CHAPTER – V

RECENT CHANGES BROUGHT ABOUT BY THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

This amending Act of 2005 is an attempt to remove the discrimination as contained in the amended section 6 of The Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Simultaneously section 23 of the Act as disentitles the female heir to ask for partition in respect of dwelling house wholly occupied by a joint family until male heirs choose to divide their respective shares therein, was omitted by this Amending Act. As a result the disabilities of female heirs were removed. This is a great step of the government so far The Hindu Code is concerned. This is the product of 174th Report of the Law Commission of India on “Property Rights of Women: Proposed reform under the Hindu Law”. ¹

According to the amending Act of 2005, in a Joint Hindu Family governed by the Mitakshara Law, the daughter of a coparcener shall, also by birth become a coparcener in her own right in the same manner as the son heir. She shall have the same rights in the coparcenary property as she would have had if she had been a son. She shall be subject to the same liabilities and disabilities in respect of the said coparcenary property as that of a son and any reference to a Hindu Mitakshara coparcenary shall be deemed to include a reference to a daughter.

This provision shall not affect or invalidate any disposition or alienation including partition or testamentary disposition of property which had taken place before 20th December, 2004.

Further any property to which female Hindu becomes entitled by virtue of above provision shall be held by her with the incidents of coparcenary ownership and shall be regarded, as property capable of being disposed of by her by will and other testamentary disposition. The provision was also made that where a Hindu dies after the commencement of The Hindu Succession (Amendment) Act of 2005, his interest in the property of a Joint Hindu Family governed by the Mitakshara Law, shall devolve by testamentary or intestate succession under the Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

Further the daughter is allotted the same share as is allotted to a son.

The provision was also made that the share of the predeceased son or a predeceased daughter as they would have got, had they been alive at the time of partition, shall be allotted to the surviving child of such predeceased daughter.

Further the share of the predeceased son or a predeceased daughter as such child would have got, had he or she been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased daughter.

The most important fact is that 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.

This amending Act of 2005 has also clear provision that, after commencement of the amending Act of 2005, no court shall recognize any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great grandfather (on the ground of the pious obligation under the Hindu law), of such son, grandson or great grandson to discharge any such debt. But, if any debt contracted before the commencement this amending Act of 2005, the right of any creditor, to proceed
against son, grandson or great grandson, shall not affect or any alienation relating to any such debt or right shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if Hindu Succession (Amendment) Act of 2005 had not been enacted.

Further for the purpose of creditors right stated above the expression son, grandson or great grandson shall be deemed to refer to the son, grandson or great grandson who was born or adopted prior to the commencement (9\textsuperscript{th} September, 2005) of the amending Act of 2005.

Such provisions shall not be apply to a partition which has been done before 20\textsuperscript{th} December, 2004. Sections 23 and 24 omitted. Likewise special provisions relating to rights of dwelling house and the disentitlement rights of widow’s remarrying, respectively omitted from the Act. The amending Act also in the schedule of the Hindu Succession (Amendment) Act of 2005 added new heirs viz, son of a predeceased daughter, son of a pre deceased daughter, daughter of a pre deceased son.

Thus the amendment of Hindu Succession (Amendment) Act of 2005 is a total commitment for the women empowerment and protection of women’s right to property. This amending Act in a partrilineal system, like Mitakshara school of Hindu’s law opened the door for the women, to have the birth right of control and ownership of property beyond their right to sustenance.

\textbf{174\textsuperscript{TH} REPORT OF LAW COMMISSION OF INDIA ON “PROPERTY RIGHTS OF WOMEN: PROPOSED REFORMS UNDER THE HINDU LAW”}

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 amongst the members of a 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 empower to it make recommendations for the removal of anomalies, ambiguities and inequalities in the law, decided to undertake a study of certain provisions regarding the property rights of Hindu women under The Hindu Succession Act, 1956. The study was aimed at suggesting changes to this act so that women get an equal share in the ancestral property.²

Before any amendment in the law is suggested with a view to reform the existing law, it is proper that opinion is elicited by way of placing the proposed amendments before the public and obtaining their views and if possible by holding workshops etc. the commission thus decided to have the widest possible interaction with a cross section of society including judges, lawyers, scholars, NGO’s etc. by issuing a questionnaire. Their views were also elicited on several of the provisions introduced by certain state legislatures regarding the property rights of Hindu Succession Act, 1956. The main focus/thrust of the questionnaire was to elicited views on three issues namely:

(i) Granting daughters coparcenary rights in the ancestral property; or to totally abolish the right by birth given only to male members;
(ii) Allowing daughters full right of residence in their parental dwelling house; and
(iii) Restricting the power of a person to bequeath property by way of testamentary disposition extending to one half or one third of the property.

The commission received replies in response to the questionnaire. These replies have been analysed and tabulated.

Aiming at a wider and more intense interaction the law commission in collaboration with the ILS, Law College and Vaikunthrao Dempo Trust of Goa, organized a two way workshop on “Property rights of Hindu Women proposed Reforms” in Pune on 28-29 August, 1999. At this workshop the Chairman and

members of the Law Commission held detailed discussions with eminent lawyers and NGO's and teachers of ILS Law College, Pune. A working paper on coparcenary rights to Daughters under Hindu Law along with a draft Bill was circulated.

The law commission has carefully considered all the replies and the discussion at the workshop at Pune before formulating its recommendations to amend the Hindu Succession Act, 1956 with a view to giving the Hindu women, an equal right to succeed to the ancestral property.

To remove inequalities and Anomalies Discriminating women despite the Constitution guaranteeing equality to women, present in the Hindu law in the sphere of property rights. In our society maltreatment of a women in her husband’s family, e.g., for failing to respond to a demand of dowry, often results in her death. But the tragedy is that there is discriminatory treatment given to her even by the members of her own natal family.³

The law commission was concerned with the discrimination inherent in the Mitakshara coparcenary under section 6 of the Hindu Succession Act, as it only consists of male members. The commission in this regard ascertained the opinion of a cross section of society in order to find out, whether the Mitakshara coparcenary should be retained as provided in section 6 of the Hindu Succession Act, 1956, or in an altered form, or it should be totally abolished. The commission’s main aim is to end gender discrimination which is apparent in section 6 of the Hindu Succession Act, 1956, by suggesting appropriate amendments to the Act.

Section 6 of The Hindu Succession Act – A Study

The Hindu Succession Act, 1956 (hereinafter referred as the HSA) dealing with intestate succession among Hindus came into force on 17th June, 1956. This Act brought about changes in the law of succession and gave rights which were

hitherto unknown, in relation to a woman’s property. However, it did not interfere with the special rights of those who are members of a Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by Mitakshara and Dayabhaga schools as also to those in certain parts of Southern India who were previously governed by the Murumakkattayam, Aliyasantana and Nambudri systems⁴. The Act applies to any person who is a Hindu by religion in any of its forms of developments including a Virashaiva a Lingayat or follower of the Brahma Prarthana or Arya Samaj: or to any person who is Buddhist, Jain or Sikh by religion to any other person who is not a Muslim, Christian, Parsi or Jew by religion as per section 2. In the case of a testamentary disposition this Act does not apply and the interest of the deceased is governed by the Indian succession Act, 1925.

Section 4 of the Act is of importance and gives overriding effect to the provisions of the Act abrogating thereby all the rules of the Law of succession hitherto applicable to Hindus whether by virtue of any text or rule of Hindu law or any custom or usage having the force of laws, in respect of all matters dealt with in the Act. The HSA reformed the Hindu personal law and gave a woman greater property rights, allowing her full ownership rights instead of limited rights in the property she inherits under section 14 with a fresh stock of heirs under sections 15 and 16 of the Act. The daughters were also granted property rights in their father’s estate. In the matter of succession to the property of a Hindu male dying intestate, the Act lays down a set of general rules in sections 8 to 13.

Devolution of Inertest in Coparcenary Property

Section 6 of the HSA dealing with devolution of interest to coparcenary property states:

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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 with this Act:

Provided that, if the deceased had left him surviving a female in that class who claims through such 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.

Explanation 1 – For the purpose of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

Explanation 2 – Nothing contained in the proviso to his section shall be construed as enabling a person who has separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

Before the commencement of the HSA, codifying the rules of succession, the concept of a Hindu family under Mitakshara school or law was that it was ordinarily joint not only in estate but in religious matters as well. Coparcenary property, in contradiction with the absolute or separate property of an individual coparcener, devolve upon surviving coparceners in the family, according to the rule of devolution by survivorship.

Section 6 dealing with the devolution of the interest of a male Hindu in coparcenary property and while recognizing the rule of devolution by survivorship among the members of the coparcenary, makes an exception to the surviving a female relative specified in class I of schedule I, or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or
intestate succession under this act and not by survivorship. Further, under section 30 a coparcener may make a testamentary disposition of his undivided interest in the joint family property.

**The rules of survivorship comes into operation only**

(1) Where the deceased does not leave him surviving a female relative specified in class I, or a male relative specified in that class who claims through such female relative and,

(2) When the deceased has not made a testamentary disposition of his undivided share in the coparcenary property. The schedule to the Act read with section 8 provides the following twelve relations as class I heirs: son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of a predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of a predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

Section 6 contemplates the existence of coparcenary property and more than one coparcener for the application of the rule of devolution by survivorship. The head note of the section reads “Devolution of interest in coparcenary property”. The language of the main provision of the effect that “his interest in the property shall devolve by survivorship, upon the surviving members” indicates that the devolution by survivorship is with reference to the deceased coparcener’s interest alone; this is coupled with the national partition contemplate in explanation 1 in this section for the ascertainment of the interest of the no disruption of the entire coparcenary. It follows that the other coparceners, would continue to be joint in respect of the other coparcenary property till a partition is effected.

It has already been pointed out above that the main provision of this section deals with the devolution of the interest of a coparcener dying intestate by the rule of survivorship and the proviso speaks of the interest of the deceased
in the Mitakshara coparcenary property. Now, in order to ascertain what is the interest of the deceased coparcener, one necessarily needs to keep in mind the two explanations under the proviso. These two explanations give the necessary assistance for ascertaining the interest of the deceased coparcener in the Mitakshara coparcenary property. Explanation I provides for ascertaining the interest on the basis of a notional partition by applying a fiction as if the partition had taken place immediately before the death of the deceased coparcener. Explanation II lays down that a person who has separated himself from the coparcenary before the death of the deceased or any of the heirs of such divided coparcener is not entitled to claim on intestacy a share in the interest referred to in the section.

Under the proviso if a female relative in class I of the schedule or a male relative in that class claiming through such female relative survives the deceased, then only would the question of claiming his interest by succession arise. Explanation I to section 6 was interpreted differently by the High Courts of Bombay, Delhi, Orissa and Gujarat in the cases where the female relative happened to a wife or the mother living at the time of the death of the coparcener. It is now not the mother living at the time of the death of the coparcener. It is now not necessary to discuss this matter as the controversy has been finally set at rest by the decision of the Supreme Court in 1978 in Gurupad v. Heerabai and reiterated later in 1994 in Shyama Devi v. Manju Shukla wherein it has been held that the proviso to section 6 gives the formula for fixing the share of the claimant and the share is to be determined in accordance with explanation I by deeming that a partition had taken place a little before his death which gives the clue for arriving at the share of the deceased.

7 (1994) 6 SSC 342 (343).
Despite the Constitution guarantees equality to women there are still many discriminatory aspects in the law of succession against a Hindu woman under the Mitakshara system of joint family as per section 6 of the HSA as only males are recognized as coparceners.

The States of Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka have amended the provisions of HSA effecting changes in the Mitakshara coparcenary of the Hindu undivided family. These four states have declared the daughter to be coparcener. The state of Kerala, however, have totally abolished the right by birth and put an end to the joint Hindu family instead of tinkering with coparcenary. The consequence of this de-recognition of the members of the family, irrespective of their sex, who are governed by Mitakshara law is that they become tenants in common of the joint family property and become full owners of their share.

Recommendations given by the law commission

As a first reaction the law commission was inclined to recommend the adoption of the Kerala model in toto as it had abolished the right by birth of males in the Mitakshara coparcenary and brought an end to the joint Hindu family. this appeared to be fair to women as they did not have any right by birth; but on further examination it became clear that if the joint Hindu family is abolished as on date and there are only male coparceners, then only they would hold as tenants in common and women would not get anything more than what they are already entitled to by inheritance under section 6 of HSA. So the commission is of the view that it would be better to first make daughters coparceners like sons so that they would be entitled to and get their shares on partition or on the death of the male coparcener and hold thereafter as tenants in common. We recommend accordingly.8

The Andhra model does not do full justice to daughters as it denies a daughter, married before the Act came into force, the right to become a coparcener. Obviously, this was based on the assumption that daughters go out of family on marriage and thereby cease to be full members of the family. The commission wanted to do away with this distinction between married and unmarried daughters, but after a great deal of deliberation and agonizing, it decided, that it should be retained as a married daughter has already received gifts at the time of marriage which though not commensurate with the son’s share is often quite substantial. Keeping this in mind the distinction between daughters already married before the commencement of the act and those married thereafter appears to be reasonable and further would prevent heart burning and tension in the family. A daughter who is married after the commencement of the act will have already become a coparcener and entitled to her share in the ancestral property so she may not receive any substantial family gifts at the time of her marriage. Hopefully, this will result in the death of the evil dowry system.

The Kerala Act abrogated the doctrine of pious obligation of the son whereas the Andhra Model and others which conferred coparcenary rights on unmarried daughters are silent in this regard except that the daughter as a coparcener is bound by the common liabilities and presumably can become a karta in the joint family. We recommend the abrogation of the doctrine of pious obligation and that the daughter be a coparcener in the full sense.

Consequently, as above indicated, we have recommended a combination of the Andhra and Kerala Models. We are of the view that this synthesis is in keeping with justice, equity and family harmony.

We are also of the view that section 23 of HSA which places restrictions on the daughter to claim partition of the dwelling house should be deleted altogether. We recommend accordingly.

As noticed earlier, quite often fathers will away their property so that the daughter does not get a share even in his self acquired property. Apart from this,
quite often persons will away their property to people who are not relatives, thus totally depriving the children and legal heirs who have a legitimate expectation. Consequently, there has been a strong demand for placing a restriction on the right of testamentary disposition. But after due deliberation the commission is not inclined to the placing of any restrictions on the right of a Hindu deceased to will away property.

**STATE AMENDMENTS ON THE PROPERTY RIGHTS OF WOMEN:**

To overcome the lacuna and in order to make gender equality, the states of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu amended section 6 of Hindu Succession Act in 1986, 1994 and 1989 respectively stating that daughters to be a coparcener in joint Hindu family. Besides with the enactment of Kerala joint Hindu Family System (Abolition) Act in 1975, the state abolished fully the right to property by birth by males and put an end to the joint Hindu Family System. Likewise all the members became tenants in common of the joint family property and became full owner of their share.

The state of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu removed the discrimination inherent in Mitakshara coparcenary. The expression of provisions in Hindu Succession Act are almost similar with each other. Only difference poses is that Karnataka in respect of property rights of women inserts sections 6A, 6B and 6C and the States of Andhra Pradesh, Maharashtra and Tamil Nadu insert 29A, 29B and 29C in the Hindu Succession Act of 1956, the Central Act. These amendments contain non-obstante clause and at the same time provide equal rights to a daughter in the coparcenary property with the son. As per these amendments, in a joint Hindu family governed by Mitakshara law, the daughter of a coparcener becomes entitled to be a coparcener by birth in her own right in the equal scale as her brother and accordingly has similar rights in the coparcenary property and at same time be subject to similar liabilities and disabilities.

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9 State Amendments have been discussed in brief.
Again the daughter is entitled to equal share with her brother in the joint family coparcenary property on a partition of the said property. The provision also made clear that the share of the predeceased daughter son or predeceased daughter on such partition shall be shared by the surviving children of such predeceased son or predeceased daughter if alive at the time of partition. Another clarity in the provision is that the daughter can also dispose of the property in the form of will or other testamentary disposition because the property shall be held by her with the incident of coparcenary ownership.¹⁰

Moreover, the daughter can have double property rights. Firstly she became coparcenary property right owner in her natal joint family and secondly after her marriage she shall also be a member of her marital joint family. Hence it can be said that these four states have altered the system of Mitakshara joint family coparcenary.


1. The Hindu succession act 1956 has amended and codified the law relating to intestate succession among Hindus. The act brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women's property. However, it does not interfere with the special rights of those who are members of Hindu Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by the Mitakshara and Dayabhaga schools and also to those governed previously by the Marumakkattayam, Aliyasantana and Nambudari laws. The act applies to every person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahma Prarthana or Arya Samaj; or to any

¹⁰ State enactments are prospective in nature and not applicable to daughters who are married prior to or to a partition which has been effected before the commencement of such enactments.
person to who is Buddhist, Jain or sikh by religion; or to any other person
who is not a Muslim, Christian, Parsi or Jew by religion. In the case of a
testamentary disposition, this Act does not apply and the interest of the
deceased is governed by the Indian succession act, 1925\textsuperscript{11}.

2. Section 6 of the act deals with devolution of interest of a male Hindu in
coparcenary property and recognizes the rule of devolution by
survivorship among the members of the coparcenary. The retention of the
Mitakshara coparcenary property without including the females in it means
that the females cannot inherit in ancestral property as their male
counterparts do. The law by excluding the daughter from participating in
the coparcenary ownership not only contributes to her discrimination on
the ground of gender but also has led to oppression and negation of her
fundamental right of equality guaranteed by the constitution having regard
to the need to render social justice to women, the states of Andhra
Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary
changes in the law giving equal rights to daughters in Hindu Mitakshara
coparcenary property. The Kerala legislature has enacted the Kerala Joint
Hindu family system (Abolition) Act, 1975.

3. It is proposed to remove the discrimination as contained in section 6 of the
Hindu succession act, 1956 by giving equal rights to daughter in the Hindu
Mitakshara coparcenary property as the sons have. Section 23 of the Act
disentitles a female heirs to ask for partition in respect of a dwelling house
wholly occupied by a joint family until the male heirs choose to divide their
respective shares therein. It is also proposed to omit the said section so
as to remove the disability on female heirs contained in that section.

4. The above proposals are based on the recommendations of the law
commission of India as contained in its 174\textsuperscript{th} report on “Property Rights of
Women: Proposed Reform under the Hindu Law”.

5. The Bill seeks to achieve the above objects.

\textsuperscript{11} Dr. S.R. Myneni, Hindu Law (Family Law-1) 1\textsuperscript{st} edition, 2009 p. 493
THE HINDU SUCCESSION (AMENDMENT) ACT 2005- PRIMARY CHANGES INTRODUCED BY THE ACT:

The Hindu succession (Amendment) Bill was introduced in the parliament on 20 December 2004 and was passed by the Rajya Sabha on 16 August 2005 and the Lok Sabha on 29 August 2005 respectively. Based on the recommendations of the 174th Report of the law Commission on property right of women proposed reforms under Hindu Law its primary aim was to remove gender inequalities under the Act, as it stood before the amendment. The amendment also become necessary in view of the changes in Hindu Succession Act, 1956, in five Indian states namely, Kerala, Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra. The Bill received president’s assent on 5 September 2005 and it came into force on 9th September 2005\(^ {12}\).

It is noteworthy that while in Kerala, the joint family concept and the pious obligation of the son to pay his father’s debts were abolished the other four states retained both, additionally, introducing an unmarried daughter as a coparcener. The present Act incorporates changes that are a combination of the Andhra and the Kerala model. It retains the concept of joint family and introduces daughters as coparceners but abolishes the pious obligation of the son to pay the debts of his father. Besides these basic changes, it amends the concept of coparcenary, abolishes the doctrine of survivorship, modifies the provisions relating to devolution of interest in Mitakshara coparcenary, the provisions relating to intestate succession, the category of class I heirs, rules relating to disqualification of heirs and marginally touches the provision relating to testamentary succession. The primary changes introduced by the Act have been discussed in detail under the following headings.

(1) Deletion of provisions exempting application of the Act to agricultural holdings

With respect to the application of the Act, s 4(2), Hindu succession Act 1956, provided:

Section 4(2) – For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provision of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for fixation of ceilings or for the devolution of tenancy rights of such holdings.

Thus, if there was law that dealt with

(i) Prevention of fragmentation of agricultural holdings or
(ii) Fixation of ceilings or
(iii) Devolution of tenancy rights of such holdings

To such property and to the interests in such property the Hindu succession Act did not apply. At the same time, if a particular state did not have any such law, then the Hindu succession Act applied by default. It was only when express provision existed with respect to devolution of agricultural property owned by an individual or held by him as tenant of the respective state government (the ownership of the land vesting with the state, with the tenant having heritable cultivating rights) that the Hindu Succession Act 1956, did not apply.

By deleting s 4(2) confusion has been created, as the legislature has not provided any express provision, that states or confirms the application of Hindu Succession Act to agricultural property over and above any state law, that also deals with the same. These laws, which provide for prevention of fragmentation of agricultural holdings, fixation of ceilings and devolution of tenancy rights, apply to the inhabitants of the states uniformly, in respective of their religion. For example, the whole of
the agricultural land (unless otherwise provided) would be subject to a uniform law, and the religion of the land owner or the tenant, as the case may be, will be of no consequence. The deletion of s 4(2) and an implied presumption that after the amendment the Hindu Succession Act applies to all kinds of property including rights in agricultural land, would mean that now a diversity would exist state in agricultural property. All inhabitants of a particular state, to whom Hindu Succession Act does not apply, such as non Hindus, would still be governed by the state laws, while property of those subject to Hindu Succession Act would devolve in a different manner. An exception therefore would be created in favour of Hindus, generally diversifying the application of laws governing agricultural property.

The second point of confusion due to deletion of s 4(2) and absence of a provision extending the application of Hindu Succession Act over agricultural land, even if a parallel law enacted by a state exists, is with respect to the conflict that may arise over central or state legislations that are diverse in content. Inheritance and succession are subjects specified in list III, entry (v) while land is a state subject. Whether the centre is competent to legislate on agricultural land is a matter of dispute. Normally, if there is a subject on which both the centre as well as the state can legislate in case of the constitution the centre should be competent to legislate on it. This confusion is bound to crop up paving way for immense litigation in this area.

(2) Abolition of doctrine of survivorship in case of male coparceners

The Amending Act, by a specific provision, abolishes the incidents of survivorship one of the primary incidents of coparcenary when a male coparcener dies. Section 6(3) states.

Section 6(3) – where a Hindu dies after commencement of the Hindu Succession (Amendment) Act 2005, his interest in the property of a
joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession as the case may be under this act and not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

Thus, the traditional concept of coparcenary, where coparcenary property shelf with incidents of survivorship, stand abolished expressly by the legislature.

Under the classical law, the share of each coparcener fluctuated with births and deaths in the family. It decreased with the birth of a coparcener and increased with the death of a coparcener. On the death of coparcener, his interest was taken by the surviving coparceners and nothing remained for his female dependents. This rule was first modified by the Act of 1937, where the coparcener’s widow was permitted to hold on to his share for the rest of her life, and only on her death, the doctrine of survivorship applied and the male collateral could take the property.

The application of doctrine of survivorship was further diluted in 1956, when the Hindu succession Act was enacted. The Act confined the application of doctrine of survivorship only to cases where a male Hindu died as a member of Mitakshara coparcenary, having an undivided interest in the property and did not leave behind him, a class I female heirs or the of his predeceased daughter. In such cases, the application of doctrine of survivorship was expressly saved by the Act. However, if there was any class I female heirs present or the son of his predeceased daughter, then the application of doctrine of survivorship was defeated and the interest of the male Hindu in the Mitakshara coparcenary, calculated after effecting a notional partition, went by intestate succession in accordance with the Act. Thus, the application of doctrine of survivorship was conditional upon an undivided male coparcener dying without leaving behind any of these nine heirs. As per the present Act, the
doctrine of survivorship has been abolished unconditionally. Now, if any male Hindu dies, having at the time of his death, an undivided interest in Mitakshara coparcenary, the rule of survivorship would not apply to any class of heirs.

For example, a Hindu family comprises of a father f, and two sons S1 and S2 who form an undivided coparcenary. Each of them would have a one third share in the joint family property. Then, S2 dies as a member of this undivided coparcenary.

\[ F \]
\[ S_1 \quad S_2 \]

Under the old law, on the death of S2 the surviving coparceners would have taken the share of S2 by survivorship and their share would have increases to a half each. Thus, both F and S1 would have entitled to one half of the property on the death of S2.

After the amendment, and with the abolishing of doctrine of survivorship, the share of S2 would be calculated after affecting a notional partition, and that would come to one third. This one third would not go by doctrine of survivorship and would go by testamentary or intestate succession as the case may be. If there is no will, then this one third would go according to the Hindu succession Act, as per which as between the father and the brother, the father will be preferred and the brother will be excluded from inheritance in his presence. Therefore, the father will get two third of the total property and the brother would take one third.

Thus, abolition of doctrine of survivorship creates unequal rights between surviving coparceners vis-a-vis each other, which is contrary to
the basic concept of coparcenary. Here, no purpose seems to be served by the abolition of this doctrine.

It should be noted that with retention of doctrine of survivorship, the legislature in 1955 had not distorted the concept and incidents of coparcenary, and at the same time had not given the females an unfair deal. This doctrine was applicable only when none of the class I female heirs was present. The presence of even one of the class I female heirs would have altered the mode of devolution of property from survivorship to intestate or testamentary succession, as the case may be. Presently, there is a direct application of succession laws. For example, a Hindu joint family comprises father f, his wife, and two sons S1 and S2 if any of the male members died between 1956 to September 2005, the doctrine of survivorship, even though expressly retained by and not abolished by the legislature, would not have applied, due to the presence of W, who is a class I female heir.

Therefore, abolition of doctrine of survivorship was unnecessary as to useful purpose is served by it. Rather, there is confusion and the newly introduced inequality amongst the coparceners, as illustrated above, may be disadvantageous to the family members.

(3) Introduction of daughters as coparceners:

One of the major changes brought in by the amendment is that in a Hindu joint family, the exclusive prerogative of males to be coparceners has been changed altogether and the right by birth in the coparcenary
property has been conferred in favour of a daughter as well. This radical change has fundamentally altered the character of a Mitakshara coparcenary. Before the central enactment, four Indian states had brought in a similar change, introduction of daughters as coparceners. At present, instead of only the son having a right by birth, any child born in the family or validly adopted, will be a coparcener and would have an interest over the coparcenary property. Thus the traditional concept that only males could be members of the coparcenary and no female could ever be a coparcener nor could own coparcenary property is no longer the law. According to S 6.

In a joint family governed by the Mitakshara Law, the daughter of a coparcener shall –

a. By birth become a coparcener in her own right in the same manner as the son.
b. Have the same rights in the coparcenary property as she would have had if she had been a son.
c. Be subject to the same liabilities in respect of the said coparcenary property as that of a son.

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

According to this provision, the discrimination against daughter has been brought to an end, as her rights and liabilities are the same as that of a son. This also means that a daughter is now capable of acquiring an interest in the coparcenary property, demand a partition of the same, and dispose it of through a testamentary disposition. Further, daughters would not only be empowered to form a coparcenary along with their other siblings (irrespective of gender), but would also be competent to start a joint family herself. She can even be a karta, throw herself acquired earnings into the joint family fund, something that was not possible before
the amendment. The rule that females cannot form or start a joint family on their own but can continue it even on the death of a male member in the family but provided they have the capacity to add a male member to it by birth or through adoption, stands abrogated now. In other words, all the prerogatives and uniqueness of a son’s position in the family is available to a daughter as well.

Section 6(2) makes it very clear that a female Hindu would be entitled to hold property with the incidents of coparcenary ownership. Therefore, a distinction has been created between female members of joint family in relation to their rights over the joint family property. The two classes of females are one, who are born in the family and secondly, those who become members of this joint family by marriage to the coparceners. Females, who are born in the family ie, daughters, sisters possess a right by birth in the coparcenary property and those who become members of the joint family by amendment. Their rights over the joint family property continue to be the same, like maintenance out of its funds, a right of residence in the family house, etc.

(4) Marital status of daughter

It is noteworthy that under the Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra amendments to the Hindu succession Act 1956, daughters of coparceners, who were married on the day the amendment, was enforced in each state respectively, could not become coparceners. Only daughters who were unmarried on such date could become coparceners. Besides, as the legislature provided that their coparcenary rights were identical to that of sons, their future marital status did not divest them of coparcenary rights. They continued to be coparceners even after marriage and even their children had a right by birth in the coparcenary property. Daughters who were married on the date of enforcement of amendments did not get the benefit under the
amendments. In fact, this provision creating distinction between the rights of a married and unmarried daughter was also challenged in Karnataka High court in a case, and the court had justified the distinction and exclusion of a married daughter on the ground that it was based on a sound policy of the legislature. A contrary stand would have created chaos in the society and would have disturbed settled claims and titles. Under the present amendment, a daughter of a coparcener is included as a coparcener herself without any reference or limitation with respect to her marital status. Therefore, after 6\textsuperscript{th} September 2005, a daughter who was married even before this date, would be a coparcener. It is interesting to note that the married after marriage, but would nevertheless be a member of coparcenary, with an entitlement to seek partition of the joint family property in her own right. To that nothing contained in this subsection shall affect or invalidate any disposition or alienation including an partition or testamentary disposition effected before 20\textsuperscript{th} December 2004.

This was necessary so that settled rights should not be disturbed. However, a joint family where a daughter has been married before 20 December 2004, and the male members have not effected a partition, would now have to share this property with their married sisters, as the daughter, irrespective of their marital status, have become coparceners. For example, a family comprises father F, his wife W two sons S1 and S2 and two daughters D1 and D2.

\[ \begin{array}{cccc}
F & \rightarrow & W \\
S_1 & | & S_2 & | & D_1 & | & D_2 \\
\end{array} \]

D1 gets married in 1990. As the law stood before the amendment of 2005, D1 would cease to be a member of her father’s joint family upon her marriage. The rest of the family continues to be joint and enjoys the
joint upon her marriage. The rest of the family continues to be joint and enjoys the joint family property together. This situation continues till September 2005. Till now D1 did not have any right over the joint family property nor was even a member of it, but now not only she will become a coparcener, she would have the same rights in the joint family property as her brothers would have. She is entitled to demand a partition and would also get an equal share like her brothers at the time of such partition. If she dies without seeking partition, a notional partition would be affected to ascertain her share which would go to her heirs. Therefore, not only the unmarried daughter, but daughters in general, are benefited by this amendment.

In order to avoid confusion and give meaning to this provision, the partitions and alienation effected prior to 20 December 2004, have been expressly saved. For example in figure given above, if after the marriage of D1, a partition was effected among the family members, or the father as the karta of the family had alienated a portion of the joint family had alienated a portion of the joint family property for a legal necessity, the validity of the partition and the alienation if otherwise valid, cannot be challenged. The married daughter, even though might have been a coparcener, would not be entitled to reopen the partition already affected, nor would be empowered to challenge the alienation affected before such date, on the ground that her consent was not obtained for it.

(5) Property held by daughters with incidents of coparcenary ownership

The amendment clarifies that the joint family property would be held by the daughters, as they have become coparceners with incidents of coparcenary ownership section 6(2) states:

Section 6(2) – Any property to which a female Hindu becomes entitled by virtue of sub section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded notwithstanding anything
contained in this Act or any other law for the time being in force as property capable of being disposed of by her by testamentary disposition.

Thus according to s 6(2) a female would hold the property with incidents of coparcenary ownership. The legislature has not explained nor provided anywhere as to what these incidents of coparcenary ownership are. Thus the natural step would be to seek their explanation under the classical law under which there are two basic incidents of coparcenary ownership. First, that each coparceners holds the property with the incidents of unity of possession and community of interest, i.e., all coparceners jointly have the title to the property and joint possession of the property. Till the time a partition takes place, no one can predict what his share is. Secondly, all coparceners hold the property with incidents of doctrine of survivorship i.e., on the death of the one coparcener, his interest in the coparcenary property is taken by the surviving coparceners and not by his heirs. Does this mean that the doctrine of survivorship would apply in case of female coparceners and not male coparceners, as the legislature expressly provides, that the female coparceners, would hold the property with incidents of coparcenary, survivorship being one of such basic incident, or does it means that if the female coparceners would hold property with incidents of coparcenary, survivorship being one of such basic incident or does it mean that if the legislature has abolished that application of doctrine of survivorship for male coparceners, and female coparceners would hold the property and they share exactly in the same manner as the male, it stands abolished for them too? By the abolition of the doctrine of survivorship in case of male coparceners by an express provision, the legislature has created another confusion. It is a fundamental rule in laws relating to inheritance and succession that the term his does not include her. This must have been the reason why the legislature amended s30 of the Act to add her after him. The use of the term his interest and not his or her as has been used in s 30, clearly suggests that it is only in case of an undivided male Hindu dying that
doctrine of survivorship would not apply and if a female coparcener dies, the doctrine of survivorship may apply. Besides, explanation to s 6(3) states:

(6) Retention of the concept of notional partition

The amendment retains the concept of notional partition but modified its application. Prior to this amendment, notional partition was effected only if the undivided male coparcener had died leaving behind any of the eight class I female heirs or the son of a predeceased daughter and did not apply generally in every case of death of a male coparcener. The present amendment makes application of notional partition in all cases of intestacies. Section 6(3) states:

Section 6(3) – Where a Hindu dies after the commencement of the Hindu succession Act, 2005 his interest in the property of joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession as the case may be under this Act, and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place.

From the language of the section, two things are clear. First, the doctrine of survivorship stands abolished in case of male coparceners, and secondly, in all cases where a Hindu male dies, his interest in the Mitakshara coparcenary would be ascertained with the help of a deemed partition or a notional partition.

(7) Calculation of shares while affecting a notional partition

The present Act provides in detail the calculation of shares while affecting a notional partition. Section 6(3) provides.

(a) The daughter is allotted the same share as is allotted to the son.
(b) The share of the predeceased son or predeceased daughter, as they would have got had they been alive at the time of the partition, shall be allotted to the surviving child of such predeceased son or of such predeceased daughter and

(c) The share of the predeceased child of a predeceased son or of a predeceased daughter as such child would have got had he or she been alive at the time of the partition shall be allotted to him as if a partition has taken place immediately before this death, irrespective of whether he was entitled to claim partition or not.

At present if a minor child dies, irrespective of the sex, his or her share would be calculated after effecting notional partition and such share would go by intestate or testamentary succession, as the case may be.

(8) Devolution of coparcenary interest held by a female

According to the amending Act, a female coparcener would hold the property with incidents of coparcenary ownership, but does not specify how the property would devolve if she dies. If a Hindu female seeks partition of coparcenary property gets her share, marries and then dies, who would succeed to this interest, her husband or her natal family members? This question is very significant in case of females, as in accordance with the rules of intestate succession, her property that may be available for succession is divided into three specific categories:

(i) Property that she may have inherited from her parents;
(ii) Property that she may have inherited from her husband and or father in law;
(iii) And any other property.

Coparcenary interest is acquired by a daughter by birth and thought it comes from the family of her father, it is not an interest that she has inherited from her parents. In such a case, it will obviously be covered by
the third category, i.e., any other property or general property. In such a situation her heirs would be her husband, her children and children of predeceased children. It would also mean, that if she dies issueless after seeking partition, her husband would succeed to her total property including this interest that she had in the coparcenary property. Similarly, if she dies without seeking partition, then her share would be ascertained by affecting a notional partition, and the share so calculated would be taken by her husband as her primary heir. This interpretation seems contrary to s 6(3) which in the first instance provides that if a Hindu dies after the commencement of the Hindu Succession Act 2005, his interest in the property of a joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession. As the case may be under this Act, not by survivorship and the coparcenary property shall be deemed to have been divided as if a partition had taken place. By using the term his interest and not his or her interest a doubt has already been created whether this section applies at all when a female coparcener dies. Assuming that it does apply to a female absence of a will, as per which the husband would take the property along with her children or children of predeceased children.

The substance of S 6(3) (b) and (c), however, lends support to the argument that s 15 of the Act does not apply to the interest of a female coparcener and her interest goes only to her children. It clearly provides, that where a partition takes place and one of the child is already dead, bit has left behind a child or child of a predeceased child, the share of the predeceased son or a predeceased daughter as they would have got had they been alive at the time of the partition shall be allotted to the surviving child of such predeceased son or predeceased daughter. So, if a female coparcener dies without seeking partition then partition would take place, her share will be allotted to her surviving children, and the husband even if alive, will not get any share. This is in contrast to s 15, where the spouse
succeeds along with the children of a female. A contradiction has been introduced between the first part of s 6(3) and sub cl. (b) and (c).

(9) Separation of son during the lifetime of father

Under the old law, if a son sought partition during the lifetime of father, and separated from the family after taking his share, the remaining family continuing and maintaining the joint status, on the death of the father neither such separated son nor any of his heirs, were eligible to take any claim out of the share of the father. For example:

A Hindu family comprises of father F, and his two sons S1 and S2 is married and has a wife W1 and a son SS. S1 seeks partition in 2000, takes his one third share in the joint family property and goes out of the family. The father dies in 2003. His share in the remaining joint family property would have gone to S2 and S1 would not be taken into account at all.

In the same illustration, if S1 died in 2001 and then the father dies in 2003, even then neither W1 nor SS would have any claim over the undivided share of the father in the joint family property. However, after the amendment and with the abolition of the doctrine of survivorship in the same situation, if S1 seeks partition and takes his share and goes out of the family, S2 and F remaining joint, on the death of F, in October 2005 the doctrine of after effecting a notional partition would go straight away by
intestate succession as per which both S1 and S2 would share equally. This means that a separated son after having taken his share from the joint family property would again claim a share if and when any member of the coparcenary dies intestate.

In the same illustration and in the second situation contemplated above where the separated son dies before the father and leaves behind his widow and son, these heirs were incapable to inherit the share of the father as they would be deemed to be dead. However, after the amendment when S1 dies W1 and SS alone will inherit his property that he had taken out of the joint family property and now when F dies, then again both of them would take a share out of his property in the capacity of widow of predeceased son and son of a predeceased son. It appears not only anomalous but inequitable too.

(10) Abolition of pious obligation of son to pay the debts of father

One of the features of classical Hindu law that imposed upon a son grandson or great grandson the liability to pay their father’s debts has been abrogated by the present amendment. The emphasis to pay the father’s debts was so strong that if the son had to pay his and his father’s debts, it was provided that he should pay his father’s debts first to free him from a leading a life of bondage in the next life. At the same time as a logical rule the debts contracted before the enforcement of the amendment are subject to the rules of classical Hindu law. It is the date of contracting of debts that would be decisive to determine as to which law would apply the law prior to the amendment or subsequent to it. Section 6(4) states:

Section 6(4) – After the commencement of the Hindu succession Act 2005, no court shall recognize any right to proceed against a son, grandson or great grandson for the recovery of any debt due from his father, grandfather or great grandfather solely on the ground of the pious
obligations under the Hindu law of such son, grandson or great grandson to discharge any such debt:

Provided that in case of any debt contracted before the commencement of the Hindu Succession Act 2005, nothing contained in this sub section shall affect

(a) The right of any credit to proceed against the son, grandson or great grandson as the case may be or

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

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

At present the repayment of debts contracted by any Hindu would be his personal responsibility and the male descendants would not be liable to the creditor.

(11) Applicability of Amending Act to partitions affected before 20 December 2004

The Amending Act is prospective in application and therefore, its provisions would not apply to any partition that was affected before 20 December 2004. Section 6(5) states:

Section 6(5) – Nothing Contained in this section shall apply to a partition, which has been effected before the 20th day of December 2004.
(12) Recognition of oral partition

The amending Act clearly says that the term partition used in this whole section means a partition that is in writing and duly registered or the one that is affected by a decree of court in essence, proving which would be easy. It should be noted that under the classical law partition can be even oral or in writing. Since partition does not amount to a transfer of property within the meaning of § 5, Transfer of Property Act 1882, it is not required to comply with the primary formalities of transfer of property i.e., writing attestation and registration. However the present Act makes it clear that the terms partition refers to only those partitions that are either executed in writing and registered as per the Registration Act 1908, or have been undertaken in pursuance to the decree of a court. The Act provides:

Explanation – For the purposes of this section partition means any partition made by execution of a deed of partition duly registered under the Registered Act 1908 or partition affected by a decree of a court.

(13) Abolition of special rules relating to dwelling house

One of the major gender discriminatory provisions under Hindu Succession Act, 1956 was § 23, which specified special rules relating to devolution of a dwelling house. Section 23, as it stood before it was abrogated, provided.

Section 23 – Where a Hindu intestate has left surviving him or her both male and female heirs specified in class 1 of the schedule and his or her property includes a dwelling house wholly occupied by members of his or her family then notwithstanding anything contained in this Act, the right of any such female heir to claim partition of the dwelling house shall not arise female heir is a daughter, she shall be entitled to a right of residence
in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

Under this section, the right of female class I heirs was limited to a right of residence in the dwelling house. Their ownership did not vest in them a right to have the house partitioned and specifying of their shares, till the male heirs chose to destroy their joint status themselves. In case the female heir was a married daughter, her ownership was without even a right of residence unless she was unmarried widow or was deserted by or separated from her husband. In other words, her marital status and her relations with her husband had a direct reflection on her need to have a residence in her own property.

The purpose envisaged by the legislature for enacting this provision was to defer the actual partition of the dwelling house that was actually and wholly in occupation of the male heirs until they themselves chose to destroy their joint status. Thus, the fragmentation of the dwelling house at the instance of male heirs only was permissible despite the fact that they might be the owners of a fractional share. For example, on the death a Hindu father his wife W, four daughters D1, D2, D3, D4 and a son S inherited his house.

Here, the son was the owner of only one sixth of the house, yet it was only who at whose instance the house could be partitioned. Even if all the remaining five co sharers wanted to demarcate their shares, they could not do so. Further if all the daughters were married the son though was the owner of one sixth the house had a legal right to occupy the share of all of his sisters without their consent.
The practical implication of this statutory interdict on a female heir to claim partition of the house till the male heir decides otherwise, resulted in the denial of any claim over the house. They had its ownership but no right to ascertain which portion of the house had come as their share. A married daughter had no right residence in it. Further, in case there was only one male heir then the fact of partition could never arise and despite the fact that the section used the expression in plural i.e. male heirs dividing their respective shares the judicial interpretation had been that the restriction applied even in case of there being a single male heir. This was a major setback on the inheritance rights of women, as discrimination was visible not only on grounds of sex alone, but also on the marital status of daughters. In presence of male heirs in the family the females could not partition their shares and married daughter could not live in their own portions without the consent of the brothers, who did not own the portion of the sister but were legally entitled to occupy their shares without any monetary compensation to them even against their wishes. This provision has now been deleted and the rights of all class I heirs on any kind of property is at par with each other. Daughters are eligible to inherit and enjoy the property of the father or the mother in the same manner as the son. Further irrespective of the nature of property whether it is house cash jewellery shares and stocks or commercial ventures they have not only an equal right to own their share, but they can seek its partition and enjoy it without any impediment. The deflection of S 23 from the statute book was long overdue and is a very welcome step in attaining gender parity in inheritance laws.

(14) Deletion of section 24

Under the old law, the general rules of succession in S 24 clarified the position of the three specific widows, who were eligible to inherit the property of the intestate. These three widows were widow of predeceased son, widow of a predeceased son of a predeceased son and brother's
widow. The first two were class I heirs, while the third was a class II heir Sec 24 as it stood before the deletion provided as follows

Certain widows remarrying may not inherit as widows – Any heir who is related to an intestate as the widow of a pre deceased son of a pre deceased son or the widow of a brother shall not be entitled to succeed to the property of the intestate as such widow, if on the date the succession opens she has re-married.

These widows could inherit as such only when they had not remarried on the date the succession opened. If they had remarried, they would have ceased to be widows of the respective relatives of the intestate and would not have been eligible to inherit the property of the intestate. For example a Hindu family comprises of father F and two sons S1 and S2 and a grandson SS.

```
       F
      /   \
W1    (S1) S2
    |     |
W2    (SS)
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Both S1 and SS are married to W1 and W2 respectively. S1 and SS died during the lifetime of F. on the death of F, all the three heirs, S2, W1 and W2 would inherit the property. S2 taking one half and W1 and W2 taking one fourth each. However, if any of these two heirs W1 and W2 remarry before the death of F then she would be ineligible to inherit the property of F. Only on the death of F, the succession would open, and on this date if they were already married they would cease to be the widows of the son and the grandson respectively and would not be counted as heirs. Similarly, if a person dies leaving behind a brother’s widow who is a
class II heir, she can inherit the property as such widow only if she had not remarried on the date of opening of succession.

Section has been deleted by the amending Act. However, it does not mean that the situation and the eligibility criteria have changed. Even without S 24 being on paper, the situation with respect to these widows has remained the same. Section 24 was superfluous and its deletion therefore, would not alter the situation at all. One has to understand that under the Hindu Succession Act, 1956, two categories of relatives are recognized as heirs to the intestate. One who were related to the deceased through blood and second who were related to the deceased through marriage, i.e., who entered the family of the deceased through marriage to the male members. The disqualification of remarriage is attached to those heirs who entered the family by marriage, became widows on the death the respective male members to whom they were married, and went out of the family again by a remarriage. Marriage or remarriage of blood relatives such as daughters, sister, mother is of no consequence but remarriage of son’s widow, son’s, son’s widow or brother’s widow would mean that they cease to be members of the intestate’s family and their inheritance rights would be created in the family they are married into. After remarriage, they would be related to the intestate neither as blood relatives nor by marriage and therefore would not be eligible to be his heirs.

(15) Eligibility of female coparceners to make a testamentary disposition

The introduction of daughters as coparceners and creation of rights in their favour that is same as that of the son has been recognized in S 30 of the amending Act as well. A female coparcener is empowered to dispose of by him or her in place of disposed by him. It should be remembered that under the classical law, a coparcener was not
empowered to make a testamentary disposition of his undivided share in Mitakshara coparcenary, and it went by survivorship to the surviving coparceners. Permissibility of testamentary disposition of undivided share would have defeated the application of doctrine of survivorship and therefore, such disposition was void. The Hindu Succession Act, 1956, for the first time provided competency to an undivided coparcener to make a valid bequest of his share in Mitakshara coparcenary and the present Act extends this competency to a female coparcener as well.

(16) Introduction of four new heirs in Class I category

The schedule of the principal Act has been amended and four new heirs have been added to the class I category. This change has been brought into only in case of a male intestate while the category of heirs to a female intestate has not been touched at all. These four heirs were previously class II heirs and were excluded both in presence of the class I heirs and the father of the intestate. Presently, as their placement has been changed, they inherit along with class I heirs and would exclude the father in their presence. These four heirs can broadly be described as the great grand children of the specifically are son of a predeceased daughter, daughter of a predeceased daughter of a predeceased daughter, daughter of a predeceased son of a predeceased son. This brings the number of class I heirs now to 16 instead of 12, and now 11 female heirs and five male heirs together form the class I category. However, there are two flaws. First, not all the great grand children have been treated equally. As illustrated in figure given below, the four new heirs are DDS, DDD, DSD and SDD.
It should be noted that as amongst the great grand children of an intestate, SSS and SSD i.e., son of a predeceased son of a predeceased son and daughter of a predeceased son of a predeceased son were already class I heirs. Four more have been added now taking the total number of great grand children to six. However, two great grand children have been still left out of the class I category, who are SDS and DSS, i.e., son of a predeceased daughter of a predeceased son and son of a predeceased daughter. All great grand daughters are class I heirs but two great grand sons are not, DSD is an heir while her brother DSS is not. Similarly, SDD is an heir while her brother SDS is not. One wonder what can be the rationale for leaving two out of four great grandsons and including only their sisters as class I heirs. It is not only perplexing, but appears to be unjust as between the brothers and sisters. This discrimination against the brothers is without any cogent reason and should be corrected with immediate effect by the legislature.

It appears that there was undue haste on part of the legislature to get the amendment through which is also apparent from the second flaw. This second mistake and a very curious one is that all these newly introduced heirs were class II heirs prior to their elevation to the class I
category. They were specified in the class II category in entry (ii) and (iii) respectively. Normally, if an heir is placed in one class and is elevated, his name would be deleted from the former category where he was placed and will now appear in the new category to which he now belongs. The name of the heirs cannot and should not appear simultaneously at two places or in two different categories, more so when one excludes the other. Strangely enough, they continue to occupy their place as class II heirs even after their elevation to class I. Their names now appear both as class I and class II heirs. This anomaly is strange, and piece of faulty legislative drafting as while the schedule was amended to include these new heirs in class I strangely enough, the class II category was not modified and these four heirs continue to be both in class I as well as in class II category. The legislature should have amended both class I heirs and class II categories together, when they lifted these four heirs from class II. Their appearance in class II category is now redundant and should be deleted.

DEVOLUTION OF INTEREST IN COPARCENARY PROPERTY – UNDER SECTION 6 OF THE HINDU SUCCESSION (AMENDEMENT) ACT, 2005:

The Hindu Succession (Amendment) Act, 2005 has widely affected the concept of Mitakshara Hindu Coparcenary. Hindu Succession (Amendment) Act, 2005 has totally damaged the concept of Mitakshara Coparcenary because the daughter has been treated like a son under Hindu Succession (Amendment) Act, 2005. She becomes entitled to a share in coparcenary by birth. She by birth becomes a coparcener in her own right in the same manner as the son. She is not only conferred the coparcenary right as the son; she has been given all the rights possessed by the son in the coparcenary and similarly, she is also bound by the similar liabilities as a son. The major achievement lies in including all daughters especially married daughters, as coparcenary in joint family property.  

The 2005 Act does not touch separate property (except broadening the class-1 heirs). But it includes daughters as coparceners in the Mitakshara joint family property, with the same rights as sons to shares, to claim partition and (by presumption) to become karta (manager), while also sharing the liabilities.

In addition, the Act makes the heirs of predeceased sons and daughters more equal, by including as class-1 heirs two generations of children of predeceased daughters, as was already the case for sons. The main significant change making all daughters (including married ones) coparceners in joint family property is also of great importance for women, both economically and symbolically. Economically, it can enhance women’s security by giving them birth rights in property that cannot be willed away by men. In a male-biased society where wills often disinherit women, this is a substantial gain. Also, as noted, women can become kartas of the property. Symbolically, all this signals that daughters and sons are equally important members of the parental family. It undermines the notion that after marriage the daughter belongs only to her husband’s family. If her marriage breaks down, she can return to her birth home by right, and not on the sufferance of relatives. This will enhance her self confidence and social worth and give her greater bargaining power for herself and her children, in both parental and marital families.

Giving married daughters coparcenary rights from the start is unusual. Except Kerala which abolished joint family property and together, in other state-level amendments of Hindu Succession Act i.e. Tamil Nadu, Andhra Pradesh, Karnataka and Maharashtra – only daughters unmarried when the amendments were passed got coparcenary rights. Notably, however, they retained this right on subsequent marriage, and fear of extensive litigation by such married daughters has proved false.

Under the 2005 Amendment Act, married daughter will also benefit by the deletion of section 23 of Hindu Succession Act, 1956, since now they will have residence and partition rights in the parental dwelling house. In particular, women
facing spousal violence will have some where to go. The only negative aspect is that allowing partition could increase the vulnerability of elderly parents. A preferred alternative would have been to bar both sons and daughters from seeking partition during their parents life-times, if the family had only one dwelling.

Recently, in Nagammal vs. N. Desiyappan,\(^{14}\) the Madras High Court held that unmarried daughters of Hindu coparcener shall become coparcener by birth and unmarried daughters of deceased are to be treated equally with son and is entitled to equal share.

**FEMALES AS KARTA:**

The position of the Karta is regulated by birth and is guided by seniority. For being a Karta and to be entitled to manage the family affairs, including the property, it is essential that the Karta is capable of acquiring an interest in the family property. The Karta, therefore, must have not merely an interest of residence and maintenance, but of ownership in this property. A daughter is born in the family, but ceases to be a member of the family on her marriage. In contrast, other female members become members of the joint family on their marriage to lineal male descendants, but are not born in this family. Therefore, a position that is regulated by birth cannot be conferred on these females. Secondly, to be a Karta, it is essential that not only should he be a male, but he should also be a coparcener, as a non-coparcener male cannot become a Karta.\(^{15}\)

Since a female is not a coparcener,\(^{16}\) she cannot be a Karta,\(^ {17}\) nor is she empowered to represent the family generally.\(^{18}\) However, Nagpur High Court has held that under certain special situations, even a female can act as a Karta and

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\(^{14}\) AIR 2006 Mad. 265.
\(^{15}\) Poonam Saxena Family Law lectures Family Law-II, 2\textsuperscript{nd} edition 2007, p. 199
\(^{17}\) Sahdeo Singh vs. Ramchabila Singh AIR 1978 Pat 285
\(^{18}\) Ram Awadh vs. Kedar Nath AIR 1976 All 283.
her decision would be binding on the family members. This decision does not
appear to be correct, as she is neither a coparcener, nor is she entitled to a share
in the coparcenary property. On behalf of a minor coparcener, she can act as a
guardian, but that would not make her the Karta. A mother, therefore, cannot be
a Karta.19 A wife cannot act as the Karta in absence of her husband,20 nor can
she act as the Karta in a joint family comprising her husband and her son.21
Similarly, a Hindu widow cannot be a Karta, even if rights are conferred on her, in
the deceased husband’s coparcenary property.22

Position Post 1985

Beginning with 1985, till 1994, the states of Andhra Pradesh (1985),
Tamil Nadu (1989), Maharashtra and Karnataka (1994) have introduced the
possibility of unmarried daughters being coparceners in the same manner as a
son. Since now, in these states, upon marriage, a daughter continues to be a
coparcener, she fulfils the requirements for becoming a Karta. Born in the family,
she acquires an interest in the coparcenary property and therefore, she can be a
Karta, if she is the senior most member in the family and she will be entitled to
represent the family in all legal proceedings.23

Position Post 2005

Presently, a daughter is a coparcener in the same manner as a son. Since she is
a coparcener, she is also entitled to be a Karta and represent the family in all
matters.

RESPONSIBILITIES OF KARTA:

The superior position of a Karta is settled with superior responsibilities. He
has the primary responsibilities of providing food, shelter, clothing, or in other

19 Mangubti vs. Lingaraj AIR 1956 Ori-I
21 Krishnaya vs. Balvankata Subbaya (1968)-I Andh LT 197
22 Radha Ammal vs. Commissioner of Income Tax 1951 ILR Mad 56.
words, a residence and maintenance to all the family members. This also includes a responsibility to provide for marriage expenses of unmarried children, more specifically the daughters, and for funeral expenses of the departed members. As he represents the family, he has to defend the family in all litigations that may be file against the family, by a member of the family or outsiders. As he manages the property, he has the responsibility to pay all the statutory or other dues, such as taxes, debts etc, due to the family or to the family property.24

THE DOCTRINE OF PIOUS OBLIGATION – POSITION BEFORE AMENDEMENT ACT 39 OF 2005:

The doctrine of pious obligation of the sons to pay their father’s debt has been abolished by section-6(4) of the Hindu Succession Act, as it exists after the Hindu Succession (Amendment) Act, 2005.25

Liability to pay debts – The Hindu Law, maintains high sense of morality as regards payment of debts as it is deemed necessary for the salvation of the debtor’s soul. The sons, grandsons and great-grandsons have, therefore, been made liable to pay the debts of their ancestors if they have not been incurred for immoral or illegal purposes. According to ‘Smritis’ the non-payment of a debt was regarded as a sin, the consequences of which follow the debtor after his death. A test which is attributed to Katyayana says: “He who having received a sum lent or the like does not repay it to the owner, will be born hereafter in the creditor’s house a slave, a servant, a woman or a quadruped.” There are other texts which say that a person in debt goes to hell. Hindu Law-givers, therefore, imposed a pious duty on the descendants of a man including his son, grandson and great-grandsons to pay off the debts of their deceased ancestor and relieve them of torments of hell consequent on non-payment. Thus, Narada says, “Therefore, the son, born, should without keeping his self-interest in mind, liberate his father from debt earnestly so that he (father) may not go to hell.”

24 Lalitha Kumari vs. Rajah of Vizianagram AIR 1954 Mad 19.
We have seen in the chapter on joint-family and coparcenary property that the father, grandfather and great-grandfather as karta, of a joint family, have authority to contract debts for 'necessity' or 'benefits' of the family and the whole joint-family property, including the interest of sons, grandsons and great-grandsons, is liable for the payment of that debt. This liability has not been abolished by the Hindu Succession (Amendment) Act, 2005.

But the sons are also liable to pay the debts contracted by their father, for his own personal benefit, during the time of their jointness; provided such debts are not contracted with “immorality”, i.e., they were not contracted for illegal or immoral purposes.\(^\text{26}\)

Thus, the liability to the debts may be summarized under the following three heads:

1) Liability of separate property.- The separate property of a Hindu is under all circumstances always liable for his personal debts whether incurred for immoral or unlawful objects. This liability has also not been abolished by the Hindu Succession (Amendment) Act, 2005.

2) Liability of undivided coparcenary interest.- It has now been established that the undivided interest of a coparcener in the coparcenary property, may be attached in his lifetime in execution of a decree against him and if so attached, it may be sold even after his death.\(^\text{27}\)

3) Liability of coparcenary property.- Where coparcenary consists of an ancestor and his sons, grandsons and great-grandsons and the ancestor dies, the whole coparcenary property is liable for his debts even after his death subjects to the condition that the debt was not incurred for an immoral or unlawful purpose.

**Nature of liabilities-Three-fold** - According to Mayne the liabilities of a Hindu to pay debts contracted by another arises from three different sources.

\(^{26}\) Sideshwar vs. Bhuleshwar, AIR 1953 SC 487.
\(^{27}\) Madho Prasad vs. Meharban Singh, 17 IA 194.
(1) Religious- The religious duty of discharging the debtor from the sin of his debts-obligations in the case of the son and grandsons only.

(2) Moral- The moral duty of discharging the debt contracted by one whose assets have passed into the hands or another.

(3) Legal- The legal duty of paying a debt contracted by one person as agent of another.

**Religious Duty** - The religious obligation is attached to the son as well as grandson and according to the Privy Council, to the great-grandsons also, on the ground that all the three are coparceners with others by their birth. Further, it is based on the doctrine of “pious obligation” which means that a son has a pious duty to pay the father’s debt not contracted for illegal or immoral purpose.

**The Doctrine of Pious Obligation-Its origin**- This well-known doctrine has its origin in the Smriti which follow the undischarged debts even in the world afterwards. It is for the purpose of rescuing the father from these torments in the next world that an obligation is imposed upon the sons to pay their father’s debts.

Thus Brihaspati says that if the father is no longer alive, the debt must be paid by his sons. The father’s debt must be paid first of all, and after that a man’s own debt; but a debt contracted by the paternal grandfather must always be paid before these two events. The father’s debts on being proved, must be paid by the sons, as if it were their own; the grandfather’s debt must be paid by his son’s son without interest, but the son of a grandson need not pay it at all. “Sons shall not be made to pay (a debt incurred by their father) for spirituous liquor, for idle gift, for promises made under influence of love or wrath, or for suretyship; nor the balance of a fine or toll liquidated in part by their father.”

Manu says: “Money due by a surety or idly promised or lost at a play or due for spirituous liquor, or what remains unpaid of a fine and tax or duty, the son shall not be obliged to pay.

According to Gautam, money due by a surety, a commercial debt, a fee (due to the parents of the bride), debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons (of the debtor).

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28 Masitulla vs. Damodar Prasad, ILR 48 All 578 (PC).
Yajnavalkya in this respect declares: “A son has not to pay in this world his father’s debt incurred for spirituous liquor, for gratification of lust or gambling, nor a fine nor what remains unpaid of a toll; nor (shall he make good) idle gifts.”

Narada is not far behind when he says, “A father must not pay the debt of his son but a must pay a debt contracted by his father excepting those debts which have been contracted from love, anger, spirituous liquor, games or bailments.”

According to Vyasa, The son has not to pay a fine or the balance of a fine or a tax (or toll) or its balance (due by the father) nor that which is not proper.

**Effect of the judicial decisions on the doctrine** - The doctrine, as formulated in the original texts has been modified in some respects by judicial decisions. Under the law, as it now stands, the obligation of the son is not a personal obligation, existing irrespective or the receipt of any assets. It is a liability confined to the assets received by him in his share of the joint-family property or to his interest in the same. The obligation exists whether the sons are major or minor or whether the father is alive or dead. If the debts have been contracted by the father and they are not immoral or irreligious, the interest of the sons in the coparcenary property can always be made liable for such debts.\(^{29}\)

The fundamental rule is that a Hindu son is not liable for debt contracted by his father, which Ayavaharika, i.e., illegal, dishonest or immoral. The facts, circumstances and conduct of the father are to be looked into to ascertain the nature and character of the debt.\(^{30}\)

By virtue of the doctrine of pious obligation, the interests of the sons in the joint-family property are liable for the debts of their father in joint-family, provided they were not incurred for any illegal or immoral purpose. The creditor could legally attach and put up to sale the right, title and interest of the sons in the joint-family property.

**Liability when arises.** - The son’s pious duty to pay off his father’s debt not contracted for illegal or immoral purposes, is present liability annexed to both the

\(^{29}\) Sidesh vs. Budeshwar, AIR 1943 SC 487.
\(^{30}\) Bipro Charan Sabato vs. Vauri Sabato (1979) 47 CIT 553.
father’s and son’s interests in the ancestral property and does not depend on the facts whether the father is alive or dead.

His liability arises the moment the father fails to pay or the father’s share in the joint property or his self-acquired properties are found insufficient to meet debts.

**Duration of liability** – The pious obligation of the sons to pay the father’s debts subsists only so long as the liability of the father subsists. Their liability is neither joint nor several. It arises even in father’s lifetime and not merely on his death.\(^{31}\)

**Son’s liability** – The liability of a son to pay the debts of the father is not personal; it is limited only to the son’s interest in the coparcenary property.

This view was again supported by Gujarat High Court in Jayanti Lal *vs.* Srikant.\(^{32}\) The Court held that the doctrine of pious obligation applies to the debts contracted by the father before partition but it does not apply to debts incurred after partition. The sons even after partition are under pious obligation to pay off the debt incurred by their father before partition.

**Privy Council on son’s liability.**- Their Lordship of the Privy Council have laid down the following five propositions in respect of father’s power to contract the debts and son’s liability to pay it:\(^{33}\)

1. The managing member of a joint undivided estate cannot alienate or burden the estate ‘qua’ manager except for purpose of necessity, but,
2. If he is the father and other members are the sons he may, by incurring debt so long as it is not for an immoral purpose lay the estate open to be taken in execution upon a decree for payment of that debt.
3. If he purports to burden the estate by mortgage then unless that mortgage is to discharge antecedent debt, it would not bind the estate.
4. Antecedent debt means antecedent in fact as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

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\(^{31}\) Brij Narayan vs. Mangla Prasad, 51 IA 129.

\(^{32}\) AIR 1980 Guj 67.

\(^{33}\) Raja Brij Narayan Rai vs. Mangla Prasad Rai (1923) 15 IA 129: ILR 46 All 95.
(5) There is no rule that this result is affected by the question whether father, who contracted the debt or burdened the estate, is alive or dead.

The Supreme Court has also held that “there is no warrant for the view that to saddle the sons with this pious obligation to pay the debt of their father, it is necessary that the father should be the manager or ‘karta’ of the joint family, or that the family must be composed of the father and sons only and no other male member.”

A father as manager can incur debt by mortgage of joint family property, for discharging his debt. His son is under pious obligation to pay the mortgage debt which his father is personally liable to pay provided it is not incurred for immoral purpose. In such a case, son’s liability cannot be confined only to money decree against his father. It is the existence of the father’s debt that enables the creditor to sell the property in execution of a money decree against the father…… The theory is that the father may, in order to pay a just debt, legally sell the whole estate without suit so that his creditor may bring about such a sale by the intervention of a suit.

Where a father as manager has incurred debt for discharging his debt by mortgage of joint-family property, but the debt is neither for legal necessity nor for payment of antecedent debt, the creditor can, in execution of mortgage decree for realization of a debt which the father is personally liable to repay, sell the estate without obtaining a personal decree against him. The son is liable not only after but also before the sale is held. It is well settled that the son is liable in the case of money decree for payment of the debt before the sale is held. So also he is liable in case of mortgage decree for payment of the debt by the sale of property. If there is just debt owing by the father, it is open to the creditor to realize the debt by the sale of the property in execution of the decree or with the sale of the property in the execution proceedings unless he can show that the

debt for which the property is sold is either non-existent or is tainted with immorality or illegality.\textsuperscript{35}

Thus under the Mitakshara School of Hindu Law:

1. The son is under pious obligation to pay his father’s debt which is “Vyavaharika” i.e., lawful and not avyavaharika, i.e., unlawful, illegal or immoral, incurred before partition, i.e., when they were joint.

2. The son is not liable for a debt contracted by father after partition.

\textbf{POSITION AFTER THE COMMENCEMENT OF THE HINDU SUCCESSION (AMENDMENT) ACT, 2005:}

As has been stated earlier, the doctrine of the pious obligation of the son to pay the personal debts of the father under the Mitakshara Law has been abolished by Section 6 of the Hindu Succession Act, 1956 as substituted by the Hindu Succession (Amendment) Act, 2005. Sub-section (4) of this section now runs as under-

“After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognize any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the found of the pious obligation under the Hindu Law of such son, grandson or great-grandson to discharge any such debt:

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

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

(b) Any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have

\textsuperscript{35} Fakir Chand vs. Harman Kaur, AIR 1967 SC 727.
been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted\textsuperscript{36}.

Explanation - For the purpose of Clause (a) the expression ‘son’, ‘grandson’ or ‘great-grandson’ shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005 had not been passed.”

To conclude, the doctrine of pious obligation has no place in the Mitakshara Law after the commencement of the Hindu Succession (Amendment) Act, 2005. But the doctrine of pious obligation is applicable for the contracted personal debts or the father taken by him before the commencement of this Amending Act.

SPECIAL RULES RELATING TO DWELLING HOUSE – LAW PRIOR TO THE HINDU SUCCESSION (AMENDMENT) ACT, 2005:

Under the Hindu succession Act, the general provision is that the rights of a son and daughter are equal. It is without reference to the type of property available for succession. An impression is created therefore, that whatever may be the type of property, be it a house, cash, clothes, vehicle, shop or even household goods, a daughter has an equal claim over it, not merely of ownership, but also of a right to possess, enjoy and alienate it in the same manner as a son. But where the inherited property comprises a dwelling house that was in the occupation of the male members of the family of the intestate, special rules have been provided for its devolution.\textsuperscript{37}

**Section 23 of the Hindu Succession Act 1956 reads**

Special provisions respecting dwelling house – Where a Hindu intestate has left surviving him or her, both male and female heirs specified in class I of

\textsuperscript{36} R.K. Agarwala, Hindu Law 22\textsuperscript{nd} edition 2007 p. 364

the schedule and his property includes a dwelling house wholly occupied by members of his or her family, then notwithstanding anything contained in this Act the right of any such female heir to claim partition of the dwelling house shall not arise until the male heirs choose to divide their respective shares therein but the female heir should be entitled to a right of residence therein, provided that where such female heir is a daughter, she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted by or has separated from her husband or is a widow.

By virtue of this provision, ownership of all class I female heirs in a dwelling house, is narrowed down to a right of residence only. What they are denied as a right to have their shares partitioned and specified till the male heirs choose to divide their respective shares among themselves. There are twelve class I heirs, eight of them being females and four males. The eight females heirs, viz, the widow of an intestate, his mother, daughter, daughter of a predeceased son and widow of a predeceased son of a predeceased son, cannot partition or specify their shares in the dwelling house if at the time of the death of the intestate, his house was wholly occupied by his son, son of a predeceased daughter. But if these male heirs decide to divide their share among sons and the widow of an intestate inherits his house. Each of them is the owner of one third of the house, but the right of the widow to partition and not otherwise, at her option. Where the female heir happens to be a daughter, her ownership is without a right of residence and demarcation of her share unless she is unmarried a widow or has deserted by or is separated from her husband. For example, a son and a daughter inherit a house. The daughter is married. Though she owns half of the house, she cannot possess it or live in it without the permission of her brother, even though he owns only half of it.

The non existence of the right to demarcate their respective shares of the class I female heirs does not adversely affect their ownership in the property and if they are unable to do it in their lifetime, their legal heirs inherit their shares with
the same disability of incapability of affecting a partition and demarcation of their shares.

**Essential conditions for application of section 23**

(i) The section applies in case of both male as well as female intestates.

(ii) It does not apply in case of testamentary succession, where the property goes under a will.\(^{38}\)

(iii) This section has no application where the intestate was governed by the Marumkkattayyam or Aliyasantana laws before the passing of the Act.

(iv) The restriction applies only in case of a dwelling house and not to any other kind of property. A dwelling house means a house which is used for residential purposes. It does not refer to any house but only one or two are used for the purposes of residence by the family members, these house alone, will be called dwelling houses. A guest house owned by the family and used for commercial purpose, is not a dwelling house and though controlled by the male members, will not be subject to this provision.

(v) Such dwelling house should have been wholly occupied by members of the intestate family. The term wholly means that not even some portion of the house should be in possession of non family members. Where the whole house, or a portion of it\(^{39}\) is let out to tenants, who are total strangers, the house is not wholly occupied and the section is not applicable. Servants and relatives are not family members and if the house is occupied by them, the restriction on female members would not apply. Similarly, wholly occupied does not means that only the covered area should be occupied. If there is plenty of space around

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\(^{38}\) Dharma Singh vs. A.S.O. AIR 1990 SC 1880; Rajeshwari Devi vs. Laxmi Devi (1997) 1 HLR 590 (All.)


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the house which even exceeds the share of the female the dwelling house is not wholly occupied and can be partitioned. The restriction applies on the females to ascertain their shares till the male heirs do not destruct their joint status which means that they divide by a formal partition and specification of their shares. If they choose to enter into an informal arrangement and occupy different portions of the house, they have not destructed their joint status formally and S 23 continues to apply. Even if one of the male heirs remains ex parte in a suit for partition the joint status is maintained as is not divided. But where the sole male heir sells his half share in the property, it indicates his desire to affect a partition and the female heirs can claim partition.

**Restriction applicable in case of male heirs or even a single male heir**

The section provides that the class I female heirs cannot as certain their shares by a partition, till the male heirs choose to divide their respective shares. It used the term male heirs and a literal interpretation would suggest that there have to be more than one male heir in order that the restriction applies. Secondly, a division of respective shares is possible only when more than one male heir is present. Further, the term is male heirs and not male members and would not include a living son’s son. For example, if the co heirs to an intestate are a son and a daughter the son is a single male heir. In such a case, there is no possibility of a partition ever taking place in the future. Does it means that the legislature intended that the restriction should apply only in the presence of two or more male heirs? A conflict of judicial opinion prevailed on this issue.

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40 Ramesh vs. Ranjani (2002) 1 Lw 10 where the male heir sold a portion of the disputed property, remained ex parte and no question of whether the dwelling house was wholly occupied by the members of the family was raised by anyone the restriction can not be applied and the female heir can seek partition of her share even in presence of a male heir. See Purushotam Behera vs. Rangabati Barik 1999 AIHC 4760 (Ori).
41 Bhumidi Govardhan vs. Subhadramma AIR 1994 AP 87.
The Orissa High Court in Mahanti Matyulu vs. Oluru Appanawa,\(^{44}\) observed:

In case of a single male heir, there is no possibility of that male heir claiming partition against another male heir, as there is none and if in such a case, the right to claim partition by the female heir is restricted it would practically destroy and that right forever.

Discussing the practical implication of the denial of such right, the high court further observed:

The legislature having given the female heirs absolute rights of inheritance in one hand, could not have taken away the same by the other. In case of property descending on more than one male heir, along with one or more female heirs, the female heir or heirs would get her or their share partitioned as and when the male heirs chose to divide their respective shares in the dwelling house, whereas in case of single male heir inheriting the dwelling house, with one or more female heirs, the latter would remain owners in pen and paper, but cannot exercise any act of ownership except residing therein which right in rare cases can be rarely exercised.

However, in Janabai Ammal Gunabooshni TAS Palani Muddliar,\(^{45}\) a Division Bench comprising Ratnavel Pandia J, and Venugopal J, held:

Even in cases where there is only one male heir of the intestate in a Hindu joint family, the female heirs cannot claim partition of the dwelling house until the male heirs choose to divide their respective shares therein. Section 23 cannot be deemed to have intended that the restriction is to operate only if there are two or more male members in the family. Acceptance of contrary view will cause gross injustice to the single male heir and the very object with which the section has been enacted would be completely nullified. In such cases, the hardship that

\(^{44}\) Mehanti Matyulu vs. Oluru Appanawa AIR 1993 Ori 36.

\(^{45}\) Janki Ammal vs. T.A.S. Palani Mudaliar AIR 1981 Mad 62.
would be caused to the female heir in not being able to claim partition is certainly relatively less than the injustice that could be done to the single male member.

The matter went to the Supreme Court\textsuperscript{46} which held that the expression male heirs include even a single male heir.

Thus, even where the intestate has left behind a single male heir, and though the fact of partition would never arise, the female heirs cannot divide their shares. This decision, it is respectfully submitted does not appear to be correct. The use of the expression, male heirs choosing to divide their respective shares unmistakably shows that a minimum of two male heirs must be present before the restriction applies, otherwise how else will they divide their respective shares. It may be argued that male heirs may include a single male heir, but if the legislature in fact, had wanted it to be applicable in case of a single male heir also, it would not have used the expression ‘their respective shares.’ The entire phrase has been used in plural and to hold that it includes a case, where no partition is ever possible is to give it a twisted interpretation, the one that was never intended by the legislature.

\textbf{Informal adjustment permissible}

Though a suit for partition and separate possession in a dwelling house is not maintainable until the male heirs themselves destroy their joint status, there is no bar on any adjustment of interests of the parties in the house or in other properties, without destroying the dwelling house as unit\textsuperscript{47} and where the male heir expresses his inclination or desire to have a division in the written statement, it is sufficient to enable the female heir to ascertain her share.\textsuperscript{48}

\textsuperscript{46} Narsimha Murthi vs. Sushila Bai AIR 1996 SC 1826.
\textsuperscript{47} D.M.Jayamma vs. Muniyamma 2000 AIHC 4013 (Kant).
\textsuperscript{48} L. Geeta vs. G. Shekhar 2001 AIHC 3264 Mad.
Implication of section 23

Till the male heir or heirs are occupying the house and they do not wish to demarcate their shares formally, all class I female heirs suffer from a disability to ascertain their shares. For example, a Hindu male dies, leaving behind a widow and son and a house that was being used for residential purposes by his these family members. The son has the ownership of half of this house and this ownership gives him all the rights of an owner, viz., of its possession, enjoyment, demarcation and alienation at his pleasure. He can let it out to anyone, sell it, gift it or simply live in it. He does not have to seek the permission of anyone to do it. But if we look at it from the point of view of the widow, she is the owner of half of the house as well, but her ownership is limited to only a right of residence in it. She cannot ascertain which half belongs to hers, and accordingly, in which corner of the house she would live, will be decided by the son. She cannot let out her portion as it cannot be ascertained. If she sells her probable half, the transferee would stand in her shoes and would also be incapable of ascertaining the share.49 Take another example, an intestate dies, leaving behind a son and a married daughter and a dwelling house which was in occupation of the son. The son is the owner of half of it, and the daughter is the owner of the other half. If we look at the ownership of the daughter, she is an owner on paper, but as she is married, she has no right even to live in it, unless she is a widow, or is deserted by the husband or is divorced. If she does not fit into the description of a widow, divorcée or a deserted woman, she is not empowered to even step inside her portion of the house, without the permission of her brother. If her husband is transferred out of station for reasons of his employment, and she, having no other place to live, looks for an accommodation, she may be forced to live in tenanted premises, but she cannot live in her own property because she is married. The present set up is vastly different and it may not be feasible for a married woman to follow her husband wherever he is transferred. With a growing number of women taking up employment, and the education of children at a

49 Saroj Kumari vs. Anil Kumar 1979 HLR 237.
particular place becoming a predominant consideration, spouses without a marital break-up, may have two different places of residences. The daughter owns property but because it is a share in the house which is occupied by her brother and his family, she cannot live in it. This is therefore, merely a paper ownership. If we take a look at the entitlement of the son, he is the owner of half of the property, the other half belonging to the married daughter but as the expression used in S 23, indicates that the house should be ‘wholly occupied’ by male heirs, the son has legal right to possess and enjoy the share of the sister against her wishes and without any monetary return. He owns only half of the house, but S 23 gives him a right to enjoy the whole house. An equitable division of property is what the legislature expects sharers to give effect to, but here, there are no rules requiring the brother, who now has a legal permission to enjoy the share of the sister, to give her something in return. This ‘free for life use’ of the share of a female by a male heir, without her consent, is in the nature of deprivation of one for the unjust enrichment of another. This deprivation is of the right of the female, so that the male heirs can live comfortably in her share. The legislature has not fixed even a time frame within which the brothers should demarcate their shares and there for, the law made it very convenient for them to appropriate the share of their married sisters. The only thing that they cannot do is to sell her share, but S 23 gives physical possession and enjoyment of her share, to the male heirs.

**Maximum hardship to a married daughter**

The acquisition of property as an owner, carries with it, all the basic incidences of ownership, i.e., a right to the title, a right to possess and enjoy the property and a right to sell it at the owner’s pleasure. Section 23 gives a married daughter a title, but no right to possess and enjoy the property and consequently even though in theory the right to sell the property is not denied, it is inconceivable that this interest, which is without the right of possession, will be purchased by anyone. The practical implication of this statutory interdict on a
married daughter to claim partition of the house, till the male heirs decide otherwise, results in the denial of any claim of enjoyment of the dwelling house.

**Relevance of section 23**

No provision similar to S 23 had been included either in the Hindu Code Bill 1948 or even in the original Hindu succession Bill of 1954. It was introduced later in the amended Bill, at the instance of the conservatives, who were vehemently opposed to the idea of a house being partitioned at the instance of female members. The reasons given by the parliamentarian for its inclusion, centered around a presumption of its applicability only to a daughter and ignored the fact that it is one provision that restricts the manner of enjoyment of eight heirs, for the convenience of four heirs.

**Reasons advocated for justifying the retention of section 23**

The protagonists of retention of s 23 are the parliamentarians, and even the judiciary. Let us analyze the basic reasons for the denial to the females, of a right to demarcate their share and a total denial to the married daughter, to even possess her own property.

**(a) Introduction of strangers**

On the basis of arguments put forward for denying to the females, a right to ascertain their shares and with respect to a married daughter, a denial of a right of residence is that it would result in the introduction of strangers in the house. A few observations of the Parliamentarians at the time of the discussion of the Hindu Succession Bill 1954, are noteworthy here:

The brother-in-law and the persons who belong to the family wherein our daughters are given, will pounce upon the property of the father-in-law. There are legislations because the daughter is given the property. Females are not educated and they have not had the experience
of litigation. It is but natural that the husbands of such females would like to have the loaf of the property of the family from which the female has come to the other family. This would cause a great nuisance and great unhappiness and trouble to the society.\textsuperscript{50}

If the daughter and the daughter’s daughter etc, are given share in the immovable property (house), it will result in new elements coming into the family, the family system would be disrupted, there will be disorder in that family, and it will breed ill will, hatred etc.\textsuperscript{51}

It will have a very disturbing effect on the agrarian set-up in this country. If you give the share to the married daughter, are you not making the son-in-law a co-sharer in the family property? It will have a very disastrous effect.\textsuperscript{52}

The brothers, two or three, may stay together for some time, but the difficulty will arise when there are two daughters and two sons and only one house. How can the property of a man be divided among two sons and two daughters, if he dies leaving one house? How can the house be divided?\textsuperscript{53}

All the arguments are confined to the basic presumption that if the share is given to the daughter, it would mean the introduction of strangers into the family. But it should be noted that the denial of a right of demarcation is for all the class I female heirs, which includes the mother and the widow of the intestate as well. Secondly, it has been held\textsuperscript{54} that females have a right to sell their shares without demarcating it, but the transeree stands in her shoes. This would mean that unless he purchases the share of a married daughter, he also acquires a right of residence in it,

\textsuperscript{50} Sh. Bogawat, “Lok Sabha debates”, Part –II 1955 p. 8211-12
\textsuperscript{51} Ibid, Sh. Lakshmaiyya p. 8209.
\textsuperscript{52} Ibid, Sh. Sadhan Gupta, p. 8139.
\textsuperscript{53} Ibid, Sh. Dabhi, p. 8322.
\textsuperscript{54} Saroj Kumari vs. Anil Kumar 1979 HLR 237.
along with the male members. If that is permissible, then the whole purpose of keeping the restriction is frustrated, as he would be a total stranger to the family. For example, a son and the daughter of the intestate, inherit the property. The daughter is incapable of ascertaining her share and the reason advanced is that it would mean an introduction of strangers into the family. As she is the owner of half of the property, she can sell it in favour of anyone. If she sells it to a stranger, not because she wants to do it, but because she needs the money, the stranger would step into her shoes and would take what exactly was her entitlement in the property. If what she had was a right of residence, the stranger would also take the right of residence along with the male heir and thus, this provision fails to prevent the introduction of strangers in the house and its retention is meaningless.

(b) Arguments of Dissension in the family

On the favourite arguments advanced to support this provision is, that a denial to the married daughter, of a right of residence in her own property is necessary, otherwise, there will be dissensions in the family. Parliamentarians had cautioned:

Don’t proceed on equality, otherwise you would be in trouble. It is not a question of equality, it is a question of giving the rights according to the social pattern. If you proceed on equality, everything would be spoiled. If you give the same rights to the daughters as to a son, there will be uneasiness and tensions in the country and every family will be ruined with litigation.55

It is apparent at whose instance there would be tensions in the family. They could only be at the instance of a person who is denied a right to unjust enrichment and is deprived of a possession far in excess of

his entitlement. If the brother obeys the laws of inheritance and parts with the share of the sister and does not insist on possessing her share without her consent, there will be no litigation. Litigations and dissensions will be there only when either the behaviour and attitude of the brother is unjust or the sister tries to take something that is not her entitlement in law. Maintaining love and sibling affectation is the duty of the sister as well as of the brother and an insistence that a female must keep love and affection above her entitlement, is a heavy price for her to pay. The deprivation of her just claims should not be only to avoid the male member’s displeasure.

(c) Married daughter does not belong to the Father's family

One of the social phenomenon prevalent in the society (not necessarily only among Hindus) is that the son continues to live in the house of the parents, with them, even after his marriage. His separation ordinarily, is due to reasons of his employment in a different city or if he wants to explore better options and outside his parental home. It stems from the practical convenience of the arrangement that a common residence would enable the son and his family to look after the parents in their old age, which is also seen as one of the duties of the son, but has now been recognized by the judiciary as the duty of a daughter as well, including that of a married daughter. In contrast, it is advocated that a daughter, on marriage, leaves the house of the parents and joins the husband’s household. Her residence changes on marriage and till she is unmarried, her residence in his father’s house is seen as merely temporary.

This social phenomenon cannot be made the basis of a denial to the daughter, of the right to claim partition or a right of residence. If it is a fact that the daughter leaves the house of her parents on marriage and goes somewhere else, the disability should not have been imposed on the
mother if the intestate or the widow of the intestate, who not only live in the same house, but have spent a longer time period in it, in comparison to the son and with no likelihood of leaving it in future. Secondly, the restriction is not operative on a son who separates from his parents during their lifetime, lives elsewhere with his family members and does not look after them in their old age. Thirdly, the court recognizes the duty of the daughters (including married daughters) and imposes it on her when it comes to maintaining her parents, on exactly the same lines as on the son, but it adopts a differential treatment when it comes to giving her the inheritance rights in the property of these very parents, by making it subject to the rights of a son.

(d) Dwelling house is an impartible asset

One of the arguments for denying to the females, a right to partition the house is that it is an impartible asset and should not be fragmented at the instance of the female members. The Madras High Court, in Mookkammad vs. Chitravadivamman, explained it in the following words:

Section 23 of The Hindu Succession Act, appearing in the chain of sections of the codified Hindu law, is intended to respect one of the ancient Hindu tenets which treasured the dwelling house of the family as an impartible asset as between a female member and a male member. In order to perpetuate those memorable intentions of Hindu families; Parliament took that auspicious aspect into consideration while codifying the Hindu Law.

The Supreme Court has observed:

The reverence to preserve the ancestral house in the memory of the father or mother is not the exclusively preserve of the son alone.

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56 AIR 1980 Mad 241
57 Narsimha Murthi vs. Sushila Bai AIR 1996 SC 1826.
Daughters too would be anxious and more reverential to preserve the dwelling house, to perpetuate the parental memory.

The approving tone of the language by using the words, ‘memorable intentions of the Hindu families’ and ‘reverence to preserve the ancestral house in the memory of the father or the mother’, indicates a justification of this provision by the judiciary. However, it should be noted that it is based on an ancient tenet, and its impartibility is to be preserved only between a male and a female and not between males only. Out of many respected ancient tenets, this selective inclusion in a modern legislative enactment, of this one, is in itself questionable. Secondly, reverence can never be enforced by the legislature or the judiciary, by imposing upon one sex only, a disability to ascertain the share in this manner. It is expressed and exercised voluntarily. The section and the reasoning smacks of a presumption that reverence on the part of the sons to preserve the house is implied and does not need any interference, but as far as the females are concerned, it needs to be enforced by the legal machinery.

(e) Denial of a Right to enjoy the Property is necessary, otherwise there will be Gross Injustice to the Brother

A glaringly incourageous reason put forward is that if the brother is denied the use of his sister's share for free, it will cause gross injustice to him. What is unfortunate is, that it is the Indian judiciary, including the Supreme Court, which is advocating it. The basic reasoning is that if a married daughter is permitted to partition her share and live in it, the brother would be thrown out on the streets and it will cause gross injustice to him. K Ramaswamy J, in Narasimhamoorthy v Sushilabai, gave various examples to show how the application of S 23 would prevent the brother from being thrown on the roads. He observed:

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58 Narsimha Murthi vs. Sushila Bai AIR 1996 SC 1826.
59 Supra Note 58

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Take a case of Hindu male or female owing a flat in a metropolis or in a major city like Bombay etc, with a two room tenement, left behind by a Hindu intestate. It may not be feasible to be partitioned for convenient use and occupation by both the son and the daughter and to be sold out. In that event, the son and his family will be thrown out on streets and the daughter would coolly walk away with her share to her matrimonial home, causing great injustice to the son and rendering him homeless/shelterless. With passage of time, the female members, having lost their moorings in the parental family after marriage, may choose to seek partition, though not voluntarily, but by inescapable compulsions and constrained to seek partition and allotment of her share in the dwelling house of the intestate father or mother. But the son, with his share of money, may be incapable to purchase a dwelling house for his family and the decree of partition would make them shelter less.

Take yet another instance, where a two room tenement flat was left by the deceased father or mother, apart from other properties. There is no love lost between the brother and sister. The latter demands her pound of flesh at an unacceptable price and the male heir would be unable to buy off her share, forcing the brother to sell the dwelling flat or its leasehold rights interest, to see that the brother and his family are thrown into the streets to satisfy her ego. If the right to partition is acceded to, the son will be left high and dry, causing greatest humiliation and injustice.

In both the cases, the sister had not demanded the share of the brother, but her own share, which the legislature had given her. Regrettably, the above observation of the Supreme Court, it is respectfully submitted, also appears to suffer from a bias against the sister from the language used in the examples i.e., ‘the daughter would coolly walk away with her share to the matrimonial home’ and ‘to see that the brother and family are thrown on the streets to satisfy her ego.’ These are prejudiced assumptions, which show a woman (sister) as unconcerning and
deliberately vindictive. Further, in all these examples, the judiciary failed to visualize one situation. What would be the outcome of the two instances, if instead of there being one brother and one sister, there were only two brothers, as even in that case, it would be inconvenient for them to partition it, or being about a solution if one demands his pound of flesh at an unacceptable price?

In the second example, the court presumes that there is no love lost between the brother and the sister and the sister would demand her pound of flesh. When the relations are strained, it need not always be the sister’s fault, but perhaps the basis for strained relations is her demand of her share and a denial on the part of the brother, to hand it over to her. The court painted a pathetic picture of the brother who all along, wanted to enjoy the share of the sister, which appeared to be one sided and unrealistic. The reasoning and examples appear to have been viewed only from the brother’s side, rather than being based on rational judgment. According to the reasoning, as the sister demand an unacceptable price, the brother would be unable to buy her share, which indicates that if she had demanded the market price, it would have been possible for him to buy her share. Or even if that does not happen, being the owner of half of the flat, he should be content to live in that half. He should be satisfied with what rightfully belongs to him. Neither the court, nor anyone else for that matter, should help people grab the share of somebody else, without her consent, for free. There was not even a remote chance of the brother being thrown on the road in any case. Even by the demanding her pound of flesh or by asking for her share, the sister is not trying to even touch the share of the brother, rather, it seems to be the brother who is insisting upon possessing her share, in reality.

What is noteworthy here is, that the judiciary was concerned that if the brother (who is the owner of half of the property only) is not allowed to use and occupy the share of his sister (who is the owner of the other half),
it would cause gross injustice to him. But where the sister is not allowed at all to use, or even occupy her own share, the hardship to her is less than the hardship of the brother. Such reasoning appears to be incorrect on the face of it. For the sister, it is a total denial of the use of her property and what the brother wants, is a free use of her share. Unfortunately, even the judiciary perceives men as the rightful successors as the father’s property, and women, who have statutorily been conferred a right to inherit the property, are visualized as intruders or share snatchers. Rather than victims, they are seen as vindictive and opportunists. It is despite the fact that Indian females as a rule, voluntarily or even half heartedly, relinquish their shares in favour of their brothers so as to keep the bond of love and affection intact, but there is no reason for the judiciary to impose upon them, a mandatory surrender of their inheritance rights.

When it comes to acquiring a roof over one’s head, the trend of the judiciary is very surprising. A married daughter has no right of residence, let alone of demanding a partition and possession of the inherited dwelling house, in the presence of her brothers. A married woman has also, no right of residence in the matrimonial home owned by the husband, without his consent. In a Bombay case, the husband threw the wife out of the house and prevented her from re-entering it. She sought the help of the court to obtain an ad interim order, restraining her husband and in laws from turning her out or trying to prevent her re-entry. The husband’s appeal against the order of the trial court was granted in his favour. Rejecting the wife’s claim that she should be entitled to live in the house, the court observed:

If this argument is accepted in all its implications, it would be impossible to prevent public disorder on a very wide scale. Today, it is a case of the wife entering her alleged matrimonial home. Next, it will be others, including persons with all sorts of claims, existing, bonafide,

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60 S.P. Jain vs. N.I. Jain 1987 Bombay (unreported).
dubious and dishonest. A state, subject to the rule of law, cannot permit this to happen – nay not in the name of feminism, nor for the protection of the deserving.

The decision is extremely relevant in the Indian context as women have been dependent on men for a roof over their heads, even in situations where they own the property.

It is ironical that the judiciary, in one case, while justifying the denial to the married daughters, a right of residence in her property, occupied by the brothers, came up with a very strange argument. The Karnataka High Court held.\footnote{Kalamna vs. Veeramma AIR 1992 Kant 362.}

The object of this proviso would be defeated and it will encourage the married daughters to desert their husbands or live separately from their husbands, if it is held that the daughter living on her own accord, separately from her husband, is entitled to a residence.

Succession rights of a woman and her marital relations with the husband, have no connection with each other. A woman cannot be denial her rights to enjoy the inherited property on grounds of marital discords with her husband. Only one question can be put to the court in such cases, viz, would they like to impose some impediments on the inheritance rights of a man who deserts his wife?

In the present social set-up, which has vastly changed over time, the apprehensions of the Parliamentarians also need to be examined in a different light. Noteworthy is the fact that presently, more sons are separating from their parents, along with their families, for a variety of reasons ranging from considerations of employment, a desire of settling abroad, or even a desire to lead in independent life. A married daughter's status is exactly equal to that of a separated son, and she has not
separated voluntarily, but due to the social custom. Yet, while the legislature chose to restrict the right of the daughter, it has not put any implements on the rights of a separated son from partitioning the parental house. From the coparcenary property, a son is handed the share immediately on his separation and his rights in the separate property are also well protected. Further, if the basic reason for the denial of this right to married daughters was only that the property would go out of the family, it is strange that this prohibition is not extended to a married daughter’s son. Under the Act, a deceased daughter’s (marital status irrelevant) son and daughter are class I heirs. The prohibition to ascertain her share and a denial of the right of resident in this property is appended to a daughter, and also to a daughter’s daughter, but a daughter’s son does not suffer from any such disability. For example, a man having a son and married daughter dies and leaves behind, a dwelling house. The daughter being married, has no claim of residence and partition of the house, even though she is the owner of half of it, but if she predeceases the intestate and is survived by a son and a daughter, both these children would be a class-I heirs along with the intestate’s own son. Her son, belonging to a different family and definitely having the capability to take the property out of the family, is capable of not merely effecting a partition of the dwelling house, but also of residing in it or alienating it if he so desires, yet the daughter’s daughter, who along with him, inherits exactly the same portion of property, is incapable of partitioning it.

Thus, this common belief, that after 1956, a daughter is treated on par with the son and that Hindus, being progressive in nature and amenable to social change with ease, place their women in a better position in comparison with their sisters under other personal laws, does not appear to be true. With the deletion of section 23, differential treatment in property acquisition and ownership and its manner of enjoyment, only on grounds of sex, has been abolished. It is a welcome step and was indeed the need of the hour.
DAUGHTERS RIGHT TO PARTITION DWELLING HOUSE OF FATHER AFTER THE AMENDMENT OF 2005:

Perhaps the most inequitable provision under the pre-amended act was section 23 that put statutory impediments on the right of all the class one female heirs to seek partition of their inherited share in the dwelling house in absence of the consent of the male members of the intestate’s family. This year also three cases\textsuperscript{62} came up before the various courts in which the question as to whether the deletion of section 23 would affect positively the right of daughters who had filed claims seeking partition of the dwelling house as against their brothers and whose suits were pending in the courts when the amendment came in were decided by the courts. The courts held that the restriction imposed upon the female heirs to claim partition in respect of dwelling house ceased to be effective from 09/09/2005, in light of omission of section 23 by Amendment Act 39 of 2005. It further held that the effect of omission of section 23 would apply to all proceedings whether original or appellate involving adjudication of rights of parties and pending as on this date or initiated after it\textsuperscript{63}.

In Santosh Kumar’s case the prayer for a partition of the dwelling house was contested by the brother on two grounds, firstly, that the daughter does not have a right to have her share ascertain under the act, and secondly, that since he had made substantial improvements in the house at his own cost the same should be reserved for him. Strangely enough the trial court granted the verdict in his favour and the matter was carried in appeal by his sister. The high court reserve the ruling of lower court and held that if one co-sharer makes improvements or modifications in the common property without the consent of other sharers he does it at his own peril and at best can claim only an equitable consideration for the allotment of the house to him after its valuation. With respect to the second issue, during the pendency of this appeal the Hindu

\textsuperscript{62} Santosh Kumar vs. Baby, AIR 2007 Ker 214; Koshalya Bai, Bihari Lal, Pateriya vs. Heera Lal Bhagwandas Gupta, AIR 2007 (NOC) 136, Bombay; Ratnakar Rao Sindhe vs. Leela Ashwath, AIR 2007 (NOC) 941 (Kar)

\textsuperscript{63} Annual Survey of Indian Law Institute 2007 volume XLIII p. 370

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succession act was amended and section 23 was deleted and the brother contended that the petition should be considered in light of the facts and the legal position as it stood and existed on the day of the filing of the petition and not in light of the subsequently changed legal and factual scenario. The court held and rightly so that this right of the brother or any male heir under section 23 was personal in character and was neither transferable nor heritable and if it was held that the situation and legal position existing on the date of presentation of the petition only should be considered and regard should not be had to subsequent events then it would mean that this right could become heritable, i.e., a defeasible right of a male heir would get defeated the movement his personal right ceases. Such personal right of the male heir is taken away by the omission of section 23. The effect of such commission would be retroactive. Holding that one co-sharer cannot build on the common property in such a way as to defeat the legitimate rights of other co-sharer when the extent of property is small, such construction would make it impossible to partition the property in specie among all co-sharers. The law does not recognize any such right in one co-sharer to make improvement in co-ownership property without express consent granted by other co-owners. The entitlement to get share in a co-ownership property is a very valuable right and it cannot be defeated by one co-owner by constructing a building in it without the consent of the other co-owners. He cannot thereafter claim to allot the entire property including the building without valuating the structure. Such unauthorized acts of a co-owner in a co-ownership property would defeat the rights of other co-sharers who have equal hare in the property. The situation would be grave if the extent of the property is small. The courts, thus, rejected the claim of the brother as he had only 1/6th share in the total property, and allowed the plea of the sister for ascertaining her share in the property.
DISQUALIFICATIONS:

Introduction

Under Hindu law, the inheritance rights of a person were not absolute. Despite the nearness of relationship, a person could still be disqualified from inheriting property on account of his certain physical or mental infirmities, or a specific conduct. This exclusion from inheritance was not merely on religious grounds, viz., an incapability to perform religious rites, but depended upon social and moral grounds and bodily defects as well. An heir under the classical law could be excluded from inheritance on the following grounds.64

(i) Mental infirmities: These included congenital idiocy65 and insanity.66
(ii) Physical defects: absolute and complete lameness,67 a person born blind,68 deaf,69 dumb,70 an impotent or a eunuch.
(iii) Diseases: Virulent form of leprosy71 and other incurable and chronic diseases.
(iv) Conduct: An outcaste72 and his issue, a person entering a religious order by becoming a hermit or a sanyasi,73 a murderer disqualified on ground of public policy,74 and in case of a woman, on grounds of her unchastity.75

64 According to Yajanavalkya, “An impotent person, an outcaste and his issue, one lame, a madman, an idiot, a blind man and a person affiliated with an incurable decease, are persons not entitled to a share and are to be maintained.” Vijananeshwara says that the above mentioned person must be supported by an allowance of food and raiment only. Manu says, “Impotent person and outcastes, persons born blind or deaf, the insane, idiot and the dumb, as well as those deficient in any organ (action or succession) receive no share.” See yajanavalkya, vol II, p. 140; Mitakshara, II, X, P. 5, 10; Manu, vol. IX, p. 201; also see Poonam Saxena Family Law lectures Family Law-II, 2nd edition 2007, p. 490.
65 Parmeshwaran vs. Parmeshwaran AIR 1961 Mad. 345
66 Babuji vs. Dattu (1923) 47 Bom 707.
67 Murarji vs. Parvati Bai (1876) ILR Bom 177.
68 Pudyava vs. Pawanasa (1922) ILR 45 Mad 949 (FD).
69 Anukul Chandra vs. Surendera Nath 1939 ILR Cal 592.
71 Kayarohana Pathan vs. Subbarava Khevan (1915) ILR 38 Mad 250.
72 Since the passing of the Caste Disabilities Removal Act 1815, this disqualification has been removed.
73 Pandit Parmanand vs. Nihal chand (1938) ILR Lah 453
74 Chandra Singh Vs. Chameli AIR 1962 Punj 162.
Hindu Inheritance (removal of disabilities) Act, 1928

The act was enacted to remove the large number of grounds on the basis of which heirs could earlier be disqualified from inheritance or from seeking partition. Section 2 of this act provided:

Notwithstanding any rule of Hindu law or custom to the contrary, no person governed by the Hindu law, other than a person who is and has been from birth, a lunatic or idiot, shall be excluded from any right or share in joint family property by reason only of any disease, deformity or physical or mental defect.

The act removed several disqualifications attached to the affliction of various diseases and physical and mental defects, but did not apply to Hindus governed by the Dayabhaga Law.76

The disqualification on grounds of change of religion, loss of caste or excommunication, had already been removed by The Caste Disabilities Removal Act, 1850, and therefore, it was congenital idiocy and lunacy, that disqualified an heir from inheriting. Yet, at the same time, a murderer continued to be disqualified on the grounds of public policy. As the Act was silent on the aspect of disqualification based on the unchastity of females, it continued despite the passing of the act.

DISQUALIFICATIONS UNDER THE HINDU SUCCESSION ACT, 1956

The present provides for three types of disqualifications only, which are based on a violation of the fundamental principles of inheritance.

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76 The Hindu inheritance removal of disabilities Act 1928, S3
Difference of religion

(a) Convert’s Descendants

The Hindu Succession Act, 1956, applies to Hindus. Therefore, not only the intestate, but the heir must also be a Hindu. If the heir is of a different religion, he or she is not eligible for inheriting the property of the Hindu relative under the Hindu Succession Act, 1956. Under Hindu law, a person who was excommunicated or who ceased to be a Hindu by converting to another religion, lost the right to inherit the property of his Hindu relatives, despite the closeness of blood relationship. For example, if a son has converted, he will lose the right to inherit his father’s property. This general rule, which was applied strictly, was modified by the enactment of the Caste Disabilities (Removal) Act 1850. This Act was also known as The Freedom of Religion Act 1850, and it removed the disabilities that a person suffered from, on his conversion to another religion or in his excommunication, and one of the disabilities that it removed was the ‘inability to inherit the property of a relative of the former religion.’ This act was general in application and was not confined to only Hindus and Muslims. Though directed primarily at protecting the inheritance rights to the convert, it enabled a non-Hindu to inherit from Hindu, thereby making an inroad into the basic principle of succession of this religion based law, viz., the sameness of religion of the intestate and the convert. But beyond protecting the convert personally, it did not extend the protection any further, i.e. to his descendants,77 not did it affect the rule of similarity of religion of the intestate and the heir, in any other manner. Therefore, a convert, irrespective of his/her religion, inherits from the Hindu intestate, not because Hindu law permits it, but because of the statutory protection conferred on him by the Caste Disabilities Removal Act 1850. Hindu law did not permit a convert to inherit, but this rule was expressly abolished by the legislation. A convert’s descendants, born to

77 Mohammad Ismail vs. Abdul Hamid (1948) 2 Mad LJ 87
him after such conversion, if not Hindus, will be disqualified from inheriting the property of the intestate.\textsuperscript{78} So, for the descendants to be disqualified, two things should co-exist. First, they should be born after the conversion; and second, they should not be Hindus. For example, out of two brothers B1 and B2 one brother B2 converts to the Christian faith and gets married to a non-Hindu. On the death of B1, B2 would inherit the property, as despite being a non-Hindu, his rights are protected by the Caste Disabilities Removal Act 1850. But suppose, B2 dies during the lifetime of B1 and then B1 also dies. In that case, S, the son of B2, who was born after B2’s conversion, will be a convert’s descendant born to him after conversion and would be disqualified from inheriting the property of the Hindu intestate.

In the present example, let us suppose that after the conversion, B2 gets married to a Hindu girl, W, he can do it either under the special marriage act 1954, or even under the Indian Christian Marriage Act 1872, where the marriage of a Christian and a non-Christian is permissible. After a son, S, is born to him, he dies. W, being a Hindu, goes back to her parent’s family and the child is brought up as a member of her Hindu parent’s community. The child will be a Hindu. If B1 dies, then, S, even though he was a convert’s descendant born to him after conversion, will be entitled to inherit the property of B1 because he is a Hindu.

\textbf{(b) Born after conversion}

In order to be a disqualified, the descendants must have been born after the conversion of their parents and not before it. For example, a family consists of the father F, and a son S. S gets married to SW and a son SS, is born to him.

\textsuperscript{78} G.S. Sadashiva vs. M. Shrinivasan AIR 2001 Kant 453; E. Ramesh vs. P. Rajni (2002) 4 Lw 192
After the birth of SS, S and SW convert to the Muslim faith and a daughter SD is born to them. Shortly, thereafter, S dies. Now, on the death of the father F, SW will retain her inheritance rights as she is a convert and her rights are statutorily protected. SS will inherit as he is the son of a predeceased son, born to him before conversion, but SD will be disqualified as even though she is a class I heir, she was born to the Hindu father after his conversion to Muslim faith, and since, at the time of her birth, both parents were Muslims, she is a Muslim by birth, and not a Hindu.

A Hindu male H, gets married to a Hindu female W and son S, is born to him. On the death of W, H converts to the Muslim faith and gets married to a Muslim girl $W_2$ and son $S_1$ is born to him from her.

Let us consider three situations:

(i) If S dies, he is a convert and Muslim, but is still entitled to inherit the property of his Hindu son, because of the removal of his disability to inherit due to difference of religion, by the Caste Disabilities (Removal) Act, 1850.

(ii) If instead of S, H dies, because H was a Muslim at the time of his death, the Muslim law of succession will govern succession to his property and S being a non-Hindu, will not inherit from his Muslim father.

(iii) If, after the death of H, H's father, F dies. S will be the son of his predeceased son, born to him before conversion and would inherit the property, but $S_1$, who was born after the conversion, would be disqualified from inheritance.

A convert's descendants should be Hindus in order to inherit the property of the intestate, at the time when the succession opens. It is the time of the death of the intestate that is material for determining whether the convert's descendant is eligible to inherit the property or not. If the descendant was not a Hindu at the
Remarriage of widow

Under Hindu law, heirs need not be related to the intestate by blood or a valid adoption only, but can be relatives introduced in the family by marriage to a male member. For succession to the property of a male intestate, five widows, namely, the intestate’s own widow, his father’s widow and brother’s widow, (class-II heirs), widow of a predeceased son and widow of a predeceased son of a predeceased son, are, with respect to the intestate, his heirs introduced in his family by marriage to male members, who can be ascendants, i.e. father; collaterals; i.e. brothers’ or descendant i.e. so and son of a predeceased son. For succession to the property of a female intestate, the entire categories of heirs of husband are relations by marriage.

Certain widows disqualified in remarriage – Law prior to The Hindu Succession (Amendment) Act, 2005

For a male intestate, his own ‘widow’ will become a widow when he dies and therefore, there is no question of her being married at the time of the opening of the succession. With respect to the father’s widow, the term would include both the intestate’s own mother as well as a stepmother. The intestate’s own mother is related to her son by blood, and not by marriage to the father only. She inherits in her own right and she does not cease to be the mother by her remarriage,79 and so, her rights are not affected by her marital status.

The stepmother on the other hand, is a relation introduced in the family by her marriage to the father of the intestate, and upon her remarriage, she ceases to be a member of this family and her position should not be any different from that of the other three windows, whose remarriage before the opening of succession, disqualifies them from inheriting the property of the deceased. In the

79 Bhuri Bai vs. Champa Bai AIR 1968, Raj139; Kishan Lal vs. Gindori (2002) 1 HLR 375 (P & H)
original Hindu Succession Bill 1954 (Bill No. 13), the father’s widow was in fact, included in this category, along with the other three widows, whose remarriage disqualified them from inheritance. But there was no differentiation between a biological or adoptive mother and any other widow of the father (step mother) of the intestate. Rather than differentiating between the two, the legislature removed this category from the disqualification clause and created an anomalous situation. Now a stepmother can remarry after the death of the father of the intestate, and still retain her rights of succession in the property of her step son. They could have retained the expression father’s widow along with the brother’s sons and son’s son’s widows, with an explanation, ‘that the expression father’s widow does not include the mother of the intestate.’ By not doing this, it has created a distinction between her and the widows of the other deceased male members, which is not based on any logical explanation.

Under section 24, three widows, who have been specified by their relationships, namely, the widow of a predeceased son, the widow of a predeceased son of a predeceased son or a widow of a brother, shall not be entitled to succeed to the property of the intestate as such widows, if on the date the succession opens, they have remarried.

These three widows had become members of the intestate’s family by getting married to his male relations and they become his heirs on the death of these relations. In fact, the claim of any of such widow is through the male relation only, viz., a brother’s widow claims through the brother because she was married to the brother of the intestate. It was only because of her marriage that she had become a member of this family, and if, upon the death of the brother, she remarries, she ceases to be a member of his family. She is not an heir in her own right, but is so in the capacity of the widow of a male relation. When she ceases to be a widow by getting married, she also loses both the membership of this family, as well as her succession rights.
Marital status relevant on the date of opening of the succession

The date of opening of the succession is the date when the intestate dies, and therefore, the marital status of the widows is material as on that date. If on that date, the widows fit the description of widows of the respective male relations, they will be entitled to inherit and their subsequent remarriage will not divest them of the property already vested in them.

Let us examine three situations here again:

(i) A dies and is survived by his brother B1 and a widow of his predeceased son. As the widow of the son is a class I heir, she will inherit the property and the brother will not get anything.

(ii) A dies in 1990 and is survived by his brother B1 and the widow of his predeceased son SW, who remarries after two days of A’s death. Here again, as SW did fit the description of a widow of a predeceased son on the date of opening of the succession, i.e. the date of the death of the intestate, the property vests in her the moment the succession opens. A day or two days later, when she remarries, she will not be divested of the property already vested in her.

(iii) A dies on 31 January 1990, and is survived by his brother B, and the former widow of the predeceased son, SW, who remarries on 30 Jan., 1990. It is inappropriate to describe her here, as a widow of the predeceased son as she has already married one day prior to the demise of the intestate. On the date on which the succession opens, she is not a widow anymore and has already remarried, hence, she would be disqualified and the whole property will be taken by the brother.

Such widow

The disqualification on the ground of remarriage applies in case any of these three widows remarry yet, claim to inherit as widows. For example, , the
widow of a predeceased son, remarrying before the death of the intestate, cannot succeed to his property as his son's widow, but if she claims to inherit in some other capacity, then the fact that she was once his son's widow will not disqualify her if she is otherwise entitled to inherit. Under Hindu law, the prohibited degrees of relationship are so contemplated, that ordinarily, the widow of a male relation, who is an heir to the intestate, cannot marry another male relation, on whom death, she could still be an heir of the intestate, unless there is a custom to the contrary in the community to which both the parties belong. The widow of a lineal descendant and the widow of a predeceased brother, are under the prohibited degrees of relationship under the Hindu Marriage Act 1955, and a marriage solemnized in violation of this degree, will be a void marriage in the eyes of law, conferring no benefits unless the parties establish a contrary custom.

**LAW AFTER THE ENFORCEMENT OF THE HINDU SUCCESSION (AMENDMENT) ACT, 2005:**

Section 24 has been deleted by the amending Act. However, it does not mean that the situation and the eligibility criteria have changed. Even without S 24 being on paper, the situation with respect to these widows has remained the same. Section 24 was superfluous and its deletion therefore, would not alter the situation at all.

Under the Hindu succession Act 1956 two categories of relatives are recognized as heirs to the intestate. One who were related to the deceased through blood and second who were related to the deceased through marriage i.e, who entered the family of the deceased through marriage to the male members. The disqualification of remarriage is attached to those heirs who entered the family by marriage, became widows on the death of the respective male members to whom they were married, and went out of the family again by a remarriage. Marriage or remarriage of blood relatives such as daughters, sisters, mother is of no consequence, but remarriage of son’s widow, son’s son’s widow, or brother’s widow would mean that they cease to be members of the intestate’s
family, and their inheritance rights would be created in the family they are married into. After remarriage, they would be related to the intestate neither as blood relatives nor by marriage and therefore would not be eligible to be his heirs.

**Murderer**

This rule is based on public policy, equity, justice and good conscience. A person who commits the murder of the intestate or abets its commission, cannot inherit his property. If he commits the murder, not of the intestate, but of an intermediary between the intestate and him, and on whose death, he would become eligible to inherit, it would be a murder in furtherance of succession and would again disqualify him from inheriting the property of the intestate. Section 25 says.\(^80\)

A person who commits murder or abets the commission of murder, shall be disqualified from inheriting the property of the person murdered or any other property in furtherance of the succession to which he or she committed or abetted the commission of the murder.

**Commission of Murder**

Murder means to kill or to assassinate and it is to be understood in its popular sense, and not in the technical, rigid and beyond reasonable doubt proof oriented sense of the Indian Penal Code.\(^81\) An acquittal from the criminal courts on the basis of benefit of doubt, or because the prosecution could not prove the case beyond reasonable doubt, may still disentitle a person from inheriting the property of the intestate whom he killed. A murder committed under grave and sudden provocation, or even to save one’s own life or the life of some other person, might be looked upon sympathetically under criminal law, but it would not place the heir differently from a case where he kills the intestate through

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80 Chinnapappal vs. Rajammal 2002 AIHC 643 (Mad).
meticulous planning and a well executed murder. The civil courts are not bound, normally, by the verdict of the criminal court and they can assess the case independently. However, if there is a finding of the criminal court that the claimant is not the murderer and the deceased had committed suicide, then there is no bar to the claimant being granted a share in the property of the deceased.⁸²

The term murder is not to be equated with being responsible for death. For example, a son, due to his deviant and obnoxious behavior, brings shame to the family, and his upright father is unable to take the humiliation and commits suicide, or where, due to mismanagement by the son, the father suffers a huge loss and dies of a heart attack, the son is responsible for the death of the father, yet he is not a murderer and would not be disqualified under this section.

**Murder Committed in Furtherance of Succession**

Where a person commits the murderer, not of the intestate, but of his heir, the removal of whom will accelerate the succession in his favour, such murderer is again disqualified from inheriting the property of the deceased. For example, a family consists of a Hindu male A, his father F, and a son of his predeceased brother BS.

![Family Tree Diagram]

In terms of priority, on the death of A, it is the father who would inherit his property and not BS, as the son of a predeceased brother has an inferior

⁸² G.S. Sadashiva vs. M.C. Srinivasan AIR 2001 Kant 453.
placement in comparison to the father. In apprehension of A’s death, if BS commits the murder of the father of A, on the death of A, despite being the closest relation, he would be disqualified from inheriting the property of the intestate. Here again, he may personally kill the father or take somebody’s help in its commission or abet its commission, the consequences will be the same.

The rule of disqualification on ground of commission of murder or abetting it, is applicable to both intestate as well as testamentary succession.

Since the amendment of the Act in 2005, heirs can be disqualified under only two situations.\(^3\) Section 25 of the act provides that if a person commits murder of the intestate he cannot succeed to his property. This section incorporates the principle of “Nemo ex suo delicto meliorem suam conditionem facere potest” and is based on the principles of justice, equity and good conscience to make it impossible for a murderer who deserves to be hanged or to be shut behind the prison bars for life to derive advantage or beneficial interest from the very heinous act committed by him. In the instant case, the husband was held guilty of committing the murder of the wife within few years of her marriage. She had left behind property including a flat that she had purchased before her marriage. In accordance with the provisions of Hindu Succession Act the property would constitute her general property and would have gone to her husband. However, in accordance with the provision of section 27 of the Act, as he was the one who had committed her murder, he stood disqualified from inheriting her property. The second category of heirs under section 15 is “heirs of husband”. The court held that if the heir is disqualified he is presumed to be dead and the succession passes to the heirs in the next category the next category. However, in this case, the next category in fact was a representative of the disqualified heir. Thus, neither the disqualified heirs nor his representatives are entitled to succeed. Therefore, the parents of the husband were held not entitled to inherit the property would then pass to the next heirs i.e. the parents of the deceased woman.

\(^3\) Annual Survey of Indian Law Institute 2007 vol. XLIII p. 371
However, where an heir is charged with the murder of the intestate, but is acquitted by the criminal court as her involvement in the murder is not proved at all, such an heir is not disqualified and can inherit the property of deceased. In a Bombay case, the wife was accused of murdering her husband to commit murder along with three persons and was denied succession certificates in view of section 25 of the Hindu Succession Act. In the light of clear acquittal by the criminal courts, the Bombay High Court rightly held that as there was nothing to suggest that she could have been involved in any way with the number of her husband, she was entitled to succeed to his property.

CONSEQUENCES OF DISQUALIFICATION:

The heir who is disqualified is presumed to be dead, and the succession passes to the next heir in line, who is eligible to inherit the property. Section 27 provides, 'if any person is disqualified from inheriting any property under this Act, it shall devolve as if such person had died before the intestate.'

The disqualified heir is presumed to be dead, and the next eligible heir takes the property. For example, A, a Hindu male is murdered by his son S. The son is a disqualified heir and will be presumed to be dead. His wife will take the label of widow of a predeceased son for the purposes of succession and will inherit the property in her own right.

DISEASE AND DEFECT NOT TO DISQUALIFY:

Section 28 of the Hindu succession Act 1956 provides.

No person shall be disqualified from succeeding to any property on the ground of any disease, defect or deformity, or save as provided in this Act, on any other ground whatsoever.

The Act provides for only three types of disqualifications. It categorically specifies that no disease, whether curable or incurable or defect whether congenital or acquired later, would disqualified a person from inheriting the
property of the intestate. Insanity, any other kind of mental or physical
abnormality, or handicap including blindness or diseases like cancer HIV AIDS or
any other deadly disease, will not have any effect on the succession rights of a
person.

DECISIONS OF SUPREME COURT ON PROPERTY RIGHTS OF WOMEN:

The judiciary always is behind the gender justice. The protection of
women’s right to property is not a new thing in the life of Supreme Court or High
Courts in India. The explanation I of section 6 of the Hindu Succession Act, 1956
(before 2005 amendment) was interpreted differently by the High Courts of
Bombay, Delhi, Orissa and Gujarat in the cases84 where women’s rights to
property effected. The Supreme Court in Gurupad vs. Heerabai85, and in Shyama
Devi vs. Manju Shukla86, held that the proviso of section 6 gave the formula for
fixing share of the claimant and the share was to be determined in accordance
with the explanation I by deeming that a partition had taken place a little before
his death, which gave the clue for arriving at the share of the deceased.

The Supreme Court in the matter of State of Maharashtra vs. Narayan
Rao,87 held that it was no doubt true that the right of a female heir to the interest
inherited by her in the family property gets fixed on the date of the birth of a male
member of the family without her concurrence as otherwise it will lead to strange
results which could not have been in the contemplation of Parliament when it
enacted that provision and it might also not be in the interest of such females.88

The Supreme Court in Narashimah Murthy vs. Sushilabai,89 held that a
female heirs right to claim partition to the dwelling house of the Hindu dying
intestate under section 23 of the Hindu Succession Act, 1956 would be deferred
or kept in abeyance during the life time or even a sole surviving male heir of the

85 Gurupad vs. Meera Bai AIR 1978 SC 1239
86 (1994) 6 SCC 342.
87 AIR 1985 SC 716.
89 AIR 1996 SC 1826
deceased until he choose to separate his share or ceases to occupy it or lets it out. The idea of this section is to prevent the fragmentation and disintegration of the dwelling house at the instance of the female heirs, the detriment of the male heirs in occupation of the house, by rendering the male heir homeless or shelterless.  

The more important observation was made by Supreme Court in a case where it was held that the eligibility of married daughter must be placed at par with an unmarried daughter for, she must have been once in that state, so as to claim the benefit.

Hence once a daughter is made a coparcener on the same footing as a son then the right as a coparcener should be real in spirit and content. Hence his spirit inspired the Indian Parliament to omit section 23 in toto from the Hindu Succession Act of 1956.

In order to give the women same footing right it is pertinent to look forward the widow’s right to reside in dwelling house. The family dwelling house should not be alienated without the widow’s consent or without providing her an alternative recommendation after she has agreed to the sale of the dwelling house. In order to protect such right section 24 was omitted by the Hindu Succession Amendment Act of 2005.

In case of Radhika vs. Aghnu Ram Mahto, the Supreme Court in respect of property right of daughter of second wife, held that, for the property inherited by a female Hindu from her father or mother, a female’s paternal side in the absence of her son, daughter or children of the predeceased son or daughter, the succession opens to the heirs of the father or mother and to the class I heirs, in the order specified in sub-section (1) of section 15 and in section 16 of the Hindu Succession Act of 1956.

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90 174th Report of Law Commission of India, 2000  
91 Savita Samvedi vs. Union of India, 1996 JT (1) 680.  
The Apex court in P.S. Sairam vs. P.S. Rama Rao,\textsuperscript{93} held that the shares of the parties in the joint Hindu family property have to be determined in accordance with the provisions of section 6 of the Hindu Succession Act, 1956 and accordingly decreed in favor of seven daughters of the joint family along with male heirs accordingly.

In a very recent case\textsuperscript{94} the court by going negatively with women’s right to property disqualified the daughter in laws right to father in laws property on the ground that the son had murdered his own father.

The court went through the matter on the ground of justice, equity and good conscience. Here in the case the sole male survivor, the son incurred disqualification by murdering his own father. He could not inherit property of father in view of section 25 and 27 of the Hindu Succession Act, 1956. His wife, who claimed to the property through him, could not have a better claim to property of her deceased father in law.

The Supreme Court in dealing with the gift related property held that the father can gift of ancestral immovable property within a reasonable, limits in favour of his daughter.\textsuperscript{95}

The court observed in a case,\textsuperscript{96} that the benefit of section 29A of the Hindu Succession Act, 1956 can be invoked only by major daughters if they are not married prior to the commencement of section 29A of the Act.\textsuperscript{97}

If the property held by a female was inherited from her father or mother, in absence of any son or daughter of the deceased including the children of any predeceased son or daughter, it would only devolve upon heirs of the father and his sister who was the only legal heir of her father. Deceased female Hindu admittedly inherited the property in question from her mother. The intent of the

\textsuperscript{94} Valikanu vs. R. Singaperumal, AIR 2005 SC 2587.
\textsuperscript{95} R. Kuppayee vs. Raja Gounder, AIR 2004 SC 1284.
\textsuperscript{96} B. Chandershekar Reddy vs. State of AP, AIR 2003, SC 2322.
\textsuperscript{97} Hindu Succession (AP) amendment Act, 1986 (AP Act 13 of 1986).
legislature is clear that if the property is originally belonged to the parents of deceased female, should go to the legal heirs of the father. Further the fact that a female Hindu originally had a limited right and later acquired the full right in any way, would not alter the rules of succession, given in sub-section (2) of section 15 of the Hindu Succession Act, 1956.98

The Supreme Court in case of Kalawatibai vs. Soiryabai,99 in the matter of widow’s right to property held that a female Hindu possessing the property on the date of the Hindu Succession Act of 1956 came into force, could become absolute owner only if she was a limited owner. The legislature did not intend to extend the benefit of enlargement of estate to any or every female Hindu irrespective of whether she was a limited owner or not.

Both brother and sister are class I heirs under Hindu Succession Act, 1956 and they share property equally.100

Under section 3 of the Hindu Women’s Right to Property, Act, 1937 (now repealed) a widow succeeds as an heir to her husband. She fully represents the estate.101

The chance of daughter to succeed to her father’s estate in case of father died intestate not a pre-existing legal right. The destitute widowed daughter has a right to claim maintenance from her father both during his lifetime and also against his estate after his death.102 The illegitimate daughter cannot claim heirship as per section 15 of the Hindu Succession Act, 1956.103

DECISIONS OF HIGH COURTS ON PROPERTY RIGHTS OF WOMEN:

Before the Hindu Succession Amendment Act, 1956 for giving the women their right to property in 2005, the States like Andhra Pradesh, Maharashtra,

98 Bhagat Ram (D) by LRs vs. Teja Singh (D) by LRs, AIR 2002 SC 1.
99 AIR 1991 SC 1581.
100 Krishna, minor through his father and guardian vs. State of Haryana, AIR 1994 SC 2536.
103 Vithabai Krishanjee Patil vs. Banubai w/o Baby Payamal, AIR 1994 SC 481
Karnataka and Tamil Nadu have made provisions pertaining the women's rights to property for their respective states. Accordingly the High Courts of these states have used these provisions in favour of the women for their property rights. Besides other high courts have shown their pitiable concern over such rights of women.

In a very recent case\textsuperscript{104} it was held that under sections\textsuperscript{105} 6 and 6A of the Hindu Succession Act, 1956, unmarried daughters are entitled to equal status of a coparcener and are entitled to equal rights with son.

In case of Mallipedy (died) vs. Narendra Tulasamma (died),\textsuperscript{106} the Andhra High Court gave its verdict on the property right in favour of first wife of the deceased husband. It held that second wife being not legally wedded wife, would not be entitled to any property. The first wife is entitled to the entire property since there was no other survivor.

The Karnataka high court in another case\textsuperscript{107} held that widow of deceased son not being class I heir “V” who died intestate sons of “V” cannot claim the right of pre-emption.

The Andhra Pradesh high court in another case of Prakash v. Pushpa Vani,\textsuperscript{108} in the matter of concubine property right held that concubine is entitled to the maintained by her paramour till her death. The right was not taken away by Hindu's Women’s Right of Property Act, 1937. The life interest in the house which is given to her in lieu of maintenance before the commencement of the Hindu Succession Act, 1956, would enlarge into full estate after the commencement of the Hindu Succession Act, 1956.

\textsuperscript{104} Ravikirti Shetty vs. Jagatpala Shetty, AIR 2005 AARN 194.
\textsuperscript{105} Instituted by Karnataka Hindu Succession Act of 1994 (23 of 194).
\textsuperscript{106} AIR 2005, AP 221.
\textsuperscript{107} Ganeshappa (D) by LRs vs. V. Krishanama, AIR 2005 Karn 160.
\textsuperscript{108} AIR 2004 NOC 463 (AP).
Calcutta High Court in dealing with the female’s right to property in case of Kamal Basu Majumdar vs. Usha Bhadra Chaudhary,\(^{109}\) held that right of female to house property does not disappear if the tenants vacates premises during pendency of suit. In this case the female south for petition and such house, was partly occupied by tenant.

In relation to the widow’s right to property Jharkhand high Court in Naresh Jha vs. Rakesh Kumar,\(^{110}\) showed this corner over devolution of property.

In a case\(^{111}\) male Hindu died leaving behind a widow and two sons. His death occurred prior to coming into force of Hindu Women’s Right to Property Act, 1937 repealed by Hindu Succession Act, 1956. His property would devolve upon his two sons in equal shares and no share in property would devolve upon widow.

In a case pertaining to the right of a married daughter, it was held that daughter being class I heirs is entitled for share in the property of father and marriage before 20 years back is immaterial.

The Madras High court in R. Deivanai Ammal case\(^{112}\) where a female heir claimed partition right held that provision of section 23 (now omitted by the Hindu Succession Amendment Act, 2005) of the Hindu Succession Act, 1956 is not an absolute bar to claim the partition right.

The properties purchase by Hindu widow with savings from joint Hindu family lands prima facie should be regarded as her own self acquisition unless the person claiming a share in them has pleaded and proved that the widow treated them accretion to joint family estate.\(^{113}\)

\(^{109}\) AIR 2004 Cal 185.
\(^{110}\) AIR 2004 Jharkhand 2.
\(^{111}\) Subbayyajoga Naik vs. Narayani, AIR 2004 Karn 430.
\(^{112}\) R. Devanai Ammal (D) by LRs vs. G. Meenakshi Ammal, AIR 2004 Mad 629.
\(^{113}\) Neelavva vs. Bhimavva, AIR 1982 Karn 307.
Thus, the High Courts in dealing with the women’s right to property in the line of provision of Hindu Succession Act, 1956, concern of the legislative intent of the act in toto. But they face the problem of divergent laws of succession among the Hindus because the succession varies with the variation of principles of different schools of Hindu law in the scale of uncodified provision of Hindu law. This is so because before the enactment of the Hindu Succession Act, 1956 the country was with fundamental concept of Hindu law and the same was not taken away fully in the said Act. Hence the conflict between codified Hindu law and uncodified Hindu law confuses the courts in India to interpret the provisions of any law in the light of succession and property rights. Though not fully, the Hindu Succession Amendment Act, 2005 can enable the courts to protect the women’s right to property without any ambiguity and passion. Without passion because the amendment provision of the Hindu Succession Act, 1956 is the complete code for the protection of women’s right to property and the omission of section 23 and 24 can supply more fuel to serve the long awaited purpose of the Indian women.

Moreover, though very late, the Indian women were blessed with the amendment of Hindu Succession Act, 1956 in August 2005. Perhaps it is the commitment of government of India for the gender justice. Though it has signed the international convention on elimination of all forms of discrimination against women in 1979, it was sensitized in 2000 by the law commission of India. Further though two bills for this purpose were drafted in 2002 and 2004, the final act was passed in August 2005 on the basis of committee report, for this specific women’s right to property.

No doubt the daughters were empowered for their rights in the ancestral property as if they are sons. But once a daughter became a coparcener on the equal scale as her brother in real spirit and content, the relationship that stands

from dawn of civilization i.e., love to sister and daughter will cease to continue impassionately. In this respect it can be quoted that:

“Sometimes, new laws allow legal intellectuals to feel, they had corrected a long standing error. But contrarily enough they preserve for individuals to think over the socially unenforced rights for ever.”