Some useful matter regarding Hindu Succession Amendment Act, 2005

Dear Students,

Now come to the important aspect of the Hindu Succession Act, 1956. As we have already discussed in detail the main provision of the Act. Although the main object of the 1956 Act was to give equal status to the Hindu women at par with her man. But it fail to meted out its real objective and after the 50 years of this Act, Parliament has to bring out radical changes under this Act through Hindu Succession Amendment Act, 2005. This Act has directly strike the old system of coparcernary and major role and share of sons in the Hindu family. I have been supplying some matter written by two jurists for your perusal.

Prof.Vijendra Kr. on Hindu Succession Amendment Act, 2005

The Amendment made to the Hindu Succession Act, 1956 in 2005 has attempted to make the daughter of coparcener a 'coparcener'. This amendment was made under the pretext of allowing for gender friendly succession laws. However, there are many ambiguities surrounding an understanding the Hindu Succession (Amendment) Act, 2005. There are several implications of the amendment, the most significant being a possible reconstitution of the Mitakshara Coparcenary. By introducing the daughter as a coparcener, the traditional patriarchal nature of the coparcenary has experienced a dramatic change. There is a confusion surrounding the definition of the Mitakshara Coparcenary, in the light of the Hindu Succession (Amendment) Act, 2005 - the position of the "daughter of a coparcener" is one which needs to be examined better.

Section 6 of the Hindu Succession (Amendment) Act, 2005 clearly states that the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It also states that she shall have the same rights in the coparcenary property as she would have had she been a son, and that she would be subject to the same liabilities. The daughter is thus, an acceptable member of the Hindu coparcenary, by virtue of the Section 6 of the Hindu Succession (Amendment) Act, 2005. However, the matter is not so simple.

The first problem encountered on examining Section 6 entails the lack of an explicit distinction between married and unmarried daughters. This fact must be emphasized as the married and the unmarried daughter do differ in respects such as membership of family; something which is crucial to the notion of the coparcenary. However, working under the assumption that the term daughter, as used in the Act, is inclusive of both married and

unmarried daughters, it is necessary to understand that the attempt to distinguish between a married and unmarried daughter might prove futile, with respect to defining the coparcenary.

Another interesting problem while defining the coparcenary concern the inclusion or exclusion of the adopted daughter is concerned. The text of the Section 6 of the Hindu Succession (Amendment) Act, 2005 nowhere mentions any reference to an adopted daughter, but maintains the inclusion of only a daughter by birth, as a part of the coparcenary. Thus, for all practical purposes, it is impossible to include the adopted daughter in the new definition of the coparcenary - a matter which needs to be re-examined.

The crux of the problems lies in the confusion which surrounds the phrase, "the daughter of a coparcener". It is clear from a reading of Section 6 that the daughter of the propositus is most definitely a coparcener, entitled to a share in the coparcenary property, equal to that of her brother's. However, it is necessary to understand that the applicability of this phrase is restricted to this interpretation alone. In other words, it is incorrect to include the daughter's children as coparceners in their mother's family. The text of Section 6 clearly makes no mention of the daughter's son, and hence, it may be safely assumed that he is to be excluded from his mother's coparcenary. However, while there is ambiguity surrounding the position of the daughter's daughter, it is impractical to suggest that the daughter of the daughter may be considered a member of her mother's coparcenary. On marriage the daughter ceases to be a member of her family of birth. Thus, she is a coparcener in her natal family, but no longer a member of it. Her daughter will receive a share in her father's coparcenary. If the daughter's daughter is allowed a share in the mother's coparcenary, she would be the recipient of a double share that is, a share from each of her parent's coparcenary. Thus, the daughter's children cannot be made coparceners.

This emphasises the unfair advantage attributable to the daughter's children that stems from problems linked to membership of a family. In essence, the married daughter's share in her father's coparcenary will only serve to help her husband's family. Thus, there is a crucial problem surrounding the membership of a family, and the coparcenary itself.

It is necessary to note that the system of the Mitakshara coparcenary loses its meaning, as membership of joint family is no longer a pre-requisite. The amended Section 6 of the Hindu Succession Act, 1956 has made a daughter who is not a member of the family, a coparcener. The system of the coparcenary proves itself futile as no matter how the property passed onto

the married daughter, it will only benefit the family of her marriage. In essence, it is perhaps time to reconsider the notion of the coparcener, and in effect re-look the constituents of the Hindu joint family. However, based on the analysis of the sources mentioned above it is suggested that the Mitakshara coparcenary shall now consist of "the common ancestor, the son, son's son, son' son' son, the daughter of common ancestor, son's daughter and son's son's daughter".

The Hindu Succession (Amendment) Act presumes the married female's continuance in the family of her birth. This presumption is neither logical nor workable. Therefore, the Act must provide that a daughter on marriage ceases to be the coparcener in the family of her birth … that the coparcenary interest of a daughter in the family of her birth would be determined at the time of marriage. Her interest will be ascertained on the date of the marriage presuming that it was the date on which the severance of her status has affected and it must follow actual division of coparcenary property (partition)…otherwise the Act will create more problems than it solves. The net result would be social and family feuds and tensions. Therefore, it is suggested that the aforesaid provision regarding continuance of a daughter as coparcener even after marriage be removed.

Further, it is submitted that the Hindu Succession (Amendment) Act makes discrimination between a daughter born in the family and a daughter adopted in the family of her adoption. Therefore, this anomaly must be removed by making an amendment in the existing Act to absorb adopted daughter in the family of her adoption as a coparcener as is done in the case of an adopted son.

Finally it is submitted that if there is a real desire to help the female in general and the Hindu female in particular in the light of the Hindu Succession (Amendment) Act, 2005, the provisions to make the wife a sharer in the property at the moment of her entry into the family of her marriage must be made. Since her entry in the family of her marriage is not temporary but is permanent for life, the female should be made a sharer in the property of the relations of her husband. Where the husband is a sharer, she should be an equal sharer with her husband. If the Parliament is serious to improve financial position of Hindu female, the wife, who is the other half of her husband, it should make a law that should give her equal economic rights in the property of her husband and equal right of heirship with her husband in the property of relatives of her husband as she is the inseparable half of her husband. It will be in total conformity with the spirit of Hindu view of life as she is Sapinda Gotraja. On the

analogy and rationale of Dattaka, all her rights must cease in the family of her birth after marriage and consequent replacement must take place in the family of her marriage. Further, every marriage must be registered.12 If these provisions are made, divorce will become only an exception, and on divorce a Hindu female should be divested of all her properties which she had got by virtue of her marriage.[1]

Another researcher view on the Hindu Succession Amendment Act, 2005

Be the 1956 Act or the 2005 Amendment, while altering the basic structures of the Hindu Joint Family concept, both the legislations have retained the concept of coparcenary in the superstructure. Traditionally the coparcenary and the Hindu undivided family as a whole were patriarchal, which wholly excluded the women folk of the family. It was always the sons, grandsons and the great grandsons and never the daughter and her lineal descendants. It was this picture that was redrawn by the Hindu Code Bill and by the 2005 Amendment. Even though the Hindu Code Bill of the B N Rau Committee, originally intended to abolish Mitakshara Coparcenary and to replace it with the concept of Dayabhaga,[2] the Hindu Succession Act came out in 1956 with the Mitakshara Coparcenary accommodated within it, though in a slightly diluted form. The rule of survivorship was watered down by including a proviso that the interest of a coparcener in a Mitakshara Coparcenary shall devolve down upon the other coparceners by rule of survivorship only if he is not survived by a female relative specified in Class I of Schedule I, or a male relative specified in that Class who claims through such female relative. Thus unlike the then existed Mitakshara view, which gave more importance to the Hindu Joint Family system over the coparcener's blood relatives, the 1956 Act gave importance to the welfare of the latter. The 2005 Amendment Act brought in a revolutionary change by making daughter of the coparcener a coparcener, along with the son. It uprooted the existing norms that a woman cannot be a coparcener and that she can never become the Karta of the joint family. The Amendment Act has totally eliminated the concept of devolution of interest in a coparcenary property by survivorship.

[1] From the article of Prof.Vijendra Kumar, titled "Coparcenary under Hindu Law, Boundaries redefined, published in Nalsar Law Review, 2008-09

[2] Under the Mitakshara rule the agnates of a deceased are preferred to his cognates; under the Dayabhaga rule the basis of heirship is blood relationship to the deceased and not the relationship based on cognatic or agnatic relationship. The Bill intended to universalise the law of inheritance by extending the Dayabhaga rule to the territory in which the rule of the Mitakshara then operated. See Constituent Assembly (Legislative) Debates, Vol. IV, 9th April 1948, pp. 3628-33

The interest of a coparcener shall continue to be diminished by births in the HUF, but the same will not be further increased by deaths in undivided family. A Hindu undivided family which was in existence at the time of commencement of the Amendment Act shall wither away slowly and shall disappear finally either by the inevitable demise all the existing coparceners or by a partition on the demand of a coparcener.

However, it is worthwhile to note that the Amendment Act also has not abrogated the concept of Coparcenary as such. A new coparcenary may be formed on the partition of an existing coparcenary by the partitioned coparceners with their sons and daughters. On the partition of a coparcenary property, each of the partitioned coparceners shall form their individual coparcenaries with their sons, daughters, grandsons and great grandsons. A new coparcenary may be also formed by the deliberate pooling up of separate properties of a person, along with his son/s and daughter/s, which is enjoyed jointly by the members of the coparcenary.[3]

View by Shelly Saluja and Soumya Saxena , NLIU Law Student from legalserviceof india.com

Changes Brought In The Position Of The Women (Specifically Focusing On Section 6)

Out of many significant benefits brought in for women, one of the significant benefit has been to make women coparcenary (right by birth) in Mitakshara joint family property. Earlier the female heir only had a deceased man's notional portion. With this amendment, both male and female will get equal rights. In a major blow to patriarchy, centuries-old customary Hindu law in the shape of the exclusive male mitakshara coparcenary has been breached throughout the country.

The preferential right by birth of sons in joint family property, with the offering of "shradha" for the spiritual benefit and solace of ancestors, has for centuries been considered sacred and inviolate. It has also played a major role in the blatant preference for sons in Indian society. This amendment, in one fell swoop, has made the daughter a member of the coparcenary and is a significant advancement towards gender equality.

The significant change of making all daughters (including married ones) coparceners in joint family property - has been of a of great importance for women, both economically and symbolically. Economically, it can enhance women's security, by giving them birthrights in property that cannot be willed away by men. In a male-biased society where wills often disinherit women, this is a substantial gain. Also, as noted, women can become kartas of the property. Symbolically, all this signals that daughters and sons are equally important members of the parental family. It undermines the notion that after marriage the daughter belongs only to her husband's family. If her marriage breaks down, she can now return to her birth home by right, and not on the sufferance of relatives. This will enhance her self-

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confidence and social worth and give her greater bargaining power for herself and her children, in both parental and marital families.

Now under the amendment, daughters will now get a share equal to that of sons at the time of the notional partition, just before the death of the father, and an equal share of the father's separate share. Equal distribution of undivided interests in co-parcenery property. However, the position of the mother vis-à-vis the coparcenary stays the same. She, not being a member of the coparcenary, will not get a share at the time of the notional partition. The mother will be entitled to an equal share with other Class I heirs only from the separate share of the father computed at the time of the notional partition. In effect, the actual share of the mother will go down, as the separate share of the father will be less as the property will now be equally divided between father, sons and daughters in the notional partition.

Some Anomalies Still Persist

Some other anomalies also persist-

1. One stems from retaining the Mitaksara joint property system.

Making daughters coparceners will decrease the shares of other Class I female heirs, such as the deceased's widow and mother, since the coparcenary share of the deceased male from whom they inherit will decline. In States where the wife takes a share on partition, as in Maharashtra, the widow's potential share will now equal the son's and daughter's. But where the wife takes no share on partition, as in Tamil Nadu or Andhra Pradesh, the widow's potential share will fall below the daughter's.

2. Co-parcenary remains a primary entitlement of males

the law, no doubt provides for equal division of the male co-parcener's share on his death between all heirs, male and female; still, the law puts the male heirs on a higher footing by providing that they shall inherit an additional independent share in co-parcenary property over and above what they inherit equally with female heirs; the very concept of co-parcenary is that of an exclusive male membership club and therefore should be abolished.

But such abolition needed to be dovetailed with partially restricting the right to will (say to 1/3 of the property). Such restrictions are common in several European countries. Otherwise women may inherit little, as wills often disinherit them. However, since the 2005 Act does not touch testamentary freedom, retaining the Mitaksara system and making daughters coparceners, while not the ideal solution, at least provides women assured shares in joint family property (if we include landholdings, the numbers benefiting could be large). 3. If a Hindu female dies intestate, her property devolves first to husband's heirs, then to husband's father's heirs and finally only to mother's heirs; thus the intestate Hindu female property is kept within the husband's lien.

Another reason for having an all India legislation is that if the Joint Family has properties in two states, one which is governed by the Amending Act and the other not so governed, it may result in two Kartas, one a daughter and the other a son. Difficulties pertaining to territorial

application of Amending Act will also arise. Thus is the need for an all India Act or Uniform Civil Code more immediate.

The difficult question of implementing the 2005 Act remains. Campaigns for legal literacy; efforts to enhance social awareness of the advantages to the whole family if women own property; and legal and social aid for women seeking to assert their rights, are only a few of the many steps needed to fulfill the change incorporated in the Act.[4]

[4] Shelly Saluja and Soumya Saxena , NLIU Law Student from legalserviceof india.com