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DAUGHTER AS A COPARCENER: A PARADIGM SHIFT UNDER MITAKSHARA LAW

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Abstract

The late 20th Century has witnessed multiple social welfare legislations made in the country wherein special focus has been on women's empowerment and their economic independence. Through these legislations, equal status and employment opportunities have been provided to women from all walks of life. Similarly, on September 9, 2005, the Hindu Succession Act, 1956 was amended, wherein the '*daughter*' of a coparcener governed by Mitakshara law was made coparcener by birth and was confirmed with status and equal interest in the coparcenary property. The Act of 2005 was welcomed by everyone and through this amendment, social, legal, and economic justice for daughters was achieved. However, a lot of confusion on certain issues was left unanswered by the lawmakers which has created huge litigation. Through this paper, the author attempts to examine such issues on which legal opinion and application need clarity with judicial scrutiny. This paper explores and exhibits gaps in the application, interpretation, and execution of property rights of a '*daughter*' in the coparcenary property. Further, the paper brings to its readers, the clarity provided by judicial precedents on filling these gaps with settled judicial law.

I Introduction

STATUS, BEING a coparcener, is one of the most distinctive features of Mitakshara law which determines interest in the coparcener property by birth. The Hindu Succession Act, 1956 is the first legislation towards a partial codification of the Mitakshara law and determined rights accrued from being a member of the Mitakshara coparcenary. Under uncodified Hindu law, a daughter was never considered as a coparcener equal to her male counterpart in the Joint Hindu Family governed by Mitakshara law. It was only male members of a Joint Hindu Family who had privileges and opportunities of ownership, possession, and/or a claim on share in the Mitakshara coparcenary property. The coparcenary, as understood in Hindu law, has its origin in the concept of *Daya* as explained by Vijnaneshwara while commenting on Yajnavalkyasmriti in the *Daya vibhaga prakranam vayavahara adhaya*. Vijnaneshwara defined *Daya* as only the property which becomes the property of another person, solely by reason of relation to the owner. The words solely by reason of relation exclude any

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other cause, such as the purchase or the like.[1] Further, Narada also approves the meaning of the *Daya* which is a coparcenary property because according to him, sons can divide only the father's property (coparcenary property) which has been approved by the learned (*Svatvanimitasambandhopalashanam*). Therefore, the unique concept of coparcenary is the product of ancient Hindu jurisprudence which later became the essential feature of Hindu law in general and Mitakshara law in particular.

Until the Hindu Succession (Amendment) Act, 2005 did not come into force, a daughter was not recognised by Hindu law as a coparcener in her own right though she was provided with property rights in different capacities from her father and mother. The Succession, Joint Family, Partition, and Will are enlisted in the third list of the Seventh Schedule (article 246), known as the '*Concurrent List*' of the Constitution of India. In 1956, the Hindu Succession Act was enacted by the Parliament which states '*to amend and codify the law relating to intestate succession among Hindus*'. In the Act of 1956, a '*daughter*' governed by Mitakshara law was considered a Class-I heir to her father and legal heir to her mother but she was not considered a coparcener. Hence, the Act of 1956 could not alleviate unequal treatment among the son and daughter and their property rights in the Joint Hindu Family as it existed before the Act came into force. In 1986,[2] the erstwhile Andhra Pradesh was the first state in the country to introduce an amendment to section 29 of the Hindu Succession Act, 1956 and added section 29-A, section 29-B, and section 29-C by state amendment while confirming the coparcenary status of unmarried daughters. The said amended law was followed by Tamil Nadu,[3] and Maharashtra,[4] whereas Karnataka[5] amended section 6 of the principal Act of 1956 and added section 6-A, section 6-B, and section 6-C by state amendment. The purpose and object of these states' amendments were similar, *i.e.,* to provide '*daughter*' with the status of being a coparcener and an interest in the Mitakshara coparcenary property. With the same spirit in law, the Parliament of India amended section 6 of the Hindu Succession Act, 1956 in 2005. The Hindu Succession (Amended) Act, 2005 provides the '*daughter*' of a coparcener, governed by Mitakshara law, with the status of being a coparcener by birth in her own right by the application of section 6 of the Hindu Succession (Amendment) Act, 2005 with effect from September 9, 2005, and also provides her with an equal property right in the coparcenary property.

A right so created and confirmed to a '*daughter*' of a coparcener governed by Mitakshara law has the retrospective effect to the date when the original Bill was introduced in the Rajya Sabha by the then Union Law Minister, H.R. Bhardwaj, *i.e.,* December 24, 2004.

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1 H.T. Colebrooke, *Daya-Bhaga And Mitaksara* 242 (1st edn., 1984).

2 The Hindu Succession (Andhra Pradesh Amendment) Act, 1986.

3 The Hindu Succession (Tamil Nadu Amendment) Act, 1989.

4 The Hindu Succession (Maharashtra Amendment) Act, 1994.

5 The Hindu Succession (Karnataka Amendment) Act, 1990.

The main purpose of the retrospective effect was to avoid fictitious partition, if any, which would have taken place between the date of the commencement of the amended Act and the date when the original bill was introduced in the Rajya Sabha. Since September 9, 2005, several attempts have been made by research scholars, members of academia, and members of the bar to resolve ambiguity surrounding the interpretation, application, and execution of section 6 of the amended Act of 2005, but such ambiguity has created a plethora of litigation where family relations are brought before the courts. Some of the cases have come up before the Supreme Court where partial clarifications were pronounced. Further, in *Vineeta Sharma* v. *Rakesh Sharma,*[6] a long pending ambiguity relating to the existence of the father or daughter at the time of commencement of the amended Act of 2005 was scrutinised by the Supreme Court. The apex court has settled the law on the issue of the existence of the father of '*daughter*', as a coparcener, at the time of commencement of the Act of 2005. The Mitakshara law, through this judicial pronouncement, has been refurbished to a certain extent and has settled many ambiguities relating to daughters' status and rights in a Mitakshara coparcenary.

The apex court has clubbed a batch of petitions having similar or identical issues together and placed them before a larger bench consisting of three justices, *viz.*, Arun Mishra, S. Abdul Nazeer, and M.R. Shah of the Supreme Court. Proper use of Artificial Intelligence (AI) for clubbing and executing cases of similar nature has been exhibited by the apex court in *Vineeta Sharma's*[7] case successfully. Similarly, cases having an identical question of law or interpretation of the law may also be clubbed together with the help of AI for speedy disposal of cases.

II Genesis of coparcenary status and rights

Daughter, as coparcener, means and includes one, confirmation of status on a female child of a Mitakshara coparcener by birth; and two, confirmation of interest in the Mitakshara coparcenary property. For the purpose of conferment of the status, the birth of a child is a matter of fact but it must be within the wedlock of the parents. The female child must have been born alive, legitimate in fact, and with no legal bar attached to her birth. Further, the birth must have been either during the lifetime of the father, or within 280 days after the death of the father, or born to a commissioned woman in surrogacy or cases where the embryo cryopreservation process has been used.[8] Legitimate birth of a female child confers special status being coparcener under Mitakshara law. Furthermore, at the time of the birth of a female child, there must be

6 AIR 2020 SC 3717.

7 *Ibid*.

8 Cryopreservation is a medical process where embryos freezing is the combination of female eggs and male sperms or male gametes, *available at*: https://en.wikipedia.org/wiki/Embryo_cryopreservation (last visited on April 23, 2022.

a coparcenary in existence to which her father is/was an undivided member. Therefore, at the time of the commencement of the Hindu Succession (Amendment) Act 2005, if the father of a daughter was not alive but the coparcenary was in existence, the daughter of the deceased male coparcener shall by birth become a coparcener in such coparcenary. The only disqualification one can imagine in such circumstances is the birth of a female child which is 'legitimate in law' and not 'in fact', and it has a legal bar attached to it. Subsequently, confirmation of coparcenary right is a matter of fact and law as well. There must be a Mitakshara coparcenary in existence and the said coparcenary must have a property in existence which is known as coparcenary property. Unless there is coparcenary property, a daughter who is bestowed with coparcenary status by the Hindu Succession (Amendment) Act, 2005, cannot acquire an interest in any other property governed by Mitakshara law. Hence, there must be a coparcenary and coparcenary property in existence when a daughter is born. In such cases, a daughter by birth becomes a coparcener and gets a right to ask for partition or gets a right to challenge any alienation made for non-legal necessity by the *Karta*/father or any other coparcener in the family of her birth.

The daughters born before the Act of 2005 came into force are one set of daughters, and the daughters born on and after the said Act came into force are the other set of daughters. The question of having her father alive on the date when the Hindu Succession (Amendment) Act 2005 came into force has its own significance. The daughters who were born on and after the Amendment Act came into force have no issue with the existence of their father being alive at the time when they are bestowed with the new status of being coparceners. However, there was an uncertainty in law with respect to the daughters born before the Act came into force, and whose fathers had died before they were bestowed with the new status of being a coparcener. This anomaly in the application, interpretation, and execution of law as laid down in Section 6 of the Hindu Succession (Amendment) Act, 2005 has created a lot of litigation. There has been a plethora of cases decided by the courts including the apex court of the land where '*living daughter of living father*'[9] only was considered as coparcener and the daughter of the father who was not alive on the date when this Act came into force was not considered as a coparcener. At this juncture, one must understand that a daughter once born in a Joint Hindu Family, governed by Mitakshara law becomes a member of that family, irrespective of the fact, whether her father remains alive. Such birth of a daughter in the Joint Hindu Family is quintessential and needs to be considered while conferring upon her the status of being a coparcener and not the living status of the father at the time of conferring such status on the daughter. Once a daughter marries and becomes a member of her husband's family, the status of a coparcener bestowed in her natal family remains intact. However, the birth of a daughter

9 *Prakash* v. *Phulvati,* AIR 2016 SC 769.

must be 'legitimate in fact' and she must have been born alive as rightly opined by the Supreme Court, "*once a daughter, always a daughter*".[10]

Moreover, while considering the interest of a daughter under the new Mitakshara coparcenary, the existence of coparcenary property becomes a crucial point for discussion. With a considered intent and/or object, the lawmakers have conferred coparcenary status over a daughter who is governed by Mitakshara law but the law in itself cannot create coparcenary property which is a normal phenomenon of a Joint Hindu Family. However, if the birth of a daughter takes place in a Joint Hindu Family wherein there is no existence of coparcenary property, then the conferment of the status of a coparcener on a daughter in a Joint Hindu Family may be futile as the status of a coparcener will not be attached with any right or interest in the coparcenary property. In a contemporary Hindu society, where in most of the cases, working male members or business persons are not claiming their share on the partition from the original coparcenary property or they have developed their own earnings and accumulated such properties which are not in the nature of coparcenary property, will such kind of property fall within the ambit of a coparcenary property and/or whether a daughter who has been bestowed with the new status being coparcener gets any legal remedy in such property? These questions need to be addressed keeping into consideration the changing nature of the Joint Hindu Family in light of the recent judicial pronouncements.

The present law considers gender-based identities while conferring status and right in the joint Hindu family property, whether the family is governed by Mitakshara or Dayabhaga law. For example, son, grandson, and great-grandson being male descendants of their father, grandfather, and great grandfather are considered coparceners from the time immemorial under Mitakshara law, and daughters are considered by law since September 9, 2005, under the Hindu Succession (Amendment) Act, 2005. In all such eventualities, the gender of a child is having the paramount consideration for conferring status and right over the child accordingly. What happens to the child who changes his/her gender by using medical development after attainment of the majority? Whether such an eventuality will have any impact on the status of such a person and/or whether the property rights of such a person will be affected by such a change in gender? With the advancement in medical jurisprudence and procedures, the gender of a person has become a vital factor on the basis of which laws are majorly framed. Hence, it becomes imperative for lawmakers to scrutinise the said issue in light of the Amendment Act of 2005. Where a child, by birth, is a female, but later changes the gender to male or vice-versa, then the conferment of the status of a coparcener on a daughter and the said law may have to encounter certain complexities in the future.

10 In *Savita Samvedi* v. *Union of India,* 1996 (2) SCC 380 the court opined that, "… *a daughter is a daughter throughout her life*", referred in *Vinita Sharma* v. *Rakesh Sharma,* AIR 2020 SC 3717, 3748.

Further, the position of an adopted '*daughter*' in the family of her adoption, to be a coparcener, is not clear as provided in re-drafted section 6 of the Hindu Succession (Amendment) Act, 2005. On a plain reading of the wordings "*by birth become a coparcener*" used in sub-section (1)(a) of section 6 of the Act of 2005, it appears obvious that only a '*daughter*' by birth becomes a coparcener and a '*daughter*' by adoption does not become a coparcener. Hindu law had been and is permitting adoption (*Dattak*) among Hindus since time immemorial and it is peculiar only to Hindus and not recognised by other religions like Muslim and Christian.[11] In Hindu law, an adopted child, in the family of adoption, is considered a child born to the parents, in the family of his birth. Therefore, Hindu law does not differentiate between a child born to legal wedlock and adopted by adoptive parent/s while determining the status and rights of such a child. In support of this argument, the full bench of the High Court of Calcutta in *Uma Sunkar* v. *Kali Komul*[12] case observed that it is now settled that "an adopted son (child) occupies the same position, and has the same rights and privileges in the family of the adopter as the legitimate son (child)". The theory of adoption depends upon the principle of a complete severance of the child adopted from the family in which he is born, both in respect of the paternal and the maternal line, and his complete substitution into the adopter's family, as if he were born in it.[13] Whereas, a '*daughter*' in the family of her birth (natal family) is a coparcener by virtue of section 6 of the Act of 2005 with effect from September 9, 2005. A '*daughter*' who is a coparcener in her natal family, if she is given in adoption by her parents before she attains the age of fifteen years, as required by the Hindu Adoptions and Maintenance Act, 1956; she loses her status being coparcener in the family of her adoption as sub-section (1)(a) of section 6 of the Act of 2005 considers only the '*daughter*' by birth and not by any other means to confer the status being coparcener; though adoption is a valid reason to become a member of ones' family besides birth and marriage. Hence, the lawmakers are required to revisit sub-section (1)(a) of section 6 of the Act of 2005 and provide an explanation to consider an adopted '*daughter*' within the ambit of a '*daughter*', who has been conferred with the status being coparcener. Whereas thinking about transgender and queer in adoption is far from reality and is never thought of, we need to give a thought to this aspect as well.

Although, coparcenary as 'status' and as a 'right' in coparcenary property are two independent propositions yet complementary to each other in the Mitakshara coparcenary system. Real economic independence can only be achieved when both co-exist and daughters are encouraged to grow and contribute to making their families a better and happy place to live. An application of the law for the execution of any right, be it property right, comes later.

11 Vijender Kumar (rev.), John D. Mayne, *Treatise On Hindu Law* and *Usage* 753 (18th edn. 2020).

12 (1881) 6 Cal. 256.

13 Vijender Kumar, *Hindu Law of Adoption - Principles and Precedents* 419 (1st edn. 2004).

Understanding *of Vineeta Sharma's* judgment

In order to understand the judicial principles enunciated in *Vineeta Sharma* v. *Rakesh Sharma*[14] case and for the convenience of the readers, certain relevant portions of the said case are provided in the following lines. A question relating to the interpretation of section 6 of the Hindu Succession Act, 1956 as amended by the Hindu Succession (Amendment) Act, 2005 was referred to a larger bench in *Vineeta Sharma's*[15] case with a view of the conflicting verdicts rendered in two division benches' decisions of the Supreme Court *viz.*, *Prakash* v. *Phulavati*[16] and *Danamma* v. *Amar*.[17] The larger bench was also provided with other connected matters having a similar question of law involved in them. Following are the questions placed before the larger bench for its consideration: [18]

> (1) That "Section 6 as amended by the Act of 2005 is deemed to be there since 17.6.1956 when the Act of 1956 came into force, the amended provisions are given retrospective effect, when the daughters were denied right in the coparcenary property, pending proceedings are to be decided in the light of the amended provisions". Further, that,"the oral partition and unregistered partition deeds are excluded from the definition of 'partition' used in the Explanation to amended Section 6(5)"
>
> (2) That, "the retrospectivity of Section 6 as substituted by the Hindu Succession (Amendment) Act 2005 and in case the father who was a coparcener in the joint Hindu family, was not alive when the Act of

14 AIR 2020 SC 3717.

15 *Vineeta Sharma* v. *Rakesh Sharma,* AIR 2020 SC 3717.

16 (2020) 2 SCC 36. A division bench of the Supreme Court of India in this case held that, "Section 6 of the Hindu Succession (Amendment) Act 2005 is not retrospective in operation, and it applies when both coparceners and his daughter were alive on the date of commencement of the Act of 2005, *i.e.*, September 9, 2005. The Court further opined that, the provision 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. 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 Section 6 have been held to be prospective".

17 (2018) 3 SCC 34. The Supreme Court of India in this case held that, "amended provisions of Section 6 confer full rights upon the daughter coparcener. Any coparcener, including a daughter, can claim a partition in the coparcenary property. Gurunalingappa died in the year 2001, leaving behind two daughters, two sons, a widow. Coparcener's father was not alive when the substituted provision of Section 6 came into force. The daughters, sons, and the widow were given 1/5th share apiece".

18 *Lokmani* v. *Mahadevamma,* SLP [C] No. 6840 of 2016.

2005 came into force, whether daughter would become a coparcener of joint Hindu family property"[19];

(3) That, "where the final decree has not been passed in a suit for partition, whether the redistribution of shares can be claimed by the daughters by amended Section 6, as substituted by the Hindu Succession (Amendment) Act, 2005"[20];

(4) That, "whether Section 6 of the Hindu Succession (Amendment) Act, 2005 is prospective as the father died in the year 1994; and thus, no benefit could be drawn by the daughters"[21];

(5) That, "the petitioner sought partition of his father's ancestral properties, and suit was filed in 2001. The trial court granted 1/7th share to all the parties. The same was modified"[22]. It was held that, "the petitioner, and daughters were entitled to only 1/35th share" in the light of the decision of the Supreme Court in *Prakash* v. *Phulvati's*[23] case. Further, in *Indubai* v. *Yadavrao*,[24] "a similar question has been raised"; and

(6) That, "where the daughters have been accorded equal shares in Item No. 1 of Schedule A property, that has been questioned".[25]

Operative part of the judgment

On August 11, 2020, after due consideration of submissions and analysis of judicial pronouncements and academic literature on the issues, the bench consisting of Justice Arun Mishra, J, S. Abdul Nazeer, and J M.R. Shah J of the Supreme Court of India in *Vineeta Sharma*[26] held that:

(i) The provisions contained in substituted Section 6 of the Hindu Succession Act 1956 confer status of coparcener on the daughters born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) as to be the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

19 *Balchandra v. Poonam,* SLP [C] No. 35994/2015.

20 *Sistia Sarada Devi* v. *Uppaluri Hari Narayana,* SLP [C] No. 38542/2016.

21 *Girijavva* v. *Kumar Hanmantagouda,* SLP [C] No. 6403/2019.

22 *V.L. Jayalakshmi* v. *V.L. Balakrishna,* SLP [C] No. 14353/2019.

23 (2020) 2 SCC 36.

24 SLP [C] No. 24901/2019.

25 *B.K. Venkatesh* v. *B.K. Padmavathi,* SLP [C] Nos. 1766-67/2020.

26 *Supra* note 15.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

(iv) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disposition of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class-I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed 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.

(v) In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced 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.[27]

While taking stock of the pending litigation in various high courts and subordinate courts, the Supreme Court held that: [28]

> The court understands that on this question, suits/appeals are pending before different High Courts and subordinate courts. The matters have already been delayed due to legal imbroglio caused by conflicting decisions. The daughters cannot be deprived of their right of equality conferred upon them by Section 6. Hence, the Court requests that the pending matters be decided, as far as possible, within six months.

In view of the submissions made before the Supreme Court of India by the council of both the parties, Solicitor General of India and *amicus curiae*, and after reviewing the laws relating to the questions, the court held that:[29]

> The court overruled the views of the contrary expressed in *Prakash* v. *Phulvati* (supra) and *Mangammal* v. *T.B. Raju* (supra), the opinion expressed in *Danamma* v. *Amar* (supra) is partly overruled to the extent it is contrary to this decision.

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27 *Id*. at 3778.

28 *Ibid*.

29 *Id*. at 3778-3779.

Analysis of the judgment

While analysing *Vineeta Sharma*[30] judgment, the author finds that section 6 of the Hindu Succession Act of 1956 lays emphasis on the '*devolution of interest in coparcenary property*', as it can easily be understood from the title of section. Section 6 of the Act of 1956 provides that '*an interest of male Hindu who dies intestate*' denotes two propositions: *first*, when a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance of this Act. (ii) *Provided* that, if the deceased had left him surviving a female relative in Class-I of the Schedule or a male relative specified in Class-I who claims through such a female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be under this Act and not by survivorship. *Secondly*, in case intestate dies as an undivided member of Mitakshara coparcenary, there was an Explanation I[31] which was attached with section 6 of the original Act of 1956, and through this Explanation, one can ascertain the share of a male Hindu who died intestate and as an undivided member of his coparcenary upon his death. Until 2005, when the original Act of 1956 was under review for amendment, there was no other alternative before the courts and the lawmakers by which they could ascertain the actual share of the deceased coparcener from the undivided coparcenary property immediately on the death of such coparcener. It was only the Explanation I attached with section 6 of the Hindu Succession Act, 1956 which helps to ascertain the share of the deceased from the surplus coparcenary property. Therefore, the lawmakers did not omit the law laid down in the form of Explanation I from the statute as attached with sub-section (3) of section 6 of the Hindu Succession (Amendment) Act, 2005 which came into force on September 9, 2005. Hence, by applying this Explanation, one can determine and/or ascertain the share of the deceased undivided coparcener on his intestacy from the surplus coparcenary property.

Mitakshara coparcenary which governs most Hindus in the country is still an uncodified portion of Hindu law. In 2005, an attempt was made by the lawmakers to codify Mitakshara coparcenary partially through central legislation when they introduced the '*daughter*' of a coparcener, who is governed by the Mitakshara law, as coparcener and confirmed her coparcenary status by birth in the same way as that of a son. However, the lawmakers have miserably failed to amend and codify Mitakshara coparcenary in its letter and spirit because they have confirmed coparcenary status only on the '*daughter*'

30 *Supra* note 15.

31 Explanation I reads as, "*For the purposes of this 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*".

of a coparcener by birth. Whereas the original Mitakshara coparcenary consists of a father, his son, grandson, and great-grandson, meaning thereby, 'father along with male descendants from next three degrees constitutes a Mitakshara coparcenary'. While introducing '*daughter*' into the father's coparcenary by birth, the lawmakers have taken cognizance only of '*daughter*' alone and none other than the '*daughter*', meaning thereby that, '*daughter*'s children, grand-children, *etc*., are not considered in new Mitakshara coparcenary, which may be called 'statutory Mitakshara coparcenary'. The reason for '*daughter*' not incorporated in the original Mitakshara coparcenary of her father could have been that, 'on marriage, daughter goes to the next family and becomes *sapindas-gotraja* of her husband's family';[32] consequently, 'becomes a member of the joint Hindu family of her husband'. On such happening, all her ties with the family of birth are deemed to have been severed and replaced in the family of her marriage. However, in contemporary Hindu society such kind of practice has hardly any significance; hence, '*daughter*' is introduced as a coparcener and is included in her father's coparcenary by the amended section 6 of the Hindu Succession (Amendment) Act, 2005. Therefore, the title of section 6 of the Act of 1956 and the Act of 2005 explains one kind of law, and sub-section (1) (a), (b), and (c) of section 6 of the Act of 2005 provides different kind of law besides *Proviso* attached therewith being different in its application and operation.

A daughter's interest in the coparcenary property can be examined by analysing the legislative intent behind the redrafted section 6 of the Hindu Succession Act. It is imperative that the author discusses the language and intent with certain observations with the help of judicial pronouncements and Hindu jurisprudence. Sub-section (1) of section 6 of the Hindu Succession (Amendment) Act, 2005 can be understood independently that, for the first time among Hindus governed by Mitakshara coparcenary it finds,

> On and from the commencement of the Hindu Succession (Amendment) Act, 2005 (September 9, 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; and (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son.

III Mitakshara coparcenary

The two commentators, *viz*., Vijnaneshwara (Mitakshara) and Jimutawahan, (Dayabhaga) interpreted the law propounded by Smritis and/or Dharmashastras differently. In contemporary parlance, the approach of the Mitakshara is socialistic whereas the

32 *Kamesh Panjiyar* v. *State of Bihar,* AIR 2005 SC 785.

Dayabhaga is individualistic. Therefore, Mitakshara believes in corporal ownership of the property while Dayabhaga believes in individual ownership. Further, the joint Hindu family is one of the areas where the Mitakshara and the Dayabhaga differ from each other fundamentally and still have significance in Hindu contemporary society. Under the Mitakshara law, there is a coparcenary between father and son whereas, under the Dayabhaga law, there is no coparcenary between father and son. Hence, under the Mitakshara law, the son has an interest by birth in the coparcenary property whereas under the Dayabhaga law, the son has no interest by birth in the father's coparcenary property. However, for the purpose of this paper, one must understand, why a daughter was not considered to be a coparcener before the amendment of 2005. Here, one needs to understand why a son was considered a coparcener and he was given an interest in the coparcenary property of his father, grandfather, and great grandfather by birth in addition to the son being a Class-I heir to his father, grandfather, and great grandfather. It would be appropriate if one understands Manu on this point. He has rightly referred to a son as, by the birth of the son, the father goes to heaven; by the birth of the grandson, the father goes to heaven permanently; and by the birth of the great-grandson, he (great grandfather) goes to the abode of the Sun+. Thereby, suggesting that the son has the right to the property of the father even during his lifetime, in his absence, the grandson has such right and in his absence, the great-grandson has such right.[33] Manu, further added that the son protects or saves the father from the hell called '*Put*', and therefore, he is called '*Putra*' that is '*Son*'. By this, it is suggested that the father is under the obligation of his son (in as much as he saves him from hell) and therefore, the son is entitled to a corresponding right in the father's property by birth. The obligation of the son arises also out of the son's birth.[34] Additionally, Manu said that oblations should be offered to the deceased father, grandfather, and great-grandfather. The offerer is the fourth-degree son. The fifth has no right to offer oblations, which means the son (great-grandson) has the right to offer water and '*Pind*' (rice-cake) to his father, grandfather, and great-grandfather but the great-great grandson (fifth-degree son) has no right to do so.[35] It is because of these reasons that the son was given a right by birth and this reasonably created the concept of the coparcenary. That is why the daughter was not given a share in the coparcenary property as she did not possess the religious qualifications of the son.

33 Manu, IX, 137 reads as "Through a son he conquers the worlds, through a son's son he obtains immortality, but through his son's grandson he gains the world of the Sun". Vide F. Max Muller (ed.), 25 *The Sacred Books Of The East,* 1st edn., in 1886, 354 (12th Ind. Rep. 2015).

34 Manu, IX, 138 reads as "*Because a son delivers (trayate) his father from the hell called Put, he was therefore called put-tra (a deliverer from Put) by the self-existent (svayambhu) himself*". Vide F. Max Muller (ed.), 25 *The Sacred Books Of The East,* 1st edn., in 1886, 354(12th Ind. Rep. 2015).

35 Manu, IX,186 reads as, "*To three (ancestors) water must be offered, to three the funeral cake is given, the fourth (descendant is) the giver of these (oblations), the fifth has no connection (with them)*". Vide F. Max Muller (ed.), 25 *The Sacred Books Of The East*, 1st edn., in 1886, 366 (12th Ind. Rep. 2015).

The daughter ceases to be a member of her paternal family upon marriage and joins and becomes a member of her husband's family. Therefore, coparcenary has a common ancestor or propositus and he forms coparcenary with his sons, grandsons, and great-grandsons.

If 'A' propositus dies leaving behind his sons, living or deceased (deceased son being represented by his son or sons), and grandson(s), then male descendants from next three generations would constitute a Mitakshara coparcenary. Therefore, for determining whether a male member of a Joint Hindu family is a coparcener or not, one has to take into account the living four generations including the common ancestor; among the living generations. The first generation in order is relevant being the propositus/last holder and the next three generations will be entitled to claim coparcenary rights and not the subsequent; however, the last holder can impose partition over the other male descendants. Only when the first generation ceases to exist, the fifth generation comes into the fold of coparcenary and so on. But, in 2005, while upholding the principle of equity and doctrine of equality, the lawmakers by amendment to the principal Act of 1956 provided to a '*daughter*' equal property rights by birth in the coparcenary property governed by Mitakshara law. And, sub-section (1) (b) of section 6 of the Act of 2005 makes it clear that, '*the daughter of a coparcener shall have the same rights in the coparcenary property as she would have had if she had been a son*'.

Conferment of coparcenary status

By enacting the Hindu Succession (Amendment) Act, 2005, the lawmakers have conferred on a '*daughter*' of a coparcener who is governed by Mitakshara law, a 'status' in law which is known as 'coparcener'. The said status in law is conferred on a '*daughter*' with effect from the date of her birth. The daughter has been confirmed an equal right in the coparcenary property as she would have had if she had been a son. Through legal fiction, she has been considered as a son; though she is not a son *i.e.,* a male child; she is a female by sex/gender; she (*daughter*) is she and she is not he- the son. In such a textual context, how can it be said that she, a '*daughter*', got coparcenary status in her own right and as not that of a son? Such kind of fiction, legal or non-legal, undermines the existence of a '*daughter*'. A daughter has her own persona in the family; she should be given status as she stands in her own right; and not as that of a son of her father. From the date of her birth, a '*daughter*' has become a coparcener along with her father, grandfather, and great grandfather including her siblings in her own right and not as that of a son of her father. Therefore, legal fiction does not appear to be gender neutral in letter and spirit.

The Amendment Act has overhauled the Mitakshara coparcenary by including a '*daughter*' as a coparcener by birth in her father's property; however, on a bare reading of the statute, it appears that her rights are the same as that of the son after the Amendment Act of 2005 came into force. But, the words '*same manner*' used in clause (a) of sub-

section (1) of section 6 denotes that her rights will be seen from a perspective of a son and not in an independent capacity. This may undermine the purpose of the Amendment Act if put to judicial scrutiny in the future. However, in *Danamma* v. *Amar,*[36] the Supreme Court of India held that: [37]

> The law relating to joint Hindu family governed by Mitakshara law has undergone unprecedented changes. The said changes have been brought forward to address the growing needs to ensure an equal treatment to nearest female relatives, namely the daughters of the coparcener. Section 6 of the Act stipulates that daughter would be a coparcener from her birth, and would have same rights and liabilities as that of the son of her father. Therefore, a daughter would hold property to which she is entitled as the coparcenary property, which would be construed as property being capable of being disposed of by her, either by Will or by any other instrument of disposition. These changes have been sought to be made on touchstone of equality, thus seeking to remove perceived disability and prejudice to which a daughter was subjected. Section 6 of the Act as amended, stipulates that on and from the commencement of amended Act of 2005, the daughter of a Mitakshara coparcener shall by birth become a coparcener in her own right in the same manner as that of the son. It is apparent that the status conferred upon sons under the old Hindu law was to treat them as coparceners since birth. The provisions of the amended Act of 2005 statutorily recognised the rights of daughters as coparceners as too well since their birth. The Section 6 of the Amended Act used the words, 'in the same manner as the son', which means that both the sons and the daughters of a Mitakshara coparcener have been conferred with the right of becoming a coparcener by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and the daughters of a Mitakshara coparcener become coparceners by virtue of birth. Devolution of coparcenary property comes at a later stage and as a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above. One of the incidents of a coparcenary is the right of a coparcener to seek partition which includes: (i) severance of status; and (ii) division of property by metes and bound. Hence, the rights of coparceners emanate and flow from birth, now including daughters, as is evident from sub-section (1) (a) and (b) of the Act of 2005.

36 AIR 2018 SC 721.

37 *Id*. at 729.

The High Court of Karnataka in *Pushpalatha N.V.* v. *V. Padma*[38] held that: [39]

> When the Hindu Succession Act 1956 was enacted, the legislature had no intention of conferring status and right which are conferred for the first time on a female relative of a coparcener including a daughter. Therefore, while enacting this substituted provision of Section 6 also it cannot be made retrospective in the sense that it is applicable to the daughters born before the Act came into force. Before amendment, the daughter of a Mitakshara coparcener was not conferred with the status being a coparcener. Such a status is conferred only by the Hindu Succession (Amendment) Act 2005. After conferring such status, right to coparcenary property is given from the date of her birth. Therefore, it should necessarily follow such a date of birth which should be after the Act came into force, i.e., June 17, 1956. There was no intention either under the original Act or the Act after amendment to confer any such right on a daughter of a coparcener who was born prior to June 17, 1956. Therefore, in this context also, the opening words of the amending Section 6 assume importance. The status of a coparcener is conferred on a daughter of a Mitakshara coparcener on and from the commencement of the Hindu Succession (Amendment) Act 2005. The right to property is conferred from the date of birth. But, both these rights are conferred under the Act and, therefore, it necessarily follows that the daughter of a coparcener who is born after the Act came into force alone will be entitled to a right in the coparcenary property and not a daughter who was born prior to June 17, 1956.

The court further held that: [40]

> By virtue of the substituted provision, what the Parliament intends to do is first to declare that, on and from the commencement of the Hindu Succession (Amendment) Act 2005 in a joint family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property which she would have had if she had been a son. Therefore, the Mitakshara law in respect of coparcenary property and coparcenary consisting of only male member came to an end. By such a declaration, the Parliament declared that from the date of amendment, Shastric and customary law of coparcenary governed by Mitakshara law is no more applicable and it ceased to exist.

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38 AIR 2010 Kant 124, 144.

39 *Id*. at 144.

40 *Pushpalatha N.V.* v. *V. Padma,* AIR 2010 Kant 124, 144-145.

> Thus, by virtue of the aforesaid provision, a right is conferred on a daughter of a coparcener for the first time. The said right is conferred by birth. Therefore, though such a right was declared in the year 2005, the declaration that the said right as a coparcener ensures to her benefit by birth makes the said provision retrospective. Though on the date of the birth she did not have such right because of the law governing on that day by amending the law, yet such a right is conferred on her from the date of the Act of 1956. A historical blunder depriving an equal right in spite of the Constitutional mandate is now remedied and the lawful right to which the daughter was entitled by virtue of the Constitution is restored to her from the date of her birth. This, the Parliament has done by using the express words that a daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son.

The High Court of Bombay in *Vaishali Satish Ganorkar* v. *Satish Keshorao Ganorkar* held that: [41]

> Ipso facto upon passing of the Amendment Act all the daughters of a coparcener in a Mitakshara coparcenary or a joint Hindu family do not become coparceners. The daughters who are born after such dates would certainly be coparcener by virtue of birth, but for a daughter who was born prior to the coming into force of the Hindu Succession (Amendment) Act, 2005 she would be a coparcener only upon devolution of interest in coparcenary property takes place.[42] Until a coparcener dies and his succession opens and a succession takes place, there is no devolution of interest; and hence, no daughter of such coparcener to whom an interest in the coparcenary property would devolve would be entitled to be a coparcener or to have rights or the liabilities in the coparcenary property along with the son of such coparcener.[43] A reading of Section 6 of the Act as a whole would, therefore, show that either the devolution of legal rights would accrue by opening of a succession on or after September 9, 2005 in case of daughter born before September 9, 2005 or by birth itself in case of daughter born after September 9, 2005 upon them.[44]

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41 AIR 2012 Bom 101.

42 *Id*. at 104.

43 *Ibid*.

44 *Id*. at 106.

Existence of coparcenary property

The lawmakers have imagined that there must be a coparcenary property in which a '*daughter*' shall have rights equal to the son. Here, one needs to understand that under Shastric Hindu law having property, movable or immovable, is not a pre-requisite of a Joint Hindu Family. Though a Joint Hindu Family is joint in food, worship, and estate; yet having estate is not a mandatory requirement of a Joint Hindu Family. In *Brij Narain Aggarwal* v. *Anup Kumar Goyal*,[45] the High Court of Delhi held that: [46]

> Sub-section 6 (1) envisages existence of a joint Hindu family, when the Amendment came into force and right of the daughter in Hindu undivided family coparcenary is to be determined if Hindu undivided family is in existence. Thus, the very first condition of the application of this amended provision is that on the day when Amendment Act came into force, a Hindu undivided family governed by Mitakshara law must be in existence. If a Joint Hindu Family is in existence on that day, the daughter shall be a coparcener in the joint Hindu family like any other son and shall have same right in the coparcenary as that of a son and shall be subject to the same liabilities in respect of the said coparcenary property as the son would be. If no Hindu undivided family is in existence on that particular day, when amended Act came into force, the question of daughter being coparcener does not arise.

Therefore, even after conferring the status of being a coparcener on a '*daughter*', the law cannot assure her that she will definitely be getting an interest in the coparcenary property. As a matter of law, she gets an interest in the coparcenary property only if there is coparcenary property in existence. At the time of Amendment of 2005 came into force, if there is no coparcenary property with the Joint Hindu Family to which her father is an undivided member, then the confirmation of status may not be fruitful for a daughter. If her father has only self-acquired property, in that property, she cannot claim any right during his lifetime. Though on his death, she being Class-I heir; she will get her equal share along with other surviving heirs. But, in her father's self-acquired property, she cannot claim any interest as a 'coparcener' because her father's self-acquired property does not form part of the coparcenary property. In such instances, it is significant to identify whether there is a need for a clause that may determine and give a right to a daughter in her father's property. In the case of self-acquired property, no person can claim a right by birth, be it a son or a daughter. However, in the case of a daughter, if she does not have any means and also the recognition as that of a son, then the status of a coparcener will not assist her in acquiring any right in property. Thus, getting equal property rights is far from reality.

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45 AIR 2007 Del 254.

46 *Id*. at 256. See also *Pravat Chandra Pattnaik* v. *Sarat Chandra Pattnaik,* AIR 2008 Ori 133.

Liability of a coparcener

'*Daughter*' as coparcener will be subject to the same liabilities in respect of the coparcenary property as that of a son. There is no clarity in sub-section (1)(c) of section 6 of the Act of 2005 on the words '*same liabilities*' as referred; to whether it is about 'pious obligation' or 'property obligation' or 'legal obligation'. At this juncture, one needs to understand that, 'pious obligation' which had been a core principle of filial relationship between the members of one's family of having different generations together, has been abolished by sub-section (4) of section 6 of the Act of 2005 with effect from September 9, 2005. Such omission of a core principle of Hindu law through legislation indicates the intention of the lawmakers that, 'daughter as coparcener shall not be under any obligation towards her father, grandfather, and great grandfather due to pious nature'. Whereas until this amendment, the son has been under the pious obligation to pay all debts-secured or unsecured, if any, towards his father, grandfather, and great grandfather. On a practical note, such practice reiterates that 'after marriage '*daughter*' performs religious rites or ceremonies towards her husband's father, husband's grandfather and husband's great grandfather being a daughter-in-law and becomes a member of her husband's family'. However, legal and property liabilities remain in force. This point indicates and proves that, 'the amendment was meant for confirming on '*daughter*' only property right and no filial obligation on her towards her natal family'. This results in the magnanimity of injustice towards the daughter-in-law, who contributes her whole life to the family of her husband, and is still not considered a 'coparcener along with her husband, his father, and grandfather'. Consequently, she being a daughter-in-law has no joint property in her matrimonial home, but she is a member of her husband's Joint Hindu Family. On the other hand, after marriage, '*daughter*' is not a member of the Joint Hindu Family of her father, but she is a coparcener along with her father, grandfather, and great grandfather including her siblings in her natal family; hence, she has an interest in the coparcenary property headed by her father and continues to have it even after her marriage though she ceases to be a member of her natal family on marriage. However, she continues to be a member of the coparcenary in her natal family.

A '*daughter*' is now recognised as a coparcener; however, one of the other questions which need to be addressed is her right as a *Karta* in a Joint Hindu Family. To become a *Karta* under Hindu law, a person must be a coparcener and a permanent member of the joint family. If both these conditions are fulfilled, then a '*daughter*' is entitled to become a *Karta* and enjoys her status, being *Karta*, and fulfils her obligations. But, as stated earlier, applying the same reasoning, a '*daughter*' who is a coparcener in her natal family and she is also a member in her Joint Hindu Family but on marriage, she goes to the next family, *i.e.*, the family of her husband and becomes a member to that family. A '*daughter*' on marriage becomes a daughter-in-law in the family of her husband where she is not a coparcener but becomes a member of the Joint Hindu Family. In

Commissioner of Income-Tax v. *Seth Govind Ram,*[47] the Supreme Court after reviewing the authorities took the view that the mother or any other female could not be the *Karta* of the Joint Hindu Family. This is in accordance with the text of Hindu law. According to Hindu sages (authorities), only a coparcener can be a *Karta*. Since females cannot be coparceners, they cannot be the *Karta* of the Joint Hindu Family. In contemporary Hindu families, it has become quite complex to determine whether a '*daughter*' gets any chance to become *Karta* in her own right in her natal family. At the same time, it is the same case for her in her husband's family. The ascertainment of the rights of a '*daughter*' in the family of her birth as well as the family of her marriage may create complexities owing to an unclear position as per the prevailing statutory provisions.

Daughter as coparcener

As the understanding given by section 6 of the Hindu Succession (Amendment) Act of 2005 making '*daughter*' of a coparcener governed by Mitakshara law as 'coparcener' makes it evident that '*daughter*' born to a Hindu male, who is governed by Mitakshara law, by virtue of birth becomes a coparcener from the date when this Act of 2005 came into force *i.e.,* September 9, 2005. Here, the law presumes that the father of a '*daughter*', who is in debate under section 6 of the Act of 2005, is already a coparcener in his father's coparcenary, and the '*daughter*' is a legitimate female child of her father, who seems to have been born to the legal wedlock of her father and mother. By reading section 6 (1)(a) of the Act of 2005, one realises that '*daughter*' on and from September 9, 2005, by birth becomes a coparcener, but the section nowhere mentions anything about the date/time or eventuality of birth. Such a proposition creates scope for academic debate and litigation. Further, the *proviso* attached with sub-section (1) of section 6 of the Act of 2005 creates the assumption to the extent that if any partition or alienation, or disposition of property has taken place before December 20, 2004, this amended section will not attract any legal consequences, but after December 20, 2004, the '*daughter*' must be made a party to such dispositions. Such demarcation of time for application of the provision of law creates an assumption in the mind of legal experts that the lawmakers must have presumed while drafting the law, daughter's existence in terms of retrospective order. Moreover, they must have also assumed that if coparcenary property has been disposed of by any legal instrument before December 20, 2004, and no share has been allotted to a '*daughter*'; in such circumstances, the law laid down in the redrafted section 6 of the Act of 2005 does not attract any legal consequences.

A date from which a '*daughter*' is to be counted as a coparcener is September 9, 2005, but the date of her birth is not at all deliberated and/or considered in the redrafted section 6 of the Act of 2005. Further, '*daughter*' means and includes a living (born alive), legitimate female child, and one whose parents are governed by Mitakshara law.

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47 AIR 1966 SC 2.

Furthermore, whether her father is or was alive at the time of the Act came into force *i.e.,* September 9, 2005, has not been made clear in the statutory provisions. Hence, such non-mentioning of the eventuality of the birth of a '*daughter*', who has been confirmed with the status being coparcener and the existence of the coparcener (father) when the Amended Act came into force has created a lot of litigation. The amended Act of 2005 makes a '*daughter*' by birth a coparcener in the family of her father indicating that the birth of a '*daughter*' is the date/moment from where her status and right being coparcener emerged. Such birth may be before, on, or after the amended Act of 2005 came into force. Further, the Act does not mention anything about the father to be alive or dead on the date when this Act came into force but it mentions that the '*daughter*' of a coparcener who is governed by Mitakshara law meaning thereby that the coparcenary must be in existence through her father to which she becomes a member.

In *Prakash* v. *Phulavati,*[48] the Supreme Court of India held that:[49]

> The legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment. Thus, no other interpretation is possible in view of express language of the statute. The proviso keeping dispositions or alienations or partition prior to December 20, 2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, explanation has to be read harmoniously with the substantive provision of Section 6 (5) by being limited to a transaction of partition effected after December 20, 2004. Notional partition, by its very nature, is not covered either under proviso or under sub-section (5) or under the explanation.

The court, further, held that: [50]

> Normal rule is that a proviso excepts something out of the enactment which would otherwise be within the purview of the enactment but if the text, context or purpose so require a different rule may apply. Similarly, an explanation is to explain the meaning of words of the section but if the language or purpose so require, the explanation can be so interpreted. Rules of interpretation of statutes are useful servants but difficult masters. Object of interpretation is to discover the intention of legislature. In

48 AIR 2016 SC 769.

49 *Id.* at 776.

50 *Id.* at 776-777.

> this background, it can be found that the proviso to Section 6 (1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to December 20, 2004 on which date the Bill was introduced. Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to December 20, 2004 is not to make the main provisions retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when conferred by the statute becomes available and is to be enforced. Main provision of the amendment in Section 6 (1) and (3) is not in any manner intended to be affected but strengthened in this way. Settled principles governing such transactions relied upon by the applicants are not intended to be done away with for period prior to December 20, 2004. In no case statutory notional partition even after December 20, 2004 could be covered by the explanation or the proviso in question. Hence, the rights under the Hindu Succession (Amendment) Act, 2005 are applicable to living daughters of living coparceners as on September 9, 2005 irrespective of when such daughters are born. Disposition or alienation including partition which may have taken place before December 20, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the explanation.

In *Badrinarayan Shankar Bhandari* v. *Omprakash Shankar Bhandari*[51] the High Court of Bombay held that: [52]

> A bare perusal of sub-section (1) of Section of the Hindu Succession (Amendment) Act 2005 would, thus, clearly show that the legislative intent in enacting clause (a) is prospective i.e., daughter born on or after September 9, 2005 will become a coparcener by birth, but the legislative intent in enacting clauses (b) and (c) is retrospective, because rights in the coparcenary property are conferred by clause (b) on the daughter who was already born before the amendment, and who is alive on the date of Amendment coming into force. Further, it would not matter whether the daughter concerned is born before 1956 or after 1956. This is for the simple reason that the Hindu Succession Act, 1956 when it came into force applied to all Hindus in the country irrespective of their date of birth. The date of birth was not a criterion for application of the principal Act. The only requirement is that when the Act is being

51 AIR 2014 Bom 151.

52 *Id*. at 172.

> sought to be applied, the person concerned must be in existence/living. The Parliament has specifically used the word 'on and from the commencement of Hindu Succession (Amendment) Act, 2005' so as to ensure that rights which are already settled are not disturbed by virtue of a person claiming as heir to a daughter who had passed away before the Amendment Act came into force.

The High Court of Bombay in *Vaishali Satish Ganorkar* v. *Satish Keshorao Ganorkar*[53] held that: [54]

> The general scope and purview of the Hindu Succession (Amendment) Act 2005 is to make all daughters coparceners so as to devolve upon them the share in coparcenary property along with and as much as all sons. The remedy that it seeks to apply is to remove gender discrimination in such devolution of interest. Further, it makes every daughter a coparcener by birth. The former law was that the daughter was not a coparcener by birth and no interest in a coparcenary devolved upon her by succession, intestate or testamentary. The legislation contemplated that on and from September 9, 2005 the daughter would become a coparcener by birth for the devolution of interest in coparcenary property. The Hindu Succession (Amendment) Act, 2005 received the assent of the President on September 5, 2005 and was published in the Gazette of India on September 6, 2005. The amended Section 6 of the Act was to come into effect expressly from September 9, 2005. In the Amended Act of 2005 mere protection is not granted to the daughter; they are given a substantive right to be treated as coparceners upon devolution of interest to them and even otherwise by virtue of their birth. This grant would affect vested rights, as in this case, when alienation and dispositions have been made. Hence, retrospectively such as to make the Act applicable to all the daughters born even prior to the amendment cannot be granted when the legislation itself specifies the posterior date from which the Act would come into force. The new rights granted to a daughter which would affect vested rights would be on a wholly different footing; and therefore, cannot be applied retrospectively.

IV Impact of statutory provisions on mitakshara coparcenary

Proviso attached with sub-section (1) of section 6 of the Act of 2005 makes it evident that, '*nothing 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'*. On December

53 AIR 2012 Bom 101.

54 *Id*. at 112-113.

24, 2004, the original Bill was introduced in the Rajya Sabha by the then Union Law Minister, H.R. Bhardwaj. Consequently, this day has become aa a cut-of-date for the execution of the coparcenary right of a '*daughter*' governed by Mitakshara law[55] and if any partition of the original coparcenary property has taken place before this date, the '*daughter*' shall not be considered eligible for any share from such partition. In light of words used in the proviso to sub-section (1) of section 6, it is clear that the substituted section has no application and it shall not affect or invalidate any disposition or alienation or partition or testamentary disposition which has taken place before December 20, 2004. In other words, if there is no disposition or alienation of property belonging to a Joint Hindu Family, the '*daughter*' who is conferred the status of a coparcener by virtue of which she gets a right by birth is entitled to the same rights in the coparcenary property in the same manner as the son. The language employed in the proviso is unambiguous and clear. The intention was to save disposition and alienation including any partition or testamentary disposition of property that had taken place before December 20, 2004.[56] Where the transaction of transfer/sale of coparcenary property in favour of the defendant purchaser took place prior to the enforcement of the Hindu Succession (Amendment) Act, 2005, and by the consent terms/decree the transaction/sale deed in favour of the defendant came to be confirmed by the father, the same would relate back to the date of original sale deed dated March 3, 2004. Therefore, merely because the consent terms were entered into on December 22, 2004, it cannot be said that the title in favour of the defendant has become clear and marketable only on and from December 22, 2004. Even on a fair reading of the amended section 6 of the Hindu Succession Act, any disposition or alienation of the ancestral property which had taken place before December 20, 2004, shall not affect or invalidate such disposition in view of the amendment to section 6 of the Hindu Succession Act. Therefore, what is stated is disposition or alienation and not with respect to a clear and marketable title. Thus, an amendment to section 6 of the Hindu Succession Act shall not affect the sale dated March 3, 2004, executed in favour of the defendant as the same as prior to the relevant date, *i.e.,* December 20, 2004. Even though there was a relinquishment deed executed by the daughter relinquishing her right from the land in question. The said relinquishment deed was also signed by the husband of the plaintiff. This relinquishment deed was executed simultaneously on the consent terms being arrived at between the father and sons on the basis of which the consent decree came to be passed. Under these circumstances, there is no question of doubting the relinquishment deed; and therefore, the trial court has materially erred in granting an injunction in favour of plaintiff daughter restraining defendant from transferring the property.[57]

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55 See Hindu Succesion Act, 2005 Sec 6, Sub s. 5 reads: "*Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004*".

56 *Pushpalatha N.V.* v. *V. Padma,* AIR 2010 Kant 124, 147.

57 *Virlkumar Natvarlal Patel* v. *Kapilaben Manilal Jivanbhai,* AIR 2009 Guj 184, 189-190.

Further, *in Jayaraman Kounder* v. *Malathi*[58] the High Court of Madras held that: [59]

> Right of a daughter to coparcenary property under Section 6 of the Act of 2005 is prospective. The properties sold by the father and brother in year 1994 are exempted from the Amendment Act of 2005. Daughters are entitled to a share in coparcenary property of Hindu joint family governed by Mitakshara law as coparcener.[60] They also have right to sue for partition against other coparceners including their father.[61] However, if the partition of Hindu joint family property has taken place before the Hindu Succession (Amendment) Act, 2005 came into force, daughter cannot claim share in the property under Section 6 of the Act.[62] Where property in question was sold in execution of decree for specific performance prior to enforcement of the Hindu Succession (Amendment) Act, 2005, therefore, execution of sale deed/alienation would not fall within purview of Section 6 (1) of the Act; hence, daughter cannot claim any right in such property.

While making the position clear about a preliminary and final decree and their impact on the nature of property in case of a partition, the Supreme Court in *Ganduri Koteshwaramma* v. *Chakiri Yanadi*[63] held that: [64]

> A preliminary decree determines the right and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. If in the interregnum, i.e., after passing of the preliminary decree but before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation.

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58 AIR 2019 Mad 113.

59 *Tasveer Paul Kaur* v. *Sukhmahinder Singh,* AIR 2009 (NOC) 2205 (P&H).

60 *Santilata Sahu* v. *Sabitri Sahu,* AIR 2008 Ori 86. See also *Mangilal* v. *Saligram,* AIR 2009 (NOC) 1273 (MP).

61 *Ram Belas Singh* v. *Uttamraj Singh* AIR 2008 Pat 81. See also *R. Kantha* v. *Union of India,* AIR 2010 Kant 27; *Phulavati* v. *Prakash,* AIR 2011 Kant 78.

62 *Sumathi* v. *Sengottaiyan,* AIR 2010 Mad 115.

63 AIR 2012 SC 169.

64 *Id*. at 172-173.

Further, the court held that: [65]

> Section 97 of the Code of Civil Procedure, 1908 provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree but that does not create any hindrance or obstruction in the power of the court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require.[66] Furthermore, the court held that it is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree. As such by passing of preliminary decree in partition suit before the stipulated date it cannot be said that the rights of daughter to share in coparcenary property is lost.

While analysing the creation and impact of the Repealing and Amending Act, 2015 on the status and right of a '*daughter*' who has been conferred with the status being coparcener since November 9, 2005, the High Court of Karnataka in *Lokamani* v. *Mahadevmma*[67] held that: [68]

> The Repealing and Amending Act, 2015 does not disclose any intention on part of Parliament to take away status of a coparcener conferred on a daughter giving equal rights with the son in coparcenary property. Similarly, no such intention can be gathered with regard to restoration of Sections 23 and 24 of the Principal Act which were repealed by the Hindu Succession (Amendment) Act, 2005. On the contrary, by virtue of the Repealing and Amending Act, 2015, the amendments made to the Hindu Succession Act in the year 2005, became part of the Act and the same is given retrospective effect from the day the Principal Act came into force in the year 1956, as if the said amended provision was in operation at that time. Thus, the equal rights conferred on the daughter by the Amending Act have not been taken away by the Repealing and Amending Act 2015. Further, the main object of a Repealing and Amending Act is only to strike out the unnecessary Acts and excise dead

65 *Ibid*.

66 *Id.* at 175.

67 AIR 2016 Kant 4.

68 *Id*. at 11-12.

> matter from the statute book in order to lighten the burden of ever increasing spate of legislation and to remove confusion from the public mind. In other words, the Repealing and Amending Act is enacted not to bring in any change in law, but to remove enactments which have become unnecessary. Thus, the Repealing and Amending Act, 2015 only expurgates the Hindu Succession (Amendment) Act 2005 along with similar Acts, which had served the purpose. Therefore, the repeal of an Amending Act has no repercussion on the parent Act which together with the amendments remains unaffected. The court further held that 'partition' excludes oral partition, palu-patti, and unregistered partition deed from the purview of word 'partition'. Only the partition affected by way of registered deed prior to 20th December, 2004, debars daughter from taking an equal share with son in coparcenary property. Further, sale deed in respect of portion of property which were executed after enforcement of the Amendment Act came into force and it was not saved by the proviso to Section 6(1). Such sale deed is liable to be set aside and the daughter is entitled to share in that property irrespective of the question of legal necessity and benefit of estate. Furthermore, even if property is purchased in the name of the daughters and cash and jewellery are given to them, it cannot take away their legal right as daughters to claim a share in the coparcenary properties.

In *Ratnamala Vilas More v. Tanaji Machindra Pawar*[69] with regards the entitlement and share of the '*daughter*' in the suit property, now in view of the law laid down by the Supreme Court in *Prakash v. Phulavati*[70] which is further confirmed and reaffirmed by the Supreme Court in *Dhanamma* v. *Amar*[71] the legal position is unequivocal that, now a '*daughter*' of a coparcener acquires by birth the status of coparcener in her own right in the same manner as the son. One of the incidents of coparcenary, being the right of a coparcener to seek severance of status, even a '*daughter*' can now avail right to partition. It was categorically held that "*even when the daughters are born prior to enactment of the Hindu Succession Act, 1956, in view of the amendment to Section 6 of the said Act in the year 2005, they also acquire the status of a coparcener by virtue of birth and hence they are entitled to sue for partition*".[72] It was further held that "*the amended provision of Section 6 of the Hindu Succession Act, statutorily recognises the rights of daughter as coparcener since birth, as the Section uses the words 'in the same manner as the son'*."[73] Therefore, in this case, both the daughter and son having been conferred the right of being 'coparcener by birth', and the right

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69 AIR 2018 Bom 260.

70 AIR 2016 SC 769.

71 AIR 2018 SC 721.

72 AIR 2018 Bom 260, 263.

73 *Ibid*.

to partition being inherent in the coparcenary property it can be availed of by any coparcener. Hence, in regard to the right of the daughter of suing for partition of her share in the suit property, the legal position is now fairly well crystallized, the finding of the appellate court denying her the said right, being against this legal position, is required to be quashed and set aside. Further, once it is held that the daughter, being coparcener by birth, has the right to sue for partition, it follows that in the said partition, the mother/widow, who is legally wedded wife of the deceased husband, is also entitled to claim partition and separate possession of her share in the joint family property.[74]

The High Court of Madras in *Bagirathi* v. *S. Manivanan*[75] has analysed the position of a '*daughter*' of a coparcener governed by Mitakshara law and also looked into the matter of whether the father is necessary to be alive at the time when the Amended Act of 2005 came in to force, or it is the coparcenary which needs to be in existence when this Act of 2005 became effective, and held that: [76]

> A careful reading of Section 6 (1) and (3) of the Hindu Succession (Amendment) Act, 2005 clearly indicates that a daughter can be considered as a coparcener only if her father was a coparcener at the time of coming into force of the amended provision. It is of course true that for the purpose of considering whether the father is a coparcener or not, the restricted meaning of the expression 'partition' as given in the Explanation to the said Section is to be attributed. Section 6 (1) is prospective in the sense that a daughter is being treated as coparcener 'on and from the commencement of the Hindu Succession (Amendment) Act 2005'. If such provision is read along with Section 6 (3), it becomes clear that if a Hindu dies after the commencement of the Act, 2005, his interest in the property shall devolve not by survivorship but by intestate succession as contemplated in the Act. In this case, the death of the father having taken place in 1975, succession itself opened in the year 1975 in accordance with the existing provision in Section 6 of the principal Act. In 1975, upon the death of the father, the property had already been vested with Class-I heirs including the daughters as contemplated in the unamended Section 6 of the said Act. Even though the intention of the amended provision is to confer better rights on the daughters, it cannot be stressed to the extent of holding that the succession which had opened prior to coming into force of the Amended Act is also required to be reopened, Section 6 as amended cannot be given retrospective effect.

74 AIR 2018 Bom 260, 263.

75 AIR 2008 Mad 250.

76 *Id*. at 255.

V Conclusion

Judiciary is the guardian of law of the land, *viz.*, the Constitution of India from where all laws derive their legitimacy; which protects the rights of people according to the law. Further, wherever there is a gap or inconsistency in the law, the Supreme Court of India invokes its power as provided under article 142 of the Constitution of India to do justice which is known as 'complete justice'. However, law making process lies with the legislators who try their best to enact legislation and provide proper legal instruments to the people, but sometimes due to the dynamic nature of changing needs of people, the legislation does not suffice all requirements of people. Similarly, even after the Hindu Succession (Amendment) Act, 2005 came into force on September 9, 2005, there was obscurity regarding the rights of a '*daughter*' in her father's coparcenary, albeit her status was determined. Either slow process of law-making or enactment of insufficient laws or misinterpretation and improper execution of law impact society at large. Eventually, such a practice creates a lot of litigation in society; coparcenary status and right of a '*daughter*' governed by Mitakshara law as bestowed by the Amendment Act of 2005 is such an example. The author has put forth arguments in this paper to clear the fallacies which may have persisted due to the said Amendment and has also examined the role of the judiciary in interpreting the words of legislation to a great extent.

The interpretation of any statute by courts is an art through which the intent of the lawmakers and objects behind the statute become lucid. There have been numerous judgments wherein the judiciary has staunchly risen to the occasion of defining the true spirit of a law. In *Hardeep Singh* v. *State of Punjab*,[77] the Supreme Court of India held that, "*The legislature cannot be presumed to have imagined all the circumstances and, therefore, it is the duty of the court to give full effect to the words used by the legislature*".[78] Further, when the Amendment Act of 2005 came into force through which a daughter's status was equated with that of a son, there were issues pertaining to her rights as a coparcener in her father's coparcenary property and also the time period of her claiming the share in property if a partition has already taken place in that joint family. The said primary issue coupled with certain ancillary issues regarding the partition and its nature was settled by the judiciary by interpreting the proviso attached with section 6 of the Act. Furthermore, in *Census Commr.* v. *R. Krishnamurthy*,[79] the Supreme Court of India held that, "*The courts do interpret the law and in such interpretation certain creative process is involved*".[80] It is imperative to understand that the role of courts is not merely confined to interpretation, but also to express the words magnificently in consonance with the

77 (2014) 3 SCC 92.

78 *Id*. at 115.

79 (2015) 2 SCC 796.

80 *Id*. at 806.

legal framework. In *Vineeta Sharma*'s[81] case, the Supreme Court of India used creative instincts and clarified the status and rights of a '*daughter*'; and also the living status of her father to acquire an interest in his coparcenary property. However, "*the court ought not to give a larger retrospective operation to a statutory provision than what can plainly be seen to have been meant by the legislature*" was held by the Supreme Court in *Sunder Dass* v. *Ram Prakesh*.[82]

The key complexity and challenges surrounding the Hindu Succession (Amendment) Act 2005 was its nature, *i.e.,* whether it was prospective or retrospective in its operation. To some extent, the *Danamma's*[83] case cleared certain aspects regarding the retrospective operation of the said Act; however, the Supreme Court in that case, also clarified that the Amendment will be applicable only to 'living daughters of living coparceners'. But, the retrospective operation has been settled now as per *Vineeta Sharma*'s[84] case which has categorically stated that it is not necessary that the father should be living when the Amendment of 2005 came into force. It is pertinent to mention here that, the Supreme Court of India in *Union of India* v. *Amrit Lal Manchanda*[85] has rightly opined, "*Judges interpret statutes, they do not interpret judgments. They interpret words of the statutes; their words are not to be interpreted as statues.*"[86] Similarly, Section 6 of the Act of 2005 and its effects were meticulously interpreted by the Supreme Court which has marked a new beginning for the daughter's status as well as her rights in the coparcenary property of her father. Hence, legal professionals, students, and research scholars need to understand the law, legal provisions, and legal interpretation from a holistic perspective.

Further, the author appreciates clubbing a number of appeals/cases/matters together for the timely disposal of cases and avoiding conflicting decisions on similar matters/issues. The author also appreciates such kind of practice in the disposal of matters but in the pretext of reducing the pendency of cases, such a practice shall not create future litigation on clubbing similar or different issues when put together and the decision of the court either does not answer all the questions or answer some questions involved in the matters or confused one issue over the other issue; hence, such kind of practice, if not exercised prudently, may create scope for future litigation due to over-emphasis on certain issues and less emphasis on other issues involved in the cases. Therefore, disposal by clubbing matters needs more clarity, application of the law, and judicious minds with a futuristic approach on the part of the lawyers, experts in domain areas,

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81 *Supra* note 15 .

82 (1977) 2 SCC 662, 669.

83 *Danamma* v. *Amar,* AIR 2018 SC 721.

84 *Supra* note 15.

85 (2004) 3 SCC 75.

86 *Id*. at 83.

and justices in the greater interest of the parties and society at large. In such a process, the registry of the court along with court managers and the technical staff play a crucial role in segregating pending cases/matters and putting them either on the bases of issues involved or warrant the cause of action in law and then putting them into a folder so that such cases/matters may be placed before the bench duly constituted for hearing of such cases/matters. If such practice is adopted at all levels in the hierarchy of courts in the country, then disposal of cases of similar nature/issues will become easy for the courts to dispose of a timely; and consequently, such practice will reduce the pendency of cases to a great extent.