

PART – A
SUMMARY OF CIVIL TOPIC
RIGHTS OF DAUGHTER BEING COPARCENER UNDER HINDU
LAW.

1. INTRODUCTION.

Coparcenary is limited to three generations next to the holder i.e. a man, his living sons, grandsons and great-grandsons. All these constitute a single coparcenary. It is a significant feature of Mitakshara Law. No female was a member of the coparcenary. Hindu Succession Act 1956 is an Act to codify the law relating to intestate succession among Hindus. This Act has brought about changes in law of succession without affecting the special rights of the members of Mitakshara coparcenary. It was found to be discriminatory. The States of Andhra Pradesh, Tamilnadu, Karnataka and Maharashtra made necessary changes in the law giving equal rights to daughters in Hindu Mitakshara coparcenary property. The law, by excluding the daughter, from participating in the coparcenary ownership contributed to her discrimination and negation of her fundamental right of equality guaranteed by constitution. The Central Amendment to Hindu Succession Act i.e. Act 39 of 2005 enacted w.e.f. 5th September, 2005 has brought about drastic change conferring the coparcenary rights on the daughters and putting them on par with sons. This amendment gives women equal rights in the inheritance of ancestral property.

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 Section 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) are concerned.

2. Rights of female under Maharashtra Amendment of 22.06.1994.

The Maharashtra Government and some other State Governments felt that non inclusion of daughters in the Mitakshara Coparcenary property was causing discrimination to them. Therefore, by passing Maharashtra Amendment Act, 1994 a significant change was brought about. By this Amendment Act, the difference between daughter and son of the Mitakshara Hindu family is removed and the daughter is conferred with the coparcenary rights in the joint family property by birth in the same manner and to the same extent as that of the son. She is, therefore, now entitled to claim partition and her share in the family property. Maharashtra Amendment brought following changes:-

a) In the event of partition, she shall be allotted the same share as that of the son, and if she is dead at the time of partition, her children will be allotted her share.

b) She shall hold such property with incidents of coparcenary ownership, and shall be entitled to dispose of it by Will or otherwise.

c) A daughter married before 22/6/1994 (the date of operation of the Act) has been excluded from these benefits. Partitions effected before 22/6/1994 are not to be reopened. Partitions effected on or after 22/6/1994 and before 15/12/1994, if not effected, according to the provisions of the Amendment, shall be

rendered null and void.

3. Difference between Section 6 Prior to amendment and Section 6 after amendment:-

Section 6 Prior to amendment :-

a) Section 6 prior to amendment provided for devolution of interest in coparcenary property. It did not in any way interfere with the Mitakshara mode of devolution of joint family by survivorship, however, it conferred some rights on certain females in joint family property on the demise of a coparcenar. It laid down that the Mitakshara joint family property will continue to devolve by survivorship but if a Mitakshara coparcenar dies leaving behind a female heir or a male heir claiming through a female, then his interest will devolve by succession and not by survivorship. It also provided a device of notional partition to determine share of legal heirs of the deceased coparceners. However, the Act did not provide for any right to daughter in respect of the partition of the property or any right to demand partition of the property or even claim a share in coparcenary property. Though the Act had given ownership rights to women she was not given birth right in joint family property like a son.

Section 6 after amendment :-

b) Now, the section stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as a son. The daughter would hold property to which she is entitled as a coparcener with all the incidents, rights and liabilities of coparcenary property and would be construed as property being capable of being disposed of by her either by a will or any other

testamentary disposition. Any property to which a female Hindu becomes entitled would be held by her with all the incidents of coparcenary ownership. She can dispose of property by testamentary disposition. After commencement of this Act, if a male Hindu dies, then his interest in the property shall devolve under this Act, as if partition had taken place soon before his death and daughter is allotted the same share as that of a son. The rights of a creditor to proceed against the son, grandson or great grandson of a debtor, for debts contracted by the father, grandfather or great grandfather solely on the ground of pious obligation are not recognized. The provisions also shall not apply to partition effected before 20th December, 2004.

4. Whether the amendment of 2005 is retrospective or prospective.

The amended Sec.6 of Hindu Succession Act has now given equal rights to the daughters in the coparcenary property alongwith sons. However, there was lot of controversy, whether the amended Sec.6 is prospective or retrospective in nature.

In the Case of **Vaishali S. Ganorkar and others Vs. Satish Keshavrao Ganorkar and others, reported in 2012(2) ALL MR 737**, the Division Bench of Hon'ble Bombay High Court held, Section 6 to be prospective in nature. However, there was one judgment of Hon'ble Apex Court in the case of **Ganduri Kotreshwaramma and others Vs. Chakari and others, reported in 2012 (1) ALL MR 443 (SC)**, wherein Hon'ble Apex Court held, said Section as retrospective one. The question involved in the said judgment was, whether a preliminary decree could be

modified if partition by metes and bounds was not effected. In view of said Judgment, the Full Bench of Hon'ble Bombay High Court in the case of **Shri. Badrinarayan Shankar Bhandari and others Vs. Omprakash Shankar Bhandari, reported in 2014(5) ALL MR 846 (F.B.)**, declared its earlier observations regarding the effect of new amended Section 6 as erroneous and held that Section 6 is having retroactive effect, meaning thereby that though the Section 6 is prospective in nature, but it relates to the date of birth of a female coparcener.

Now, the issue is set at rest by the recent decision of Hon'ble Apex Court in the case of **Prakash Vs. Phulvati, [2016 (1) Mh.L.J. 1]** wherein, it is held that the amendment has prospective effect and the rights under amendment by way of the Hindu Succession (Amendment) Act, 2005, are applicable to all the living daughters of living coparceners as on 9th September, 2005, irrespective of when such daughters are born.

5. Female right to disposition of property after amendment :-

Amendment Act, 2005 has also provided that property to which she is entitled by virtue of sub section 1 of section 6 shall be regarded as her absolute property and she is having disposable right, including by testamentary disposition. Any property to which a female Hindu becomes entitled under sub section 1 of section 6 would be held by her with all the incidents of coparcenary ownership. Notwithstanding anything contained in the Act or any other law, such property could be disposed of by such female by testamentary disposition. Therefore, the section is limited only to coparcenary property and not to any property. Section 30 of the Hindu Succession

Act is also amended and it has included female Hindu, which stipulates the right of Hindu to dispose of by will or other testamentary disposition any property which also includes his or her share in mitakshara coparcenary property which such Hindu is capable of disposing of. The effect of section 14 of the Principal Act, inter alia, is to abrogate this traditional limitation. Therefore combined effect of Amendment and section 14 of the Principal Act is that she is now a full owner of all property and can dispose it of as per her wish.

6. Effect of disposition or alienation made before 20.12.2004.

The legislature has added a proviso to sub-sec.(1) of Sec.6 of the Act providing that any dispositions or alienations, including a partition or testamentary disposition, entered into before 20th December, 2004, are not affected. The object of the proviso is to ensure that partitions, alienations or testamentary dispositions which have taken place before the stipulated date are not to be reopened. The results if such old partitions were permitted to be reopened would be catastrophic. In fact, if no such cut off date had been introduced into the amended section, the attendant consequences could well have resulted into complicated situations due to realignment of shares or changes in ownership of properties, which had already taken place.

The amended Bill was introduced in Rajya Sabha on 20th December, 2004 and, therefore, Parliament saved all dispositions or alienations including partition and testamentary disposition of property, which had taken place before introduction of the Bill in Rajya Sabha, but even registered partition deeds and the partitions

obtained by decree of Court after 20th December, 2004 are not saved. Similarly, sub-section(5) of Section 6 makes it clear that nothing in amended section shall apply to a partition which was effected before 20th December, 2004. It is held in **Ganduri Koteswarnamma V/s Chakiri Yanadi, AIR 2012 SC 169 : (2011) 9 SCC 788,** that the rights of daughters in coparcenary property as per the amended section 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on passing of a final decree.

The Hon'ble Apex Court in the case of **Prakash & others Vs. Phulavati & Others in Civil Appeal No.7217 of 2013,** observed that,

“Object of giving finality to transactions prior to 20th December, 2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the Amendment in Section 6(1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20th December, 2004. In no case statutory notional partition even after 20th December, 2004 could be covered by the Explanation or the proviso in question. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter

will be governed by the Explanation”.

7. Devolution of interest not by survivorship but it shall be divided as if partition had taken place – Allotment of shares to daughters and others.

Under the old section, as it stood prior to its amendment, when a male Hindu having an interest in a *Mitakshara* coparcenary died, his interest devolved upon the surviving members of the coparcenary. However, if such Hindu was survived by any female relative specified in class I of the schedule, or a male relative specified in that class, who claimed through such female relative, the interest of the deceased coparcener would devolve by testamentary or intestate succession under the Act, and not by survivorship.

The new provision, while retaining succession to the property by either testamentary or intestate succession, has however, brought about a radical change. The sub-section now stipulates that on the death of such coparcener, there shall be a deemed division of the property to which such coparcener is entitled, as if a partition had taken place. A notional partition and division has been introduced by way of a deeming fiction. A further change is that, upon such notional partition, the property referred to in the sub-section would be notionally divided amongst the heirs of the deceased coparcener, the daughter taking a share equal to that of a son, the share of the pre-deceased son or a pre-deceased daughter being allotted to the surviving child of such heirs. Such an eventuality has also been introduced in the case of the child of a pre-deceased child of a pre-deceased son or daughter.

8. Conclusion -

As such, by insertion of new amended Section 6 of the Hindu Succession Act, concept of female as a coparcener is incorporated and the daughter is given a share, in the coparcenary property equal to that of her brother. The amended Act came into operation on 9/9/2005 but the transactions effected before 20/12/2004 were protected. Said protective umbrella does not cover any disposition or alienation effected after 20/12/2004, despite the fact that the amendment came into effect on a latter date i.e. 9/9/2005. It is now a settled position that the amendment of 2005 is prospective in nature.

(Smt. C.R. Hankare)
District Judge-3 and A. S. J.,
Jalgaon.

(Shri.A.K.Patani)
District Judge-4 and A. S. J.,
Jalgaon.

(Shri.R.J.Katariya)
District Judge-6 and A. S. J.,
Jalgaon.

(Shri.K.S.Kulkarni)
Chief Judicial Magistrate
Jalgaon.

(Smt. A.V.Kasture)
Jt.Civil Judge, Sr.Div. & Addl.C.J.M. Jalgaon.