Chapter - 5

The Hindu Succession

(Amendment) Act, 2005:

An Analysis
THE HINDU SUCCESSION (AMENDMENT)  
ACT, 2005 : AN ANALYSIS

GENERAL

Gender based discrimination is a global phenomenon and at present, though we stand at the remnant of the 21st Century but we are still unable to boast of a society where there is complete gender equality. Woman, who shaped the destiny of human race, an architect of civilization, a nucleus of the family, a protector of the home, an inspiration and strength of man on every front is still the most disadvantaged group of human species. She has proved that she is not frail, fragile and delicate, though physically weak yet spiritually strong. A powerful generation is impossible without powerful woman. It is a stigma and a stain for the entire human race, if woman is compelled to remind society for her rights. Social democracy, for its full strength, requires the women empowerment, social and economic both. No development is possible unless and until the women's rights are protected.

With respect to the property rights of a Hindu woman, the dictates of ancient texts were multifarious.¹ Baudhyana says,² "Women are devoid of powers and incompetent to inherit, women are useless." Whatever, might have been the recommendations of the Dharamashastras, there is no dispute about the fact that the interpretations and selective pickings of its provisions and the influence of customs placed severe impediments on her rights to own

¹ Some ancient texts were recommending the granting of a share to her and some putting restrictions on her rights to even acquire it herself or hold it as an absolute owner. According to Manu a wife, son and a slave can have no property, is often quoted to show that Hindu law did not recognize any property right of woman (VIII, 16). According to Yajnavalkya, what was given to woman by the father, mother, her husband or her brother or received by her at nuptial fire or presented on her suppression and the like is denominated women's property (Yaj, II, 143). Manu Smriti, IX, 194 enumerates six kinds of Stridhana and Vishnu enumerated four kinds of Stridhana (XVII, 18).
² Baudhyana's Dharamshastra 11.22.47.
property. Customary practices also denied her absolute ownership and even restricted her rights to maintenance.

The Constitution of India which is fundamental law of the land, enshrines the principle of gender equality in its Preamble and Parts III, IV and IV-A pertaining to Fundamental Rights, Fundamental Duties and Directive Principles respectively. It not only grants equality to women\(^3\), but also empowers the State to adopt measures of positive discrimination in favour of women etc.\(^4\) Several statutory and other steps have been taken for the fulfillment of the above said cherished Constitutional objectives.\(^5\)

**BASIC FEATURES OF HINDU SUCCESSION ACT, 1956**

The greatest advantage of the Hindu Succession Act, 1956, (hereinafter referred as the Act of 1956) which came into force on 17\(^{th}\) June, 1956, is that it has consolidated most of the rules of succession among Hindus at one place. The Act overrides the Shastric, customary, statutory and other laws on any matter for which it makes a provision.\(^6\) It provides a comprehensive and uniform law of succession for Hindus governed by this Act. It amended and codified primarily the laws of intestate succession and touched briefly the law of testamentary succession\(^7\) as well as the classical law of joint family and the coparcenary.

Section 6 of the Act deals with the devolution of interest of a coparcener dying intestate. It was held in *Gurupad v. Hirabai*\(^8\) that the widow would be entitled to her successional share as well as her share

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4. Article 15 (3), Art. 39 (a), (d), Article 42 and Article 51 A(e) also deals directly or indirectly with the upliftment of woman.
5. The Hindu Marriage Act, 1955, the Hindu Adoptions and Maintenance Act, 1956, the Hindu Minority and Guardianship Act, 1956, the Hindu Succession Act, 1956, Anti Rape Laws etc. are some of the examples of such steps.
7. Section 30 of the Act deals with Testamentary Succession.
8. AIR 1978 SC 1239.
under notional partition. The women’s property rights are also recognized under Section 8 to 13 of this Act, as they get property from a male, as class-I heirs, class II heirs, agnates and cognates. This Act has also made a Hindu female, an absolute owner of any property possessed by her at the time of passing of the Act. Sections 15 and 16 of this Act deal with succession to absolute property of Hindu female dying intestate. The Act is unique in that respect as it removes defects regarding devolution of the property, makes the Hindu law of successions uniform throughout the country and abolishes the Marumakathayam and Nambudari laws in Malabar as the latter are in conflict with the former. It takes away the concept of Stridhana altogether. Now like men, women too can acquire and hold property.

The Hindu Succession Act, 1956 gave equal inheritance rights to women with men, but the Mitakshara coparcenary system was still

9 Class I heirs:- daughter; widow; mother; daughter of a pre-deceased son; daughter of a pre-deceased daughter; widow of a pre-deceased son; daughter of a pre-deceased son of a pre-deceased son; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased son of a pre-deceased son.

10 Class II heirs:- Son’s daughter’s daughter; sister; daughter’s son’s daughter; daughter’s daughter’s daughter; brother’s daughter; sister’s daughter; father’s mother; father’s widow; brother’s widow; father’s sister; mother’s mother; mother’s sister.

11 Section 3 (a) : One person is said to be an “agnate” of another if the two are related by blood or adoption wholly through males.

12 Section 3 (c) : One person is said to be a cognate of another if the two are related by blood or adoption but not wholly through males.

13 Section 14: (1) Any property possessed by a female Hindu whether acquired before or after the commencement of this Act, shall be held as a full owner thereof and not as a limited owner.

Explanation - In this sub section, “Property” includes movable and immovable property acquired by a female Hindu by inheritance of device, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, any such property held by her as Stridhava immediately before the commencement of this Act.

14 Nothing contain in sub section (I) shall apply to any property acquired by way of gift or under a will or Any other instrument or under a decree or order of a civil court or under an award where the terms of the gift, will or other instruments of the decree, order or award prescribe a restricted a estate in such property.

retained without including females in it. If a joint family gets divided, each male coparcener takes his share and no females get anything as coparcener.\textsuperscript{16} She still was decidedly and distinctly discriminated, because the son continued to claim the lion’s share; one in the capacity of class-I heir along with the daughter and another in the dominant position of a coparcener. Only when one of the coparceners dies, a female gets a share out of his share by excluding the daughters from participating in coparcenary ownership, very unfortunately merely by reason of their sex which not only contributed to an inequity and appears to be a mockery of the Fundamental Rights guaranteed by the Constitution.

**STATE AMENDMENTS REGARDING THE WOMAN’S RIGHT TO PROPERTY**

As succession matters come under Entry 5 of the List III of the 7th Schedule of the Constitution, so taking clue from this and to overcome the lacuna and in order to make gender equality, the States of Andhra Pradesh\textsuperscript{17}, Karnataka\textsuperscript{18}, Maharashtra\textsuperscript{19} and Tamil Nadu\textsuperscript{20} have realised the difficulty that arose by excluding the daughter’s right to claim partition in coparcenary property and have amended the Hindu Succession Act, 1956 to achieve the Constitutional mandate of equality. On the other hand, Kerala has tried to remove the gender bias by abolishing not only the Mitakshara coparcenary but also the joint Hindu family system all together by the Act of 1975.\textsuperscript{21} Through these Amendments the daughter was made a coparcener with its consequential effects.

\textsuperscript{16} Only 3 females i.e. widow, widowed mother and widowed grandmother, gets share from coparcenary property, but not in the capacity of coparcener. On the death of Mitakshara coparcener, his interest in coparcenary would devolve upon his widow as per Section 3 of Hindu Women’s Right to Property Act, 1937.
\textsuperscript{17} The Hindu Succession (Andhra Pradesh Amendment) Act, 1986.
\textsuperscript{18} The Hindu Succession (Karnataka Amendment) Act, 1994.
\textsuperscript{19} The Hindu Succession (Maharashtra Amendment) Act, 1994.
\textsuperscript{20} The Hindu Succession (Tamil Nadu Amendment) Act, 1989.
\textsuperscript{21} The Kerala Joint Hindu Family System (Abolition) Act, 1975.
The Kerala Joint Hindu Family System (Abolition) Act, 1975

It was enacted to abolish the joint family system among Hindus in the State of Kerala. It applied to both undivided families governed by Mitakshara Law as well as matriarchal families including a tarwad or tavazhi a kutumba or kavaru or an ilom.

A decade before the Andhra Pradesh Amendment Act, the State of Kerala has amended the Hindu Succession Act, 1956 in its application to the State of Kerala, by passing the Kerala Joint Hindu Family System (Abolition) Act, 1975. It has abolished the Joint Hindu Family System altogether. In Kerala after the commencement of this Act, no person (not even a son) can claim any right by birth in the property of an ancestor during his lifetime. As a matter of fact, it has resulted in the statutory partition of joint family property on the commencement of this Act and has covered the joint tenants into tenants-in-common.

This Act provides that all the members of a Mitakshara coparcenary will hold the property as tenants in common from the day on which the will Act come into force as if a partition had taken place and each holding his or her share separately. A lingering anomaly is that although the Hindu Succession (State Amendment) Acts have conferred upon the daughter of a coparcener status but there is still reluctance to making her a Karta because of the general male view that she is incapable of managing the properties or running the business. There are female sthanamdars in the

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22 Act 39 of 1976.
23 Section 2 (4) of the Kerala Joint Hindu Family (Abolition) Act, 1975.
24 Governed by the Madras Marumakkathayam Act, 1932; The Travancore Nayar Act, 1100; The Travancore Ezhava Act, 100; The Nanjinad Vellala Act of 1108; The Travancore Kshatriya Act, 1108; The Travancore Krishnavak or Marumakkhatayam Act 1115; The Cochin Nayar Act, 1113 or the Cochin Marumakkathayam Act, 1113.
26 Governed by the Kerala Nambudiri Act, 1958.
28 It came into force on 1-12-1976.
29 Section 4(i) of the Kerala Joint Family System (Abolition) Act, 1975.
30 Manager of the Joint Family.
31 Available at http://www.hindu.com (visited on 17/08/2011).
Malabar (Kerala). A combined reading of Sections 3 (2) and 7 (3) of this Act of 1956 makes it uncertain whether or not Section 7 (3) governs those *sthanam* property which have female *sthanamdars*. In the State of Kerala it has been made expressly clear by legislation that Section 7 (3) applies to such *sthanamdars* also. The Kerala Amendment lays down also that the devolution of the *sthanam* properties and their division among the members of the family and his heirs do not affect the position of the tenants (who were holding such properties under the deceased *sthanamdars*) regarding their eviction etc. This Act has rendered the provisions of Section 7 of the Hindu Succession Act, 1956 inoperative in the State of Kerala. This section deals with the succession to the undivided Hindu family in a *tarwad, tavazhi, kutumba, kavaru,* or *ilom.* The Kerala Act has abolished the joint property with joint tenant’s characters. Thus, the type of property to which Section 7 of the Hindu Succession Act, 1956 applies does not exist in Kerala. Therefore on the date of coming into force of this Act it was to be presumed that, a partition had taken place in every family and each person who was earlier entitled to get a share was deemed to hold his share as his distinct separate and absolute property. If under the custom a female was entitled to ask for partition or was to be granted a share in the property in lieu of her maintenance or marriage expenses, then only she was entitled to a share in the property. The Act also abolished the pious obligation of the son to repay the debts of the father, paternal grandfather or the paternal great grandfather. The liability of the joint family members

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32 Sub-Section (3) of Section 7 of the Hindu Succession Act, 1956 has only the masculine pronouns and Section 3 (2) lays down that “in this Act, unless the context otherwise requires, words, importing the masculine gender shall not be taken to include females.”
33 The Sthanam Properties (Assumption of Temporary Management and Control) and Hindu Succession Bill, 1957 (Act 28 of 1958)
37 Section 5 of the Kerala Joint Hindu Family (Abolition) Act, 1975.
for debts contracted before the Act is prospective in application and not retrospective.\textsuperscript{38}

\textbf{The Hindu Succession (Andhra Pradesh Amendment) Act, 1985\textsuperscript{39}}

After thirty years\textsuperscript{40} the Andhra Pradesh Government in 1986 took the first step to bring about legal equality in a Hindu joint family governed by Mitakshara law by stating that rights of the daughter and the son are absolutely equal. This Act, in the Statement of Objects and Reasons clarifies that it is in consonance with the Constitutional guarantee of equality before law and as the exclusion of the daughter from participation in coparcenary property ownership merely by reason of her sex is contradictory thereto, and her exclusion has led to the creation of the socially pernicious system of dowry and its attendant social evils, the Andhra legislature realised the need to take necessary steps to eradicate the baneful system of dowry by concrete positive measures to ameliorate the condition of Hindu women in the society.

By the Hindu Succession (Andhra Pardesh Amendment) Act, 1956, a new Chapter II A was inserted in the Central Act of 1956 and several changes have been brought by it. Unlike Kerala, this Amendment Act has not abolished the concept of Hindu joint family. The daughter is made a coparcener like son by birth and subject to same benefits and liabilities.\textsuperscript{41} It also provides that at the partition the daughter will get the same share as that of son. The daughter of pre-deceased son would get the same share as allotted to her counterpart son.\textsuperscript{42} The daughter is capable of disposing of her share by will or other testamentary disposition.\textsuperscript{43} The Act is retrospective, so the

\begin{itemize}
  \item \textsuperscript{38} Section 5 (2) and Section 6, \textit{ibid.}
  \item \textsuperscript{39} Act 13 of 1985.
  \item \textsuperscript{40} From the date of enactment of Hindu Succession Act, 1956.
  \item \textsuperscript{41} Section 29 (i) of the Hindu Succession (Andhra Pradesh Amendment) Act, 1986.
  \item \textsuperscript{42} Section 29 (ii), \textit{ibid.}
  \item \textsuperscript{43} Section 29 (iii), \textit{ibid.}
\end{itemize}
partition which took place before the commencement of the Act will not be affected.\textsuperscript{44} The daughter who married before this Amendment Act, 1986 would not get the benefit of this Act.\textsuperscript{45} If a Hindu female dies, after the Amendment Act, 1986, her interest in the coparcenary property shall devolve by survivorship upon the surviving members. But if the deceased had left any child or child of the pre-deceased child her interest in the Mitakshara coparcenary then the interest shall devolve by testamentary or intestate succession and not by survivorship and the concept of notional partition will apply.\textsuperscript{46} It also provides preferential right to acquire the share of the other coparceners who proposed to transfer his share. If there is no agreement for consideration between the parties, then it will be determined by the Court. In case there are more than one claimant the preference will be given to the heir who offers the highest consideration.\textsuperscript{47} The Andhra model gave motivation to other States to come up with similar enactments, with more or less identical language and content. The aims and objects of Amendments in other States are same as that of Andhra Pradesh and the same provisions were made by the other States. To adopt these Amendments the Maharashtra and Karnataka States took twelve years.\textsuperscript{48}

**Changes Made in Karnataka, Maharashtra and Tamil Nadu**

The States of Karnataka, Maharashtra and Tamil Nadu removed the discrimination inherent in Mitakshara coparcenary by doing Amendments in the Hindu Succession Act in their respective States. These Amendments contain *non-obstante* clause and at the same time provide equal rights to a daughter in the coparcenary property with

\textsuperscript{44} Section 29 (iv), *ibid.*  
\textsuperscript{46} Section 29-B the Hindu Succession (Maharashtra Amendment) Act, 1994.  
\textsuperscript{47} Section 29-C, *ibid.*  
\textsuperscript{48} Urusa Molisin (Dr.), *Women’s Property Rights in India* 145 (2010).
the son. The Hindu Succession (Tamil Nadu Amendment) Act, 1989, and the States of Karnataka and Maharashtra passed similar Acts in 1994. The sincerity with which these Acts have been passed is judged by the fact that these Acts has nullified partitions affected in between the date of passing of these Acts and the date of the notification in the official gazette. Thus the law of joint family stood modified in five Indian states. It has been abolished in States of Kerala and daughters were introduced as coparceners to begin with in Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra. In the case of Ravikirthi Shetty v. Jagathapala Shetty, it was held that according to the provision of the Hindu Succession (Karnataka Amendment) Act, 1994 only un-married daughter are made coparcener and entitled to equal rights with son. But about the daughter's, who was married before the Amendment Act came in force, is entitled only for the share in the property as a class I heir.

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. In the case of Sai Reddy v. Narayan Reddy, the Apex Court observed that these four legislations are beneficial to the women who form a part of vulnerable sections of the society and it is necessary to give a liberal effect to them. Hence it can be said that these four states have altered the system of Mitakshara joint family and coparcenary. Recently in Annam Ammal v. Selvanathan, the Madras High Court held that the daughters who married before the

49 Act 1 of 1990.
50 The Hindu Succession (Maharashtra Amendment) Act, 1994; the Hindu Succession (Karnataka Amendment) Act, 1994.
51 AIR 2005 Kar 194.
54 2012 (1) HLR (Mad) 184.
Tamil Nadu Amendment, do not become coparceners along with father and daughters would only get equal share along with their brother in their intestate father’s share in coparcenary property. So the benefit of Section 29-A is not for these daughters.

**LAW COMMISSION’S RECOMMENDATIONS**

All the above discussed facts necessitated a further change with regards to the property rights of women. Then, after the sixty two years of independence, the 9th September 2005 is remembered as a red-letter day in the Hindu women’s world, as on this date another progressive attempt in the shape of Hindu Succession (Amendment) Act, 2005 has been made by the Legislature for the economic and social empowerment of women. The main aim was to include daughters in Mitakshara coparcenary in the system by abolishing gender discrimination. This Amendment was based on the recommendation of 174th Report of the Law Commission of India. For the recommendations on the removal of anomalies and ambiguities regarding property rights of Hindu women under the Hindu Succession Act, 1956, the Law Commission, had *suo motu* taken up this subject in view of the pervasive discrimination prevalent against women in relation to laws governing the inheritance *viz-a-viz* succession of property amongst the members of a joint Hindu family. The Commission worked out the provisions of women’s right to property on the ground of social justice in one respect and the Amendments made by some States like Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu on the other. The aim of the law Commission was to recommend for the equal distribution of ancestral

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55 Various proposals of the Law Commission of India have been concretized in the form of the Hindu Succession (Amendment) Act, 2005.


57 Equal rights in economic and social spheres.
property among both male and female heirs. Hence the Hindu Succession Amendment Bill, 2004 was introduced in the on going winter session of Parliament drafted on the recommendations of the 174th Report of the 15th Law Commission. This move proposed a combination of the Andhra and Kerala models for property rights of women. The bill got passed in Rajya Sabha\textsuperscript{58} and Lok Sabha\textsuperscript{59} and after getting President’s assent\textsuperscript{60}, it came into force on 9\textsuperscript{th} September 2005. It really gave a death-blow to the old Hindu law in which the females were even devoid of several property rights.\textsuperscript{61}

The exclusion of daughters from participating in coparcenary property ownership, merely by reason of their sex is unjust. Improving their economic conditions and social status by giving equal rights by birth is a long felt social need. Undoubtedly a radical reform of the Mitakshara Law of coparcenary is needed to provide equal distribution of property not only with respect to separate or self-acquired property of the deceased male but also in respect of his undivided interest n the coparcenary property.\textsuperscript{62} The aim of this Amendment was to end gender discrimination in Mitakshara Coparcenary by including daughter in the system. Under the Mitakshara system of law, a son, son’s son, son’s son’s son had a right by birth to ancestral property or properties in hands of the father and their interest was equal to that of the father. The group having this right was termed as a coparcenary. The coparcenary was confined to the male members of the joint family. To end this discrimination the Hindu Succession (Amendment) Act, 2005 (hereinafter referred as the Amending Act of 2005) was passed. After fifty years, the government finally addressed some persisting gender inequalities in the Hindu Succession Act,

\begin{itemize}
\item \textsuperscript{58} Rajya Sabha passed this Bill on 16th August 2005.
\item \textsuperscript{59} Lok Sabha passed this Bill on 29th August, 2005.
\item \textsuperscript{60} It got President’s assent on 5th September, 2005.
\item \textsuperscript{61} Supra note 48 at 143.
\end{itemize}
1956, which itself were path breaking. The Amending Act of 2005 covers inequalities on several fronts like: agricultural land; Mitakshara joint family property; parental dwelling house, and relating to certain widows.63

The recommendation of Commission led the Central Government to amend Section 6 of the Hindu Succession Act, 1956 by giving full fledged right to women heir in ancestral property along with men and the important fact in such respect is that concept of Mitakshara coparcenary property retained under this Section of the Act, had not been amended since its conception in 1956. The Law Commission also felt a need for special protection to widow’s right to reside in dwelling house. Hence it recommended that the family dwelling house should not be alienated without the widow’s consent or without providing her an alternative accommodation after she has agreed to the sale of the dwelling house. Such recommendation led to the omission of the Section 24 of the Act.64

**CHANGES INTRODUCED BY THE HINDU SUCCESSION (AMENDMENT) ACT, 2005**

The Hindu Succession (Amendment) Act of 200565, has introduced several radical changes in the Hindu law of Mitakshara joint family, coparcenary, joint family property and succession in the whole of India.66 After fifty years, the government finally addressed some gender inequalities in the Hindu Succession Act, 1956, as it stood before the Amendment.

Before the Hindu Succession (Amendment) Act 2005 four States of Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka had introduced changes in the Mitakshara coparcenary by amending

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63 Supra note 15.
64 Supra note 62.
provision of the Act. Through these Amendments the daughter was made a coparcener like a son by birth in the joint family. The daughter as a coparcener was bound by the common liabilities and could also become a Karta of joint family and presumably retain this right even after her marriage, whereupon she had to move to her husband's place. It was, however, not clear whether she, like a son, would also be subject to the Hindu law doctrine of son's obligation to pay off the personal debts of the father under which the son's interest in the coparcenary property is liable for the personal debts of the father.67 This Amendment, in one stroke, makes "the daughter of a coparcener, by birth a coparcener in her own right in the same manner as the son in a joint Hindu family governed by Mitakshara Law". This indeed it is very bold legislative attempt to get out of the traditional inertia and put the son and the daughter on equal footing in the matter of succession, both in testate and intestate.68 The most telling change through this Amendment has been effected by the substitution of new Section 6 of the Principal Act of 1956. Section 6 of the Act, as it stood prior the Amendment of 2005, provided with devolution of interest of a coparcener dying intestate;69 however, the

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69 Section 6 – 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 he deceased has left him surviving a female relative specified in class-I of the schedule 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, as the case may be 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 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.
Explanation – 2 : Nothing contained the proviso to the 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.
Section does not apply where a coparcener has disposed of his interest by a testamentary disposition. The new Section 6 has made a change in the institution of the Mitakshara coparcenary and the Mitakshara coparcenary property, for their indirect gradual abolition without direct declaration of their end.\(^{70}\)

The main two features of the Mitakshara coparcenary were – one, right by birth of a son (male) to be a coparcener and second, devolution of interest in Mitakshara coparcenary property by survivorship on surviving Mitakshara coparceners. The singular objective of the substitution was to equalize the position of the son and the daughter both in respect of their rights and liabilities. This feat has been accomplished by abolishing the principle of survivorship, which is perhaps the most pronounced principal feature of the Mitakshara coparcenary. In functional terms, this meant that when a coparcener died undivided, he left behind nothing to be inherited by his heirs, and the surviving coparceners received what was already their's. With the abolition of this principal feature, "the undivided interest' of the deceased coparcener, instead of becoming instantly non-existent, will go to his heirs as if he died divided or asked for partition immediately before his death, irrespective of whether he was entitled to claim partition or not.\(^{71}\)

The Amendment of 2005 has followed Andhra Model and improved upon it on various counts. Firstly, the pious obligation of the son has been abolished as it would have been discrimination of the son's share alone, in the coparcenary property, and not that of the daughter. Secondly, Sections 23\(^{72}\) and 24\(^{73}\) of the Act, which


\(^{71}\) Ibid

\(^{72}\) Section 23 : Special provisions respecting dwelling house.

\(^{73}\) Section 24 : Certain widows re-marrying not to inherit as widows.
discriminated on the ground of sex, are also omitted. Thirdly, it has plugged the loop hole of anti-dating partition from the date of commencement of the Amendment by providing that only partitions effected by a registered partition deed or by a decree of the Court made before the prescribed date i.e. 20 December, 2004 would be recognised. It means this is a cut-off date and any partition before this date will not be effected or invalidated. Under the old law even an oral partition or compromise was valid in the eye of the law.\(^74\) Fourthly, under State Amendments a daughter who was married before the Amendment was disentitled from becoming a coparcener.\(^75\) But now there is no distinction between married or unmarried daughter.\(^76\)

According to the right of inheritance of the property also, a woman makes no distinction whatsoever on grounds of sex. The daughter is treated exactly in the same way as the son. It completely abolished the notion of limited or life interest. Even a life estate is to be converted into absolute one as per the Act. The Act makes the heirs of pre-deceased son and predeceased daughter equal by expanding class I heirs in the Schedule and including two generations of the children of pre-deceased daughter, as has already been so in case of son.\(^77\) It means the number of Class I heirs has been increased from 12 to 16. Sub-section (2) of Section 4 of the Principal Act of 1956 has been omitted by Section 2 of the Amending Act. In this backdrop here an effort is made to discuss the changes effected by the said Amendment which are as under:

\(^{74}\) 208th Report of Law Commission provides that oral partitions and family arrangements should also be included in the definition of partition.
\(^{75}\) Ravikirti v. Jagathpala, AIR 2005 Kant 194 (DB).
\(^{76}\) Supra note 67.
\(^{77}\) The four new heirs are: son of a predeceased daughter of a predeceased daughter; daughter of a predeceased daughter of a predeceased daughter; daughter of a predeceased son of a predeceased daughter; daughter of a predeceased daughter of predeceased son.
(1) **Deletion of Section 4 (2) of the Parent Act**

By this Amendment Section 4(2) of the Act of 1956\(^78\) has been deleted which exempts the application of this Act to the agricultural holdings, fixation of ceilings of land holdings and devolution of tenancy rights of such holdings. It means that if in any State there is any law for the time being in force to prevent the fragmentation of agricultural land or fixation of ceiling or the cultivating rights of such holding, the Act of 1956 had no application.\(^79\) Consequently, the confusion is bound to arise, that in case of conflict between the State law and the provisions of the Amended Act, which Act will prevail.\(^80\) But taking clue from Article of 254 (1) of the Constitution it is presumed that now the agricultural holdings would also be the subject matter of Hindu Succession (Amendment) Act of 2005 and the daughter will have equal rights in respect of agricultural holdings with that of son.

As the Hindu Succession Act, 1956 applies to Hindus, the Hindu daughter will get the benefit of the Amendment Act and be eligible to inherit the agricultural holdings. But the females of other religions who are the subject of State laws which excludes the daughter from agricultural holdings for the prevention of the fragmentation of agricultural land will not get the benefit. It will be discrimination only on the basis of religion which is in violation of Article 14 of the Constitution. The next point poses a question mark to the competency of the Centre to legislate upon the matter of State list. As land is a subject of this list. The term land in Entry 18 of State list is of wide amplitude and covers the land of every description, such as

\(^{78}\) Section 4 (2) of the Hindu Succession Act, 1956 saved certain State laws providing for prevention of fragmentation of land holdings.

\(^{79}\) Such as Delhi Land Reforms Act, 1954 etc.

\(^{80}\) Such as the provision of U.P. Zamindari Abolition and Land Reform Act, 1950 bars the daughter from inheriting the agricultural holdings.
agricultural land.\textsuperscript{81} List III Entry V of VIIth Schedule empowers the legislature to modify the personal laws, such as Hindu or Muslim Law.\textsuperscript{82} Parliament can enact a law under this entry, to deal with the matter of wills, intestacy and succession of agricultural property in spite of its trenching upon entry 18, List II of VIIth Schedule.\textsuperscript{83} But a different opinion has been expressed by the Rajasthan High Court in \textit{Jeewansam v. Lich Madev}\textsuperscript{84} that Section 22 of this Act does not apply to agricultural land.\textsuperscript{85} The deletion of this sub-section will adversely affect upon the agricultural and economic planning of the country by the fragmentation of the land.\textsuperscript{86}

\textbf{(2) Substitution of Section 6}

The most important and far reaching change by the Amendment has been made by substituting Section 6 of the Act with a brand new Section. The substituted new Section 6 reads as under:

\textbf{Devolution of interest in coparcenary property :}

\textbf{(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara Law, the daughter of a coparcener shall:}

\textbf{(a) by birth become a coparcener in her own right the same manner as the son;}

\textbf{(b) have the same rights in the coparcenary property as she would have had if she had been a son;}

\textbf{(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,

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\textsuperscript{82} Amiarunnisan v. Mehboob, AIR 1953 SC 91.
\textsuperscript{83} Kashiram v. Umnapada, AIR 1968 Cal 83; Hari Das v. Hukumi, AIR 1965 Punj 254.
\textsuperscript{84} AIR 1981 Raj 16.
\textsuperscript{86} Supra note 48 at 147.
Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

(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 in, as property capable of being disposed of by her by testamentary disposition.

(3) Where a Hindu dies after the 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 and;

(a) the daughter is allotted the same share as is allotted to a son;

(b) the share of the pre-deceased son or a pre-deceased daughter, as they would got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and

(c) the share of the pre-deceased child of a pre-deceased 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 the child of such pre-deceased child of the pre-deceased daughter, as the case may be,
**Explanation:** For the purpose of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) 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 ground 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-sections 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 been enforceable as if the Hindu Succession (Amendment) 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 (Amendment) Act, 2005.

(5) Nothing contained in this Section shall apply to a partition, which has been effected before the 20th day of December, 2004.
Explanation: For the purpose of this Section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition affected by a decree of a court.

The basic objective of the Act is to remove gender discriminatory practices in the property laws of the Hindus, whereby daughters have been given the status of coparceners in the Mitakshara joint family system. However, the position of other Class I female heirs should not suffer as a result of this move. Section 6 seeks to make the daughter a coparcener by birth in a joint family governed by the Mitakshara law, subject to the same liabilities in respect of the said coparcenary property as that of a son. The implications of this fundamental change are wide. Since a daughter now stands on an equal footing with a son of a coparcener, she is now invested with all the rights, including the right to seek partition of the coparcenary property. Where under the old law, since a female could not act as Karta of the joint family, as a result of the new provision, she could also become Karta of the joint Hindu family.87

There are five sub-sections in new section 6 which have introduced four basic changes in the existing law:

(a) the daughter of a coparcener is made a coparcener with all consequential effects;
(b) the right to survivorship in Mitakshara joint family is abolished.
(c) the pious obligation of the son to pay the personal debts of the father is derecognised;
(d) the daughter is conferred the right to dispose of her coparcenary interest in the joint family by way of testamentary disposition.

This Amendment has also made many fundamental changes in the concept of coparcenary etc., which are as under:

(i) **Daughter as coparcener** : Out of many significant benefits brought in for women one of the significant benefits has been to make women coparcener (right by birth) in Mitakshara joint family property. Earlier the female heir had only a share in a deceased man's notional partition. With this Amendment, both male and female will get equal rights. By a major blow to patriarchy, centuries-old customary Hindu law in the shape of the exclusive male Mitakshara coparcenary has been breached throughout the country. The preferential right by birth of sons in joint family property, with the offering of "shradha" for the spiritual benefit and solace of ancestors, has for centuries been considered sacred and inviolate. It has also played a major role in the blatant preference for sons in Indian society. This Amendment, has made the daughter a member of the coparcenary and it is a significant advancement towards gender equality. Sub-section (1) of Section 6 provides that from the date of commencement of the Amending Act 2005\(^8\) i.e. from 9 September, 2005 daughter becomes a coparcener by birth in her own rights as the son.\(^9\) It is important to point out that before the Amendment, females were members of the joint family but were not coparceners, as they had no right by birth.\(^9\) This was also the position under the Shastric law and customary law where daughters were not given property rights. The following table would show the new members of Mitakshara coparcenary :

\[
\begin{array}{c}
F \\
S \\
SS \\
SSS \\
D \\
SD \\
SSD \\
\end{array}
\]

\(88\) *(w.e.f. 9.9.2005)* daughter has been treated like a son and is now entitled to a share in coparcenary.

\(89\) Only daughter of coparcener and not daughter of daughter has been made a coparcener.

\(90\) *Jammanaina-swatva.*
Now three daughters namely, father's daughter, son's daughter, and grandson's daughter are also coparceners along with son, grandson, and great-grandson.

(ii) **Daughter's rights as Coparcener**: Now the daughter has a birth right in the coparcenary or joint family property and would enjoy all rights of a coparcener. For instance, she can challenge any alienation made by a Karta, which is not for legal necessity. It is delightful to mention here that now woman can also become Karta of the joint family as matter of right. Under the Amended Act now a female, as a Karta is entitled to represent the family and can even acquire the status of the head of the family. The Himachal Pradesh High Court decided a case, *Lekh Ram v. Sunder Ram*[^91], which deals with the devolution of property of a Hindu female, where the petitioner was claiming right on the property of her mother. Petitioner's mother became the absolute owner of the property under Section 14 (1) of the Act. The High court held that the gift deed made by the father of the plaintiff is not binding on her as the father had no right, title or interest to execute this gift deed in favour of a third party. She can also claim partition of joint family property. Now at the time of partition, there is no need to make any deductions for her marriage as no deductions are made for the marriage of a coparcener.

(iii) **Daughter's duties as Coparcener**: Daughter's share in coparcenary property would also be subject to the same liabilities as that of a son.

There was a flaw in the State Amendments introduced earlier and as under the old law a partition of joint family property could be made orally, therefore, in many families, in order to exclude the daughter from claiming a share in coparcenary, oral and fake

[^91]: 2012 (1) HLR (HP) 21.
partitions were effected. But here the question arises whether any oral partition, which is made before 20.12.2004, would be recognised or not. It is submitted that if any oral partition is in fact made and is acted upon, which would be a question of fact, to be proved by cogent evidence in each case, and then this requirement of a duly registered deed under the explanation would have no application because this provision cannot be given a retrospective effect.92

Secondly, the provisions of sub-section (1) do not apply to any partition affected before 20.12.2004 by a decree of the Court. Interpreting similar provisions under the State Amendments the Courts have impleaded the daughters. In Sai Reddy v. Narayana Reddy,93 which was a case falls under the Amendment made by the State of Andhra Pradesh, it was held by the Supreme Court that unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree, which determines shares, does not bring about the final partition. Therefore, where a preliminary decree is passed in a partition suit defining the shares of the coparceners and the daughters were made coparceners thereafter by the Amendment, the daughters would be necessary parties and can be impleaded at the appellate stage. In Prema v. Nanje Gowda94, a single Judge of the Karnataka High Court has distinguished the case of Sai Reddy, and held the observations of the Supreme Court as per incurriam in view of law laid down by the Apex Court in various other decisions.95

In Mool Chand v. Dy. Director, Consolidation96, the Supreme Court, after considering earlier cases, has held that in a suit for

93 (1991) 3 SCC 647.
94 AIR 2003 Kant 104.
95 Bhagirath v. Manivaman, AIR 2008 Mad 251.
96 AIR 1995 SC 2493.
partition, the preliminary decree determines the rights of the parties which existed on the date and failure to appeal against a preliminary decree would operate as a bar to raising any objection to it in an appeal filed against final decree. Therefore, in Prema's case, where the succession law was amended after passing the preliminary decree making the daughter coparcener, the preliminary decree became final as appeal against the same was dismissed and second appeal was held to become time bared. The application of the daughter for correction the preliminary decree and for re-allotment of her share was rejected as she failed to plead her share in first or second appeal itself.

The significant change of making all daughters (including married ones) coparceners in joint family property has been of a great importance for women, both economically and symbolically. Economically, it can enhance women's security, by giving them birthrights in the property that cannot be willed away by men. In a male-biased society where wills often disinherit women, this is a substantial gain. Now, women can also become Kartas of the property. Symbolically, all this signals that daughters and sons are equally important members of the parental family. It undermines the notion that after marriage the daughter belongs only to her husband's family. If her marriage breaks down, she can now return to her birth home by right, and not on the sufferance of relatives. This will enhance her self-confidence and social worth and give her greater bargaining power for herself and her children, in both parental and marital families. Now under the Amendment Act, daughters will get a share equal to that of sons at the time of the notional partition, that is, just before the death of the father, and an equal share of the father's separate share. It ensures equal distribution of undivided interests in
coparcenary property. However, the position of the mother vis-a-vis the coparcenary remains the same. Mother, not being a member of the coparcenary, will not get a share at the time of the notional partition. The mother will be entitled to an equal share with other class-I heirs, only from the separate share of the father computed at the time of the notional partition. In effect, the actual share of the mother will go down, as the separate share of the father will be less as the property will now be equally divided between father, sons and daughters in the notional partition.

(iv) **Distinction between the females of Hindu joint family**:
Section 6 (2), very surprisingly, has made a distinction between the females of Hindu joint family. The females who acquire the right in coparcenary property by birth like daughters and sisters would be capable to dispose of the property by testamentary disposition but the other females of joint family who have acquired the right by way of marriage would be the subject to the previous unamended law. Section 6(2) makes it crystal clear that a female Hindu would be entitled to hold property with the incidents of coparcenary ownership including its disposition by will. But very strangely the legislature has nowhere explained and provided as to what are those incidents of coparcenary. It is submitted that by using this ambiguous wording with equivocal meaning the Legislature has intended to give all rights to daughter who becomes coparcener by way of this bold legislative step.

(v) **No Survivorship**:
Section 6 (3) provides that after the commencement of the Amendment, when a Hindu dies, his interest in the joint family property shall devolve by testamentary or intestate succession under the Act and not by survivorship. This means that

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97 Under uncodified law, the incidents of coparcenary were unity of possession and community of interest.
after the Amendment, principle of survivorship has been abolished in the Mitakshara Hindu coparcenary. In the case of an intestate succession the property would be inherited equally by a son and a daughter as both have equal rights of inheritance. The cardinal rule of Mitakshara coparcenary of survivorship has been abolished, but it is only in the case of male coparcener, as the sub-section (3) clearly use the words ‘his interest’. It is interesting to note that now the female has also become coparcener but there is no mention of devolution of ‘her’ interest. So it is submitted that word ‘her’ should also be inserted in this provision. While dealing with this issue, though indirectly, the Supreme Court in *Ravanasiaddappa and Ans v. Mallika Arjun and Ors.*,\(^9\) held that children born from a void marriage are to be treated at par with coparceners and they are also entitled to the joint family properties of their father.

Already, the daughter of a coparcener was having equal right to inherit the separate property of the coparcener. But, she was not having any interest in the ‘coparcenary property in her own right’ which is given to her under the Amending Act of 2005. If it is said that in reality the rule of survivorship was hardly exist after the Hindu Succession Act, 1956, it is very true. The first dent to the classical rule of survivorship was made in 1937 by the Hindu Women’s Right to Property Act, 1937 and second in by the Hindu Succession Act, 1956. Now it is totally abolished.

**(vi) Deemed Partition and Allotment of Shares** : By Section 6(3) the concept of notional partition has been retained but it is important to point out that its application has been modified. Under the old Section 6, the operation of survivorship stood frozen and frustrated if the deceased left behind him any of the eight female relatives of class I

\(^9\) AIR 2011 SC 411.
or any male claiming through such specified female relative (i.e. daughter's son). Thus abrogation of the institution of survivorship was partial and the legal incident of survivorship did not cease to operate and continued in the case of a coparcenary of widower common ancestor or other coparceners remaining either as widower or bachelors. But now under Section 6 there would be deemed partition even in those cases where a joint family consists exclusively of male coparceners and their wives. This sub-section now stipulates that on the death of such coparcener, there shall be deemed division of the property to which such coparcener is entitled, as if a partition had taken place. In the following diagram, a coparcenary consists of F, the father and his two sons S and S1. If S dies after 9.9.2005, father would be sole heir as class II heir and the coparcenary property would not devolve by survivorship.

Now, suppose the joint family consisted of F, the father, his wife W and two sons S and S1. S dies after 9.9.2005, there will be deemed partition and his whole share in coparcenary will go to W, his mother, as was the position under the unamended Section 6.

99 Supra note 87 at 311.
By deemed partition the shares of each coparcener be demarcated and now they would not possess the property as joint tenant but as tenant in common. In the case of Hardev Rai v. Shakuntala Devi\textsuperscript{100}, the Apex Court held that Mitakshara coparcenary carries a definite concept. It is a body of individuals having been created by law unlike a joint family which can be constituted by agreement of the parties.\textsuperscript{101} It is not necessary that partition by metes and bounds amongst the coparcener must take place, when an intention is expressed for the partition of the coparcenary property the shares of each coparcenary property. The parties in such an event would not possess the property as joint tenant, but as tenant in common.\textsuperscript{102} The three clauses (a), (b) and (c) of sub-section (3) provide the rules for the allotment of shares of the deceased Hindu after working out the share by deemed partition as under:

(a) The daughter is allotted the same share as that of a son.

(b) The children of predeceased son or daughter are allotted share in accordance with per stripes rule and amongst them it would be per capita.

(c) Among the heirs of the branches of the predeceased child of pre-deceased son or daughter, the doctrine of representation applies. That is, heirs of each branch would take the same share which their parents (grandson or granddaughter) would have taken, had they being alive when the succession opened.\textsuperscript{103}

\textbf{(vii) Pious Obligation of Debt Abolished} : The doctrine of pious obligation is peculiar to Hindu law. By this Amendment the old Hindu law doctrine of son’s pious obligation to pay the personal debts of the

\begin{itemize}
  \item \textsuperscript{100} AIR 2008 SC 2489.
  \item \textsuperscript{101} For the purpose of assigning one’s interest in the property.
  \item \textsuperscript{102} Supra note 48 at 151.
  \item \textsuperscript{103} Basant K. Sharma (Dr.), Hindu Law 435 (2011).
\end{itemize}
father\textsuperscript{104}, has been abolished.\textsuperscript{105} This was an apparent flaw in the State Amendments which now has been taken care of. Under the textual law, since a debt was considered to be a sin, \textit{Shastras} enjoined that the son whether he possesses any joint family property or not should extricate the father from tribulations after his death by paying off father’s debt if it was not tainted with immorality.\textsuperscript{106} Brihaspati enjoins: ‘\textit{He who having received a sum lent or the like does not repay it to the owner will be born hereafter in his creditor’s house, a slave, a servant, a woman or a quadruped.}’\textsuperscript{107} It is strange to note that the liability of the son was to pay the debt with interest, where the grandson’s liability was limited to the payment of principal only.\textsuperscript{108} The new sub-section states that, after the commencement of the Amendment, no court shall recognise the right of a creditor to proceed against the son, grandson or great-grandson of a debtor, for debts contracted by the father, grand-father or great-grandfather solely on the ground of pious obligation. The provision to the sub-section stipulates that the right of a creditor to proceed against the specified heirs, or any alienations made in respect of, or in satisfaction of any such debts or obligations, before the coming into force of the Amendment, are protected. An explanation has been added to the effect that the expression ‘son’, ‘grandson’ or ‘great-grandson’ would be deemed to refer to such specified heirs who were born or adopted prior to the commencement of the Amendment. The doctrine of pious obligation thus stands abrogated to the extent that the specified heirs are not liable to satisfy such debts solely on the ground of pious obligation. The meaning and consequence of the Amendment is that, if

\begin{flushright}
\textsuperscript{104} To free him from leading a life of bondage in the next life.
\textsuperscript{105} See Section 6 (4).
\textsuperscript{106} \textit{Narada}, iii-4,5,6.
\textsuperscript{107} Colebrooks Digest, Vol. I, 334.
\textsuperscript{108} \textit{C.F. Lady v. Gobardhan Das}, AIR 1925 Pat 470.
\end{flushright}
a debt has been contracted by the specified ancestor, the specified heirs are not under any obligation to satisfy the debt on the ground of pious obligation alone. If however, such heir has expressly agreed to bind himself to fulfill the obligation, the provision will become redundant and inoperative. Debts contracted before the Amendment came into force have been taken out of the purview of the Amendment, with the stipulation that such debts are left untouched and are enforceable as against the specified heirs by virtue of the proviso to the sub-section. The explanation to the sub-section states that a 'son', 'grandson' or 'great grandson' mean and include such specified heirs as are born or adopted prior to the commencement of the Amendment. Therefore, specified heirs born or adopted after the coming into force of the Amendment seem to have been impliedly excluded from the liability of pious obligation, since the Section 6 is prospective and only protects the rights of creditors for debts contracted prior to the coming into force of the Amendment and preserves the rights of creditors to proceed against the specified heirs. Consequently at present, the repayment of debts contracted by any Hindu would be his personal responsibility and the male descendants would not be liable to pay the debt.

(viii) Retrospective Effect: The Amending Act is prospective in application and so its provisions would not apply to any partition that was effected before 20 December, 2004. Similarly it does not recognize oral partition as it clearly states that term 'partition' means only that is in 'writing' and duly registered or the one that is effected by decree of court. The Madras High Court in Bhagirath v. Manivaman held that amended Section 6 is prospective in that

109 Supra note 87 at 311A.
110 Section 6(5) of the Hindu Succession (Amendment) Act, 2005.
111 AIR 2008 Mad 251.
sense and as a result of this the daughter has to be treated as coparcener on and from the commencement of the Hindu Succession (Amendment) Act, 2005 i.e. 9 September, 2005.

(ix) No Discrimination between Married and Unmarried Daughters: The previous State Amendments discriminated among the married and unmarried daughters as these give the coparcenary rights equal to son only to the daughters who were unmarried at the enforcement of these Amendment Acts. Though subsequent changes in their status would not affect their rights. It was challenged in Majamma v. State of Karnataka,\(^\text{112}\) which was justified by the Court that it would create a chaos and will result in settled things unsettled. But in this Amendment Act, the married daughter is given same benefit as are available to unmarried daughter subject to the provision that any disposition, alienation, partition or testamentary disposition effected prior to the 20\(^{th}\) December, 2004, could not be invalidated. Now she is a coparcener though not the member of the joint Hindu family because the Act is silent on this point. Before the Amendment, once a daughter is given into marriage she ceased to be the member of the Hindu joint family.

(x) As that of a son: The term "Hindu Mitakshara Coparcener" used in Shastric Hindu law shall include daughter of coparcener also giving her same right and subjecting her under same liabilities as that of a son. Daughter would now have right to sue for partition against other coparceners including her father.\(^\text{113}\) Recently in G. Veeriah v. G. Shiva\(^\text{114}\), where the daughter changed her religion on her marriage and claimed partition of joint family property it was held by Andhra Pradesh High Court that:

\(^\text{112}\) (1999) AIHC 203 (Kar).
\(^\text{113}\) Ram Belas Singh v. Uttamraj Singh, AIR 2008 Pat 81; Nilamadhabha Deo v. Janaka Kumari, AIR 2009 NOC 862 (Ori).
\(^\text{114}\) AIR 2010 NOC 351 (AP).
"The recent Amendment to Section 6 of the Act has virtually obliterated the distinction between male and female members of a joint Hindu family, as regards conferment of coparcenary rights. The result is that wherever it is compatible for a Hindu male, to exercise rights of coparcener including the one, of seeking partition, it is equally competent for a Hindu female of the same degree, to exercise such rights. In view of this development, the right to the respondent daughter, to seek partition of the joint family properties; cannot be denied. If at all she has to wait for the opening of succession, it is only in respect of the properties, that are exclusively owned by the appellants, and which are not part of joint family properties. Her right to seek partition of joint family properties is absolute, and not subjected to any riders. The result is that, the right he seek partition of the joint family properties conferred upon the respondent under Section 6(1) of the Act, and it is independent of, and different from, the right to succeed under Section 6 (3) and 8 of the Act. While the partition of the joint family properties can be sought at any point of time, the succession would open only on the death of the owner of the property."

(xi) **Mitakshara Coparcenary**: As the main features of Mitakshara coparcenary such as fluctuation of shares with each birth and death, unity of possession and the prerogative of the males to be a coparcener, are no more part of Mitakshara coparcenary. By the abolition of the rule of survivorship there would be no fluctuation of shares by each death. As the death of a male coparcener will make no effect upon the share of the other coparceners because his interest in property would not devolve by survivorship but by intestate succession on the basis of deemed partition. In case of each birth the share of each coparcener will be diminished.
(xii) **No Provision for the Devolution of the interest of Female Coparcener:** There is no express provision that how the interest of female coparcener will devolve because before 2005 she was not a coparcener and her property was subject to the provision of Section 15 of Hindu Succession Act, 1956, which is not touched by this Act of 2005. In Section 6 of the Amendment Act the legislature has used the words 'his interest' which can not be said to be included 'her' also. Although in the General Clauses Act, 1897, words importing the masculine gender shall be taken to include female. But Section 3 (2) of the Hindu Succession Act, 1956 clearly says that, 'in this Act unless the context otherwise requires words importing the masculine gender shall not be taken to include females. By this Amendment the legislature expressly included the words disposed of by him or her in Section 30 of the Act of 1956.

3. **Abolition of Section 23**

One of the major gender discriminatory provision under the Act was Section 23. It specified special rules relating to devolution of a dwelling house and was against females. This provision has been abrogated by this Amendment and sex based discrimination has been removed. It will benefit the women in general and more particularly to those women who face violence or any other form of cruelty in the house of the husband.

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115 Section 13 (1) of the General Clauses Act, 1897.
116 Supra note 48 at 152.
117 Omitted Section 23 reads as follows: Special Provision Respecting Dwelling houses: where a Hindu intestate has left surviving him or her both male and female heirs specified in class I of the scheduled 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, until the male heirs choose to divided their respective shares therein, but the female heir shall be entitled to a right of residence therein. Provided that where such female heir is a daughters she shall be entitled to a right of residence in the dwelling house only if she is unmarried or has been deserted or has separated from her husband or is a widow.
4. **Omission of Section 24**

Omission of Section 24\(^{119}\) from the Hindu Succession Act provides an opportunity for equal justice to all the widows. Previously certain widows namely widow of a pre-deceased son, widow of a pre-deceased grandson and widow of a brother, had been barred from inheritance if they had remarried when the succession opened. But the Act was silent about the other widows of the joint family such as the widow of pre-deceased son’s son and the widow of the son of the pre-deceased daughter and widow of the father’s brother. Now the question arises whether the remarriage of these widows did not effect their right to hold the property of their pre-deceased husband. The second thing which comes to the mind is that whether Section 24 was useless, because as soon the widow remarries her status is changed and she ceased to be the widow of the deceased. But she would be the wife of the person to whom she was married. It is an appreciable step of legislature that deletes the useless and confusing provisions.\(^{120}\)

5. **Amendment of Section 30**

Where succession is governed by a testament or a Will, it is called testamentary succession. Under Hindu law, a Hindu male or female has the capability to make a Will of his/her property, including a share in the undivided Mitakshara coparcenary in favour of anyone.\(^{121}\) In such cases, the property will devolve on their death, in accordance with the distribution that they effect under this Will, and not according to the laws of inheritance. The only requirement is that the Will should be valid and capable of taking effect in law. Where the

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\(^{119}\) Omitted Section 24 read as: "Certain widows re-marrying may not interest as widows any their who is related to an intestate as the widow of the pre-deceased son, widow of a pre-deceased son of 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 remarried."

\(^{120}\) *Supra* Note 48 at 143.

\(^{121}\) Subject to the provisions of the Indian Succession Act, 1925.
Will is not valid, or it cannot take effect due to any reason, the property will devolve as per the laws of inheritance. The person who makes a Will is called a testator or a testatrix, the one in whose favour it is made is called a legatee, and the whole process is called testamentary succession. In this Act the legislature has substituted the words 'disposed of by him' by the words 'disposed of by him or her'. The Amendment has not only made the daughter a coparcener of the coparcenary property but has given the right to dispose of the property by a Will just like a son. It is also important to note that similar provision giving power to female for disposing of her property by Will has earlier have also been made under the provision of Section 6(3). Now the Hindu female like Hindu male has the same right of testamentary disposition of her share in coparcenary property which is in tune with the Constitutional philosophy of equality of status.\textsuperscript{122}

**NEW THINGS UNDER THE AMENDMENT ACT**

The Amendment Act of 2005 which has attempted to remove the flaws of the Act of 1956 has abolished almost all discriminatory provisions. Through this Amendment some heirs of class II have got place in the class I heirs. In old Hindu law there were only those class I heirs who form the Mitakshara coparcenary and the property devolved according to the rule of survivorship not by intestate succession though the self acquired property was devolved by intestate succession. The Hindu females had no right to acquire property by any means. These heirs were son, son’s son and son’s

\textsuperscript{122} Section 30 the Hindu Succession Act, 1956, deals with Testamentary Succession: "Any Hindu may dispose of by will or other testamentary disposition any property, which is capable of being so in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindus."

Explanations: The interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member of a tarwad, tavazhi, illom, kutumba or kavaru in the property of the tarwad, tavazhi, illom, kutumba or kavaru shall notwithstanding anything contained in this Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this Section.
son's son. The first inclusion of female heirs was made in 1937, by making certain widows the heir, who were: widow of the deceased, widow of the son, widow of son's son.\(^{123}\) The revolutionary changes were made in 1956 by the introduction of long list of heirs. (These heirs are mentioned in the fourth chapter). Though most of the heirs were females yet it was discriminatory among the heirs of same status. Such as firstly, the son's daughter's son and daughter had been placed in second class heirs entry, secondly the daughter's son's son, daughter's daughter's daughter were among class II heirs, thirdly, the class I heirs inherit the proper simultaneously but the inheritance among the class II heirs take place according to preference of their entry which means the entry one would get preference over the entry second and entry second over entry third and so on. The other flaw of the Act of 1956 was that the widow of son's son had been introduced as heir since 1937 but the widow of the daughter's son was not given the same right even in 1956.\(^{124}\)

The Amendment Act of 2005 has substituted certain heirs of class II to the class I heirs which are: daughter's son's son, daughter's son's daughter, daughter's daughter's son, daughter's daughter's daughter. While doing so permutatively, the Legislature missed two heirs, namely the son of a predeceased son of a predeceased daughter and the son of a predeceased daughter of a predeceased son, to the disadvantage of the daughter. There seems to be no rational for non inclusion of such male relatives. The Law Commission of India\(^{125}\) has now recommended the incorporation of said two heirs in class I by removing them along with four others from

\(^{123}\) But the widow of son's son's son was not included.
\(^{124}\) Supra note 48 at 154.
\(^{125}\) The Law Commission of India has taken note of this omission in this 204th Report presented to the Union Minister of Law and Justice by the Chairman of the Commission on February 5, 2008.
class II of the Schedule. The Commission calls this omission as a part of "legislative inadvertences" which needs rectification.\textsuperscript{126} The additional four heirs have been taken from class II heirs of the Schedule. Before this Amendment, class II heirs were 23, now this number of class II has been decreased to 19. It is important to note here that due to inadvertence or haste made by the legislature the above said additional 4 heirs which was shifted to class I heirs list have not deleted from list of class II heirs of the Schedule. It is respectfully submitted that this anomaly must be corrected by making Amendment in the Act.

If no heir is surviving of class I heirs then the property of Hindu male dying intestate will be succeeded by class II heirs. Class II heirs have been divided into 9 Entries. The first preference will be given to heirs of the first entry and only one heir i.e. father has been shown in the first entry. If the father of intestate Hindu is already deceased then preference will be given to II Entry's heirs and so on. It is pertinent to point out here that class II heirs consists of 11 females and 8 males after the Hindu Succession (Amendment) Act, 2005. Prior to this Amendment, there were 13 females and 10 males and total number of heirs was 23. After this, if no heir is surviving which is mentioned in class II heirs, then property will devolve upon agnates. Agnate means the heir who traces his or her relationship wholly through males with intestate.\textsuperscript{127} Lastly, if no agnate is surviving the property of the Hindu male dying intestate will be succeeded by cognates. Cognate means the heir who traces his or her relationship not wholly through male with the intestate.\textsuperscript{128} It is important to note here that if the Hindu

\textsuperscript{126} Virendra Kumar, "Gender Matters : Tackle Persisting Bias in Hindu Succession Law", The Tribune, 9 April, 2008.
\textsuperscript{127} Section 3 (a) of the Hindu Succession Act, 1956
\textsuperscript{128} Section 3 (c), \textit{ibid.}
male dying intestate is not survived by any heirs mentioned in the above said categories then the property of such intestate will be succeeded by the Government by escheat subject to all obligation of the intestate.\textsuperscript{129} It is suggested that some anomalies in respect of four heirs which are shifted from list of class II heirs to list of class I heirs may be corrected because such four heirs are not yet removed from the list of class II heirs of the Schedule.\textsuperscript{130}

**CONTRADICTION BETWEEN CENTRAL AND STATE ENACTMENTS**

Succession is a subject specified in the Concurrent List of the Constitution\textsuperscript{131} and consequently both the Union and the States are competent to legislate on this matter. In case of contradiction between the two, as per Constitutional scheme the Union law would prevail over the State legislation.\textsuperscript{132} It is relevant to point out here that the initial steps towards securing better rights in the coparcenary property in favour of the daughters were taken by the State of Andhra Pradesh and were soon followed by the States of Tamil Nadu, Karnataka and Maharashtra. Major changes were then introduced by the Central Amendment in 2005. There appear two major contradictions between the Central and the State Amendments in Hindu Succession Act, 1956. Firstly, while all the States which amended Hindu Succession Act, 1956 had introduced unmarried daughters as coparceners and married daughters were left out but as per the 2005 Central Amendment, all daughters irrespective of their marital status were made coparceners. Our Constitution\textsuperscript{133} provides that the State Amendments, so far as they are inconsistent with the

\begin{footnotesize}
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\item \textsuperscript{129} Section 29, \textit{ibid}.
\item \textsuperscript{130} These four heirs are: daughter’s son’s son, daughter’s son’s daughter, daughter’s daughter’s son, daughter’s daughter’s daughter. \textit{Supra} note 87 at 135.
\item \textsuperscript{131} Under 7th Schedule, List III, Entry 5.
\item \textsuperscript{132} Article 254 (1) of the Constitution of India, 1950.
\item \textsuperscript{133} \textit{Ibid}.
\end{itemize}
\end{footnotesize}
Central Amendment would be inoperative and the later would prevail over former even though it was passed subsequently in point of time. Thus by this scheme of harmonious construction of the Amendment all daughters would be coparceners in these states as well. In *Pushpalatha N.V. v. Padma*\(^{134}\), the Court holding that presently all daughters irrespective of their marital status are coparceners in the same manner as sons, made the following observation:

"Daughter's marriage would not put an end to the right of the daughter to coparcenary property which she acquired by birth. There cannot be a distinction between a son and a daughter under the Constitutional scheme. Any discrimination between a daughter and a son on grounds of marital status would again seem contrary to Article 14."

The second contradiction appears with respect to the capability of female coparceners to challenge alienations and re-open partitions effected post the conferment of rights in their favour by the State enactments but later taken by the Central Amendment. For example, in the State of Tamil Nadu, an unmarried daughter was made a coparcener in 1989. She could therefore acquire an interest in the coparcenary property and could also challenge an alienation effected by the Karta without her consent. However the Amendment of 2005 provided that a daughter cannot challenge alienations made prior to December 20\(^{th}\) 2004, which means that the State enactment's conferment of rights in favours of daughters was taken away by the Central Amendment retrospectively.\(^{135}\) This type of interpretation would create several confusions in this respect. In *R. Kantha v. Union of India*\(^{136}\), the Karnataka High Court resolved such conflict by holding that the Central provision taking away the rights of the

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\(^{134}\) *[AIR 2010 Kart 124.]*

\(^{135}\) Poonam Pardhan Saxena (Dr.), *Family Law Lectures, Family Law II* 269 (2011).

\(^{136}\) *[AIR 2010 Kart 27.]*
daughters to challenge the alienations made prior to cut off date of 20th December, 2004, as inoperative and ultra vires the principle of gender equality under the Constitution.

**DAUGHTER’S RIGHT TO DEMAND A PARTITION OF THE COPARCENARY PROPERTY**

The right of the married daughter to demand a partition of the coparcenary property after the Amendment of 2005 is absolute and not subject to any rider.\(^1\) Even if she has converted to any other religion\(^2\) after her marriage, the right to ask for partition of coparcenary property cannot be defeated. As far as her succession rights are concerned they are related only to the separate property of her father for which she has to wait till his death. Her conversion does not adversely affect her succession rights as it is only the descendants of the convert, born to him/her after conversion, who are disqualified from inheriting the property of the intestate.\(^3\) Because the converts enjoy statutory protection under the Caste Disabilities Removal Act, 1850.\(^4\) It is very strange to note that the persons who have converted to any other religion have not been prevented from inheritance but unfortunately it is his/her descendants who have been disqualified for no fault of them. The coparceners get a right by birth in the coparcenary property in their own right and the death of the father is not a pre-requisite for their right to seek partition and demarcation of their shares. In fact every major coparcener has a right to demand a partition from the father or the Karta as the case may be.

**CONSTITUTIONAL VALIDITY OF THE AMENDMENT ACT**

The State enactments by amending the Hindu Succession Act, 1956\(^5\) has created a distinction between the rights of daughters on

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5. The Andhra Pradesh (Hindu Succession Amendment) Act, 1986; the Karnataka (Hindu Succession Amendment) Act, 1994; The Tamil Nadu (Hindu Succession Amendment) Act, 1989 and the Maharashtra (Hindu Succession Amendment) Act, 1994.
the basis of their marital status. The day on which the Act was promulgated in the States, unmarried daughters were made coparceners in the same manner as a son in the family. However, these enactments did not apply to a daughter who was married on the day the same were passed. The Karnataka (Hindu Succession Amendment) Act, 1990 was challenged as unconstitutional on the ground that it did not treat all daughters equally and created a class within a class of daughters and discriminated against a married daughter and excluded her by including only unmarried daughters.\textsuperscript{142} The petitioner prayed that the words ‘to a daughter married prior to’ in Section 6A(d) of the Karnataka (Hindu Succession Amendment) Act, 1990, to be declared unconstitutional on the contention that daughters married prior to the commencement of the Act are alleged to have wrongly been deprived of the right conferred upon such daughters under clauses (a) and (b). It was further contended that no rationale was sought to be achieved by making the alleged discrimination against a married woman prior to the date of their marriage. According to the petitioner daughters are daughters and a class in them and irrespective of the date of their marriage no differentiation should be made as far their rights in their father’s family are concerned. Dismissing the petition of the married daughter and upholding the Constitutional validity of the Act, the Court said,\textsuperscript{143}

"The daughters married prior to the Amendment Act were deprived of the right to claim the share in the coparcenary property as was available to an unmarried daughter or a daughter married after the enforcement of the said Act. The alleged discrimination cannot be termed to be either unreasonable or irrational and without basis. The two types of daughters as contemplated by the offending portion of the Section are well defined classes in themselves."

\textsuperscript{142} \textit{Nanjauma v. State of Karnataka} 1999 AIHC 3003 (Kar).
\textsuperscript{143} \textit{Ibid.}, para 5.
The court said that they were satisfied that there was a definite nexus between the classification made and the object which has been intended to be achieved by the Legislature by making a provision in the form of clause (d) of Section 6A of the Act. As the implications of the Act were far reaching, including married daughters as coparceners would have created chaos in the society and would have resulted in upsetting the settled claims in virtually every family. The principle of equality guaranteed by Article 14 of the Constitution does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position as the varying treatment. Classification is permissible only for legitimate purposes.144

Thus, it can be gathered from the above discussion that the Amendment of Hindu Succession (Amendment) Act, 2005 is a total commitment for the women empowerment and protection of women’s right to property. This Amending Act in a patrilineal system, like Mitakshara school of Hindu law opened the doors for the daughters, to have the birth right in the family property like son. The Hindu daughter of Mitakshara joint family will now be born with a proverbial silver spoon in her mouth and she has all the rights and is subject to liabilities, just like a Hindu son. Still some more legislative steps are required to be taken along with some more societal attitudinal changes so that the remaining gender specific discrimination should be totally wiped out from legal canvass of India and our country can truly become gender neutral sovereign. It can be said that the Hindu Succession (Amendment) Act, 2005 is a total commitment for women’s property rights but now it is turn of society and judiciary to implement it and give flesh and breath to these well intentioned statutory provisions for real attainment of gender equality as enunciated in the Constitution of India.

144 Ibid., para 3005.