Family, instead she becomes a part of her Husband's Joint Hindu Family and consequently even their children are acknowledged by the name of their father in his Joint Hindu Family and not by their mother's name. The discrimination is also apparent on the face of it when we talk about unmarried

daughters adopting a child. If the unmarried son adopts a child, then his adopted child automatically becomes a coparcener whereas when the unmarried daughter adopts a child then her adopted child does not qualify as a coparcener in his/her mother's Joint Family because according to the principle of coparcenary, there has to be ancestral property which is passed on only by the 'paternal' relatives i.e., father, grandfather or the great grandfather. The adopted child of the unmarried daughter being a maternal grandchild thus cannot claim coparcenary in his or her mother's family because the property which their mother has got from her coparcener father becomes her separate property with respect to her children and the property received by the son remains ancestral property for his children. Therefore, the daughters though being a coparcener cannot create coparcenary just like the son and this proves that the statute's wordings- 'daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son' does not hold true in a real sense. The legislature does not intend to create a double coparcenary and bring about a socio religious justice because the *shastras* and consequently the Indian society has always given primacy to the male members. The legislature cannot change the concept of coparcenary which is there in the *shastras* so the only change brought about by the legislature via this Act is that the daughters of a 'male' coparcener can become a coparcener by birth in their own right. The Act solely aims to bring proprietary justice to the women who prior to this Act could not have inherited a share in their ancestor's property just like the other male members in the same family.

RECOMMENDATIONS:

The legislations in India have always tried to uplift the women and give them equal rights to that of men. Even if they contained lacunas, they have been consequently amended in consonance with the voices raised by different activists, NGOs and women organizations. But the unresolved issue in this regard is that despite the legislature's several efforts to uplift the social and economic condition of the women, why the position of the women is still downtrodden and why they are still facing discriminations and struggling for equal status as that of men. It's not only the improper implementation of the laws and the lacunas in it which is to be blamed for the aforementioned reasons but also the fact that the women are not aware of their rights. Therefore, to achieve the objective behind the amendment, it is necessary that the women and the society is made aware of it. So, efforts should be made to make people aware of the law through educational institutions or by organizing seminars and informing women about their birthright in

the family property which is created by the amendment so that they are able to claim it. In India, daughters have always been considered as paraya dhan and hence, inheritance of land by them is highly discouraged but the same is not true for the sons. The society must be educated so as to shape the attitude of the people towards gender equality. Another recommendation is that mother should also be included in coparcenary as there is no sufficient reason to exclude the mother from the coparcenary. She gets a share in the separate property of the father at the time of notional partition. Many other heirs have been included by the amendment in the list of class I heirs. Therefore, this discrimination should be removed to give equal treatment to all the women members of the family. Forums should be constituted at villages, town, ward, district, state and at the national levels to discuss the socio-economic problems which have relevance with the personal laws and to discuss the impact of such progressive legislations.



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