
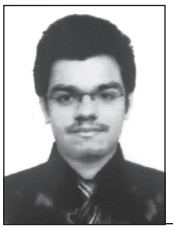

Hindu Undivided Family, Female Coparcener and her rights clarified by the three judges' bench of the Supreme Court

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Introduction

1. The Hindu Undivided Family (HUF) or Hindu Joint Family is a special feature of the Hindu community. The concept of HUF or Hindi Joint Family emanates from Hindu Law. The Hindu Joint Family has been a fundamental aspect of the life of the Hindus for centuries.

Hindu

2. As per the Hindu Succession Act, 1956 (herein after referred to as "the Act") a Hindu includes Buddhist, Jain and Sikh by religion but excludes a Muslim, Christian, Parsi and Jew by religion. Therefore, the concept of HUF applies to Buddhist, Jain and Sikh.

Hindu Undivided Family

3. The Hindu Undivided Family is defined as a unit consisting of a common ancestor and all his lineal male descendants together with their wives and unmarried daughters. At the time when Insurance Scheme had not yet come into existence, the Joint Hindu Family or Hindu Undivided Family (HUF), as it is called under the Tax Statutes, provided a fairly sophisticated form of insurance to all its members, by making provisions for its members, including unmarried daughters, widowed daughters and deserted daughters, wives and widows of the male members of the family, minor children as well as adult members. It provides a maintenance policy to all its members. Widowed daughters and deserted daughters may come back to their father's home and claim maintenance so long as they live and do not re-marry. Daughters of the family are provided with the marriage policy. All members receive education out of Joint Family Chest and free medical care is provided to all. The HUF defends them when they are involved in a civil litigation or criminal charge. The family lives under the benevolent head of the family called 'the Karta'. The structure of the joint family is so knit that interests of junior and weaker members of the family are adequately protected.

There are two main schools of Hindu law prevailing in India, the Mitakshara and Dayabhaga schools. Dayabhaga School mainly prevails in Bengal and Assam whereas Mitakshara School prevails in the rest of India. A special feature of the Mitakshara school of Hindu Law is coparcenary.

4. Hindu male with his wife and children automatically constitutes an HUF. HUF is a creature of Hindu law. It cannot be created by acts of any party, save in so far as by adoption or marriage, a stranger may be affiliated as a member thereof. An undivided family which is the normal condition of the Hindu society is ordinarily joint not only in estate but in food and worship. The joint family being the result of birth of a son or daughter, possession of joint property is only an adjunct of the family and is not necessary for its constitution. It is well established now that since HUF is a creature of Hindu law it can exist even without any nucleus of ancestral joint family property.

Coparcenary

5. Hindu coparcenary is a special feature of the Mitakshara School of Law. It is a narrower body of the HUF. Coparcenary originally consisted of father and his three male lineal descendants i.e. father, son, grandson and great grandson. A son becomes a coparcener in the HUF by birth in the family. As long as the Son is alive the grandson or great grandson do not become the coparceners of the HUF of the father. The grandson is the coparcener of the HUF of the Son. Similarly the great grandson is the coparcener of the HUF of the grandson.

Subsequent to the amendment of the Hindu Succession Act, 1956, by the Amendment Act, 2005, (hereinafter referred to as "the Amendment Act') a daughter has also been conferred with the status of a coparcener. It follows that the birth of a male or female in Hindu joint family makes him or her a coparcener of the HUF. In view of this, all the sons and daughters born in the family automatically become coparceners of the HUF. A daughter is a coparcener of her father's HUF and becomes the member of her husband's joint family after her marriage. The children of the female coparcener become the coparceners of their father's HUF. They do not become the coparceners of the maternal grandfather's HUF for the simple reason that they are born in the father's family and not in the family of the maternal grandfather.

Coparcenary property

6. Coparcenary property is the one which is inherited by a Hindu from his father, grandfather, or great grandfather. Property inherited from others is held in his individual rights and cannot be treated as forming part of the coparcenary. The property in a coparcenary is held as joint owners. In case a coparcenary property comes to the hands of a 'single person' temporarily, it would be treated as his property, but once a son is born and after the Amendment Act after the birth of a daughter, a coparcenary would revive in terms of the Mitakshara Law.

Rights of a coparcener

7. The following are the rights of a coparcener:

(i) Right by birth,

(ii) Right of survivorship,

(iii) Right to ask for partition,

(iv) Right to joint possession and enjoyment,

(v) Right to restrain unauthorised acts,

(vi) Right of alienation,

(vii) Right to ask for accounts, and

(viii) Right to make self-acquisition.

Coparcener - Daughter

8. Prior to the amendment of the Hindu Succession Act in 2005, a daughter was excluded from participating in the coparcenary as she was not considered as a coparcener like a son. It lead to her discrimination on the ground of gender and also led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. To render social justice to women, the State of Andhra Pradesh in the year 1985, the State of Tamil Nadu in the year 1989, the State of Karnataka in the year 1994 and the State of Maharashtra in the year 1994 had made necessary changes in the law for their respective states giving equal right to daughters in Hindu Mitakshara coparcenary property. In order to remove the discrimination, section 6 of the Hindu Succession Act, 1956, was amended by the Central Government giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have.

9. With the object of attaining gender equality and the removal of gender discrimination the Hindu Succession Act was amended in the year 2005 to confer the status of a coparcener on a

daughter born in the family.

10. The amended section 6 of the Hindu Succession (Amendment) Act, 2005, ("the Amendment Act") is as follows:

"Section 6. Devolution of interest in coparcenary property. —

"(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

(a) by birth become a coparcener in her own right in the same manner as the son;

(b) have the same rights in the coparcenary property as she would have had if she had been a son;

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

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

"Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

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

"(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, 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,—

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased son or of a pre--deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

"Explanation. —For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

"(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of

such son, grandson or great-grandson to discharge any such debt:

"Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect—

(a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or

(b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

"Explanation. —For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

"(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

"Explanation. —For the purposes of this section "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court."

11. A Division Bench of the Supreme Court in *Prakash v. Phulavati in Civil Appeal No. 7217 of 2013 dated 16th October, 2015 [(2016) 2 SCC 36]* held that section 6 is not retrospective in operation, and it applies when both coparceners and his daughter were alive on the date of commencement of the Amendment Act, i.e., 9th September, 2005. The Supreme Court further opined that the provisions contained in the Explanation to section 6(5) provides for the requirement of partition for substituted section 6 is to be a registered one or by a decree of a court, can have no application to a statutory notional partition on the opening of succession as provided in the unamended section 6 of the Act. The notional statutory partition is deemed to have taken place to ascertain the share of the deceased coparcener which is not covered either under the proviso to section 6(1) or section 6(5), including its Explanation. The registration requirement is inapplicable to partition of property by operation of law, which has to be given full effect. The provisions of the amended section 6 have been held to be prospective.

12. In *Danamma @ Suman Surpur & Anr. v. Amar & Ors. dated 1st February, 2018 in C. A. Nos.188-189 of 2018, [(2018) (1) Scale 657]* the Supreme Court following its decision in the case of Prakash v. Phulavati (supra) held that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. In other words, the amended section 6 applies to daughters born prior to June 17, 1956 (the date on which Hindu Succession Act came into force) or thereafter (between June 17, 1956 and September 8, 2005) provided the daughters and father are alive on September 9, 2005 i.e., on the date when the Amendment Act, 2005 came into force. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per the unamended provision, having regard to nature of such partition which is by operation of law.

13. The Division Bench of the Supreme Court in the case of *Mangammal @ Thulasi and Ors. v.*

T.B. Raju and Ors. in Civil Appeal No.1933 of 2009 dated 19th April, 2018 followed the decision of *Prakash & Anr. V. Phulvati & Ors. (supra)* and explained the decision of *Danamma @ Suman Surpur & Anr. v. Amar & Ors.* as under:

"10) Moreover, under Section 29-A of the Act, legislature has used the word "the daughter of a coparcener". Here, the implication of such wordings mean both the coparcener as well as daughter should be alive to reap the benefits of this provision at the time of commencement of the Amendment of 1989. The similar issue came up for the consideration before this Court in *Prakash & Ors. v. Phulavati & Ors., (2016) 2 SCC 36*, this Court while dealing with the identical matter held at Para 23 as under:-

"23. Accordingly, we hold that 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……" (emphasis supplied by us)

"It is pertinent to note here that recently, this Court in *Danamma @ Suman Surpur & Anr. v. Amar & Ors, 2018 (1) Scale 657* dealt, inter-alia, with the dispute of daughter's right in the ancestral property. In the above case, father of the daughter died in 2001, yet court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of the Danamma (supra), it is evident that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law whether daughter who born prior to 2005 amendment would be entitled to claim a share in ancestral property or not? In such circumstances, in our view, Prakash & Ors. (supra), would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property."

14. The decision of the Supreme Court in the case of *Vineeta Sharma v. Rakesh Sharma & Ors.* in Civil Appeal No. 32601 of 2018 with SLP No. 684 of 2016 and others dated 11th August 2020 [118 taxmann.com 322] clarifies the position in relation to certain issues arising out of the amendments to the Hindu Succession Act, 1956, made in 2005 in relation to the conferring the status of a coparcener on a daughter.

Q.(i) Whether the coparcener father must be alive on 9th September, 2005 for the daughter to be a coparcener?

15. The important aspect to be understood here is the difference between Unobstructed and Obstructed heritage. Mulla on Hindu Law has discussed the concept as below:

"216. Obstructed and unobstructed heritage. – Mitakshara divides property into two classes, namely, unobstructed heritage and obstructed heritage.

"(1) Property in which a person acquires an interest by birth is called unobstructed heritage, because the accrual of the right to it is not obstructed by the existence of the owner. Thus, property inherited by a Hindu from his father, father's father, or father's father's father, but not from his maternal grand-father, is unobstructed heritage as regards his own male issue, i.e., his son, grandson, and great-grandson. His male issues acquire an interest in it from the moment of their birth. Their right to it arises from the mere fact of their birth in the family, and they become coparceners with their

paternal ancestor in such property immediately on their birth, and in such cases ancestral property is unobstructed heritage.

"Property, the right to which accrues not by birth but on the death of the last owner without leaving a male issue, is called obstructed heritage. It is called obstructed, because the accrual of right to it is obstructed by the existence of the owner. Thus, property which devolves on parents, brothers, nephews, uncles, etc. upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then, they have a mere spes successionis, or a bare chance of succession to the property, contingent upon their surviving the owner."

16. The Supreme Court after considering the contentions of both the parties and various judgments of the Supreme Court held as under:

"44. It is apparent that unobstructed heritage takes place by birth, and the obstructed heritage takes place after the death of the owner. It is significant to note that under section 6 by birth, right is given that is called unobstructed heritage. It is not the obstructed heritage depending upon the owner's death. Thus, coparcener father need not be alive on 9.9.2005, date of substitution of provisions of Section 6."

"55. The amended provisions of section 6(1) provide that on and from the commencement of the Amendment Act, the daughter is conferred the right. Section 6(1)(a) makes daughter by birth a coparcener "in her own right" and "in the same manner as the son." **Section 6(1)(a) contains the concept of the unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth.** Section 6(1)(b) confers the same rights in the coparcenary property "as she would have had if she had been a son". The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcenary as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. **Though the rights can be claimed, w.e.f. 9.9.2005, the provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener.** At the same time, the legislature has provided savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20.12.2004, the date on which the Bill was presented in the Rajya Sabha, shall not be invalidated.

"56. The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backward and takes away or impairs vested rights acquired under existing laws. **A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended section 6, since the right is given by birth, that is an antecedent event, and the provisions operate concerning claiming rights on and from the date of Amendment Act."**

"63. Considering the principle of coparcenary that a person is conferred the rights in the Mitakshara coparcenary by

birth, similarly, the daughter has been recognised and treated as a coparcener, with equal rights and liabilities as of that of a son. **The expression used in section 6 is that she becomes coparcener in the same manner as a son.** By adoption also, the status of coparcener can be conferred. The concept of uncodified Hindu law of unobstructed heritage has been given a concrete shape under the provisions of section 6(1)(a) and 6(1)(b). **Coparcener right is by birth. Thus, it is not at all necessary that the father of the daughter should be living as on the date of the amendment, as she has not been conferred the rights of a coparcener by obstructed heritage.** According to the Mitakshara coparcenary Hindu law, as administered which is recognised in section 6(1), it is not necessary that there should be a living, coparcener or father as on the date of the amendment to whom the daughter would succeed. **The daughter would step into the coparcenary as that of a son by taking birth before or after the Act. However, daughter born before can claim these rights only with effect from the date of the amendment, i.e., 9.9.2005 with saving of past transactions as provided in the proviso to section 6(1) read with section 6(5).**

"64. The effect of the amendment is that a daughter is made coparcener, with the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. Section 6(1) recognises a joint Hindu family governed by Mitakshara law. **The coparcenary must exist on 9.9.2005 to enable the daughter of a coparcener to enjoy rights conferred on her. As the right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not.** Conferral is not based on the death of a father or other coparcener. In case living coparcener dies after 9.9.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted section 6(3)."

"75. A finding has been recorded in *Prakash v. Phulavati* that the rights under the substituted section 6 accrue to living daughters of living coparceners as on 9.9.2005 irrespective of when such daughters are born. **We find that the attention of this Court was not drawn to the aspect as to how a coparcenary is created. It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive; relevant is birth within degrees of coparcenary to which it extends. Survivorship is the mode of succession, not that of the formation of a coparcenary.** Hence, we respectfully find ourselves unable to agree with the concept of "living coparcener", as laid down in Prakash v. Phulavati. **In our opinion, the daughters should be living on 9.9.2005.** In substituted section 6, the expression 'daughter of a living coparcener' has not been used. Right is given under section 6(1)(a) to the daughter by birth. **Declaration of right based on the past event was made on 9.9.2005 and as provided in section 6(1)(b), daughters by their birth, have the same rights in the coparcenary, and they are subject to the same liabilities as provided in section 6(1)(c).** Any reference to the coparcener shall include a reference to the daughter of a coparcener. The provisions of section 6(1) leave no room to entertain the proposition that coparcener should be living on 9.9.2005 through whom the daughter is claiming. We are unable to be in unison with the effect of deemed partition for the reasons mentioned in the latter part."

17. Thus the Supreme Court corrected the view of the Division Bench and held that it is irrelevant whether the coparcener father is alive or not on 9th September, 2005 for the daughter to be a coparcener.

Q.(ii) Whether the daughters are to be given share in coparcenary equal to that of a son when the proceeding for final decree or appeal is pending, even though a preliminary decree has been passed?

Partition

18. The right to claim partition is a significant basic feature of the coparcenary and a coparcener has the right to claim partition. Prior to the amendment in 2005 of the Hindu Succession Act, 1956, a daughter was not a coparcener and therefore, she was not entitled to claim partition. The daughter has now been conferred the status of a coparcener and as a result becomes entitled to claim partition which is a vital change. By the amendment of section 6 of the Hindu Succession Act, 1956, the rights of a daughter have been amended to be equal to that of a son. Therefore, in case of a partition, the father coparcener (Karta), sons, daughters and wife of the coparcener (Karta) are entitled to an equal share. The right of a wife of a coparcener (Karta) in the coparcenary property is in no way taken away. After taking a definite share in the property, a coparcener becomes the owner of that share and he or she can alienate the same by sale or mortgage in the same manner as he or she can dispose of his or her separate property.

19. In *ITO Calicut v. N.K. Sarada Thampatty, [AIR 1991 SC 2035]*, it was held that if a preliminary decree for partition is passed, it will not amount to a partition unless an actual physical partition is carried out pursuant to a final decree.

20. In *S. Sai Reddy v. S. Narayana Reddy & Ors. [(1991) 3 SCC 647]* a suit for partition was filed. A preliminary decree determining the shares was passed. The final decree was yet to be passed. It was observed that unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. A preliminary decree does not bring about the final partition. Pending the final decree, the shares themselves are liable to be varied on account of the intervening events and the preliminary decree does not bring about any irreversible situation. The concept of partition that the legislature had in mind could not be equated with a mere severance of the status of the joint family, which could be effected by an expression of a mere desire by a family member to do so. The benefit of the provision of section 29A of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986 could not have been denied to women whose daughters were entitled to seek shares equally with sons in the family. In S. Sai Reddy (supra), it was held:

> "7. The question that falls for our consideration is whether the preliminary decree has the effect of depriving respondents 2 to 5 of the benefits of the amendment. The learned counsel placed reliance on clause (iv) of Section 29-A to support his contention that it does. Clause (ii) of the section provides that a daughter shall be allotted share like a son in the same manner treating her to be a son at the partition of the joint family property. However, the legislature was conscious that prior to the enforcement of the amending Act, partitions will already have taken place in some families and arrangements with regard to the disposition of the properties would have been made and marriage expenses would have been incurred etc. The legislature, therefore, did not want to unsettle the settled positions. Hence, it enacted clause (iv) providing that clause (ii) would not apply to a daughter married prior to the partition

or to a partition which had already been effected before the commencement of the amending Act. Thus if prior to the partition of family property a daughter had been married, she was disentitled to any share in the property. Similarly, if the partition had been effected before September 5, 1985 the date on which the amending Act came into force, the daughter even though unmarried was not given a share in the family property. The crucial question, however, is as to when a partition can be said to have been effected for the purposes of the amended provision. A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the Court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which clause (ii) of Section 29-A of the Act became applicable. This intervening event which gave shares to respondents 2 to 5 had the effect of varying shares of the parties like any supervening development. Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its strata, it is necessary to give a liberal effect to it. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. **The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view that unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act.** Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment. Spurious family settlements, instruments of partitions not to speak of oral partitions will spring up and nullify the beneficial effect of the legislation depriving a vast section of women of its benefits.

21. In *Prema v. Nanje Gowda, [AIR 2011 SC 2077]* it was held that by the change of law, the share of daughter can be enlarged even after passing a preliminary decree, the effect can be given to in final decree proceedings.

22. The Supreme Court in the case of *Vineeta Sharma (supra)*, after considering the various decisions of the Supreme Court held as under:

"99. Once the constitution of coparcenary changes by birth or death, shares have to be worked out at the time of actual

partition. The shares will have to be determined in changed scenario. The severance of status cannot come in the way to give effect to statutory provision and change by subsequent event. The statutory fiction of partition is far short of actual partition, it does not bring about the disruption of the joint family or that of coparcenary is a settled proposition of law. **For the reasons mentioned above, we are also of the opinion that mere severance of status by way of filing a suit does not bring about the partition and till the date of the final decree, change in law, and changes due to the subsequent event can be taken into consideration.**

"106. ….. **This Court consistently held in various decisions mentioned above that when the rights are subsequently conferred, the preliminary decree can be amended, and the benefit of law has to be conferred. Hence, we have no hesitation to reject the effect of statutory fiction of proviso to section 6 as discussed in Prakash v. Phulavati (supra) and Danamma (supra). If a daughter is alive on the date of enforcement of the Amendment Act, she becomes a coparcener with effect from the date of the Amendment Act, irrespective of the date of birth earlier in point of time**.

Effect of Oral partition

Q.(iii)What is the effect of oral partition subsequent to the insertion of explanation to section 6(5) of the Hindu Succession Act, 1956?

23. Section 6(5) as proposed in the original Bill of 2004 read as under:

"(5) Nothing contained in this section shall apply to a partition, which has been effected before the commencement of the Hindu Succession (Amendment) Act, 2004."

24. Subsequent to the introduction of the bill a Note for the Cabinet issued by the Legislative Department, Ministry of Law & Justice, Government of India, suggested as under:

"As regards sub-section (5) of the proposed new section 6, the committee vide paragraph has recommended that the term "partition" should be properly defined, leaving any arbitrary interpretation. Partition for all practical purposes should be registered have been effected by a decree of the Court. In case where oral partition is recognised, be backed by proper documentary evidence. It is proposed to accept this recommendation and make suitable changes in the Bill."

25. The Explanation to section 6(5) provides that for the purposes of section 6, 'partition' means a partition effected by any registered partition deed or by a decree of a court. The intention was to avoid any claim of partition which is sham or bogus to defeat the purpose of conferring rights of coparcener to daughters by the Amendment Act, 2005.

26. The intention of inserting the explanation to section 6(5) is to ensure that daughters are not deprived of their rights of obtaining their shares on becoming coparceners and claiming a partition of the coparcenary property by setting up the frivolous defence of oral partition and/or recorded in the unregistered memorandum of partition.

27. The Supreme Court has observed that a Court has to keep in mind the possibility that a plea of oral partition may be set up, fraudulently or in collusion, or based on unregistered memorandum of partition which may also be created at any point of time which is not recognized as partition under section 6(5) of the Amendment Act.

28. However, under the law that prevailed earlier, an oral partition was recognised. The intention of amended section 6(5) of the Act is only to accept the genuine partitions that might have taken place under the prevailing law and oral partitions without any documentary evidences are to be out rightly rejected. The amended provisions of section 6(5) are required to be interpreted to cast a heavy burden of proof upon the person who claims partition such as separate occupation of portions, appropriation of the income, consequent entry in the revenue records and invariably to be supported by other contemporaneous public documents admissible in evidence. Even this may be accepted most reluctantly while exercising all safeguards. Otherwise, it would become very easy to deprive a daughter of her rights as a coparcener. The Supreme Court observed that Courts cannot defeat the object of the beneficial provisions made by the Amendment Act. The Supreme Court also observed that the exception is carved out by them as earlier execution of a registered document for partition was not necessary. There is a clear legislative departure with respect to proof of partition which prevailed earlier. Therefore, the Court has recognised the other mode of partition in exceptional cases based upon documentary evidence.

29. To summarize the above the Supreme Court decision, it has held that:

(i) A daughter born before or after the amendment or born before commencement of the Hindu Succession Act, 1956, is conferred the status of a coparcener.

(ii) The rights of coparcenary can be claimed by a daughter with effect from 9th September, 2005.

(iii) It is not necessary that the father coparcener should be living on 9th September, 2005.

(iv) The statutory notional (fiction) partition created by proviso to section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The notional (fiction) partition was only for the purpose of ascertaining share of deceased coparcener. The provisions of the substituted section 6 are required to be given full effect even after a notional (fiction) partition took place.

(v) Even if a preliminary decree has been passed in the partition suit, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(vi) In view of the Explanation to Section 6(5), a plea of oral partition cannot be accepted as a statutorily recognised mode of partition. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evidenced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected out rightly.

30. Subsequent to the amendment in 2005 of section 6 of the Hindu Succession Act, 1956 the difference between a Coparcenary and Hindu joint family has diminished considerably. The judgement of the Supreme Court in the case of *Vineeta Sharma v. Rakesh Sharma (supra)* is a judgment of a three judges' bench of the Supreme Court and therefore, it overrides the earlier judgments of the division benches of the Supreme Court. The judgment has certainly given a clarity to various issues having a huge number of pending litigations on the subject throughout the country.

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