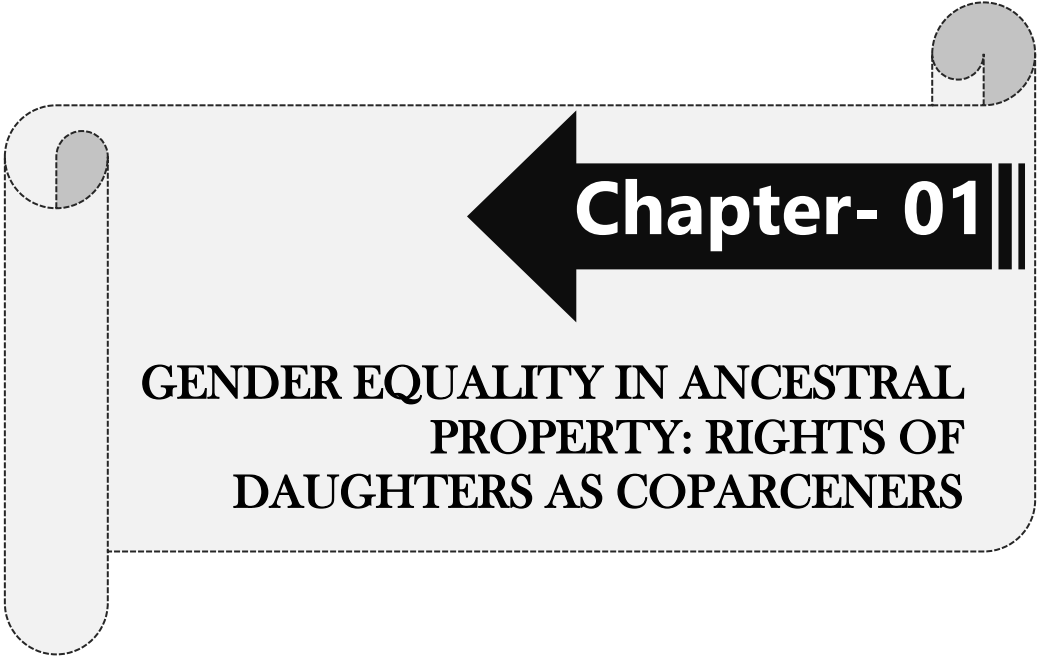




Chapter- 01

GENDER EQUALITY IN ANCESTRAL PROPERTY: RIGHTS OF DAUGHTERS AS COPARCENERS

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ABSTRACT

Coparcenary is a quasi-corporate body and it is creation of law. It has an automatic origin by birth or adoption in the family but cannot be created by mutual agreement between persons. The woman plays a paramount and momentous role in individual's life. Securing her better birth rights & giving greater proprietary rights would mean giving better future to our own society, family and to every individual. The gender inequality facets in different forms but the most tedious one percept relate to proprietary rights of woman. This disparity in proprietary rights pertaining to gender spells from ancient time. Before 1937, a widow used to only have a maintenance claim upon the family of her deceased husband. She was not given any right on the undivided coparcenary interest of her deceased husband. This paper attempts to make an analysis of several changes made for the purpose of giving greater proprietary rights to women from time to time in the same manner as provided to men.

Key words-Coparceners, Coparcenary System, Daughter, Father, Proprietary Right

INTRODUCTION

The institution of joint Hindu family is the unique feature of the Hindu society. Within the unit of Joint Hindu Family system there is narrower body known as coparcenary. It is a quasi-corporate body and it is creation of law. It has an automatic origin by birth or adoption in the family but cannot be created by mutual agreement between persons¹. Coparcenary includes the eldest male member + 3 generations. For example Son- Father- Grandfather-Great Grandfather. This group of people is known as **coparceners** and they have a right in ancestral property since the moment of their conception.

Essentials of coparcenary

1. **Unity of ownership**-The concept of unity of ownership applies to coparcenary i.e. entire coparcenary will be considered as a single unit for the ownership of the entire property and no individual coparcener without partition can declare that he is owner of entire joint property or part of it. The coparceners are called joint tenants of property i.e. the persons who are not aware as to how much share or interest they have in the property.
2. **Community of Possession**- The coparcenary also has community of possession over coparcenary property i.e. the entire coparcenary as a unit will possess the property. Thus even if one of coparceners is in possession but still it will be said

¹Ram Avadh v. Kedar Nath, AIR 1976 All. 283.

that he possess the property for all as if all of them together are possessing the property. Therefore the concept of constructive possession does not apply.

3. **Birth right in property**-In coparcenary, every individual coparcener has birth right in the joint property. Such birth right exists even when the child is in mother's womb. Individual coparcener always has the right to claim his share and get it determined and fixed i.e. he is free to claim partition at any point of time. And such partition will not be considered as transfer of title for the fact that coparceners are the joint owners of coparcenary property. Hence when they get their share determined through partition it will be mere declaration of their pre-existing title².
4. **Fluctuating interest**-Coparcener has birth right in property. So with every birth or death interest is increased or decreased. Since there is always a possibility of birth or death. Therefore coparceners have a fluctuating interest in the joint property and it will be fixed only upon partition.
5. **Spec- Succession**-As coparcener has fluctuating interest. Therefore no coparcener without partition, at a particular point of time can declare that what will be his share in future. Any such declaration of future share is a mere speculation i.e. mere chance of getting that much of property.
6. **Survivorship**-Since the entire coparcenary acts as a unit for the ownership of property. Therefore individual changes in coparcenary do not affect the unity of ownership. If some of the coparcener dies the ownership of surviving coparceners will continue i.e. ownership of property will be said to be survived upon the surviving coparceners. The rule of survivorship thus implies that if an individual coparcener dies leaving behind his undivided coparcenary interest, there will be no need to apply rule of succession to such undivided interest rather the ownership of such interest also will survive upon surviving coparceners.

Position of Woman Prior To Enactment of Hindu Succession Act, 1956 Before 1937, a widow used to only have a maintenance claim upon the family of her deceased husband. She was not given any right on the undivided coparcenary interest of her deceased husband.³

In 1937, The Hindu Women's Rights to Property Act 1937 was enacted and a change was made as per which if a coparcener dies leaving behind undivided coparcenary interest his widow will have life estate over that coparcenary interest. But

²V.N. Sarin v. Major Ajit Kumar Poplai AIR 1966 SC 432

³Sabitri Thakurain v. FA Savi, AIR 1933 Pat 306

she has not been treated as coparcener.⁴ During her life time, she enjoy it and after death it will revert back to the family. So, in 1937 limited proprietary right reforms were made in favor of woman. It was proprietary reforms not socio-religious reform.

Status of Woman after Enactment of Hindu Succession Act, 1956

In 1956 Hindu Succession Act was passed with the intention to provide greater proprietary interest to female and several changes were made like-

1. Life estate was converted into absolute property i.e. any property that a woman has as a life estate in lieu of her pre- existing right would become her absolute property.⁵
2. Survivorship was restricted. It was provided that if a male coparcener died leaving behind female heir of class I or male heir of class I claiming through such female then the undivided interest of deceased coparcener would not be governed by survivorship rather it would devolve through principle of succession.⁶

The purpose of the Hindu Succession Act 1956 is to remove inequalities between men and women with respect to rights in the property or we can say to give greater proprietary interest to female⁷. The above reforms were also in line with the constitutional mandate of gender justice enshrined in Article 14,15 and 21 of Indian Constitution.

Reasons to amend the Hindu Succession Act, 1956

The Law Commission of India submitted its 174th Report in respect of “Property Rights of Women: Proposed Reforms under the Hindu Law”. The Report starts as, “Discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of the Joint Hindu Family. It seems that this discrimination is so deep and systematic that it has placed women at the receiving end. Recognizing this the Law Commission in pursuance of its terms of reference, which inter-alia, oblige and empowerit to make recommendations for the removal of anomalies, ambiguities and inequalities in the law, decide to undertake the study of certain provisions regarding the property rights of

⁴SeethaBai v. Narasimha, (1945) ILR Mad 568

⁵Section 14(1) of Hindu Succession Act 1956

⁶Section 6 of Hindu Succession Act 1956 before 2005 Amendment

⁷https://thefactfactor.com/facts/law/civil_law/family_laws/hindu-laws/hindu-succession-act/3829/ visited on October 7, 2020

Hindu women under the Hindu Succession Act, 1956. The study is aimed at suggesting changes to this Act so that women get an equal share in the ancestral property.”⁸

It was realized that

1. Unless daughter is given a status of coparcener, there will be gender injustice in matter of partition.
2. Retainment of survivorship to any extent will affect the proprietary rights of other female.

Keeping these factors in mind, Hindu Succession Act 1956 was amended in 2005 which came into force on 9th September 2005 with the purpose to provide greater proprietary rights to female and to abolish survivorship. It was a revolutionary action in the field of legislation with respect to proprietary rights of women in India. The purpose was never to modified or change the coparcenary system or to bring about socio-religious changes rather it is evident from the reforms that the purpose was only to give greater proprietary rights to female and in that process if any intrusion is required upon essential features of coparcenary system then also the reforms will be done i.e. that much of intrusion was intended by the legislature.

In the above light, interpretation of 2005 Amendment Act should be limited only to the extent of gender equality and proprietary reform in favor of female.

Position after 2005 Amendment

1. **Section 6(1)** of Hindu Succession Act, 1956 was amended by Succession (Amendment) Act, 2005. It brought about the following changes-
 - (a) The daughter of a coparcener shall by birth become a copartner in her own right in the same manner as son.
 - (b) She has the same right in the coparcenary property as she would have had if she had been a son.
 - (c) She shall be subject to same liabilities in respect of the said coparcenary property as that of a son.
2. Succession (Amendment) Act, 2005 also abolished the doctrine of survivorship. Now the interest of the deceased coparcener will devolve by testamentary or intestate succession and not by survivorship.⁹

⁸ 174th Law Commission Report: Property Rights of Women: Proposed Reforms under the Hindu Law, 2000.

⁹ Subs. By Act 39 of 2005, sec.3, for section 6 (w.e.f. 9-9-2005).

3. Inheritance rights in all agricultural land are subject to the Hindu Succession Act (overriding State laws inconsistent with the Act).¹⁰
4. Some heirs has been included in Class I category.¹¹
5. Section 23 was omitted i.e. now daughters have the same rights as sons to reside in and claim partition of the parental dwelling house.¹²
6. Section 24 was omitted i.e. the mentioned categories of widows can inherit even if they have remarried.¹³

Daughter's status as coparcener-Daughter has been made a coparcener in the same right as that of a son. It means in reference to coparcenary property, she has same right and liability as a son. But there are several questions regarding her status as coparcener-

Q.1 Whether coparcenary is created prospectively or retrospectively since her birth?

Q.2 Even if it was created retrospectively, what about the partition or alienations which were made before the 2005 Amendment?

Q.3 Can a daughter coparcener be a source of coparcener?

Q.4 Can a daughter coparcener make a will of her undivided coparcenary interest?

Q.5 What conditions needs to be fulfilled to give her status of coparcener?

Whether coparcenary is created prospectively or retrospectively since her birth?

Her status of coparcenary ship was given retrospectively from the date of her birth. But at the same time interest of such person is to be protected whose interest had already been fixed before the commencement of 2005 Amendment by partition or alienation. As the very purpose of the Amendment was to give greater proprietary rights to female not to take proprietary rights of others. Therefore a restriction is imposed upon her right to reopening of partition or alienation done before 20th December 2004.¹⁴ But it is not all the partitions which are protected under this proviso. As per section 6 (5) of the Act only such alienation or partition which are registered or under the decree of the court is protected i.e. cannot reopened.¹⁵

¹⁰ Sub-section (2) of Section 4 of Hindu Succession Act omitted by Act 39 of 2005, sec. 2 (w.e.f. 9-9-2005)

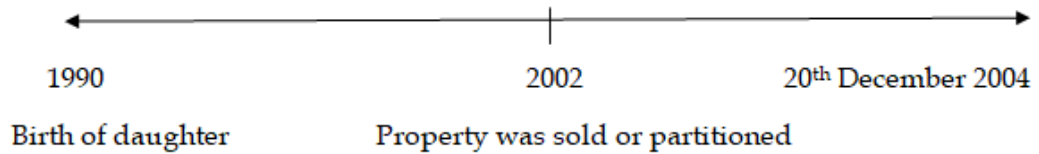
¹¹ Added by Act 39 of 2005, sec. 7 (w.e.f. 9-9-2005)

¹² Rep. by the Hindu Succession (Amendment) Act, 2005 (39 of 2005), sec. 4 (w.e.f. 9-9-2005)

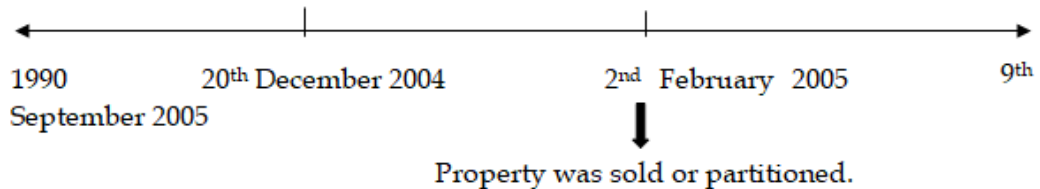
¹³ Rep. by the Hindu Succession (Amendment) Act, 2005 (39 of 2005), sec. 4 (w.e.f. 9-9-2005)

¹⁴ Proviso of Section 6(1) of the Hindu Succession Act.

¹⁵ Section 6(5) of the Hindu Succession Act



Daughter cannot claim reopening of this sale if it is registered or under the decree of court. Here interest of the buyer has been protected by section 6(5) of the Hindu Succession Act, 1956.



Property was sold or partitioned.

If the partition is done or alienation is made after 20th December 2004 and before 9th September 2005 then daughter is free to reopen such partition or alienation. The purpose behind this gap i.e. from 20th December 2004 to 9th September 2005 is to prevent the deliberate defeat of daughter's right which was tried to be done after the presentation of this bill by making malafide partition or alienation. The purpose was also to protect the rights of those daughters who were in mother's womb during that period.

Can a daughter coparcener be a source of coparcener¹⁶?

It simply means can children a daughter coparcener be considered as coparcener in her paternal family. Here we have to understand if she made a source of coparcenary it means her children will have double coparcenary i.e. they will be coparcener in their father's family and also in the family of their mother. This will complicate coparcenary structure/system. As the purpose of the amendment was proprietary reforms and not to violate coparcenary structure/system. Therefore she cannot be made a source of coparcenary.

¹⁶<https://www.livemint.com/money/personal-finance/jury-is-out-on-whether-daughter-s-children-have-rights-in-her-father-s-huf-11597393736631.html> visited on October 8, 2020

Can a daughter coparcener make a will of her undivided coparcenary interest?

Section 6(2) explicitly provides that she can make a will of her undivided coparcenary interest. Moreover even if section 6(2) would not be there, then section 30 read with section 6(1) impliedly provide that she can make a will of her undivided coparcenary interest.(as now a daughter enjoy similar status as that of son)

What conditions needs to be fulfilled to give her status of coparcener?

In *Prakash & Ors. v. Phoolvati & Ors*¹⁷, it was held that no doubt a daughter has birth right but section 6 (1) uses the word 'the daughter of coparcener has been made a coparcener'. Thus it is necessary that at the commencement of 2005 Amendment Act, her father is alive otherwise this language will not be justified and also joint property should be in existence at commencement of the Amendment Act 2005. Accordingly only that daughter will have status of coparcener who fulfills these conditions-

1. In 2005, joint property must exists.
2. Her father was also alive at the time of commencement of 2005 Amendment.

In *Danamma v. Amar*¹⁸ it was held that the amended provision of section 6 confer full rights upon the daughter coparcener. Any coparcener, including a daughter can claim a partition in the coparcenary property. The father, in the said case, died in 2001, leaving behind two daughters, two sons and a widow. Coparcener's father was not alive when the substituted provision of section 6 came into force. The daughters, sons and the widows were given 1/5th share each.

A Recent Stride towards Women's Right

Recently three judge Bench headed by Justice Arun Mishra in *Vinita Sharma v. Rakesh Sharma* 2020¹⁹, ruled that since the right in coparcenary is by birth. Therefore it does not matter whether or not father coparcener was alive on 9th September 2005. Daughter cannot be deprived of their right to equality conferred upon them by section 6 of Hindu Succession Act, 1956. The judgement also noted that several cases on this issue were pending before different courts and requested the pending matters to be decided within 6 months.

¹⁷ (2016) 2 SCC 36

¹⁸ (2018) 3 SCC 343

¹⁹2020 SCC Online SC 641, decided on August 11, 2020

CONCLUSION

Hence, we can say that the proprietary rights of women has been came a long way and had undergone many changes from time to time. The Hindu Succession (Amendment) Act, 2005 is an immense step in subverting patriarchal forces because it gives greater proprietary rights to women in the society. The Supreme Court in Vinita Sharma Case²⁰ has cleared the confusion about the law and make it clear that gender cannot be grounds for denying anyone their inheritance rights. The interpretation by the Supreme Court removed male primacy over Hindu ancestral property. These reforms were also in line with the constitutional mandate of gender justice enshrined in Article 14, 15 and 21 of Indian Constitution.

*"It took me quite a long time to develop a voice, and now that I have it, I am not going to be silent."*²¹

Madeleine Albright

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²⁰ Vinita Sharma v. Rakesh Sharma 2020 SCC Online 641

²¹<https://www.harpersbazaar.com/culture/features/a4056/empowering-female-quotes/> visited on October 9, 2020.