

Rights of Women in Hindu Joint and Coparcenery property after 2005 Amendment – Effects of recent Judicial Pronouncements

“Of all the evils for which man has made himself responsible, none is so degrading, so shocking or so brutal as his abuse of the better half of humanity; the female sex.”

- Mahatma Gandhi.

Introduction

1. The rights and obligations of a Hindu are determined by Hindu Law. Law, as understood by the Hindus, is a branch of *dharma*. Hindu Law has the most ancient pedigree of any known system of jurisprudence. Its ancient framework is the law of the Smrities. Dharma is an expression of wide import and means the aggregate of duties and obligations, which can be religious, moral, social and legal. The sources, from which knowledge of Hindu Law is to be derived, are the indices of dharma and those can be summarised as follows,

Ancient Sources

2. Before the codification of Hindu Law, the ancient literature was the only source of the law. These sources can be divided into four categories,

A. Shruti

Shruti means "what is heard". It is believed that the Rishis and Munis had reached the height of spirituality, where they were revealed the knowledge of Vedas. Vedas do refer to certain rights and duties, forms of marriage, requirement of a son, exclusion of women from inheritance, and partition but these are not very clear laws.

B. Smriti

Smriti means "what is remembered". With smritis, a systematic study and teaching of Vedas started. Many sages, from time to time, have written down the concepts given in Vedas. So it can be said that Smritis are a written memoir of the knowledge of the sages.

C. Commentaries and Digest

Most the of work was done only on the existing material given in Smritis. The work done to explain a particular smriti is called a commentary. Digests were mainly written after that and incorporated and explained material from all the smriitis.

D. Customs

Most of the Hindu law is based on customs and practices followed by the people all across the country. Even smritis have given importance

to customs. They have held customs as transcendent law and have advised the Kings to give decisions based on customs after due religious consideration.

Modern Sources

3. Hindu law has been greatly influenced by the British rule. While it might seem that the British brought with them the modern concepts of equity and justice, these concepts existed even in dharamashastras albeit in a different form. The following are the modern sources of Hindu Law,

A. Equity, Justice, and Good conscience

B. Precedent

C. Legislation

Schools of Hindu Law and Law prior to the Hindu Succession Act, 1956.

4. There are two schools of Hindu Law namely Mitakshara School and Dayabhaga School. The Dayabhaga School (even known as Bengal School of Hindu Law) prevails mostly in Bengal area, while Mitakshara School prevails in the rest parts of India. Both schools differ in two main particulars, namely, the law of inheritance and the joint family system. Mitakshara school recognizes two modes of devolution of property, namely, survivorship and succession. The rules of survivorship applies to

the joint family property and the rules of succession applies to property held in absolute severalty by the last owner. However the Dayabhaga school recognizes only one mode of devolution and that is succession.

5. The Bombay school of Mitakshara recognizes not only the widow, daughter, mother, father's mother and father's father's mother as heirs but also sister, father's sister. The law of inheritance by female heirs is not uniform. Males succeeding take the property absolutely, while succeeding females take limited estate in the property. If a separated Hindu under Mitakshara dies leaving behind a widow and a brother, the widow succeeds to the property as his heir. But the widow, being a female, does not take the property absolutely. She is entitled only to the income of the property. She can neither make a gift of the property nor can she sell, unless there is a legal necessity. Even after her death, the property will not pass to her heirs, but to the next heir of her husband.

6. A joint Hindu family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. However, a Hindu coparcenary is a much narrower body than the joint family and includes only those persons, who acquire by birth an interest in the coparcenary property. They are the sons, grandsons and great grandsons. The cardinal doctrine of Mitakshara school that property inherited by a Hindu from his father, father's father or father's father's father is ancestral property that means unobstructed heritage as regards his male issues. A property inherited by a Hindu from other relations is

his separate property.

7. Hon'ble Supreme Court has laid down the incidents of coparcenery in the case of *Hardeo Rai Vs. Shakuntala Devi and Ors. reported in AIR 2008 Supreme Court 2489* and it is held that,

“ The incidents of co-parcenership under the Mitakshara law are :

***first**, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person;*

***secondly** that such descendants can at any time work out their rights by asking for partition;*

***thirdly** that till partition each member has got ownership extending over the entire property conjointly with the rest;*

***fourthly**, that as a result of such co-ownership the possession and enjoyment of the properties is common;*

***fifthly**, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and **sixthly**, that the interest of a deceased member lapses on his death to the survivors.”*

(Emphasis Supplied)

8. The most important of the coparcenary is that a female can not be a coparcener under Mitakshara school. Even a wife, though she is entitled

to maintenance out of her husband's property, and has to that extent an interest in his property, is not her husband's coparcener. A mother is not a coparcener with her son. There can be no coparcenery in between a mother and a daughter. While considering the position of a woman in the family, a reference must also go to the concept of stridhana. It can be described thus, "a property which was given by the father, mother, husband or by a brother at the time of wedding before the nuptial fire and a gift." Stridhana is the absolute property of a woman and she may dispose of at her pleasure.

9. The position of a female member in the joint Hindu family was minimal in nature. She had no independent rights and was mostly dependant on the male counterparts of the family. She had no absolute rights in the joint family much less in the coparcenery, wherein she was not even recognized. But certain enactments in the pre independence era did try to change this poor scenario and important amongst them are,

a. The Hindu Widow's Remarriage Act, 1856

A Hindu widow can not remarry under the customary Hindu Law. But this enactment brought a radical change in this situation and removed the obstacle in the way of remarriage. This Act also provides that on her remarriage, she will forfeit her right and interest in the estate and the estate would pass to the next heirs of her deceased husband, as if she were dead. This was one of the major reasons for the failure of this

Act.

b. The Indian Succession Act, 1925

This enactment modified the Hindu Law to some extent and Section 57, 214 and schedule III deals with the Will executed by a Hindu and prescribe certain formalities in respect thereto. The provisions of this Act are made applicable to the “Wills and codicils” made by any Hindu on or after 01.09.1870 within the territories of Bengal and within the original jurisdiction of the High Courts of Judicature at Madras and Bombay.

c. The Transfer of Property Act, 1882

This Act supersedes the customary Hindu Law as to transfer of property.

d. The Hindu Inheritance (Removal of Disabilities) Act, 1928

This Act was intended to remove the difficulties in the way of a Hindu relating to inheritance and enables him to receive share in partition.

e. The Hindu Law of Inheritance (Amendment) Act, 1929

The Act admits the son's daughter, the daughter's daughter, the sister and the sister's son as heirs next after father's father and before the

father's brother.

f. The Hindu Women's Rights to Property Act, XVIII OF 1937

It gave new rights of inheritance to widows, and strikes at the root of a Mitakshara coparcenery. It gave better rights to Hindu women in respect of property but gave her a limited estate, which is held by her only during her lifetime and it then reverts back to her husband's heirs. She had no right to dispose of such property.

g. The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.

This enactment involved certain rights in Hindu married woman to claim separate residence and maintenance in given circumstances.

10. These are some of the instances, which show attempts of law makers in the pre-independence era to codify the vast and vivid Hindu Law. But these attempts were not enough to recognize the rights of the female Hindu in a family. Even after these enactments a female Hindu had no independent and substantial rights barring few or to say fewer instances provided under the above mentioned codified parts. They had minimal impact in uplifting the basic women's right in the family. Post independence era did witness major overhaul in the system. While considering the rights of women, a reference to Article 14, 15 and 16 of

the Constitution of India is a must and crucial. Article 14 guarantees equality before law and equal protection of the law. Article 15 prohibits the discrimination on the ground of religion, race, caste, sex and place of birth. Article 16 as well guarantees equality of opportunity and prohibits discrimination in matters of employment. Still there was something missing and that came with certain major enactments.

The Hindu Succession Act, 1956

“An Act to amend and codify the law relating to intestate succession among Hindus”

11. This preamble of the present Act speaks only of the law relating to intestate succession. The Act applies to Hindus and received the assent of the President on 17th June 1956. The enactment brought some radical changes in the law of succession without abolishing the joint family and the joint family property. It does not interfere with the special rights of those who are members of Mitakshara Coparcenery. Section 6 of the Act recognizes the rights upon the death of a coparcener of certain of his preferential heirs to claim an interest in the property.

12. Every coparcener is held to be entitled to the share upon partition. A wife can not demand partition but if a partition does take place, she is entitled to receive share equal to that of her son and can enjoy the same separately even from her husband. Section 6 of the Act provided that the

devolution of interest will be by survivorship. However it also came with a proviso that if such Hindu has left surviving female relative specified in Class I or a male relative specified in that class, who claims through such female relative, his interest shall devolve by testamentary or intestate succession and not by survivorship. It created the theory of notional partition.

13. As such section 6 and 8 of this Act gave rights to the female relative of a Hindu to some extent and she was entitled to succeed the interest in the property. Section 14 of the Act has one of the path breaking provision, whereby the female Hindu was given the absolute ownership in the property acquired before or after the commencement of this Act. Any movable or immovable property acquired by a female Hindu by inheritance or partition or in lieu of maintenance or by Gift or by her own skill or in any other manner was included in the scope of this section. The rights of female Hindu were tried to be recognized by this effort. Hon'ble Supreme Court in the case of V. Tulasamma vs. Seshu Reddy reported in AIR 1977 Supreme Court 1944 held that, a Hindu widow is entitled to maintenance out of her deceased husband's estate irrespective whether that estate may be in the hands of male issues or coparceners. She can follow the estate for her right of maintenance, even if it is in the hands of third person having notice of her rights.

14. But still it was a long way to go. The Act does not recognize the female Hindu as a coparcener nor does it gives any right to her to seek

partition. Her rights were still limited. Section 23 of the Act further put an embargo on the rights of a female Hindu, wherein it is provided that she is not entitled to claim partition in the dwelling house, until the male heirs choose to divide their respective shares. She was given only a right of residence in such dwelling house that too when she is unmarried or deserted by her husband or is a widow.

15. The enactment did provide certain rights to female Hindu and did recognize her role to some extent. But still it did not give the female Hindu the status of coparcener and she was still relying on the male counterparts in the family.

The Hindu Succession (Maharashtra Amendment) Act, 1994
(40 of 1994)

16. Five States in India had amended the law relating to coparcenary property. Four States namely Maharashtra, Andhra Pradesh, Tamil Nadu and Karnataka conferred upon daughters a birth right in coparcenary property.

**The State amendments of Maharashtra, Andhra Pradesh,
Tamil Nadu, and Karnataka**

17. The language of these amendments is identical. The amendments of Tamil Nadu, Andhra Pradesh and Karnataka are prospective. The Maharashtra Amendment added to the Principal Act (the Hindu

Succession Act) a new Chapter II-A entitled "Succession by Survivorship". Despite its incorporation in a law relating to succession (the Hindu Succession Act), and reference to "succession" in the title of the Chapter, the Amendment confers rights upon daughters *inter vivos* and deals with matters of property irrespective of death of any person or of succession.

18. Under Section 29-A added by the Amendment, the daughter of a coparcener shall by birth become a coparcener in her own right in a joint Hindu family governed by Mitakshara law, and shall have the same rights and be subject to the same liabilities, as if she would have been a son. 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. She shall hold such property with incidents of coparcenary ownership, and shall be entitled to dispose of it by will. A daughter married before 22.6.1994 (the date of operation of the Act) has been excluded from these benefits. Nor are partitions effected before 22.6.1994 to be reopened. And 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.

19. Under Section 29-B, if such daughter having share in Mitakshara coparcenary dies leaving behind a child or a child of a predeceased child, the share in coparcenary property held by her at the time of her death shall pass by testamentary succession if she has made a will disposing it, else by intestate succession. If she does not have these relatives, the share

shall pass by survivorship to other coparceners.

20. The policy of these State Legislatures to confer upon daughters the hitherto denied right in coparcenary property has been lauded widely, yet the amendments have been criticised for ambiguous language and interpretational difficulties. Doubts have also been expressed regarding their constitutionality, particularly in the exclusion of daughters married before such amendment came into force. So this exclusion of married daughters again became a big hurdle for the female Hindu and still their rights were not fully recognized.

**The 174th Report of the Law Commission of India and
the Hindu Succession Amendment Act of 2005**

21. The Principal Act did not provide any independent right to the daughter in respect of partition and to demand the partition. The daughter would only be able to get a share in father's share and the same would arise only on the death of her ancestor. This led to gender discrimination and daughters were left out from enjoying the coparcenary property being violative of Article 14 and 15 of the Constitution of India. Realising the dichotomy and gender discrimination, Law Commission of India undertook the study of provisions of Hindu Law with regards to the Laws of inheritance and with regards to the rights of daughters. An apprehension was also raised that a whole generation of woman contemporary to passage of this important

enactment will lose out all their property rights.

22. The Law Commission of India submitted its 174th report to the Government of India on 5th May 2000 and it is in respect of “ Property Rights of Women : Proposed Reforms under the Hindu Law.” It started with,

“Discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of a Joint Hindu family. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end. Recognizing this the Law Commission in pursuance of its terms of reference, which, inter-alia, oblige and empower it to make recommendations for the removal of anomalies, ambiguities and inequalities in the law, decided to undertake a study of certain provisions regarding the property rights of Hindu women under the Hindu Succession Act, 1956. The study is aimed at suggesting changes to this Act so that women get an equal share in the ancestral property. ”

(Emphasis Supplied)

23. Keeping this background in mind, the Hindu Succession Amendment Act, 2005 was enacted to enlarge the rights of a daughter, married and unmarried both and to bring her at par with a son or any male member of a joint Hindu family governed by the Mitakshara law. It also sought to bring the female line of descent at an equal level with the male line of descent, including children of pre-deceased daughter of pre-deceased daughter. By the way of the Amendment Act, the daughter of a coparcener has been admitted in coparcenary and after the commencement of the Amendment Act, the daughter is a coparcener in her own right. The daughter now has the same rights and liabilities in the coparcenary property as the son. This means that a daughter along with a son is liable for debts of joint family. The daughter is also entitled to dispose of her share of the coparcenary property or her interest thereof by way of a will.

24. The statement of objects and reasons for amending the Principal Act is as follows :

“STATEMENT OF OBJECTS AND REASONS

The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession Hindus and gave rights which were till then unknown in relation to women's property. However, it does not interfere with the special rights of those who are

members of Hindu Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act-lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed previously by the Murumakkattayam, Aliyasantana and Nambudir laws. The Act applies to every person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Parathana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; or to any other person who is not a Muslim, Christian, Parsi or Jew by religion. In the case of a testamentary disposition, this Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925.

2. *Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognizes the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts to. The law by excluding the daughter from participating in the*

coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. Having regard to the need of render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property, The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975.

3. *It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the said section so as to remove the disability on female heirs contained in that section.”*

(Emphasis supplied)

25. Section 6 of the Amendment Act has an overriding effect, so far as the partition of a coparcenary property and succession of interest of deceased member (male or female) is concerned. It also supersedes all customs and usages or Shashtric Law in this regard. The amended Section 6 has an overriding effect so far as the constitution of coparcenary is concerned. The basic concept of coparcenary is that only male members of a joint Hindu family can constitute a coparcenary completely excluding the female members of the family. This concept has not been substantially modified with the amendment of Section 6. However, although the daughter has been included as a coparcener by way of this amendment, the wife, mother and widow are still standing in queue for their admission in the coparcenary.

Recent Judicial Pronouncements and their effects

26. Judicial pronouncements of Hon'ble Supreme Court and Hon'ble High Courts are of vital importance, as they lay down the interpretation of the enactment and the intention of the legislature. Some of the most important recent judicial pronouncements are discussed to ascertain the actual effects of the Amendment Act of 2005.

27. Hon'ble Supreme Court in the case of **Ganduri Koteswaramma Vs. Chakiri Yanadi reported in AIR 2012 SC 169,** held that,

“The new Section 6 provides for parity of rights in the

coparcenary property among male and female members of a joint hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son.”

(Emphasis Supplied)

28. Hon'ble Bombay High Court in the case of *Ms. Vaishali Satish Ganorkar & Anr. Vs. Satish Keshorao Ganorkar & Ors. reported in AIR 2012 Bombay 101.* It was held that,

“ Ipso facto upon the passing of the Amendment Act in 2005 all the daughters of a coparcener in a coparcenary or a joint HUF do not become coparceners. The daughters who are born after such dates would certainly be coparceners by virtue of birth, but, for a

daughter who was born prior to the coming into force of the amendment Act she would be a coparcener only upon a devolution of interest in coparcenary property taking place. Until a coparcener dies and his succession opens and a succession takes place, there is no devolution of interest and hence no daughter of such coparcener to whom an interest in the coparcenary property would devolve would be entitled to be a coparcener or to have the rights or the liabilities in the coparcenary property along with the son of such coparcener. A reading of Section as a whole would, therefore, show that either the devolution of legal rights would accrue by opening of a succession on or after 9 September, 2005 in case of daughter born before 9 September, 2005 or by birth itself in case of daughter born after 9 September , 2005, upon them.”

(Emphasis Supplied)

29. However another bench of Hon'ble Bomabay High Court, in various appeals before it, disagreed with the law laid down by the Hon'ble Bombay High Court in the Vaishali Ganorkar's case and referred the matters to a bench of two or more Judges by formulating questions of law. Hon'ble Bombay High Court constituted a full bench on the said reference and proceeded to decide the questions of law raised in the said

matters. Hon'ble Bombay High Court in that case of *Badrinarayan Shankar Bhandari and others Vs. Omprakash Shankar Bhandari reported in 2014(5) Mh.L.J. 434* differed from the view taken by the Division Bench in Vaishali Ganorkar's case. It was observed that, if a daughter born prior to amendment will get right only on the death of her father, it will postpone the conferment of valuable property rights on crores of daughters, who may also lose everything upon the father and other coparceners disposing of the property in the lifetime of father. The legislature did not and could not have intended such eventuality.

30. The Hon'ble Bombay High Court in Bhandari's case cited supra observed that, the clause (b) in amended Section 6 was not referred to in Vaishali Ganorkar's case. It was also observed that,

“A bare perusal of sub section (1) of section 6 would, thus, clearly show that the legislative intent in enacting clause (a) is prospective i.e. daughter born on or after 09/09/2005 will become a coparcener by birth, but the legislative intent in enacting clauses (b) and (c) is retroactive, because rights in the coparcenary property are conferred by clause (b) on the daughter who was already born before the amendment, and who is alive on the date of Amendment coming into force. Hence, if a daughter of a coparcener had died before 09/09/2005, since she would not have acquired any

rights in the coparcenary property, her heirs would have no right in the coparcenary property. Since section 6(1) expressly confers right on daughter only on and with effect from the date of coming into force of the Amendment Act, it is not possible to take the view being canvassed by learned counsel for the appellants that heirs of such a deceased daughter can also claim benefits of the amendment.

Two conditions necessary for applicability of Amended section 6(1) are:

- (i) The daughter of the coparcener (daughter claiming benefit of amended section 6) should be alive on the date of amendment coming into force;*
- (ii) The property in question must be available on the date of the commencement of the Act as coparcenary property.”*

(Emphasis supplied)

31. Hon'ble Bombay High Court in this judgment held that, amended Section 6 of the Hindu Succession Act is retroactive in the nature. Hon'ble Bombay High Court also considered the applicability of the

amended provision to daughter born prior to 17.06.1956 and after 17.06.1956 but prior to 09.09.2005. It was held that, it is imperative that the daughter who seeks to exercise such a right must herself be alive at the time when the Amendment Act, 2005 was brought into force. The Principal Act was applicable to all Hindus irrespective of their date of birth, when it came into force. The date of birth was not a criterion for the application of the Principal Act. The only requirement is that when the Act is being sought to be applied, the person concerned must be in existence or alive. So, to ensure the rights which are already settled the Parliament has specifically used the word “On and from the commencement of Hindu Succession (Amendment) Act, 2005”.

32. It was observed and laid down that, the Amendment Act applies to all daughters born prior to 09.09.2005 and who are alive on the date of commencement of that Act i.e. on 09.09.2005. 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 a coparcener on or after 09.09.2005 that, the amended Section 6(3) of the Act would apply. The provisions of amended Section 6(3) do not and cannot impinged upon or curtail or restrict the rights of daughters born prior to 09.09.2005. Sub section (1) and (2) of amended Section 6 and sub section (3) operate in two different fields.

33. This judgment of Hon'ble Bombay High Court has laid down the minute details to be considered by all the Courts and has laid down the

law in respect of the Amendment Act of 2005. The ratio has paved way to many women, who are aspiring to assert their rights in coparcenary property. It has given a huge relief to the daughters to fight with the discrimination on the ground of gender and the consistent oppression and negation of their fundamental right of equality.

To conclude,

*“ I raise up my voice not so I can shout
but so that those without a voice can be
heard, we cannot succeed when half of us are
held back.”*

- Malala Yousufzai