DISTRICT AND SESSIONS COURT, OSMANABAD

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SUMMARY/GIST

FOR THE

2nd JUDICIAL OFFICERS **WORK-SHOP**

Schedule to be

Held on 10th January, 2016.

-: Subjects :-

Civil - *"Concept of partition in Hindu Law in view of Sec. 6 of the Hindu Succession Act, 1956."*

Criminal - *" Provisions under Domestic Violence Act."*

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Part -A

CIVIL

Subject - "Concept of partition in Hindu Law in view of Sec. 6 of the Hindu Succession Act, 1956."

Gist of workshop paper on Concept of partition in Hindu law In view of Section 6 of the Hindu Succession Act, 1956.

INTRODUCTION:

Partition is the severance of the status of Joint Hindu Family, known as Hindu Undivided Family. Under Hindu Law once the status of Hindu Family is put to an end, there is notional division of properties among the members and the joint ownership of property comes to an end.

2. Partition under Hindu Law, can be total or partial. In total partition all the members cease to be members of the HUF and all the properties cease to be properties belonging to the said HUF. Partition could be partial as well. It may be partial vis-a-vis members, where some members go out on partition and other members continue to be the members of the family. It may be partial vis-a-vis properties where, some properties, are divided among the members other properties continue to be HUF properties. Partial partition may be partial vis-a-vis properties and members both.

DEFINITION OF JOINT HINDU FAMILY OR HINDU UNDIVIDED FAMILY

3. A Joint Hindu Family is the normal condition of Hindu Society, or at least it was until the last few decades. A joint Hindu family is a group of relatives tied together by ties of kinship & marriage and descended from a common ancestor. It includes children, children's children down the line, spouses. A joint Hindu Family is normally joint in worship/kitchen/business. Even daughter in laws/widowed daughters who has returned back to their parental side are part of a Hindu joint family. A joint family may encompass countless generations.

4. A joint family is headed by a karta who is normally the eldest living male member of the family. Karta has some peculiar rights and obligations under traditional Hindu Law, he has the power and duty of superintendence of how the joint family is run, who is getting what? how the members are being maintained? He is also entitled to dispose off the property in times of dire need/necessity. After 2005

amendments by which women have been given equal proprietary rights in ancestral property even women can be Kartas.

A COPARCENARY

5. Within the joint family there is a narrower body called the Coparcenary. This includes the eldest male member + 3 generations. For eg: Son – Father – Grandfather – Great Grandfather. This special group of people is called coparceners and has a definitive right in ancestral property right since the moment of their conception. Earlier only a Son/Son's son/Son's son's son was coparceners – now daughters are equally coparceners after 2005. They can get their share culled out by filing a suit for partition at any time. A coparcener's interest is not fixed it fluctuates by birth and deaths in the family.

6. **CONCEPT OF PARTITION AS PER HINDU LAW.**

Partition is a word of technical import in Hindu law. Partition in one sense is a severance of joint family status and coparcener of a coparcenary is entitled to claim it as a matter of his individual volition. In this narrow sense all that is necessary to constitute partition is a definite and unequivocal indication of his intention by a member of a joint family to separate himself from the family and enjoy his share in severalty. Such an unequivocal intention to separate brings about a disruption of joint family status, at any rate, in respect of separating member or members and thereby puts an end to the coparcenary with right of survivorship and such separated member holds from the time of disruption of joint family as tenant-in-common.

7. Such partition has an impact on devolution of shares of such members. It goes to his heirs displacing survivorship. Such partition irrespective of whether it is accompanied or followed by division of properties by metes and bounds covers both a division of right and division of property. A disruption of joint family status by definite and unequivocal indication to separate implies separation in interest and in right, although not immediately followed by a de facto actual division of the subject-matter. This may at any time, be claimed by

virtue of the separate right. A physical and actual division of property by metes and bounds follows from disruption of status and would be termed partition in a broader sense.

8. In Hindu Law qua joint family and joint family property the word partition' is understood in a special sense. If severance of joint family status is brought about by a deed, a writing or an unequivocal declaration of intention to bring about such disruption, qua the joint family, it constitutes partition. To constitute a partition all that is necessary is a definite and unequivocal indication of intention by a member of a joint family to separate himself from the family What form such intimation, indication or representation of members should take would depend upon the circumstances of each case. A further requirement is that the unequivocal indication of intention to separate must be to the knowledge of the persons affected by such declaration: This intention to separate may be manifest in diverse ways. Undoubtedly, indication or intimation must be to members of the joint family likely to be affected by such a declaration.

9. Since time immemorial the framing of all laws have been exclusively for the benefit of man, and woman has been treated as subservient, and dependent on male support. The right to property is important for the freedom and development of a human being. Prior to the Hindu Succession Act, 1956 shastric and customary laws that varied from region to region governed Hindus and sometimes it varied in the same region on a caste basis resulting in diversity in the law. Consequently in matters of succession also, there were different schools, like Dayabhaga in Bengal and the adjoining areas; Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India with slight variations The multiplicity of succession laws in India, diverse in their nature, owing to their varied origin made the property laws even mere complex. Earlier, woman in a joint Hindu family, consisting both of man and woman, had a right to sustenance, but the control and ownership of property did not vest in her. In a patrilineal system, like the Mitakshara school of Hindu law, a woman, was not given a birth right in the family property like a son.

10. The Mitakshara law also recognizes inheritance by succession but only

to the property separately owned by an individual, male or female. Females are included as heirs to this kind of property by Mitakshara law. Before the Hindu Law of Inheritance (Amendment) Act 1929, the Bengal, Benares and Mithila sub schools of Mitakshara recognized only five female relations as being entitled to inherit namely - widow, daughter, mother, paternal grandmother, and paternal great-grandmother . The Madras sub-school recognized the heritable capacity of a larger number of female's heirs that are of the son's daughter, daughter's daughter and the sister, as heirs who are expressly named as heirs in Hindu Law of Inheritance (Amendment) Act, 1929. The son's daughter and the daughter's daughter ranked as bandhus in Bombay and Madras. The Bombay school which is most liberal to women, recognised a number of other female heirs, including a half sister, father's sister and women married into the family such as stepmother, son's widow, brother's widow and also many other females classified as bandhus.

11. The Dayabhaga School neither accords a right by birth nor by survivorship though a joint family and joint property is recognized. It lays down only one mode of succession and the same rules of inheritance apply whether the family is divided or undivided and whether the property is ancestral or self acquired. Neither sons nor daughters become coparceners at birth nor do they have rights in the family property during their father's life time. However, on his death, they inherit as tenants-in-common. It is a notable feature of the Dayabhaga School that the daughters also get equal shares along with their brothers. Since this ownership arises only on the extinction of the father's ownership none of them can compel the father to partition the property in his lifetime and the latter is free to give or sell the property without their consent. Therefore, under the Dayabhaga law, succession rather than survivorship is the rule. If one of the male heirs dies, his heirs, including females such as his wife and daughter would become members of the joint property, not in their own right, but representing him. Since females could be coparceners, they could also act as kartas, and manage the property on behalf of the other members in the Dayabhaga School. However, during the British regime, the country became politically and socially integrated, but the British Government did not venture to interfere with the personal laws of Hindus or of other communities.

During this period, however, social reform movements raised the issue of amelioration of the woman's position in society. .

12. The earliest legislation bringing females into the scheme of inheritance is the Hindu Law of Inheritance Act, 1929. This Act, conferred inheritance rights on three female heirs, i.e., son's daughter, daughter's daughter and sister (thereby creating a limited restriction on the rule of survivorship). Another landmark legislation conferring ownership rights on woman was the Hindu Women's Right to Property Act (XVIII of) 1937 .

13. This Act brought about revolutionary changes in the Hindu Law of all schools, and brought changes not only in the law of coparcenary but also in the law of partition, alienation of property, inheritance and adoption. The Act of 1937 enabled the widow to succeed along with the son and to take a share equal to that of the son. But, the widow did not become a coparcener even though she possessed a right akin to a coparcenary interest in the property and was a member of the joint family. The widow was entitled only to a limited estate in the property of the deceased with a right to claim partition. A daughter had virtually no inheritance rights. Despite these enactments having brought important changes in the law of succession by conferring new rights of succession on certain females, these were still found to be incoherent and defective in many respects and gave rise to a number of anomalies and left untouched the basic features of discrimination against women. These enactments now stand repealed.

14. The framers of the Indian Constitution took note of the adverse and discriminatory position of women in society and took special care to ensure that the State took positive steps to give her equal status. Articles 14, 15(2) and (3) and 16 of the Constitution of India thus not only inhibit discrimination against women but in appropriate circumstances provide a free hand to the State to provide protective discrimination in favour of women. These provisions are part of the Fundamental Rights guaranteed by the Constitution. Part IV of the Constitution contains the Directive Principles which are no less fundamental in the governance of the State

and inter alia also provide that the State shall endeavor to ensure equality between man and woman. Notwithstanding these constitutional mandates/directives given more than fifty years ago, a woman is still neglected in her own natal family as well as in the family she marries into because of blatant disregard and unjustified violation of these provisions by some of the personal laws. To carry out reforms to remove the disparities and disabilities suffered by Hindu women, despite the resistance of the orthodox section of the Hindus, the Hindu Succession Act, 1956 was enacted and came into force on 17th June, 1956. It applies to all the Hindus including Buddhists, Jains and Sikhs. It lays down a uniform and comprehensive system of inheritance and applies to those governed both by the Mitakshara and the Dayabahaga Schools and also to those in South India governed by the Marumakkattayam, Aliyasantana, Nambudri and other systems of Hindu Law.

DEVOLUTION OF INTEREST IN COPARCENERY PROPERTY: THE HINDU SUCCESSION ACT, 1956:- POSITION BEFORE 2005 AMENDMENT

15. The very preamble of the Act signifies that an Act to amend and codify the law relating to intestate succession among Hindus. The Act aims to lay down a uniform law of succession whereas attempt has been made to ensure equality inheritance rights between sons and daughters. It applies to all Hindus including Buddhists, Jains and Sikhs. It lays down a uniform and comprehensive system of inheritance and .applies to those governed by the Mitakshara and Dayabhaga schools as well as other [Marumakkattayam, Aliyasantans and Nambudri] schools. The Hindu Succession Act reformed the Hindu personal law and gave women greater property rights, allowing her ownership rights instead of limited rights in property.

16. The daughters were also granted property rights in their father's estate. In the matter of succession of property of a Hindu male dying intestate, the Act lays, down a set of general rules in sections 8 to 13. Sections 15 and 16 of the act contain separate general rules affecting succession to the property of a fem intestate. Under section 8 of the Act three Classes [Gotraja, Sapindas, Samanodlakas and Bandhus]

of heirs recognized by Mitakshara Law and three Classes[Sapindas, Sakulyas and Bandhus] of heirs recognised by Dayabhaga Law cease exist in case of devolution taking place after coming into force of the Act. The heirs are divided into instead, four Classes viz:

Heirs in Class I of the Schedule

a. Heirs in Class II of the Schedule
b. Agnates, and
c. Cognates.

17. Of course mother, widow, son and daughter are primary heirs. In the absence of Class I heirs, the property devolves on Class II heirs and in their absence first on agnates and then on cognates. Still some sections of the Act came under criticism evoking controversy as being favourable to continue inequality on the basis of gender. One such provision has been the retention of mitakshara coparcenary with only males as coparceners [7th Report of Parliamentary Standing Committee dated 13th May, 2005].

18. As per the Law Commission Report, coparcenary constitutes a narrower body of persons within a joint family and consists of father, son, son's son and son's son's son. Thus ancestral property continues to be governed by a wholly patrilineal regime, wherein property descends only through the male line as only the male members of a Joint Hindu Family have an interest by birth in the coparcenary property, in contradiction with the absolute or separate property of an individual coparcener, devolve upon surviving coparceners in the family, according to the rule of devolution by survivorship. Since a woman could not be a coparcener, she was not entitled to a share in the ancestral property by birth. Section 6 of the Act, although it does not interfere with the special rights of those who are members of a mitaksltara coparcenary, recognises, without abolishing joint family property, the right upon death of a coparcener, of certain members of his preferential heirs to claim an interest in the property that would have been allotted to such coparcener if a partition [Notional partition] of the joint family property had in fact taken place immediately before his death.

19. Thus section 6 of the Act, while recognising the rule of devolution by survivorship among the members of the coparcenary, makes an exception to the rule in the proviso. According to the proviso, if the deceased has left a surviving female relative specified in Class I of the Schedule I or a male relative specified in that Class who claims through such female relation, the interest of a deceased in mitakshara coparcenary property shall devolve by testamentary of intestate succession under the Act and not as survivorship [7th Report of Parliamentary Standing Committee]. Thus non-conclusion of women as coparceners in the joint family property under the mitakshara system as reflected in section 6 of the Act relating to devolution of interest in coparcenary property, has been under criticism for being violative of the equal rights of women guaranteed under the Constitution in relation to property rights. This means that females cannot inherit ancestral property as males do. If a joint family gets divided, each male coparcener takes his share and females get nothing. Only when one of the coparceners dies, a female gets share of his interest as an heir to the deceased. Further as per the proviso to section 6 of the Act, the interest of the deceased male in the mitakshara coparcenary devolve by intestate succession firstly upon the heirs specified in Class I of Schedule I. Under this Schedule there are only four primary heirs, namely son, daughter, widow and mother. For the remaining eight, the principle of representation goes up to two degrees in the male line of descent. But in the female line of descent, it goes only up to one degree. Thus the son's son's son and the son's son's daughter get a share but a daughter's daughter's son and daughter's daughter's daughter do not get anything.

20. Again as per section 23 of the Act married daughter is denied the right to residence in the parental home unless widowed, deserted or separated from her husband and female heir has been disentitled to ask for partition in respect of dwelling house wholly occupied by members of joint family until the male heirs choose to divide their respective shares therein. These provisions have been identified as major sources of disabilities thrust by law on woman. Another controversy is the establishment of the right to will the property. A man has full

testamentary power over his property including his interest in the coparcenary.

21. On the whole the Hindu Succession Act [Before amendment of Hindu Succession Act, 1956 in 2005] gave a weapon to a man to deprive a woman of the rights she earlier had under certain schools of Hindu Law. The legal right of Hindus to bequeath property by way of will was conferred by the Indian Succession Act, 1925.

22. It is interesting to note that the exact phrase of "notional partition" has not been used anywhere in the Act whereas it has been used repeatedly by the judiciary for explanations. Time and again it has been asked if the actual purpose of effecting a notional partition is only to ascertain the share of the deceased coparcener and to stop at that or is the purpose to go a step ahead and deduce that a partition has indeed taken place and all those, including females who would have been entitled to get a share in the event of a real partition would be allotted a share in case of such notional partition".

23. The best approach that is followed by courts gives standing to the actual intent of the legislature that was followed while incorporating section 6 in the Act. As per the liberal interpretation, the effects of a real partition should follow once the share of the deceased has been ascertained and if there are female members who would have been entitled to receive a share if a real partition had taken place, they must be given such share, irrespective of whether the primary purpose of presuming this partition was only to determine the share of the deceased coparcener Rangubai Lalji Patil v Laxman Patil (1966) 68 Bom LR 74. Also see Govindram Mithamal Sindhi v Chetumel Villardas AIR 1970 Bom 251; Ananda v Haribandhu AIR 1967 Ori 194; Vidyaben v JN Bhatt AIR 1974 Guj 23; Chandralata v Sarat Kumar AIR 1973 MP 169; Kanahaya Lal v Jamna Devi AIR 1973 Del 160; Karuppa Gounder v Palaniammai AIR 1963 Mad 245; Controller of Estate UP v Anari Devi Halwasaiya AIR 1972 All 179.

24. The Supreme Court in **Gurupad vs. Hirabai AIR 1978 SC 1239** observed that ignoring a woman's right to get a share at the time of notional partition essentially means that:

> "One unwittingly permits one's imagination to boggle under the oppression of the reality that there was in fact no partition between the plaintiff's husband and his sons. The fiction created by Explanation I has to be given its full and due effect."

The Court also quoted a passage from Lord Asquith:

> "If you are bidden to treat an imaginary state of affairs as real, you must also imagine as real, the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accomplished it, and if the statute says that you must imagine a certain state of affairs, it cannot be interpreted to mean that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of the state of affairs".

25. The Court interpreted section 6 to mean that in fact that a partition had taken place between the deceased and the coparceners immediately before his death. This assumption, as per the Court, is irrevocable once made and all the consequences that would flow from a logical partition would follow which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. Thus, the heir would get her share at the time of notional partition and will also receive a share at the time of inheritance, if entitled.

26. It was specifically noted by the Court in this case that all the reforms that had taken place earlier were with a view to improving the property rights of women and a narrow approach would lead to taking a step backwards. The Court went on to mention that it would render fruitless the social reform that has enabled Hindu women to acquire an equal status with men and as such the interpretation that should be preferred should be the one

that furthers the intention of the legislature and remedies the injustice from which Hindu women have suffered over the years. This approach of the Court was later reaffirmed in State of Maharashtra v. Narayan Rao Sham Rao Deshmukh.

27. It is pertinent to mention here that a narrow approach has been also followed by the Courts in some cases where the basic principle has been to presume that a partition had been effected only for a specific purpose which is to ascertain the interest of the deceased coparcener as available for succession. It was further presumed that in this particular approach that once the said interest was ascertained there was no need to allot shares to the members, whether male or female, to the family.

DEVOLUTION OF INTEREST IN COPARCENERY PROPERTY: THE HINDU SUCCESSION ACT, 1956:- POSITION AFTER 2005 AMENDMENT

Amendment in the Year 1994

28. In the year 1986 the State of Andra Pradesh, in the year 1990 the State of Tamilnadu and in the year 1994 the State of Maharashtra and the State of Karnataka added Chapter II-A to Hindu Succession Act, 1956 containing Section 29-A, 29-B and 29-C, recognizing the daughter in Hindu joint family governed by Mitakshara Law as coparcener by birth in her own right in the same manner as the son having same right in the coparcenary property as she would have had, if she had been a son, inclusive of the right to claim survivorship subject to same liabilities and disabilities in respect thereto as that of son. On partition equal share allotable to a son is allotted to the daughters as a coparcener. However, as per Maharashtra Amendment 1994 said Chapter was not applicable to a daughter married before commencement of the Hindu Succession Maharashtra (Amendment) Act, 1994 which came into effect from 22.06.1994. By the said amendment the preferential right to acquire property in respect of interest in any immovable property of intestate or in any business carried on by him or her was also given to the daughter.

The Hindu Succession (Amendment) Act, 2005

29. The Hindu Succession (Amendment) Act, 2005 is a landmark step towards women empowerment. This amending Act of 2005 is an attempt to remove the discrimination as contained in S. 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the coparcenary property as the sons have. Section 6 of the amendment act has an overriding effect, so far as the constitution of coparcenary, partition of a coparcenary property and succession of interest of deceased member (male or female) are concerned. It also supersedes all customs and usages of Shashtric Law in this regard.

30. As per sub Section (1) On and from the commencement of the Act of 2005 in a joint Hindu Family governed by Mitakshara law the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights and liabilities in respect of coparcenary property as that of a son. As per first proviso, coparcenary right given to a daughter shall not affect or invalidate any disposition or alienation including partition or testamentary disposition of the property which took place prior to 20.12.2004. Under Sub Section (2) a daughter who became coparcener and entitled to a property is capable of to dispose of her coparcenary interest in joint family property by testamentary disposition such as will, gift etc.

31. Sub Section (3) states that where a Hindu dies after commencement of the Act, 2005 his interest in the property of joint Hindu family governed by Mitakshara law shall devolve by testamentary or intestate succession under this Act and not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place and daughter is allotted the same share as is allotted to a son, the share of predeceased son or predeceased daughter shall be allotted to their surviving child and share of predeceased child of a deceased son or daughter shall be allotted to child of such predeceased son or daughter. Explanation to sub-section (3) speaks about ascertaining share of deceased coparcener on the basis of notional partition on the date of his death.

32. Sub-section (4) states that after commencement of amendment no

Court shall recognize the right of a creditor to proceed against the son, grand son or great grand son of a debtor, for debts contracted by the father grand father or great grand father on the ground of pious obligation. Its proviso protected the right of a creditor to proceed against specified heirs or any alienation made in respect of or in satisfaction of any such debt or obligation before the enactment of the Act. Its explanation clarifies son, grandson, or great grand son who were born or adopted before the commencement of the Act. Sub Section (5) states that this section shall not apply to a partition which has been effected before 20.12.2004. Its explanation says that partition means any partition made by execution of a registered partition deed or by the decree of a Court.

33. As per Section 23 of the Act of 1956 a female heir specified in Class I of the Schedule was not entitled to claim partition in the dwelling house until male heir chooses to divide their shares therein and the female was entitled to right of residence in the dwelling house if she is unmarried or has been deserted by or has separated from her husband or is a widow. By the Amendment Act of 2005 Section 23 has been omitted with effect from 09.09.2005. Therefore, a daughter who is the coparcener is entitled to claim the partition in their dwelling house whether she is unmarried or married or deserted by or separated from her husband or a widow. Similarly, as per Section 24 of the Act, 1956 any heir who is related to an intestate as the widow or predeceased son, the widow of predeceased son of a predeceased son or a widow of a brother was not entitled to succeed the property of the intestate as such widow if on the date of the succession opens, has remarried. By the Amendment Act 2005 Section 24 has been omitted with effect from 09.09.2005. So now such widow are also entitled to succeed the property of the intestate.

34. As per section 30 of the Act, 1956 only male Hindu was entitled to dispose of by Will or other testamentary disposition his interest or share in Mitakshara coparcenary property. By the Amendment Act of 2005 by substituting the words “disposition of by him or her” in Section 30 a right is given to the female Hindu to dispose of by Will or other testamentary disposition of her interest in Mitakshara coparcenary property.

Decisions of the Hon'ble Supreme Court and Hon'ble High Court in respect of Hindu Succession (Amendment) Act, 2005

35. In **Champabai Pardeshi Vs Shamabai Pardeshi 2010(3) All M.R. 262** it came to be ruled that the Amendment Act,2005 will be retrospectively applicable in case of agricultural properties left by the deceased and further it has been observed by making reference to the Division Bench Ruling in **Smt. Kaushalyabai Vs. Hiralal 2007 (2) All M.R. 679** that the provisions of the Amendment Act, 2005 are required to be taken note of while deciding the appeal even though the suit had been filed far earlier to the Act of 2005.

36. The Hon'ble Apex Court in the case of **Prema Vs. Nanje Gowda AIR 2011 SC 2077** has held that as per the amendment in Sec. 6 of Hindu Succession Act Sec. 6 (a) was inserted by Karnataka amendment Act 1990 and as per this provision, in suit for partition unmarried daughter can seek equal share in final decree proceedings in terms of amendments. Thus, as per this observation it is clear that the amendments in Sec. 6 of Hindu Succession Act can held to be retrospective in effect.

37. The provision of Amendment Act, 2005 has been held to be of prospective operation in relation to S.6 (1) (a) in **Sadashiv vs. Chandrakant 2012 (2) Mh.L.J. 197.**

38. The Hon'ble Supreme Court in **Ganduri Vs. Chakiri Yanadi, AIR 2012 SC 169** held that the amended section 6 will apply to a partition suit wherein the final decree was not passed before the date of commencement of the Amended Act of 2005.

39. In **Leelabai Vs. Bhikabai, 2014 (4) Mh.L.J.,** it is held that the equal share given to the daughter of a coparcener governed by Hindu Mitakshara Law along with brothers is by way of a substantive right. Though the substantive right is created on and from 09.09.2005, it relates back to the incidence of birth.

40. In **Vaishali Ganorkar Vs. Satish, 2012 (3) Mh.L.J. 669** the Division Bench of Hon'ble Bombay High Court held that new section 6 was prospective in operation and it applied to daughters born on or after 09.09.2005. As regards the

daughters born before 09.09.2005, it was held that they would get rights in coparcenary property upon the death of their father-coparcener on or after 09.09.2005. The Division Bench concluded that a daughter born on or after 09.09.2005 would be entitled to coparcenary right by birth while daughter born prior to 09.09.2005 would be entitled to coparcenary property only on succession i.e. death of a coparcener to whose interest the daughter succeeds. The Division Bench also relied on the decisions of Apex Court in **G. Shekhar Vs. Geeta 2009 (5) Mh.L.J., 755 and Sheeladevi Vs. Lal Chand 2007 (2) Mh.L.J., 1** wherein it was held that the Amendment Act of 2005 is prospective and would have no application where succession opened prior to the Amended Act 2005 coming into force.

41. However, in **Badri Nayaran Vs. Om Prakash 2014 (5) Mh.L.J. 434** the Full Bench of Hon'ble High Court held that the decision of the Division Bench in **Vaishali Ganorkar's** case is per incurium. The Hon'ble High Court further held that new section 6 (1) (a) is prospective in operation whereas section 6 (1) (b) and (c) as well as section 6(2) are retroactive in operation. Retroactive means the rights under section 6 (1) (b) and (c) and section 6(2) are available to all daughters living on the date of coming into force of Amendment Act of 2005 i.e. on 09.09.2005 though born prior to 09.09.2005. The daughters born on or after 09.09.2005 held to be entitled to get the benefits of amended Section 6(1)(a). In other words, the heirs of daughters who died before 09.09.2005 do not get the benefits of new section 6. It also held that new section 6 applies to daughters born prior to 17.06.1956 and thereafter in between 17.06.1956 to 08.09.2005 provided they are alive on 09.09.2005. Furthermore, the case of coparcener who died before 09.09.2005 would be governed by pre-amended section 6(1) of the Act. It is only in case of death of a coparcener on or after 09.09.2005 that the amended section 6(3) of the Act would apply.

42. Now, the issue of retrospective or prospective effect of the new amendment Act is finally set at rest by the recent decision of Hon'ble Apex Court in the case of **Prakash Vs. Phulvati in Civil Appeal No. 7217/2013** wherein it is held that the amendment has prospective effect. The rights under the amendment are

applicable to living daughters of living coparceners as on 9th September 2005 irrespective of when such daughters are born.

ORDER OF SUCCESSION IN DIFFERENT CLASSES OF HEIRS AND DISTRIBUTION OF PROPERTY.

43. The Hindu Succession Act came into force to codify the law relating to an intestate succession among the Hindus, in 1956. After commencement of this Act, a person who is Hindu by religion, is governed by provisions of this law regarding mode of succession. The general rules of succession regarding male can be seen in Sections 8, 9 and 10 of this Act, whereas Sec. 15 deals with the succession about female Hindus. Sec 8 of the Act says that, property of a male Hindu dying intestate shall devolve firstly upon the heirs specified in class I of the schedule. In the absence of them it will devolve upon class II heirs and if there are no class I or class II heirs, upon agnates and cognates of the deceased. Thus, Sec. 8 specifies the category of heirs, on which the property of Hindu male can devolve. As per Sec. 9, heirs specified in class I shall take the property simultaneously and equally to the exclusion of others. It means Sec. 9 of the Act speaks about the precedence of heirs i.e. who will precede over another. If there are class I heirs they will precede over the class II.

44. Sec. 8 of the Hindu Succession Act, groups the heirs of male intestate into 4 categories and lays down that, his heritable property will devolve firstly upon the heirs specified in class I of the schedule. In the absence of heirs specified in class I schedule the property will devolve upon the heirs enumerated in class II. Here in the first entry in class II of the schedule will be preferred to one in the second entry in and so on in the succession. If there are no heirs belonging to class I or class II, the property will devolve upon the agnates. The person is said to be agnate of another if the two are related by blood or adoption wholly through males. In the absence of agnates the property will lastly devolve upon the cognates. The cognate means, the persons related by blood or adoption not necessary through males.

45. Section 10 of the Hindu Succession Act, 1956 provides the rules for

distribution of property among heirs in Class-I of the Schedule. The intestate's widow or widows, surviving sons and daughters and the mother, the heirs in the branch of each predeceased son or predeceased daughter shall take one share. Section 11 of the Act provides for distribution of property among heirs in Class-II of the Schedule. Section 12 of the Act provides for order of Succession among agnates and cognates of deceased. The effect of Section 10 to 13 of the Act is that the distinction between male and female heirs in the matter of succession has been removed and male and female heirs have been treated equally in the matter of succession.

Sec. 8 – General rules of succession in the case of males -

46. The property of a male Hindu dying intestate shall devolve according to the provisions of this chapter :-

(a) firstly, upon the heirs, being the relatives specified in Class I of the Schedule;

(b) secondly, if there is no heir of class I, then upon the heirs, being the relatives specified in class II of the Schedule;

(c) thirdly, if there is no heir of any of the two classes, then upon the agnates of the deceased; and

(d) lastly, if there is no agnate, then upon the cognates of the deceased.

Sec. 9 – Order of succession among heirs in the Schedule -

47. Among the heirs specified in the schedule, those in class I shall take simultaneously and to the exclusion of all other heirs; those in the first entry in class II shall be preferred to those in second entry; those in the second entry shall be preferred to those in the third entry; and so on the succession.

Class I heirs :-

Class I heirs includes 12 persons i.e. son, daughter, widow, mother, son of a predeceased son, daughter of a predeceased, son of predeceased daughter, daughter of a predeceased daughter, widow of a predeceased son, son of a predeceased son of a predeceased son, daughter of a predeceased son of a predeceased son, widow of a predeceased son of a predeceased son.

Sec. 10 – Distribution of property among heirs in class I of the Schedule -

48. The property of an intestate shall be divided among the heirs in class I of the Schedule in accordance with the following rules:-

Rule 1 -The intestate's widow, or of there are more widows than one, all the widows together, shall take one share.

Rule 2 -The surviving sons and daughters and the mother of the intestate shall each take one share.

Rule 3 – The heirs in the branch of each predeceased son or each predeceased daughter of the intestate shall take between them one share.

Rule 4 – The distribution of the share referred to in rule 3 :-

d. among the heirs in the branch of the predeceased son shall be so made that his widow (or widow together) and the surviving sons and daughters get equal portions; and the branch of his predeceased sons gets the same portion.

e. among the heirs in the branch of the predeceased daughter shall be so made that the surviving sons and daughters get equal portions.

(B) Class II heirs:-

a. Father.

(1) Son's daughter's son (2) son's daughter's daughter , (3) brother, (4) sister

III) (3) (1) Daughter's son's son, (2) daughter's son's daughter, daughter's daughter's son, (4) daughter's daughter's daughter.

IV) (1) Brother's son (2) sister's son (3) brother's daughter, (4)sisters daughter.

V) Father's father, father's mother.

VI) Father's widow; brother's widow.

VII) Father's brother; father's sister.

VIII) Mother's father; mother's mother.

IX) Mother's brother; mother's sister.

Sec 11- Distribution of property among heirs in class II of the Schedule -

49. The property of an intestate shall be divided between the heirs specified in any one entry in class II of the Schedule so that they share equally.

Sec. 12 – Order of succession among agnates and cognates :-

50. The order of succession among agnates or cognates, as the case may be, shall be determined in accordance with the rules of preference laid down hereunder.

Rule -1 of two heirs, the one who has fewer or no degrees of ascent is preferred.

Rule - 2 Where the number of degrees of ascent is the same or none, that heir is preferred who has fewer or no degrees of descent.

Rule – 3 Where neither heir is entitled to be preferred to the other under rule 1 or rule 2 they take simultaneously.

PROPERTY OF FEMALE TO BE HER ABSOLUTE PROPERTY AND SUCCESSION IN CASE OF FEMALE HINDU DIED INTEST.

51. The proprietary position of woman in any system of law represents the thought and the feeling of the community. Section 14. Hindu Succession Act, 1956, has introduced fundamental changes in the Hindu law of woman's property.

Section 14

52. Section 14 provides that any property possessed by a Hindu female, whether acquired before or after the commencement of this Act shall be held by her as full owner thereof and not as limited owner. Sub-section (1) explains further that "property" in this sub-section includes both movable and immovable property acquired by her by inheritance, partition, gift or will or acquired in lieu of maintenance or arrears of maintenance or acquired by her own skill or exertion or by purchase or by prescription or any other manner whatsoever, and also any property held by her as *stridhana* immediately before the commencement of the said Act. It is immaterial whether it be obtained by inheritance of the deceased husband's separate property or of his share in coparcenary property by virtue of the proviso to section 6 of the Act, or by demise of her deceased husband or gift from a relative or any other person, and whether before, at or after her marriage. But, as expressly provided by sub section (2) of this section, a Hindu female shall not be entitled to hold any property as an absolute owner if she has acquired the same by way of gift,

or under a will or any other instrument, or under a decree or order of a civil court or under a award, where the terms of the gift, will or other instrument or the decree order or award prescribe a restricted estate in such property.

53. A Hindu female can secure the property from numerous sources but every such property cannot be Stridhan, Whether a property constitutes Stridhan depends upon the following factors:

* Source of the acquiring the property.
* The status of the female at the time of acquiring the property. i.e. maidenhood, married status or widowhood.
* the school to which she belonged.

Conditions to be fulfilled for the application of Sec. 14

1. Ownership of the property must vest in her, and
2. She must be in the possession of the estate when the Act came into force.

54. The Hon'ble supreme Court and High Courts have given wider connotations for the term possession. According to their observation, it can be in the form of actual and constructive possession. **In Santosh v/s Saraswathi AIR) 2008) SC 500,** a question has been raised regarding the possession of property of female Hindu and Court held the view that where property was given to the woman by way of maintenance over which she had a right, her possession was accepted, it became her absolute property. In ***Mangal V/s Rattno, AIR(1956)SCJ 437,*** even when the property is in the possession of a trespasser, it has been held that she is in constructive possession.

ABSOLUTE OWNERSHIP OF PROPERTY.

55. In ***Bhura V/s Kashiram, AIR 1994 SC 1202***, it has been held that, " the testator had given the property to Sarjabai only for a limited period, hence she would not be its absolute owner under sub-section (1) of Section 14. The property would, in fact, be governed by sub-section (2) of section 14 as the court should give effect to the intention of the testator."

56. In V. **Tulsamma** ***V/s Seshea Reddy, AIR 1977 SC 1944,*** it has been

held that," When some property is allotted to the widow in lieu of her claim for maintenance, she becomes its absolute owner."

57. Sub-section (2) of section 14 must be read as a proviso or exception to sub-section (1) of section 14 its operation must be confined to cases where property is acquired for the first time as a grant without any pre-existing right. It the female had an existing interest in the property, the interposition of any instrument will not affect the operation of sub-section (1) of section 14 and the property will be held by the female as her absolute property.

SUCCESSION IN CASE OF FEMALE HINDU DIED INTESTATE :-

58. Section 14 provided that every property which was in possession of a Hindu female at the time of the enforcement of the Act, whether acquired prior to or after the Act, became her absolute property. The old law relating to the order of succession to such property has been done away with and a new order of succession has been introduced in its place, which included females as well. A uniform law relating to various categories of heirs has been contained in Section 15 of the Act. Thus, on the death of a Hindu female intestate, her property devolved according to the rules contained in section 15 and 16. Section 15 lays down that when a Hindu female dies intestate leaving her stridhan, it would devolve upon the following categories of heir according to the rules provided in Section 16 of the Act.

a) Firstly, upon sons and daughter (including the children of a predeceased son or daughter) and husband;
b) Secondly, upon the heirs of husband;
c) Thirdly, upon father and mother;
d) Fourthly, upon the heirs of father;
e) Fifthly, upon the heirs of mother.

Sections 16

59. Order of succession and manner of distribution among heirs of a female Hindu The order of succession among the heirs referred to in section 15 shall be, and the distribution of the intestates property among those heirs shall take place, according to the following rules, namely:-

Rule 1: Among the heirs specified in sub-section (1) of section 15, those in one entry shall be preferred to those in any succeeding entry and those including in the same entry shall take simultaneously.

Rule 2: If any son or daughter of the intestate had pre-deceased the intestate leaving his or her own children alive at the time of the intestate's death, the children of such son or daughter shall take between them the share which such son or daughter would have taken if living at the time of the intestate's death.

Rule 3: The devolution of the property of the intestate on the heirs referred to in clauses (b), (d) and (e) of sub-section (1) and in sub-section (2) of section 15 shall be in the same order and according to the same rules as would have applied if the property had been the father's or the mother's or the husband's as the case may be, and such person had died intestate in respect thereof immediately after the intestate's death.

WIDOWS RIGHT IN THE PROPERTY AND EFFECT OF REMARRIAGE

60. Before enactment of Hindu Succession Act, 1956 principally, there were two schools of Hindu Law in India i.e. Dayabhaga which was prevalent in eastern part of India i.e. Bengal and the adjoining areas and Mitakshara which was prevalent in the rest of India. Apart from it some legislation that came into picture were Hindu Widow's Remarriage Act 1856, Hindu Inheritance Act, 1929, Hindu woman's Right to Property Act, 1937. Hindu Women's Right to Property Act, 1937 gave Indian women right in intestate's property. By this Act, with son and grandson, widow of the deceased and the respective widows of his son and grandson were also given right in his property. According to section 3(2) of this Act, it was declared that widow has same interest in the property that her husband had. But this right was not absolute. It was restricted on grounds of chastity and re-marriage under section 3(3) of this Act. Section 2 of Hindu Widow's Remarriage Act provided that the rights and interests of certain properties which a widow gets from her husband as limited estate shall cease upon her remarriage and shall devolve as if she has died.

61. Prior to the Act of 1956, Women had no right in ancestral property, they had no coparcenary rights, and married women had no right in father's property or in dwelling home. So, there was need for some effective and strong legislation that could deal with all the aspects of women's property rights. The Hindu Succession Act had brought about a sea change in Shastric Hindu law and made Hindu widows eligible and equal in the matter of inheritance and succession along with male heirs. Main purpose of Hindu Succession Act, 1956 was to deal with intestate succession among Hindus.

62. In **Jayaram Govind Bhalerao V.Jaywant Balkrishna Deshmukh and Ors.- reported in AIR 2008 Bom**. 151 considered the Section 3(2) of Hindu Women's Right to Property Act and Section 14 of Hindu Succession Act. In the said case in 1942, when husband of female Hindu died, he had an interest in the Joint Hindu Family Property and admittedly the parties were governed by Mitakshara School of Hindu Law as applicable in Maharashtra. In view of the provisions of sub-section 3(2) of the said Act, she would get the same interest in the Joint Hindu Family Property as her husband had at the time of his death, but that interest was limited interest. As the partition did not take place, after death of her husband or after the death of father-in-law, the Joint Family and the Joint Family Property continued till Hindu Succession Act, 1956 was enacted. Section 14 of the Hindu Succession Act, 1956 amended the Hindu Law in relation to the intestate succession in respect of female Hindus. Thus, what the female Hindu had received as the limited estate on death of her husband in 1942 by virtue of S. 3(2) of the said Act, she became full owner of the same by virtue of S. 14(1) of the Hindu Succession Act, 1956.

63. It is further held by considering Section 30 – Testamentary Succession that, in spite of the restrictions on the disposition of undivided coparcenary interest by coparcener or by a widow by Will under the Mitakshara School of law, in view of the drastic change brought in by S. 30 and particularly Explanation to S. 30 of the Hindu Succession Act, the interest of a male Hindu in a Mitakshara coparcenary property shall be deemed to be property capable of being disposed of

by a male or female within the meaning of this Section. Hindu widow in question got interest of her husband in the coparcenary property in 1942 as a limited estate but she became full owner of that interest in 1956 and by virtue of S. 30, she could bequeath her share or interest by executing a Will.

EFFECT OF REMARRIAGE OF WIDOW

64. Under ancient Hindu Law, the concept of remarriage of widow was forbidden. As a result, if a widow remarries, she was boycotted by society for all practical purposes least spoken about any property rights in her deceased husband's property. Therefore, remarriage of widow assumes importance in the life of such widow. Law has undergone changes with time. Remarriage of widow is not, now under the act, a ground for divesting her of the estate inherited from her husband. The Hindu Widow's Remarriage Act, 1856, though it legalized the remarriage of widow, had the effect of divesting the estate inherited by her as a widow. By her second marriage she forfeited the interest taken by her in her husband's estate, and it passed to the next heirs of her husband as if she were dead (S. 2 of that Act) However, the rule laid down in that enactment can not apply to a case covered by the present Act and a widow becomes full owner of the share or interest in her husband's property that may devolve on her by succession under the present section (S.8 of succession Act). Her re-marriage, which would evidently be after the vesting in her of her share or interest on the death of the husband, would not operate to divest such share of interest.

65. The Hindu Widow's Remarriage Act, 1856, is not repealed, but Sec. 4 of the present Succession Act in effect abrogates the operation of that Act in the case of a widow who succeeds to the property of her husband under the present section, and section 14 of Succession Act has effect of vesting in her that interest or share in her husband's property as full owner. So also, if the husband dies pending divorce proceedings, the wife would not lose her rights to succeed to the husband's property.

Relevant Case Laws

66. In **Baliram Dhake Vs. Rahubai AIR 2009 Bom. 57** it was held that if

any Hindu widow inherited her husband's property and subsequently remarry, it would not cause her to be divested of the property, since she became full owner by virtue of the operation of section 14 of the Hindu Succession Act.

67. In **Cherotte Sugathan Vs. Cherottee Bhjarati AIR 2008 SC 1467,** a right of Hindu widow remarrying to her former husband's property has been considered by the Hon'ble Apex Court. It has been held that former husband had died on 02.08.1976. Succession was to be opened on that date. The widow was held to have become absolute owner of property of her husband by reason of inheritance in term of Section 14(1) of Succession Act.

68. In **Santosh Popat Chavan V/s Sulochana Rajiv MANU/MH/2482/2014** it has been held that "In the light of above basic doctrine of jurisprudence, I hold that the right having been given to a widow or mother or women under the Act of 1956, she cannot be told that though she has a right to get share, but she cannot file a suit for recovery of share of her deceased husband as she has no right to file a suit. When a right is given, the remedy has to be there namely, remedy to file a suit for partition, which cannot depend upon the desire or demand of other coparcener in the family to have a partition of the joint family property. I do not think that personal law of Hindus, in this context, can be said to be affected in any manner. Any contrary interpretation would be in violence to the dicta discussed above by me on the subject, and would be retrograde step."

CONCLUSION

69. The basic object of the amendment to the Section 6 of the Hindu Succession Act was to achieve equal inheritance for all. Daughter whether married or unmarried of a coparcener in a Hindu joint family governed by Mitakshara Law now is coparcener by birth in her own right in the same manner as a son; she has right of claim by survivorship and has same liabilities and disabilities as a son; now coparcenary property to be divided and allotted in equal share. We have to bear in mind the law at present governing the field is the recent authority of Full Bench of our Parent High Court.

70. The effect of recent Full Bench decision of APEX Court is that all daughters (married or unmarried) are having right in the coparcenary property as that of a son. However, such daughters must be alive on the date 9th September, 2005, the date on which the amendment was effected to Hindu Succession Act. Obviously said right is subject to the Limitation Act the daughter will not be having right if the partition is effected prior to December, 2004 so also the daughter is not entitled any right if there is any disposition or alienation of the coparcenery property prior to December, 2004. Now, as per the new Amendment the daughters married or unmarried are having absolute right as that of a son in the coparcenery property.

71. It would not be out of place to mention that even after 10 years of the amendment women are still not aware about the rights conferred on them by the recent amendment. But the law cannot be successful unless and until there is social awareness amongst the women about their rights. Women themselves relinquish their rights and tend to suffer deprivation. We started from Shastric and Customary Laws and now are at a position that daughter is given rights at par with son as a coparcener. We are from the era of limited rights in the estate as trustee to having absolute rights in the coparcenary property. This change which took about **49 years** to bring daughters at par with the sons with respect to their right in their ancestral property cannot be lost sight of just because of ignorance of people. We have to make efforts to implement the law so as to achieve the objective behind the amendment of the law. Above all it is the woman herself who has to be aware of and assert her rights.

Thank You.