

Daughter as a Coparcener: Step towards Gender Equality

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DECLARATION OF ORIGINALITY

I hereby declare that this research paper was entirely my own work and all additional sources of information have been duly cited and any internet source which I have quoted in my paper have been correctly referenced in the footnotes and bibliography. Whenever, and wherever an opinion has been expressed in the paper, the author has expressed his personal opinion.

CHAPTER - I

INTRODUCTION

1.1 The Concept of coparcenary

Coparcenary, defined as joint heirship or joint ownership of a property, is the product of ancient Hindu jurisprudence which later on became an integral part of the Mitakshara school of Hindu law. The concept of coparcenary in Hindu Law has its origin in the concept of Daya explained by Vijñāneshwara as a property which becomes the property of another person by the virtue of relation to the owner.² The concept of coparcenary under English law is different from the Hindu legal system in the sense that in English law, coparcenary is the creation of the act of parties or creation of law whereas in Hindu law, coparcenary cannot be created by the acts of the parties though it

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²Kulwant Malik, "Theory Of Coparcenary Under Hindu Legal System", [http://www.ssmrae.com/admin /images/cdc75de713d4b39cb48bf46ae4fe5c0e.pdf](http://www.ssmrae.com/admin/images/cdc75de713d4b39cb48bf46ae4fe5c0e.pdf) (December 20, 2013).

can be terminated by their acts.³ A Hindu coparcenary is a narrow body of joint family members comprising of coparceners who acquire an interest in the coparcenary property by birth by the virtue of being sons, grandsons and great-grandsons of the holder of the property, limited to three degrees. Every coparcener has certain rights, such as, the right to be in joint possession and enjoyment of the family property and the right to partition. Mitakshara and the Dayabhaga, two main schools of Hindu law differ fundamentally over the concept of coparcenary, in the process deviating from the original concept. One of the fundamental differences between the two schools lies in the interest in the coparcenary property where Mitakshara school talks about right by birth due to which there is no defined share for it fluctuates by birth and death of the coparcener in the joint family and Dayabhaga talks about a defined interest in the property as it is only after the death of the father that the sons constitute a coparcenary since there is no right by birth.

Since a coparcenary consists only of the father and his three male lineal descendants, women, whether daughters, mothers or widows, cannot be a part of the Mitakshara coparcenary.

1.2. Research plan

This research article is based on whether making a daughter a coparcener in the joint family property is a step towards gender equality. This hypothesis has been looked into by researching on the position of women in three different stages, namely, position of Women before the enactment of The Hindu Succession Act 1956, that is, under Shastrik Law, her position on and after the enactment of Hindu Succession Act 1956 (HSA) and the last and final stage of her position after the amendment in the Hindu Succession Act, that is, The Hindu Succession (Amendment) Act 2005. The researcher aims to look into

³Vijender Kumar, “Coparcenary under Hindu Law: Boundaries Redefined”, http://www.academia.edu/1891799/Coparcenary_Under_Hindu_Law_Boundaries_Redefined (December 20, 2013).

the changes brought about by these legislations in the position of the women and their criticism on the grounds of retaining discriminatory provisions. The researcher further aims to suggest some steps which can be taken to bring about gender equality in the family, first and foremost.

Every effort has been made to present an unbiased account of the issue in hand; however, the research may suffer from an inevitable bias which comes from referring to sources of information which might have a certain bias.

CHAPTER II

CUSTOMARY HINDU LAW: SUBJUGATING WOMEN

2.1. Introduction

“Women constitute half of the world’s population, perform nearly two-thirds of its hours, receive one-tenth of the world’s income and less than one hundredth of the property.”⁴

Since times immemorial, backed by historical writings, laws have been framed keeping in mind the interests of the male sex with female sex financially dependent on their husbands, brothers and other male relatives. Well-educated young women, able to maintain themselves in a patriarchal society as an independent working woman are married off to doctors, engineers and other men in service, thus curtailing her self-dependence and making her submissive to her husband, leaving her at his mercy.⁵ While, on the one hand, developed countries around the world ensured the woman’s right to hold and inherit property, putting her on an equal social and economic footing with men, on the other hand, a bare reading of the law in India governing the succession of

⁴Philip N. Cohen, “Stop that Feminist Viral Statistic Meme”, http://www.huffingtonpost.com/philip-n-cohen/stop-that-feminist-viral-_b_835743.html (December 20, 2013).

⁵Asha Nayar-Basu, “OF FATHERS AND SONS”, http://www.telegraphindia.com/1051011/asp/opinion/story_5331519.asp (December 20, 2013).

property amongst the members of Hindu joint family place women who faces the tremendous responsibility of the upbringing of next generation while shuttling from home to work at the receiving end.

Prior to the Hindu Succession Act 1956, there was no uniformity in the laws governing the succession of property with shastric and customary laws varying from region to region on the basis of caste. The presence of a large number of succession laws in India due to different schools such as Dayabhaga in West Bengal and Assam, Nambudri in Kerala, Mayukha in Bombay, Konkan and Gujarat and Mitakshara in other parts of India and the diversity in their nature made the property laws even more complex, bringing in non-uniformity.

2.2. Position of women before the enactment of The Hindu Succession Act 1956

The concept of coparcenary came into existence in ancient times when the concept of a property owned by individual was unknown and was only owned by either a patriarch or by the family. This concept of family ownership of property was divided into two schools, namely Mitakshara and Dayabhaga due to the difference of opinions between the two leading commentators, Vijnaneshwara (Mitakshara) and Jimutawahan (Dayabhaga).⁶ Mitakshara and Dayabhaga schools of Hindu law differ fundamentally over joint family as Mitakshara believed in corporate ownership of property, exhibiting socialistic approach while Dayabhaga believed in personal ownership exhibiting individualistic approach.⁷ Under the customary Hindu law and the concept of ‘Mitakshara coparcenary’ property, a Hindu undivided family consists of a common ancestor and all his lineal male descendants, together with wives or widows and unmarried daughters in the family, with such family represented

⁶ Dr. Sivaramayya, “Law: Of Daughters, Sons and Widows: Discrimination in Inheritance Laws”, <http://www.indiatogether.org/manushi/issue100/sivarama.htm> (December 20, 2013).

⁷ Ibid.

by Karta or manager of the family.⁸ Though a common ancestor starts the joint family, such joint family does not cease to exist with the death of the common ancestor. A Mitakshara coparcenary consists of a narrower body of people within a joint family comprising of father and his three male lineal descendants who have an interest by birth in the joint family property with the share decreasing with births and increasing with deaths in the family due to devolution by survivorship within the coparcenary.⁹ Unlike Mitakshara school, sons have no right by birth under the Dayabhaga school as there is no coparcenary between father and son with the son having no right of survivorship. A Mitakshara coparcener has certain rights, such as the right to be in joint possession and enjoyment of the family property as well as the right to claim partition. The exclusion of women from an interest by birth in the coparcenary property and limiting male ownership to four degrees was due to the custom prevailing in ancient times.¹⁰ The religious belief that a father goes to heaven by the birth of the son suggested that the son has right to the property of the father even during his life time for saving him from hell which subordinated the position of the women in the society, making her an unwanted element. The religious belief of offering oblations to the deceased father, grandfather and great-grandfather by the fourth degree son gave rise to the concept of limiting coparcenership to four degrees. Daughter was not given a share in the coparcenary property as she did not possess the religious qualifications of the son and she was a temporary member in the family of her birth under Hindu law for she ceased to be a member in the family of her birth on her marriage. The Supreme Court in *Kamesh Panjiyar v. State of Bihar*

⁸ Roopa Gargava, "Position of karta and the effect of amendment of section 6 of HSA, 1956 in 2005", http://www.legalserviceindia.com/articles/karta_hsa.htm (December 20, 2013).

⁹ Supra note 4.

¹⁰ Selva Kumar S, "Women's right to property", <http://www.Deccanherald.com/content/12717/F> (December 20, 2013).

held that a bride leaves the parental home for the matrimonial home, leaving behind not only memories but also her surname, gotra and maidenhood.¹¹

Under Mitakshara school of Hindu law, a woman though having right to sustenance, the control and ownership of the family property was not vested in her. Females were included as heirs only to the property separately owned by an individual for inheritance by succession. The Bengal, Benares and Mithila sub-schools of Mitakshara school recognized five female relations, namely widow, daughter, mother, paternal grandmother and paternal great-grandmother entitled to inherit¹² whereas the Madras sub-school gave inheritance rights to more number of female heirs such as son's daughter, daughter's daughter and the sister, also named as heirs in the Hindu Law of Inheritance (Amendment) Act 1929.¹³ The Bombay sub-school considered most liberal for women, recognizing greater number of female heirs, included son's widow, father's sister and a half sister.¹⁴ The Dayabhaga school following the rule of succession neither recognized a right by birth nor by survivorship in the joint family property for sons and daughters though daughters get an equal share along with their brothers and could also become the karta of the joint family property.¹⁵ Dayabhaga school, a more reformed school of Hindu Law, recognized a widow, daughter, mother, father's mother and father's father's mother as heirs.¹⁶ Though the British regime unified the country socially and politically, they chose not to interfere with the personal laws governing the Hindus in order to avoid the wrath of the Hindu society. The earliest legislation for upliftment of Hindu women in the society by

¹¹ *Kamesh Panjiyar v. State of Bihar* [2005 (2) SCC 388].

¹² "The Law of Inheritance in Bengal", <http://www.lawteacher.net/equity-law/essays/the-law-of-inheritance-in-bengal-equity-law-essay.php> (December 20, 2013).

¹³ Romit Agrawal, "Whether Amendments Made To The Hindu Succession Act Are Achieving Gender Equality?", <http://www.legalserviceindia.com/articles/gehsa.htm> (December 20, 2013).

¹⁴ Law Commission of India, "Property Rights of Women: Proposed Reforms under the Hindu Law", <http://www.lawcommissionofindia.nic.in/kerala.htm#chapter2> (December 21, 2013).

¹⁵ *Ibid.*

¹⁶ *Guru Gobind v. Ananda Lal* (1870) 5 Beng LR 15.

bringing females into the scheme of inheritance was the Hindu Law of Inheritance Act 1929 conferring inheritance rights on three female heirs, namely son's daughter, daughter's daughter and sister.¹⁷ The next landmark legislation which conferred ownership rights on women was the Hindu Women's Right to Property Act (XVIII of) 1937 bringing about revolutionary changes in all schools of Hindu law in the law of coparcenery, law of inheritance and law of partition.¹⁸ Though the Act of 1937 brought about important changes in the law of succession conferring a share on the widow equal to that of son, they were found to be flawed on certain grounds such as no inheritance rights for the daughter and the widow entitled to a limited share in the property of the deceased, leaving much to be desired over discrimination against women.

The founding fathers of the Indian constitution taking heed of this discriminatory and subordinated position of women in the society took positive steps to provide her with equal status as the man under Article 14, Art. 15(2) and (3) and Art. 16 of the Indian Constitution as a part of Fundamental Rights guaranteed by the Constitution. Under Part IV of the constitution containing the directive principles, Article 39(d) provides for the state to ensure equality between man and woman by implementing the policy of equal pay for equal work for both men and women.¹⁹ Notwithstanding the fundamental rights and directives give by the Indian constitution, a woman continued to be neglected and discriminated in the family of her birth as well as her matrimonial family due to unjustified violation of such provisions by some of the prejudiced personal laws.

¹⁷ Supra note 13.

¹⁸ Ibid.

¹⁹ Article 39, Constitution Of India 1949.

CHAPTER III

THE HINDU SUCCESSION ACT 1956

3.1. Introduction

The Hindu Succession Act 1956 which came into force on 17th June, 1956 despite the resistance provided by some sections of Hindu society, repealing the Act of 1937 aimed at removing the disparities and prejudice suffered by Hindu women by giving them greater property rights. The long title of the Act states that it is an act to amend and codify the law relating to intestate succession among Hindus.²⁰ The Act laid down a uniform and comprehensive law of succession with an attempt to ensure equality of inheritance rights between sons and daughters, applying to Hindus, Buddhists, Jains and Sikhs. The Act reformed the Hindu law by giving absolute ownership rights to women and granting daughters an interest in the property of their father to provide for equality between men and women.

3.2. What does law say?

The Act lays down a set of general rules in Sections 8 to 13 in matters of succession of property of a male Hindu dying intestate, dividing the heirs into four classes, namely:

1. Heirs in Class I of the Schedule
2. Heirs in Class II of the Schedule
3. Agnates, and
4. Cognates²¹

The property devolves on Class II heirs in the absence of primary heirs such as a son, daughter, widow and mother who are the Class I heirs, and in their absence first on agnates and then on cognates. Sections 15 and 16 of the act

²⁰ The Hindu Succession Act 1956.

²¹ Sec. 8, The Hindu Succession Act 1956.

talk about succession of property of a female Hindu dying intestate, dividing the heirs into four classes, namely:

1. Sons and daughters of the deceased and the husband
2. Heirs of the husband
3. Mother and father
4. Heirs of the father
5. Heirs of the mother²²

3.3. Achievements of the Hindu Succession Act, 1956

The Hindu Succession Act 1956, under Section 14(1), conferred upon Hindu women full and absolute ownership of property for the first time where the word ‘property’ includes both movable and immovable property.²³ The Supreme Court in *Punithavalli v. Ramanlingam* held that the right conferred upon women under Section 14(1) is a departure from Hindu law, text and rules and an estate taken by a female Hindu is an absolute ownership.²⁴

The object of Section 14 is to give absolute ownership rights to female and convert any estate already held by a woman as a limited owner on the date of the commencement of the Act to an absolute owner. The Apex court of the country in the case *Bai Vijaya v. T. Chelabhai* held that Section 14 was a step towards practical recognition of equality of the sexes elevating women from an inferior position and putting them on a higher pedestal ensuring uniformity in the laws.²⁵ In *Gulwant Kaur v. Mohinder Singh* the SC talking about the objective of Section 14 of HSA held that it removes restrictions on the ownership of the property possessed by a female Hindu as long as her possession is traceable to lawful origin.²⁶ Talking about the literal and contextual meaning of the word ‘possessed’ used in Sec. 14, the Apex court in *Eramma v. Veerappa* held that it is used in broad sense and in the context

²² Sec. 15, The Hindu Succession Act 1956.

²³ Sec. 14(1), The Hindu Succession Act 1956.

²⁴ *Punithavalli v. Ramanlingam* AIR 1970 SC 1730.

²⁵ *Bai Vijaya v. T. Chelabhai* AIR 1979 SC 993.

²⁶ *Gulwant Kaur v. Mohinder Singh* AIR 1987 SC 2251.

means the state of owning or having in one's hand or power.²⁷ The words under Sec. 14 includes both actual and constructive possession of the property, which was upheld in *Kotturu Swami v. Veeravva* where the Supreme Court held that a woman becomes the absolute owner of the property whether she is in actual or constructive possession of such property even though the property was acquired before 1956.²⁸ That the expression 'female Hindu' under Sec. 14 includes not only wife but also other female Hindus, with daughter covered within the ambit of this act was held in *Vidya v. Nand Ram*²⁹. In *Pratap Singh v. Union of India*, a case related to Stridhana, the Supreme Court held that Section 14(1) is not violative of Articles 14 and 15(1) of the Indian Constitution as Section 14 is a beneficial legislation providing absolute property rights to female Hindus for the first time.³⁰ The provision in Sec. 14(1) of the Act is protected by the express constitutional mandate under Article 15(3) of the Constitution of India which provides that nothing shall prevent the state from making any special provision for the benefit of women and children.³¹ Where a female Hindu, after the commencement of this Act, is given any property subject to certain limitations, she would hold that property under limited ownership with the limitations set out in Sec. 14(2) which says, "nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property."³²

Section 6 of the Act, recognizing the rule of devolution by survivorship among members of the coparcenary makes an exception to the rule in the proviso stating that if the deceased is survived by a female relative of Class I of the

²⁷ *Eramma v. Veeruppa* [1966] 2 S.C.R. 626.

²⁸ *Kotturu Swami v. Veeravva* AIR 2001 SC 747.

²⁹ *Vidya v. Nand Ram* 2001 (2) ALT 22 SC.

³⁰ *Pratap Singh v. Union of India* AIR 1985 SC 1695.

³¹ *Ibid.*

³² Sec. 14(2), The Hindu Succession Act 1956.

Schedule or a male relative who claims through the female relative, the interest of the deceased in the coparcenary property would devolve by intestate or testamentary succession.³³

3.4. Criticism of The Hindu Succession Act 1956

The Act is an uneasy compromise between the conservatives who wanted to retain the Mitakshara coparcenary and the discrimination against daughters and the progressives who wanted to abolish the Mitakshara coparcenary altogether for the upliftment of women.³⁴ The Nehru government chose to retain the Mitakshara coparcenary and system of joint family in spite of recommendations to the contrary by BN Rau committee.

The notion that the daughters were equal to sons under the Hindu law was prevalent due to Section 10 of the HSA dealing with matters of succession of property of a male Hindu dying intestate which declared that property is to be distributed equally among the Class I heirs defined by the Schedule, of which daughters, mothers and widows were a part of. Though such a step seemed in favour of bringing about gender equality, the truth was a far cry due to the mischief which was present in the concept of Mitakshara coparcenary property. The coparcenary property continued to be governed by a patrilineal regime wherein only the male members of a Mitakshara joint Hindu family had an interest by birth with the Act silent on the implications of exclusion of women from the Mitakshara coparcenary. Under the explanation provided by Section 6 of the HSA, if a widowed Hindu male died leaving behind a son and a daughter, a partition would be deemed to happen just before the death of that person where in such notional partition, the father and the son divide equally with each getting half the property. The father's half then, is shared equally among the son and the daughter by the virtue of being Class I heirs, meaning

³³ Sec. 6, The Hindu Succession Act 1956.

³⁴ Joel A. Nichols (ed.), MARRIAGE AND DIVORCE IN A MULTICULTURAL CONTEXT, 1st ed. 2012, p. 232.

that in all the son gets three-fourths of the property whereas the daughter gets only one-fourth of the property. Exclusion of women as coparceners in the joint family property under the Mitakshara school of Hindu law under Section 6 of the Act was, therefore, violative of equal rights for women guaranteed by the Constitution in the context of property rights with females unable to inherit ancestral property.³⁵ Also, as per the proviso to Section 6, the interest of the deceased male in the Mitakshara coparcenary devolve firstly upon the four primary heirs, namely son, daughter, widow and mother specified in Class I of the Schedule by intestate succession.³⁶ The principle of representation goes up to two degrees in the male line of descent though it goes only up to one degree in the female line of descent for the remaining eight members in the Schedule.³⁷ Under Section 23 of the Act, the daughter's right to reside in the house of her natal family was restricted till the time of her marriage unless widowed, deserted or separated from her husband and could not ask for partition of the dwelling house occupied by members of joint family until the male heirs chose to partition.³⁸ Another controversy was the testamentary power of the man which could be exercised in a patriarchal household to disinherit a daughter of her share in the self-acquired property of such male.³⁹ Five southern states of India namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka have enacted remedial legislations in the last two to three decades to remove the discrimination against daughters brought about by the right by birth under the Mitakshara school of Hindu law. The first state to address such discriminating features against daughters was Kerala when, in 1976, the legislature passed the Kerala Joint Family System (Abolition) Act 1976 abolishing the right by birth under the Mitakshara law and the

³⁵“Report of the Standing Committee of Parliament on Law and Justice”, http://www.hrln.org/admin/issue/subpdf/Report_of_the_Parliamentary_Standing_Committee_05May.pdf (December 21, 2013).

³⁶ Supra note 34.

³⁷ Supra note 4.

³⁸ Sec. 23, The Hindu Succession Act 1956.

³⁹ Supra note 5.

Marumakattayam law.⁴⁰ The Andhra Pradesh legislature enacted the Hindu Succession (Andhra Pradesh) Amendment Act 1985 equating the rights of the daughter to those of the son by conferring the right by birth on unmarried daughters on the date of enforcement of the Act.⁴¹ The fundamental difference between the Kerala model and the Andhra Pradesh model is that where, on the one hand, Kerala abolishes the right by birth in Mitakshara joint family, Andhra Pradesh strengthens the right by birth conferring it on unmarried daughters in a Mitakshara joint family. Tamil Nadu in the year 1989, Maharashtra in the year 1994 and Karnataka in the same year made similar amendments on the lines of Andhra model in their respective states. PV Kane, who supported the recommendations made by the BN Rau Committee states that Hindu law could be unified by abolishing right by birth which is the cornerstone of the Mitakshara school and therefore, the Kerala model further unifies the Hindu Law.⁴²

Another source of gender inequality in the Act was Sec 4(2) which was silent on the provisions of tenurial laws concerning the devolution of tenancy rights in agricultural holdings due to which interests in tenancy land devolved according to state-level tenurial laws, highly gender-biased in states such as Haryana, Punjab and Uttar Pradesh giving preference to lineal male descendants and limited ownership for women.⁴³ Other discriminatory provisions in the Act were Section 15 which talked about succession of property of a female Hindu dying intestate, specifying that in the absence of sons and daughters of the deceased, such property would go to the heirs of the husband of the deceased and only in their absence that the property would devolve upon the mother and father of the deceased⁴⁴ and Section 24 which

⁴⁰ Supra note 13.

⁴¹ Ibid.

⁴² (1997) 3 SCC (Jour) 25.

⁴³ Sec. 4(2), The Hindu Succession Act 1956.

⁴⁴ Sec. 15, The Hindu Succession Act 1956.

barred certain widows, such as those of predeceased sons, from claiming a share in the deceased's property if such widow had remarried.⁴⁵

3.4. Conclusion

The Hindu Succession Act 1956 though a path-breaking act, deprived women of certain rights she earlier was guaranteed under certain schools of Hindu law. Some of the provisions of this Act have been identified as discriminatory towards women furthering the interests of male child. The essence of this discrimination and inequality lies in the retention of Mitakshara coparcenary and a claim in the ancestral property by birth. The Government by rejecting the recommendations of Rau committee of abolition of Mitakshara coparcenary tried to appease the orthodox Hindus angered by the government's attempt to provide property rights to the women and, therefore, the Act can only be considered as a half-hearted measure to improve the situation of the women in the country.⁴⁶ Unrestrained power of testation under laws of testamentary succession was frequently called upon to deprive daughters of the property rights where a person could transfer his entire property in violation of the claims of other family members. This freedom of testation when compared to testamentary laws in other countries, such as France and Germany where a person can transfer only half of his property through the will is an anomaly. The constitutional validity of the traditional Mitakshara coparcenary remains doubtful due to the silence maintained by judiciary on the issue though the law-makers are aware of the view that right by birth under Mitakshara law is violative of equality before law guaranteed by the Indian Constitution. Also, the distinction drawn between a married daughter and an unmarried daughter on the patriarchal notion that a married daughter belongs to her matrimonial family and excluding a married daughter from the scope of the Act is unreasonable and should be quashed as ultra vires

⁴⁵ Sec. 24, The Hindu Succession Act 1956.

⁴⁶ Supra note 5.

to the constitution. The widows in states governed by Dravida school, namely, Andhra Pradesh, Tamil Nadu and Karnataka who got a much lesser share than a son or a daughter also goes against the concept of marriage of equal partnership between the husband and the wife.

CHAPTER IV

THE HINDU SUCCESSION (AMENDMENT) ACT 2005

4.1. Introduction

The 174th report of the 15th Law Commission in 2000 suggested amendments in the Hindu Succession Act 1956 to set right the discrimination against women and empowering the daughter of a Mitakshara coparcener, thus forming the basis of the present amended Act.⁴⁷ The Act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by the Mitakshara and Dayabhaga schools of law removing discrimination as contained in Section 6 of the Hindu Succession Act 1956.⁴⁸ The amended Act gave women equal rights in the inheritance of ancestral property by making her a coparcener in the family property.

4.2. What does law say?

Under the Hindu Succession (Amendment) Act 2005, on and from September 9, 2005 or thereafter, a daughter of a coparcener by birth gets an interest in the coparcenary property in her own capacity as a male heir.⁴⁹ This amendment removing the inequity which existed between the son and daughter of a joint family is a significant step in bringing the Hindu law of inheritance in accord with the constitutional principles of equality. Even after the marriage, a daughter continues to be a member of the coparcenary in the family of her birth though she cannot be a member of the coparcenary to

⁴⁷“Daughters get equal share”, <http://www.lawteacher.net/finance-law/essays/daughters-get-equal-share.php> (December 22, 2013).

⁴⁸ Sec. 6, The Hindu Succession (Amendment) Act 2005.

⁴⁹ Ibid.

which her husband belongs giving rise to the doctrine of Dual membership where the daughter is a member of two different families in two different capacities.

Section 6 of the amended Act which talks about devolution of interest in the coparcenary property, seeking to make the daughter a coparcener by birth in a joint Hindu family governed by Mitakshara law, subjecting her to the same liabilities as that of a son states:-

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.⁵⁰

4.3. Achievements of the Hindu Succession (Amendment) Act 2005

In a major blow to patriarchy, shastric Hindu law in the form of exclusive male Mitakshara coparcenary based on preferential right by birth of sons in the joint family property due to the sacred and inviolate religious obligations of the son towards the father of saving him from hell now stands amended throughout the country by the passing of Hindu Succession (Amendment) Act 2005, also making a significant advancement towards achieving gender

⁵⁰ Supra note 47.

equality. The important change brought about by making all daughters coparceners in the joint family property is of a great economic and symbolic importance for women. Giving coparcenary rights to daughters would not only enhance their economic security by giving them birth-right in the property that cannot be taken away by men in a male-dominated society where women are often disinherited but also make her an equally important member of her natal family. Also, if the marriage of the daughter breaks down, she can return to her parental family by the right vested in her and not on the option of the relatives giving her greater bargaining powers for herself and her children and boosting her self confidence. After the amendment, a daughter would get an equal share as that of the son at the time of the notional partition and an equal share of the father's separate share just before the death of the father. However, the position of the mother remains the same with she, by the virtue of not being a coparcener not getting a share at the time of notional partition with her actual share in the separate share of the father computed at the time of notional partition going down due to a decrease in the separate share of the father in the notional partition. This Act gave the right to partition to daughters for the first time, also making the heirs of pre-deceased sons and daughters more equal by including two generations of children of pre-deceased daughters as Class I heirs.

Another significant amendment in the Act is the removal of Section 4(2) from the original act which was silent on the provisions of tenurial laws concerning the devolution of tenancy rights in agricultural holdings due to which interests in tenancy land devolved according to gender biased state-level tenurial laws giving preference to lineal male descendants and limited ownership for women. The 2005 Act brought all agricultural land on par with other property making a Hindu woman's inheritance rights legally equal to those of men

across all the states in India, benefitting millions of women farmers who were dependent on agriculture for survival.⁵¹

Another achievement of the amended Act was the deletion of Sec 23 from the original Act which didn't allow residence rights to married daughters in the parental home, unless separated, deserted or widowed, giving all daughters the right to reside in or seek partition of the family dwelling house.⁵² The amended Act also deleted Section 24 of the 1956 Act giving inheritance rights to widow of a pre-deceased son.

Talking about the effects of achievements of the Amended Act, there is a popular misconception that inheritance laws promoting gender equality stand to benefit only a few handful of women which is not true here as millions of women in the country stand to gain from these amendments. For example, gender equality in agricultural land can reduce the risk of poverty for a woman and her family increasing the livelihood options and enhancing the prospects of child survival by providing proper healthcare and education. The argument of fragmentation of lands and migration of women on marriage advanced by the conservatives is unjustified and misleading as fragmentation of lands can occur even during the inheritance of sons and in case of migration on marriage, women could either lease out the land to some other person or cultivate it co-operatively with other women providing them with economic security.

4.4. Criticism of the Hindu Succession (Amendment) Act 2005

Though the 2005 amendment gave equal rights to daughters in the coparcenary, the important question of whether women or daughters can be allowed to become managers of the joint family property remained

⁵¹Bina Agarwal, "Landmark step to gender equality", <http://www.hindu.com/mag/2005/09/25/stories/2005092500050100.htm> (December 23, 2013).

⁵²Sec. 23, The Hindu Succession Act 1956.

unanswered. Another question to be considered is that as managers of the property of her natal family, she could be vulnerable to the influence exercised by her husband or her husband's family. One of the main criticisms of the amended Act is that it chose to retain the Mitakshara joint property system when there was an urgent need to follow the footsteps of Kerala and abolish the joint family system. Though the amended Act makes a daughter coparcener in the joint property, it decreases the share of other Class I female heirs such as deceased's widow and mother since the share of the deceased after notional partition from whom they stand to inherit will decline. Such a thing can end up playing women against each other with inequality over property rights coming in among the female heirs and achieving justice for one category of women at the expense of another.⁵³ Another criticism of the amended act is that the move to make daughters a coparcener in the joint family property would stand to benefit only those women who are born into families having ancestral property with this law not applying to the self-acquired property of a person. Notwithstanding the fact that joint family system has been on a steady decline with fragmented households, it is unclear whom the law will benefit as today, most of the property is self-acquired governed by various laws of succession with no rights in self-acquired property by birth whatsoever. The amended act, therefore, doesn't have much to offer to Hindu women in the sense that a Hindu father can still disinherit his daughter and wife by means of a will or gift from his self-acquired property.

The main issue is the concept of birth right in Hindu law which being a conservative institution, belonging to the era of feudalism, sits at the root of the problems of inheritance rights.⁵⁴ The amendment instead of abolishing this concept reinforces it by making daughters a coparcener in the joint family property. It is important to understand that if the state intends to bring in

⁵³ Supra note 12.

⁵⁴ Reena Patel, HINDU WOMEN'S PROPERTY RIGHTS IN RURAL INDIA: LAW, LABOUR AND CULTURE IN ACTION, 1st ed. 2007, p. 53.

equality not only between male and female heirs but among the various female heirs who stand to inherit the property of the deceased, this vicious concept of birth right has to be done way with. Also, different rules in case of succession of self-acquired property of a person have to be made such as restricting the right to testation under Sec. 30 of the HSA on the lines of Continental and Muslim laws to ensure that daughters are not disinherited from the self-acquired property of their fathers.

4.5. Conclusion

Several legal reforms have taken place since India's independence, providing inheritance rights to women with absolute ownership over the property and equal share in the coparcenary property to provide her an equal status, on par with men in the society though that equal status remains illusive. The 2005 amendment, though, a right step towards empowerment of women, not only improving her livelihood options and reducing the risk of spousal violence but also improving her status in her parental family, the fact that such law is applicable only to women not married on September 9, 2005 is unjust for a woman married before 2005 who would not get any benefit under the amended Act.⁵⁵ Also, the elevation of daughter as a coparcener would erode the share of the widow during notional partition in the share of a male Hindu dying intestate with reference to ancestral property.⁵⁶ Granting coparcenary rights to daughters is an insufficient right in the sense that the property inherited from father, grandfather and great-grandfather ceased to be ancestral by Supreme Court's judgment in *Commissioner of Wealth Tax, Kanpur v. Chander Sen* where it held that under the Hindu law, the property of a male Hindu devolved on his death on his sons and the grandsons by the virtue of having an interest in the property though by reason of Sec. 8 of the Act, the

⁵⁵ Munish S. Vakharia, "Daughter's Right in Coparcenary", <http://www.bcasonline.org/articles/artin.asp?1032> (October 13, 2013).

⁵⁶ Supra note 5.

son's son gets excluded and the son alone inherits the property.⁵⁷ Where Sec. 8 was directly derogatory of the law established according to Hindu law, the court held that the statutory provisions would prevail.⁵⁸ The desirable goal of unification of Hindu law remains unfulfilled due to preservation of different schools and sub-schools of Hindu law.

The approach by the legislatures should've been to abolish the feudalistic concept of right by birth under Mitakshara law abolishing joint family and impose restrictions on the power of testation under the Indian Succession Act 1925 similar to the one under Muslim law where a person cannot will away more than one-third of his property. Retaining the Mitakshara system and making daughter a coparcener, though, may not be the ideal solution but provides a woman with an assured share in the joint family property furnishing her with an economic security.

CHAPTER V

CONCLUSION AND SUGGESTIONS

5.1. Changes brought about in the position of the Women

The desire for a son in a joint family is due to the offering of 'shradha' by the sons for the spiritual solace of the ancestors, which for centuries has been considered a sacred as it saves the father from hell. In this context, one of the significant changes brought about by the 2005 amendment is making women coparceners in the Mitakshara joint family property ensuring equal property rights for both men and women. Giving a daughter rights by birth in the joint family property makes her an equally important member of her parental family as the son undermining the notion that the daughter belongs only to her husband's family after the marriage. The objective of the amended Act is the

⁵⁷ *Commissioner of Wealth Tax, Kanpur v. Chander Sen* AIR 1986 SC 1753.

⁵⁸ *Ibid.*

empowerment of daughters of the Mitakshara coparcenary removing the discrimination prevalent in her parental family as well as her marital family.

5.2. Case laws supporting the 2005 Amendment

Various issues such as the retrospective nature of the amended Act and whether a daughter born before 9th September 2005 was entitled to benefit under the Sec. 6 of the amended Act came up before the courts. The Orissa HC, in the case, *Pravat Chandra Pattnaik v. Sarat Chandra Pattnaik*, held that the amended Act was enacted to remove the discrimination contained in Sec. 6 of the Hindu Succession Act 1956 conferring daughters with equal rights and liabilities in the Mitakshara coparcenary property as the son.⁵⁹ The court said that the Act itself is very clear creating a substantive right in favor of the daughters without any ambiguity in the provisions and therefore, the amended Act should be read keeping the intention of the legislature in mind to come to a reasonable conclusion.⁶⁰ The court also rejected the contention that only daughters born after 2005, would be treated as coparceners on the ground that the provision of the Act when read along with the intention of the legislature, makes it very clear that the amended Act makes a daughter coparcener in the joint family property from the year 2005 irrespective of when such daughters were born.⁶¹

A similar issue came up before the Karnataka HC in the case *Sugalabai v. Gundappa A. Maradi* where the court held that as soon as the Amending Act came into force, the daughter of a coparcener becomes, by birth, a coparcener in her own right in the same manner as the son.⁶² The court further said that since the change in the law came into effect during the pendency of the appeal, it is the amended law that would be made applicable in this case.⁶³ Addressing

⁵⁹ *Pravat Chandra Pattnaik v. Sarat Chandra Pattnaik* AIR 2008 Orissa 133.

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² *Sugalabai v. Gundappa A. Maradi* ILR 2007 KAR 4790.

⁶³ *Ibid.*

another issue in this case, the court held that in case of a conflict between the State law, here, Hindu Succession (Karnataka Amendment) Act 1994 and the subsequent law made by the Parliament on an Entry in Concurrent List, it is the law made by the Parliament that will prevail over the State law.⁶⁴ Therefore, in view of the decisions of the Orissa and Karnataka HC, it is a settled fact that that daughter of a coparcener becomes, by birth, a coparcener in her own right in the same manner as the son irrespective of whether she was born before or after the Amending Act came into force.

The Karnataka High Court, in the landmark case, *Pushpalatha N.V. v. Padma V.* held that a historical blunder of depriving the daughter of an equal right in spite of the constitutional mandate has now been remedied and the lawful right to which she was entitled by virtue of the constitution is restored to her from the date of her birth but a daughter born before 17th June 1956 has no such right as the intention of the Parliament wasn't to give her rights in a coparcenary property prior to 1956 when the original Act came into force.⁶⁵ The explanation given by the court in this case is contradictory to the explanation advanced by the court in its previous decision in *Sugalabai v. Gundappa A. Maradi* wherein the court held that there was nothing in the Act which showed that only those born on and after the commencement of the act would become coparceners.⁶⁶ The amended section, nowhere, talks about the view which has been taken by the Hon'ble Court that the right to property is conferred from the date of birth with the provision clearly stating that on and from the commencement of the Amendment Act, the daughter of a coparcener shall have the same rights in the coparcenary property as that of a son. A daughter need not be born before or after a certain date under the amended Act to be granted a share in the coparcenary property of the Hindu Undivided Family.

⁶⁴ Ibid.

⁶⁵ *Pushpalatha N.V. v. Padma V* AIR 2010 Karnataka 124

⁶⁶ Supra note 61.

5.3. Suggestions

The first and foremost thing to be done in the present scenario is to mobilize the society and educate people to change their attitude towards the concept of gender equality for if the concept of equality exists outside the awareness and approval of majority of the people, it cannot be realized by a section of women socialized in traditions of inequality. It is only when the people change their attitude towards women, especially the daughters, putting her on an equal footing as the son that the daunting task of implementation of the Amended Act would be a success. The need of the hour is also to impose restrictions on the rights of testation of a person under Sec. 30 of the Hindu Succession (Amendment) Act 2005 so that it protect the rights of succession of female heirs of all schools of Hindu law. The society should be made legally and socially aware of the advantages to the whole family if women own property. Also, legal and social aid should be made available to the women who seek to assert their rights.

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