CHAPTER-III
WOMEN'S RIGHTS UNDER
THE HINDU SUCCESSION ACT, 1956

1. INTRODUCTION

Change is the law of nature. No society remains static and dormant. The status, position, rights, obligations and the social structure keep on changing with the changes in the society and other social units. Accordingly, the position and status of women of different religious communities have also kept on changing in different eras due to multiplicity of factors. These factors may be political, social, and economical or may be due to the western influences; one finds a change in the status of women. With the passage of time gender equality has been recognized as a basic human right in all civilized nations. The concept of equality of sexes is no longer considered as a characteristic of any particular culture but as a universal principle and a human right.

Even when the nations of the world reaffirmed their faith in the Universal Declaration of Human Rights, 1948 in the dignity and worth of human person and in the equal rights of men and women, they made a moral commitment to bring about a social, economic and political justice, where each person would be treated fairly and provided with equal and good opportunity for development. Article-1 of the Universal Declaration of Human Rights, 1948 states, "All human being born free and equal in dignity and rights". The importance of status of women is also reflected in the resolution of the United Nations General Assembly passed unanimously on 7th November 1967. It states that for the full development of nations; the world's general welfare and the cause of peace all require full equality of both sexes everywhere. The resolution in particular calls upon the nations that it is duty of all nations to take necessary steps and measures to abolish any custom or law which tends to differentiate against the females.¹

Undoubtedly, Indian intellectuals also made laudable attempts to raise the status of women in accordance with these universally accepted principles. Their attempts were fructified through enactment of certain legislations, like the Sati Prohibition Act, 1829 Hindu Widow's Remarriage Act, 1856 and Hindu Widow's Right to Property Act, 1937. However a significant change was visible when the

¹ Subhash Chandra Singh, Post independence Gender culture in India - Sex discrimination and the legal regulation of the family, (2002), 1 SCJ p. 40.
Parliament in 1955-56 passed a series of Acts better known as the Hindu Code, which significantly improved the status of Hindu women to a great extent. These laws try to make a direct attack on those patriarchal notions and opportunities which recognizes the superiority of manly power within the social and legal structure of society.\(^2\)

The Hindu Succession Act, 1956 is also one of these welfare legislations under which, for the first time, absolute property rights were conferred on a female and an equal share of inheritance was assured to her. In this chapter an effort is made to scrutinize those provisions of Hindu Succession Act 1956 (hereinafter to be referred as principal Act), which deals with women’s rights and to study the effect of changes made in the principal Act in these provisions by the amendment of Hindu Succession (Amendment) Act, 2005 (hereinafter to be referred as Amendment Act).

2. SECTION 4

First such provision which affects the Property Rights of the women is Section 4 of the Principal Act which gives overriding effect to the Act.

2.1 Effect of Section 4(1): The effect is to abrogate: (a) the Shastric Hindu law, custom and usage which were in force with respect to any matter which is covered under this Act, (b) the statutory law to the extent the provisions of which is inconsistent with any of the provision contained in the present Act. Though the expression used in Section 4(1) (b) is “any other law in force”, it is obvious that it refers to statutory law as the other categories of law e.g., rule of interpretation of Hindu law, custom and usage are covered by Section 4(1)(a).

*G. V. Kishan Rao vs. State*\(^3\) provides a good example regarding the abrogation of traditional Hindu law by the Hindu Succession Act. The question involved in this case, before the Andara Pardesh High Court was that when the interest of a Mitakshara coparcener devolves by succession in the terms of Section 6 of the Hindu Succession Act, whether the wife (widow) would take a share, as Section 6 proposes granting of right on the wife to share equally with the son or sons, when the father effects a partition. Under the traditional Dravida law no female was entitled to claim a share if a partition takes place among the coparceners. In all other Schools which falls under the Mitakshara Jurisdiction, three females, i.e. Father’s wife, mother and grandmother take a share whenever the partition takes place in the Hindu Joint family.

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\(^2\) Ibid., p. 43.

\(^3\) A.I.R., 1987, A.P. 239.
The court held that old Hindu law of Dravida School stood abrogated by virtue of Section 4 of the Act. The court further held that where a male Hindu died leaving behind him a widow and three sons, the widow will be entitled to get a share equivalent to that of her each son. This is based on the fact that just before the death of her husband, if the property is partitioned, it will be divided into five equal shares, so that her husband, herself and three sons will each be entitled to get 1/5 share. Thus by fictional partition, she would be entitled to get 1/5 share as though partition has been effected between her husband and her three sons. Then she would again be entitled to 1/4th share out of 1/5th share of her late husband, As a result she will therefore entitled to get 1/5 + 1/20 =1/4.

Similarly, in the case of Cherotte Sugathan v. Cherotte Bharathi\(^4\), conflict arose between the Hindu Succession Act, 1956 and Hindu Widow Remarriage Act, 1856. The Court held that where a widow inherits the property of her husband on his death, she becomes absolute owner of that property by virtue of section 14(1) of Hindu succession Act 1956. Section 4 of the 1956 Act has an overriding effect. The provisions of 1956 Act, thus, shall prevail over the text of any Hindu Law or the provisions of 1856 Act. Section 2 of the 1856 Act would not prevail over the provisions of the 1956 Act having regard to section 4 and 24 thereof.

In Punjab under the customary law, prior to the passing of the Act, daughters were not entitled to inherit. If the last male holder died after the passing of the Act, the previous law which disentitles the daughter to succeed stands abrogated. In Giasi Ram vs. Ramji Lal\(^5\), a Hindu Jat in the Punjab governed by customary law sold his 1/4 share of his ancestral property. His son acquired a decree in 1920 stating that the alienation could not be effected beyond the lifetime of the alienee. Under the Punjab Custom (Power of Contest) Act 1 of 1920, no person unless a descendant in the male line from the great-grandfather of the alienor, can challenge an alienation of ancestral property. But under the customary law in Punjab, a declaratory decree obtained by one of the reversioners ensures in favour of all persons who finally take the estate. The alienor died after the commencement of the Hindu Succession Act. After his death a suit for possession was filed by the sons, daughters and the widow of the alienor. The Supreme Court held that though the widow and the daughters had no interest under the Act of 1920, to challenge the alienation, the declaratory decree

\(^4\) 2008(1) HLR (Kar.) C. 217.  
obtained by the son of alienor in 1920 ensured for the benefit of all the reversioners, when the inheritance opened and in view of Section 2 and Section 4(1) of Hindu Succession Act, the widow and the daughters along with the sons of the alienor inherited the estate and became entitled to the possession of the entire estate.

In *Mt Taro v. Darshan Singh*, the last male holder donated ancestral property to daughters, and in a suit filed by the collaterals, it was stated that the alienation would remain in the force during the lifetime of the donor. As the last male holder died after the passing of this Act, it was held that as the succession opened after the Act came into force, so the daughters would be entitled to succeed under Section 8 of the Act and thus the customary law of succession stood abrogated.

In the case of *Mewa Singh v. Sampuran Singh*, it was held that Jat Sikh who is Sikh by religion and follows Guru Granth Sahib in the performance of their marriages etc. is now governed by the Hindu Succession Act. Any custom or usage which was in force immediately before the commencement of the Act ceases to have any effect with respect to any matter for which the provisions are made in the Act itself.

Thus the customary law is abrogated only in those cases where the matter is covered by the provisions of this Act. Under Section 4(1) (a), so far as custom or usage is concerned, it is only that custom or usage which forms the part of Hindu law in force prior to the Act shall be ceased. Any other custom or usage which excluded the Hindu law or which does not form part of Hindu law is not affected by the provisions of the Act. For examples certain aboriginal tribes have their own customs. Some of the tribes have become hinduised in course of time and have been held to be governed by Hindu law, but there are others who were still not governed by the Hindu law and governed by their own custom, which is not part of the Hindu law. Regarding such type of categories the provisions of this Act will not apply.

2.2 *Section 4(2)*: Section 4(2) of the Principal Act lays down that nothing contained in the Act shall be deemed to affect the provisions of any law for the time being in force providing (i) for the prevention of fragmentation of agricultural holdings, (ii) for the fixation of ceiling, (iii) for the devolution of tenancy rights in respect of such holdings. So in the abovementioned matters the State laws have been given

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7 2000(3) Civil Court Cases 573 (Pb. & Har.).
supremacy. But the succession to agricultural land among the Hindus is regulated by the Act. However, matters relating to the partition of agricultural land, right of its possession and tenancy rights over it are subject to State laws, if any, on the subject. Similarly the devolution of tenancy rights is also subject to State laws.

As the tenancy rights are not rights of ownership, it is merely a legal right to cultivate the agricultural land. Under the Act, it is the devolution of agricultural holdings or ownership in the agricultural land as distinguished from tenancy rights which will have to succumb to the provisions of the Act.

Therefore, in order to apply the exception created by this provision, the legislation must provide for devolution of tenancy. Regarding the nature of the Madhya Pradesh Land Revenue Act, it is not tenancy legislation and as a result, exceptions made in the provisions of the Act cannot apply to it. Section 4(2) saves devolution of tenancy right in respect of agricultural holdings. As Bhumidhari or Bhumiswami rights are not tenancy rights, therefore, Section 151 of the Madhya Pradesh Land Revenue Act, 1954 which deals with the devolution of interest of Bhumidhari or Bhumiswami tenure holder is not saved because this provision does not deal with devolution of tenancy rights. The view that even in the absence of specific statutory law providing for the matters referred to in Section 4(2) of the Act, old general Hindu law of succession which recognizing the concept of limited estate and the institution of reversioners, stands saved in connection with the above matters cannot be justified because it tends to upset the objects of the Act which it wants to achieve and it is also inconsistent with the general scheme of the Act.

Thus, it may be observed that section 4(2) tries to save only that law which provides for the prevention of the fragmentation of the agricultural holdings, etc. Similarly, the Preamble to Delhi Land Reform Act, 1954 states that it was enacted for the modification of Zamindari system and it is not a law providing for the prevention of fragmentation of agricultural holdings. Accordingly, it is not saved by section 4(2).

The first and the second exceptional cases may be exemplified from the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 i.e. Bombay Holdings Act and the Bombay Tenancy and Agricultural Lands Act 1948 i.e. Bombay Tenancy Act. For example, if an intestate dies leaving behind him an agricultural land measuring 10 acres in area out of which 6 acres are in possession of a tenant and 4 acres were in the possession of intestate before he died and also leaves behind thee sons, who are his heirs, the Act will govern succession to the land. The
sons will inherit four acres of land but they cannot divide it among themselves, as the Bombay Holdings Act does not permit it. In respect of six acres of land in possession of the tenant, three sons will succeed to it and will become landlords and will be entitled to recover rent from the tenant, but their right to obtain possession of this land is regulated by the Bombay Tenancy Act. The devolution of tenancy rights will not be regulated by the Act but by the Bombay Tenancy Act.

Another illustration may be taken from the Madhya Pradesh Land Revenue Code, 1954 under which the devolution of tenancy rights among Hindus is governed by the personal law, which recognized reversioner’s right to succeed to tenancy right. This provision is saved by sub-section (2) of the Act. In sum, the Act is applicable to (a) ownership rights in agricultural holdings, (b) any right in non-agricultural holdings, including tenancy rights, and (c) any rights in agricultural holdings other than tenancy rights.

The principle, as enunciated by the Supreme Court in *Bajya v. Gopikabai*, is that where a tenancy or land tenure legislation makes a special provision for devolution of rights in agricultural lands, provision will prevail and in that even, the provision of the Act will be inapplicable to such devolution. However if the land tenure legislation itself makes the personal law of the parties applicable, the provisions of the Act must be applicable.

Accordingly as pointed out and by the Apex Court in *Sooraj v. S.D.O*, if the legislation makes a specific provision as to the mode of the devolution and specifies persons entitled to hold the land as their shares, the Act cannot apply. The rights of occupancy tenant are property. In *Tokha v. Smt. Samman*, Mst. Sama before the Hindu Succession Act came into force held the occupancy rights as widow, that is, for her lifetime and on her death they would not pass on to her heirs but to heirs of her husband under sec. 59 of the Punjab Tenancy Act. It was held that if the law as it existed prior to the Hindu Succession Act had stood, the position would be different. But after the coming into force of the Hindu Succession Act and by reason of section 14(1) she has become the absolute owner of those rights and the limited estate she held in those rights no longer exists. Therefore, her position vis-à-vis, the occupancy

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12 (1972) 74 Pb. L.R. 570.
rights is that of an absolute owner and even better than that of male owner of such rights. The male owner’s alienation of occupancy rights, if the rights were ancestral, could be questioned by his reversioners, whereas the alienation of such rights by a female owner cannot be questioned. If the matter is viewed in this perspective, it will be clear that in view of Sec. 4 of the Hindu Succession Act read with Sec. 14 the embargo put on the alienation of occupancy rights on the widow under Sec. 59(3) of the Tenancy Act does not exist. That being the position of matters, it is idle to contend that the gift by Mst. Sama in 1957 was valid.

2.3 Loophole under the Principal Act: Section 4(2) of the principle Act was always criticized because it enhances the gender discrimination. It provides that the state can pass rules “providing for the fragmentation of agricultural holding or for fixation of ceiling or for the devolution of tenancy rights in respect of such holdings”. A serious objection to it was that the beneficial effect of the Act could be denied by a resort to this provision because these laws contain features which are more discriminatory than the existing laws. The legislation in Uttar Pradesh gives an example of this kind. It provides:

When a bhumidar, sardar or asami being a male dies, his interest in his holding shall devolve in accordance with the order of the succession given below:

   a) The male descendants in the male line of descent in the equal shares per stripes…
   b) Widow and widowed mother and widow of a pre-deceased male lineal descendent in the male line of descent who have not remarried;
   c) Father;
   d) Unmarried daughter\(^\text{13}\);

The above scheme of inheritance shows that along with a son, even the widow of the deceased is not entitled to succeed. The claims of a widow, unmarried and married daughters are preceded not only by lineal male descendants but also by their widows who have not remarried. These types of rules of devolution reveal a strong preference for the male agnates and this gender gap in the ownership and control of landed property contributes in lowering down the status of women\(^\text{14}\).

\(^{13}\) The UP Zamindari Abolition and Law Reforms Act, 1951, Section 171.
2.4 Effect of the Amendment Act, 2005: In order to plug this loophole section 4(2) is deleted by the amendment Act, 2005. But by deleting section 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 state uniformly, irrespective 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 landowner or the tenant, as the case may be, will be of no consequence. The deletion of section 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 wise with respect to laws governing 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 the 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 section 4(2) and absence of a provision extending the application of Hindu Succession Act over the 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 conflict, the Centre legislation prevails. But as provided under Art 256 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.\(^\text{15}\)

3. SECTION 6

3.1 Effect on Mitakshara Coparcenary: Second important provision, which deals with the property matters of women, was Section 6 of the principal Act. This section

gives deathblow to Mitakshara coparcenary, which has been one of basic factor responsible for gender discrimination. Section 6 proclaimed that when a Hindu dies and was at the time of his death having an interest in a Mitakshara coparcenary then his interest shall devolve by survivorship, according to the Hindu law and not under the provision of this act.

At first glance one got the impression that Mitakshara Coparcenary has been left as it was, but a look at the proviso breaks such belief. The proviso to section 6 was attracted where a male Hindu has died as an undivided coparcener and left him surviving a female relative specified in clause (1) of the schedule or a male relative specified in that clause who claims through such female relatives. When the proviso has been attracted then the interest of the deceased Hindu in Mitakshara Coparcenary shall devolve not by survivorship but by testamentary or intestate succession as the case may be under the Hindu Succession Act. The Schedule which was appended to the Principal Act contained a list of 12 heirs belonging to class 1 category. Of these 8 were female, one was a male claiming through a female i.e. daughter’s son and the remaining 3 were males. So the chances of a person dying without leaving behind a daughter or a widow being remote, succession in most cases would be governed by the proviso and not by the law of survivorship.

Section 6 read with proviso in effect gives a deathblow to the whole concept of joint family property of the Mitakshara School. Apart from joint possession and enjoyment, the main features of the system are the right to acquire by birth an interest in the property and the right of the coparcener to take by survivorship the undivided interest of a deceased coparcener that is the mode of devolution by survivorship and not by the succession. The proviso to section 6 destroys, though a limited extent, the right of the surviving coparceners to take the undivided interest of a deceased coparcener (in the Mitakshara School) and prescribes the mode of devolution by succession. Actually the devolution of the undivided interest of a coparcener by succession was, within limits, first achieved by the Hindu Women’s Right to Property Act, 1937; the procession is carried further by section 6 of this Act. The proviso to section 6 affects only the law of the Mitakshara School, for the Dayabhaga always recognized devolution by succession of the undivided interest in the joint family property as well as the separate property of deceased Hindu governed by that school.

Due to its effect on Mitakshara coparcenary, Section 6 was always considered as a stumbling piece of legislation which brings about certain anomalies. First and
foremost, it prescribes the mode of devolution by succession in certain circumstances or secondly, as a result of succession the sons and other persons who succeed to the property on such succession would by force of section 19 take it between them as tenants-in-common. This did not happen even under the provision of section 3 of the Hindu women’s Rights to property Act, 1937. The undivided interest, which devolved by the succession under the Act continued to be held by the sons and the widow. Among themselves they take as members of a joint and undivided Hindu family. Section 6, however, has the effect of not only destroying the joint family character qua the undivided interest of the deceased coparcener but also the status of the members of the joint family. The sons who succeed to the undivided interest of coparcener would, however, still hold that interest qua their own sons, grandsons and great-grandsons as ancestral property, that is they would continue to hold the share come to them on devolution by succession as ancestral property in their hands qua the issue who were in existence at the date of the succession or who may thereafter be born, for there is nothing in section 6 which prevents the operation of the role of the Hindu law as to acquisition of interest by birth. Another anomaly which results is that a daughter or a widow would take absolutely her share in the undivided interest of her father or husband, as the case may be while the son would have to hold it qua his male issue as ancestral property.

Of course, Section 6 does not prevent a son, grandson or great-grandson from acquiring an interest in the joint family property so that joint family property as it is presently understood would continue to come into existence. In view of large number of female persons in class 1, there must be necessity of fragmentation so that in place of male issue and unmarried daughters (entitled to maintenance and marriage expenses only) the widow, mother and grandmother (taking a share on partition), a large number of females such as the daughter of predeceased son and others would obtain a share in what was, till the death of the intestate, joint family property. The right to demand partition becomes therefore available to a large number of persons and the continuance of the joint family, if that was the real intention of the legislature, is seriously threatened at the whim and caprice of every such person. If the object of the legislature was to continue to save the concept of joint family property—as a matter of desperate attempt at compromise—that object is defeated by the proviso. The proviso actually goes further than section 3 of the Hindu Women’s Rights to Property Act, 1937, inasmuch as besides the widow and the mother having an interest
in the property, a large number of persons such as married daughters, daughters of predeceased sons, married or unmarried, widows of the predeceased sons and grandsons come in for a share. It is true that some of these widows were brought in by the Hindu Women’s Rights to Property Act, 1937, but even that Act had not the effect of making married daughters or daughter of predeceased sons participants in the joint family property. The mischief therefore of the proviso was all the greater and entirely unwarranted by the needs of the situation or the wishes of the Legislature.

The effect of the proviso to Section 6 was to bring compulsory, though notional partition of the joint family property on the death of a coparcener leaving female relatives and male relatives claiming through female mentioned in Class 1, in respect of his share in such property, but only to the extent it was necessary to determine the interest or the share of deceased coparcener and not so as to affect either the status of jointness or the shares of the others; the right to take by survivorship the shares of others is however effectively destroyed. It would have been better if this result had been obtained by the Legislature directly and openly and it had avoided the confusion and complications and the spate of litigation, which result in course of time within the joint families particularly where big estates are involved.

One of the two courses should have been followed either the mode of devolution by the survivorship should have been destroyed altogether or that it should have been applied to the devolution of an undivided interest in all the cases. If this course were to be followed, the proviso to section 6 would have had to be deleted altogether. If, on the other hand, the rule of succession embodied in the proviso was to be applied, it should have been applied in all situations, and all the rules of succession mentioned in section 8 to 15 should have been made applicable to the same extent. The other alternative was to re-enact, in place of the proviso to section 6, the provisions of section 3 sub-sections (2) to (4) of the Hindu Women’s Right to Property Act, 1937. It may be mentioned that in the original Bill (No. XIII of 1954), all joint family property or any interest therein, which devolved by survivorship on the surviving members of coparcenary in accordance with the old law, was excluded from the operation of this Act by clause 5 of the Bill and no exception to such exclusion or of the nature provided in the present proviso to section 6 was made in the Bill. Thus section 6 was clearly a half-hearted attempt to preserve the old rule of survivorship.
The proviso also effects an important change in the old law regarding the liability of a coparcener’s share in the joint family property for his debts. Under the old law a coparcener ceased to have any interest in the joint family property after his death as his undivided share passed by survivorship and therefore the debt incurred by him could be enforced against the property during his lifetime only and his share could not be attached after his death. It is however submitted that in view of the proviso and the first explanation, it would now be possible for a creditor of a coparcener to attach his determination of interest of deceased coparcener: Notional Partition: undivided share in coparcenary property even after the death of the coparcener where he has died leaving any of the female heirs or heirs claiming through females mentioned in Class 1\(^{16}\).

How the interest of the deceased in the Mitakshara coparcenary property shall be determined for the purpose of devolution whether testamentary or intestate contemplated by the proviso, is provided in Explanation 1. Explanation 1 laid down that for the purpose of this section the interest of a Hindu Mitakshara coparcener shall be deemed to be the share of 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 1 introduces a fictional or a notional partition, immediately before the death of coparcener concerned has taken place. The share, which would have been allotted in that imaginary, fictional or notional partition, is his interest, which is now to devolve by the testamentary or intestate succession under the Act.

As pointed out by the Supreme Court in *Shayama Devi v. Manju Shukla\(^{17}\).* Explanation 1 contains the formula for determining the share of the deceased and for that purpose; statutory fiction has been introduced saying the interest of the person dying intestate shall be deemed to be share in the property that would have been allotted to him, if the partition of the property had taken place immediately before his death. As such, one has to imagine the purpose of ascertaining the interest of deceased in the coparcenary at the time of his death that a partition of the property had been affected a little prior to his death.

In Hindu law the term partition means both a division of the status and a division of property. Partition in the sense of a division of status is the process by


\(^{17}\) 1954 (6) S.C.C. 342.
which members of a joint family become divided in the status. Partition in the sense of division of the property is, according to the Mitakshara School, division of joint family property into specific shares. In the Explanation the partition referred to would be of the latter description. In this kind of partition actual division by metes and bounds is not necessary or meant. What is meant is the division of property merely into specific shares or conversion of the joint tenancy of the family into the tenancy in common of the members and not an actual division of property by metes and bounds. Therefore what the heirs of a deceased coparcener mentioned in class 1 would get is an undivided but ascertained share in the coparcenary property to which the deceased coparcener was entitled prior to his death as on partition and not a share in any specific property. In other words, such heirs would become tenants-in-common with the other surviving coparceners of the deceased in respect of the share of the deceased in the property and the other coparceners as between them would continue to be joint tenants with the right of survivorship known to Hindu law. This is another anomaly under Hindu Law of Succession.

But the actual working of this fictional or notional partition has been the subject of varied judicial interpretation. The Bombay High Court in the case of Shrirambai v. Kalgonde gave its first ruling on the subject. In this case the deceased coparcener had left behind his widow, a son and three daughters the Court observed that the undivided coparcenary share of the deceased to be ½ (the other ½ being left for the only other coparcener—the son). Court further held that the said ½ was to be divided, according to the Act, equally among the widow, the son and the three daughters of the deceased and finally gave 1/10 of the whole property to the widow.

Two year later the Bombay High court in Rangubai v. Lakshman overruled its first decision and held that the old law of partition applied under the section 6 without any modification and the female getting a share on partition would actually be entitled to those shares in addition to what they might get by inheritance out of the share of the deceased. So where the deceased coparcener left behind his widow and a son (adopted) the Court calculated the undivided share of the deceased in the coparcenary to be 1/3 (+1/3 for the only other coparcener, the son and 1/3 for his mother). Court allotted to the widow (i) half of that share (the other half given to the

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19 A.I.R., 1964, Bom. 263.
only other class I heir of the deceased, the son) by way of inheritance and (ii) 1/3 of
the whole property by way of partition (the remaining 1/3 of the whole property going
by partition to the son) and finally gave to the widow 1/2x1/3=1/6+1/3=1/2 of the
whole property, the other half going to the son (1/2x1/3+1/3).

The Orissa High Court in the case of Anand Naik v. Haribandhu\(^{21}\) accepted
and followed the later Bombay ruling. So, where the deceased coparcener left behind
his widow, two sons and five daughters, the Court calculated his undivided share in
the coparcenary to be 1/4\(^{th}\) and allotted, by partition, 1/4\(^{th}\) each to the widow and the
two sons. The Court divided the 1/4\(^{th}\) share of the deceased equally between the
widow, two sons and the five daughters (each getting 1/8 of it) and finally gave 9/32
to the widow (1/4+1/8x1/4), 9/32 to each son (1/4+1/8x1/4) and 1/32 (1/8x1/4) to
each daughter.

The Mysore High Court in the case of Mallava v. Taravatavva\(^{22}\) held that the
notional partition under Explanation 1 to section 6 was meant for calculation only and
was not to be actually effected. Accordingly, where the deceased coparcener had left
behind his widow and a son, the Court ascertained his undivided share in the
coparcenary to be 1/2 (the other 1/2 being for the son and, strangely, nothing for the
wife). Court gave half of the said 1/2 to the widow (the other half going to the only
other class 1 heir of the deceased—the son) and finally gave 1/4\(^{th}\) of the whole
property (1/2x1/2) to the widow (the balance 3/4 remaining with the son).

The High Court of Allahabad in Controller of excise duty v. Anari devi\(^{23}\)
1972 held that at the notional partition the share of the coparcener other than the
deceased and of the females would be taken into consideration for the purpose of
calculation (of the share of the deceased) but would not be actually allotted to any of
them; only the share of deceased so calculated would be divided among his class 1
heirs under the Act. So, in an estate-duty case where the deceased coparcener had left
two widows, a son and three daughters and one of his widows was required to pay
estate-duty on her share of the estate, the Court calculated the share of deceased in the
coparcenary to be 1/4(out of the remainder, ¼ each belonging to the two wives and
the son). The Court did not touch the remaining ¾ regarding it as unpartitioned (the
partition being merely notional). It held that out of ¼ (calculated share of the

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\(^{22}\) (1970) 2 Mys. L. J. 571.
\(^{23}\) A.I.R., 1972, ALL 178.
deceased) the joint share of the two widows would be 1/5 (out of the balance of 4/5, 1/5 each going to the son and three daughters). Thus it calculated the share passing to the widow required to pay estate-duty to be 1/2x1/5x1/4=1/40 of the whole estate and held that estate-duty was payable by her on the said 1/40\textsuperscript{th} share.

In another case, *M. V. Shivaji Rao Kore v. Rukmani Yamma* \textsuperscript{24} decided by the Mysore High Court, where one coparcener died leaving behind his widow, father, mother, a brother and three sisters and while his widow’s claim to a share in her deceased husband’s undivided interest in the coparcenery was yet to be settled, another coparcener (first one’s father) died, the Court held that on the death of first coparcener (the son) his undivided share in the coparcenary property was 1/3 (out of the remainder 1/3 each belonging to the father and the other son and nothing for the mother), treated the remaining 2/3 as unpartitioned (partition being notional). Out of the 1/3 share of the deceased first coparcener, allotted half to his widow (the other half going to his only other class 1 heir—his mother—each taking 1/6). Court further held that on the death of the second coparcener (the father) later, his undivided share in the coparcenary was 1/2x2/3=1/3 (the other 1/3x2/3=1/3 belonging to the other coparcener—the surviving son) which passed on by succession, in equal shares to his widow, son three daughters and predeceased son’s widow (1/6x1/3=1/18 each) and finally gave 4/18 (1/6+1/18) each to the deceased son’s widow and the deceased father’s widow, 7/18(1/3+1/18) to the surviving son and 1/18 each to the three daughters of the deceased father.

Delhi High Court in 1973, in the case of *Kanhyalal v. Jumna Devi*, \textsuperscript{25} where a coparcener died leaving behind his widow, five sons and two daughters, the court calculated the undivided share of the deceased in the coparcenary as 1/7 (there being six coparceners and a female claimant, though none of them got their shares by partition) and out of the said 1/7 gave, by succession, equal shares to the widow. The five sons and the two daughters, each getting 1/7x1/8=1/56 of the whole property (the other 48/56 remaining with the sons by survivorship).

The full bench of the High Court of Bombay in *Sushilabai v. Narayan Rao* \textsuperscript{26} decided, where a coparcener (a son) died leaving behind his widow, mother, father and a sister, and then his mother died, the Court calculated the undivided interest of

\textsuperscript{24} A.I.R., 1973, Mys. 113.

\textsuperscript{25} A.I.R., 1973, Del. 160.

\textsuperscript{26} A.I.R., 1975, Bom. 257.
the coparcener (son) to be at the time of his death, 1/3 (out of other 2/3, 1/3 each going by partition to his father and mother). Out of the said 1/3, allotted equal shares (1/2x1/3=1/6 each) to the widow and the mother of the deceased—his class 1 heirs. Court further held that on the death of the mother her share (1/3+1/6=1/2) went by succession, under the Act, equally to her husband (father of the deceased) and her daughter (sister of the deceased)—each taking ½-1/2=1/4 and finally gave 7/12 (1/3+1/4) to the father of the deceased, 1/6 to his widow, and ¼ to his sister.

On a detailed examination of statutory provisions and case law the Court concluded that the notional partition once undertaken could not be retracted and that therefore, death of a coparcener would unavoidably lead to an actual partition under which all coparceners (including the deceased and the females entitled to shares on partition) would actually get their shares by partition and that of the deceased coparcener would later be taken by succession, by his class 1 heirs.

This was where in 1978 the law stood as decided by the various High Courts. Out of these decisions, three interpretations were made:

(a) that at the notional partition under section 6 no living person would actually get a share; only the share (so calculated) of the deceased coparcener would, by succession, go to his living class 1 heirs (Allahabad, Mysore, Delhi, Madhya Pardesh, Andhra Pardesh);

(b) that at the notional partition all living coparceners as well the females entitled--- under the law of partition--- to a share would get the shares due to them; and in addition to this share of the deceased coparcener would, by succession go to his living class heirs (Bombay—past-1964 rulings—and Orissa);

(c) Even at the notional partition (at which shares would be counted but not allotted) no shares would be counted for females, the old law of partition notwithstanding (Bombay—1964 ruling—and Mysore).

Finally Supreme Court, in 1978, in *Gurupad v. Hirabai* has settled the conflict of judicial opinion. It has accepted and approved the view point of the Bombay High Court expressed by it in its 1975 ruling. In a case where a coparcener died leaving behind his widow, two sons and three daughters, the Supreme Court confirmed that at a notional partition the deceased as also his wife and two sons would be actually

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allotted ¼ share each, the ¼ allotted to the deceased would by succession, go equally to his widow, two sons and three daughters—each taking 1/4x1/6=1/24 and finally the widow and the two sons would get 7/24 (1/4+1/24) each and 1/24 would go to each of the three daughters. The Court held that partition for the purpose of section 6 was not a “processful step devised merely for the purpose of working out some other conclusion”, it was to be treated and accepted as a “concrete reality”.

In Smt. Rajrani v. Chief Settlement Officer, Delhi\(^\text{28}\) which came up from the High Court of Delhi, a Hindu died after the coming into the force of the Act leaving behind him his widow, three sons and three daughters. Had a partition taken place during the lifetime of the father, the deceased would have got 1/5 share, the widow 1/5\(^{th}\) share and three sons 1/5\(^{th}\) share each. The deceased’s share of 1/5 would devolve by inheritance upon his widow, three sons and three daughters equally each of them getting 1/5-1/7=1/35. The widow got in her own right 1/5\(^{th}\) share and hence her total share will be 1/5+1/35=8/35.

In a recent decision of the Madras High Court in C Kanna Gounder and Sagadeva v. Arjun Gounder\(^\text{29}\), a coparcenary consisted of three brothers, one of who dies issuless, leaving behind a widow. The widow executed a gift of a one-third share of the property in favour of her husband’s nephews. The Court held that the gift was invalid, as coparcenary property could not be gifted. It appears to be an incorrect judgment, the reason being that the moment the coparcener her, died leaving behind his widow, the presumption of the notional partition would apply, and his one third share, calculated after this partition will go by intestate succession to his widow. As his widow is the only class 1 heir present, she will take the property as an absolute owner and the gift of executed by her would be perfectly valid.

3.2 Separated Member not entitled: It has been mandated that the proviso to section 6 will not enable a person, who had 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\(^\text{30}\). The proviso to section 6 is an exception to the rule incorporated in the main part of section 6 and Explanation 2 is an exception to the rule incorporated in the proviso to section 6. Explanation 2 only reproduces the law, which was already in force before the Act came into force as understood by some High Courts in India.


\(^{29}\)(2003) 1 LW 408.

\(^{30}\)Explanation 2 to Section 6.
A son who is divided from family was not entitled to claim as share in the property of the father on his death if there were undivided son or sons living with him at the time of his death. Explanation 2 does no more than incorporating the same principle of law in the Act. The principle underlying it is that persons who continue to remain joint with other members of the family should be preferred in the matter of intestate succession to a person who has gone out of the family by taking away his share. Probably that was considered to be in consonance with the notions of the joint family system prevailing in India.

3.3 Loophole under the Principal Act: The major loophole under Section 6 was that in order to known the share of the deceased coparcener one has to resort to old rules of partition and the net result was unequal distribution among the brothers and sisters because the son by the virtue of being coparcener was entitled to have greater share, one as the coparcener with the father and the other as a class 1 heir whereas the daughter was again given only one share in the separated share of the deceased father. Thus even the projected image of section 6 gives the implication that the daughters have given the right in Mitakshara coparcenary but the real picture was that ancestral property continued to be governed by a wholly patriarchal regime and thus responsible for gender discrimination. In order to end this discrimination section 6 is altogether amended by the amendment Act, 2005.

3.4 The Effect of the Amendment Act, 2005: The major change introduced by the Amendment Act, is the substitution of new Section 6.

3.4.1 Section 6(1): This sub clause makes the daughter of a coparcener as a coparcenar by birth in her own right in the same manner as son and have same rights and liabilities as that of a son. Further 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, through herself acquired earning into the joint family fund, something that was not possible before the amendment. The rule that female 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 the 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.

In order to explain this provision in simple terms let’s have a look at the following example. Suppose P has two children one son S and one daughter D. Now after amendment coparcenary consist of P, S and D. Suppose son SS is born to S he will also become coparcener. Further if great grandson is born to P i.e. SSS he will also become a coparcener. Similarly daughter of S is also a coparcener. On the other hand along with daughter D her children’s whether son DS or daughter DD will also become a coparcener.

But at the same time, this interpretation would make them members of two coparcenaries, one belonging to their father and one belonging to their mother. Thus the fear is that this new law would give rise to numerous litigations if this liberal interpretation shall be given to the word ‘Daughter of coparcener shall be a Coparcener’ so to avoid this litigation there is need to enact correct and proper law. But the intriguing feature of the amending Act is that it tries to demolish the concept of coparcenary, and the same is retained! Its demolition may be perceived in two principles ways: by opening the male bastion equally to females and by abandoning the principle of survivorship.

A coparcenary, in its classical exposition, represents ‘a community of interest and unity of possession’. In it, the interest of one is the interest of all, and the possession of one is the possession of all. The proximity of Hindu joint family is organized and maintained on the patriarchal principle in which the daughters on their marriage cease to be member of their parents’ family. By making the daughter by birth a coparcener for all intents and purposes, are we envisaging the creation of a new joint family unit in which the husbands of their daughter (along with other kindred) will also be an integral part? Alternatively the daughter is deemed to be a coparcener only for the purpose of equal apportionment of patrimony? Obviously, the

latter view is intended, and for achieving this objective, we need not continue to cling to the concept of coparcenenary, it is likely to create confusion.\footnote{Virendra Kumar, \textit{The Hindu Succession Act: Ending gender bias}, The Sunday Tribune (April 9, 2006), p. 12.}

3.4.2 Section 6(2): According to Section 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 coparcener holds the property with the incidents of unity of possession and communities 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, ie, on the death of 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 mean that if the legislature has abolished the 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 males, it stands abolished for them too? By the abolition of the doctrine of survivorship in the case of male coparceners by an express provision, the legislature has created confusion. It is 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 s 30 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 Section 6(3) states: 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. Even assuming that any reference to a Mitakshara coparcener includes a reference to a daughter of a coparcener, the use of term his, him throughout leads to a confusion that has been created by the legislature. It appears that the doctrine of survivorship has been abolished for male coparceners but has been retained for females.

Further by Section 6(2) a distinction has been created between female members of joint family in the relation to their rights over the joint family property. The two classes of females are one, who are born in family and secondly, those who become members of this joint family by marriage to the coparceners. Females, who are born in the family i.e., daughters, sisters posses a right by birth in the coparcenary property and those who become members of this joint family by marriage to the coparcener, are subject to the same law as it stood before the 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\textsuperscript{33}.

3.4.3 Section 6(3): Under Section 6(3) of the amending Act, 2005 doctrine of survivorship was altogether abolished. Doctrine of survivorship was one of the important incidents of coparcenary. As per this doctrine, if Mitakshara coparcener dies leaving behind his undivided interest in the Mitakshara coparcenary property, his interest will devolve on other surviving coparceners. That why in Mitakshara coparcenary intrest of coparceners was always fluctuating? It increases with death of other coparceners and decreases with birth of coparceners in the family.

Though this doctrine was first modified by Hindu Women’s Right to Property Act, 1937 when coparcener's widow was entitled to hold the interest of her deceased husband during her life time as a limited owner, and after her death it passes to other surviving collaterals. When Hindu Succession Act, 1956 was passed this doctrine was again modified by the provisions of section 6 of the Act. Now under the amending Act, 2005 this doctrine by virtue of provisions of section 6(3) was abolished.

Through the abolition of this doctrine various confusions have also been created. For example, a Hindu family comprises of a father F, and two sons SI 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.

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 increased to a half each. Thus, both F and SI would have been 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 this 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 coparcener's vis-à-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 would be noted that with the retention 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 them would have altered the mode of devolution of property— from survivorship to intestate or testamentary succession, as the case may be. Now with the abolition of this doctrine the newly introduced inequality may be disadvantageous to the family members.  

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.

While affecting this notional partition the present Act provides in detail the calculation of shares under section 6(3). It provides:

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

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34 Ibid., p. 342.
(b) the share of the predeceased son or a predeceased daughter as, as they would have
got had they been alive at the time of partition, shall be allotted to the surviving child
of such predeceased son or such predeceased daughter;

(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
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. Thus under section 6(3) notional
partition has been affected in case of the coparcenary property but another striking
question is that after the amendment where is the coparcenary? Where is the
coparcenary property?

Under the old law there was a process to create a Mitakshara coparcenary by
birth and to constitute Mitakshara coparcenary property by inheritance as property
inherited from Father, Father’s Father, Father’s Father’s Father. But Supreme Court
through its judgment CWT vs Chander Sen35 has already made it clear that the
property inherited under the Hindu Succession Act 1956, is the separate property of a
person who inherited it. Similarly, in the case of Hardeo Rai v. Sakuntala Devi and
others36, it was held that when an intention is expressed to partition the coparcenery
property, the share of each of coparceners becomes clear and ascertainable. Once the
share of a coparcener is determined, it ceases to be a coparcenary property. Parties in
such an event would not possess the property as "joint tenants" but as "tenants-in-
common". After taking a definite share in the property, a coparcener becomes owner
of that share and as such he can alienate the same by sale or mortgage in the same
manner as he can dispose of his separate property.

Same Views were expressed by other Courts also like in the case of Malika v.
Chandrappa37, it was held that where son inheriting self acquired property of his
father, the said property shall be treated as the individual property of the son. The
heirs of the son will no right in the said property as coparceners.

37 2007(2) H.L.R.,(Kar.) 371.
Even before these decisions, way back in 1978 when *Gurupad v. Hirabai*\(^{38}\) was decided by the Supreme Court then also Supreme Court tries to give to the notional partition, the effect of real partition. In this judgment it is clearly mentioned that in order to determine the extent of deceased share. Explanation 1 to section 6 resorts to the simple expedient, undoubtedly fictional, 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 partition of that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death? The assumption once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one’s imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained. On the basis, that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition.

So, by this judgment the notional partition will be treated as real partition for all intents and purposes. It means that joint family will automatically comes to an end and so the joint family property because in *CWT v. Chander Sen* Supreme Court categorically mentions the character of the property, i.e., the property inherited by the

son from his father under section 8 of the Hindu Succession Act would be the separate property qua his own sons because now by virtue of this section new list of heirs is created. Further, section 19 of the Act also provides for the mode of succession of two or more heirs and they shall take the property as tenants-in-common and not as joint tenants. The result of this rule is that the heirs will no longer inherit the property as ancestral property as joint tenants. But when ever the partition took place, they will inherit the property as tenants-in-common.

Thus, Supreme Court’s observation through its judgments put the survival of Mitakshara coparcenary property on death knell. But the judgments would not stop the people from litigation unless the law makes it clear whether such property is a separate property or a Mitakshara coparcenary property. It is unfortunate, on the one hand, law have tried to give equal right to the daughter in this centuries old system of common ownership of property under Hindu law, and on the other hand without any law by the Parliament, and by the judgment of supreme Court the spontaneous channel to provide property for this common ownership has already been blocked. In reality this amendment has opened a channel for litigation, ambiguities, and anomalies only, without giving anything in reality to the daughter. Had the parliament been intended to give the equal right to the women they should have abolished the institution of coparcenary as it has been done in the state of Kerala.39

3.4.4 Section 6 (4): It abolishes 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 leading life of bondage in the next life. Regarding the origin of this doctrine Supreme Court in the case of Sideshwari Mukherjee v. Bhubneshwar Prasad Narain Singh40, said that this doctrine is well known, has its origin in the conception of Smriti writers who regards non payment of debt as a positive sin. This aspect of the doctrine is religious in nature and it is not based for the benefit of creditors or of the protection of third parties. It is based on pious obligation of the

sons to see their father's debt must be paid\textsuperscript{41}. But along with this doctrine has an other aspect also which is based on the logical corollary to the doctrine of the son's birth right in the ancestral property. As rights and duties are always correlated with each other, so under the Mitakshara Law if the sons are given birth right in the property, it is their duty also to repay the debt of their father. The Amendment Act does not abolish son's birth right in the property but it also recognizes daughter's right in the ancestral property. Therefore, logically both the children i.e. son and the daughter should be brought under this obligations because justice demand that rights and duties should go hand in hand\textsuperscript{42}.

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. Thus at present, the repayments of debts contracted by any Hindu would be his personal liability.

\textbf{3.4.5 Section 6(5):} This section states that the amending Act is prospective in its applications and therefore its provisions would not apply to any partition that was affected before 20\textsuperscript{th} December 2004. Further explanation to section 6(5) states that after the amendment only the written partition, which are duly registered under the Registration Act, 1908, or the partitions, which are affected by a decree of Court, is recognized. Earlier there was no such need as the partitions can be in oral also.

In the case of \textit{Surendra Nath Sharma v. Rajendra Kumar Sharma \& Ors}\textsuperscript{43}, an application was filed before the trial court for impleding the daughter as a coparcener. Application was rejected on the ground that cause of action arose in 1999 i.e. before commencement of Amendment Act 2005. The order was set aside by the High Court and held that, interalia, property was not yet partitioned. Suit for that purpose was still pending. Claim for partition being a recurring cause of action, unless division of property is brought to completion by actual delivery of allotment of share, each party has right to claim for partition. Similarly, while noticing the right of a daughter as a coparcener in the case of \textit{Vivek Kumar \& others v. Smt. Binda Devi \& others}\textsuperscript{44}, it was held that after the Amending Act of 2005, partition means any partition by execution

\begin{footnotesize}
\begin{enumerate}
\item 2009(1) H.L.R, 105.
\item A.I.R., 2006, Patna, 65.
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of a deed of partition duly registered under the Registration Act or a partition affected by a decree of court.

In the case of *Sugalabai v. Gundappa A. Maradi*

45, it was held that as per Central Act of 2005, a daughter of coparcener shall by birth become a coparcener in her own right from the commencement of Hindu Succession (Amendment) Act, 2005. So far as the pending matters are concerned by in suit or an appeal, the Central Amendment Act, 2005 brought into force, w.e.f. 9.9.2005 will have to be applied. As a result of substitution of section 6 of the Principal Act by way of Central Amendment Act of 2005, the State Act, which is earlier in point of time, cannot have any effect. Thus the provision of Section 6-A(d) of the Karnataka Amendment Act were held to be repugnant to the Central Act of 2005 and it was held interalia that Supremacy of the Parliament, therefore renders Section 6-A(d) of the Karnataka Amendment Act, 1990 void. The Central Amendment Act of 2005, which has been brought into force from 9.9.2005, shall not have any effect in so far as any disposition or alienation including any partition or testamentary disposition of property which had taken place, before the 20th day of December, 2004.

4. **SECTION 8**

Thirdly, *Section 8* which deals with general rules of succession in the case of males, also gives property right to the female members. This section enumerates the heirs of a male Hindu dying intestate and indicates along with section 9, the order of successions. Before the Act, under the Mitakshara, there are three types of heirs namely; Spindas, Samanodakas (agnates) and bandhus (cognates). Even under the Dyabhaga three types of heirs were recognized namely; Spinda, Sakulays and Samanodakas. Now the entire law of intestate succession as prescribed by the Mitakshara i.e., the rule of propinquity and Dyabhaga schools i.e., rule of religious efficacy is completely changed and replaced by the provisions of this Act.

Under this Act the classification of heirs as Spindas, Samanodakkas, Sakulys or Bandhus is completely given up. This provision refers to two classes of heirs, (Class I and Class II) and then to agnates and lastly to cognates. The word ‘Agnate’ is defined in section 3(1) (a). According to it a person is said to be an agnate of another if the two are related by blood or adoption wholly through males. Similarly the word “cognate” is defined in section 3 (1) (c) and according to it, a person is said to be

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45 2008 (1) H.L.R., (Kar.) 359.
“cognate” of another if the two are related by blood or adoption but not wholly through males. The heirs in each of the above four classes succeed only if there is no one in any of the previous classes.

4.1 Class I Heirs: On the death of intestate, the property first of all devolves upon Class I heirs. Class I heirs are also called by the name of simultaneous heirs, preferential heirs. In Class I category heirs under the Principal Act there were 12 heirs in total. Out of these 12 heirs 8 were females and 4 were male heirs. These are:

Son; daughter; widow; mother; son of a predeceased son; daughter of a predeceased son; son of predeceased daughter; daughter of a predeceased daughter; widow of a predeceased son; son of predeceased son of a predeceased son; daughter of a predeceased son of a predeceased son; widow of a predeceased son of a predeceased son.

These Class 1 heirs are called preferential heirs because these are always preferred over the later category of heirs. Out of these 16 heirs if any one is present he or she takes the whole property of the intestate to the exclusion of latter categories. They are also called simultaneous heirs, because all of them inherit the property simultaneously and divide it equally among themselves. There is no rule of preference among them. In the case of *Tara Wanti v. Shanti*\(^{46}\), father died in the year of 1948 leaving behind a sole surviving daughter. It was held that sole surviving daughter cannot be excluded from succession. As she was a Class 1 category heir so preference cannot be given to collaterals. Daughter was entitled to succeed to the estate of her father after the death of the father. Thus Class 1 category heirs are always preferred over the other categories of heirs.

Though including so many simultaneous heirs under Class 1 category is always criticized by various jurists. In the view of Vishnu Ganshyam Deshpande\(^{47}\), one of the members of the Committee on Hindu Succession Bill while discussing Hindu Succession Bill also mentioned that Dr. P. V. Kane, who is an eminent supporter of this Bill, has rightly objected to increasing the list of simultaneous heirs. He has objected to the son or daughter of predeceased daughter being included in the list. He has said, “This is going far and I do not find it in any other system of law. Even amongst Muslims if there is a daughter and a son then the son and daughter take

\(^{46}\) 2007 (1) H.L.R., (Pb. & Har.) 417.
the whole property.” He has opined that he is prepared to accept the first group of son, then widow and then daughter. The son of a predeceased son also he is prepared to accept but all the rest should be excluded. Then the inclusion of widowed daughter-in-law also does not find place in any law, not even in the Indian Succession Act. A provision for widowed daughter-in-law was made in Hindu law because widowed daughter-in-law was a part of the family. But now with the “progressive element” in the society, widowed daughters-in-law are likely to remarry and by making the women’s estate absolute the widowed daughter-in-law will be able to take the estate of her father-in-law to her new husband’s house. In the case of a widowed daughter-in-law the estate should have been kept limited and thus assault on our Hindu Law should not have been made. The mother has been included in Class 1 in order to bring uniformity with the South Indian Law of inheritance but the net result has been that the son who has to carry on the traditions of his family will actually get a very small partition of his estate. But still this number of Class 1 heirs has been retained in the Act.

4.2 Class II Heirs: If no class I category heir is present, then property will pass on to class II category heirs. Class II category is further grouped into 9 sub categories called Entries. The Rule is that heir in prior Entry excludes the heir in latter Entries. The entire heir in one Entry takes the property in equal shares in accordance with per capita rules. These Class II category heirs are:

I Father
II (1) Son’s daughter’s son
     (2) Son’s daughter’s daughter
     (3) Brother
     (4) Sister
III (1) Daughter’s son’s son
     (2) Daughter’s son’s daughter
     (3) Daughter’s daughter’s son
     (4) Daughter’s daughter’s daughter
IV (1) Brother’s son
     (2) Sister’s son
     (3) Brother’s daughter
     (4) Sister’s daughter
V Father’s father; Father’s mother
It should be noted that while under the Class-II heirs, female heirs outnumber male heirs; a closer look reveals clearly, that the patriarchal norms of preference to paternal relations over maternal relations, have been retained.

Another important aspect of Class II category heir is that ‘Father’ is included in this Class II category as Entry I heir. The position of the father is such that from the property of the son by way of inheritance, either he gets nothing, or he gets the total property. Till a single Class I heir is present, the father is excluded. But his presence excludes every other Class II heir. He inherits alone. The Hindu Code Bill 1948, as well as the original Hindu Succession Bill 1954, has placed both the parents, i.e., the mother and the father as sub category (I) of Class II heirs, but the mother was later placed in the Class I category, while the father position remains the same. This move was objected to by the parliamentarians, on the ground that as both parents stand in the same degree of propinquity, there was no rationale in preferring one to the other. Some Judges also share the same view and have called upon the legislature to amend the Act to correct the imbalance. In this connection, it may be noted that except under the Indian Succession Act 1925, where the father excludes the mother, under the Islamic law and the law applicable to Parsis, both the parents are placed on an equal footing, but inherit along with the children of the deceased, though their share is similar in comparison, to that of the children."^^footnote:48

Even parliamentarians also objected this exclusion of father from Class I category. In the views of Seeta Parmanand"^^footnote:49: In clause 8 and Class I of the Schedule “mother” has been put on the same level as sons, daughters and the widows of the intestate, as an heir to her son. This has been obviously done in order to bring about parity between the Marumakkattayam and other matriarchal systems of law prevailing in the South. This is, however, hardly necessary as the existing right enjoyed by the mother under that system can be safeguarded by introducing the proviso saying that the existing right of the mother getting an equal share under the Marumakkattayam

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and the similar law of the South in the property of the son alone with his children and widow, shall not be curtailed as this would be ultra vires of the Constitution.

Under the new scheme, a woman would be getting full share along with her brothers, sons and daughters and as such for her to claim a share again in her son’s property is neither called for nor fair to the deceased’s sons, if filial duty is a consideration, then there is no reason why the father should be excluded from this benefit. The clause does not say widowed mother either. The father has as much a right to demand filial duty from his son as the mother. Besides under the clause 17, the property of a female Hindu dying intestate shall devolve upon the father and the mother if the deceased has left no son, daughter or husband. One has not been given precedence over the other.

In the view of Sham Sunder Narain Tankha\(^50\), in Class I of the schedule the “mother” has been included as a simultaneous heir with the widow and the children of the deceased. While raising no objection to the mother’s inclusion in this class of simultaneous heirs, I see no logic, or justification for excluding the father as an heir from this group and placing him in Class II. The father stands in the same relationship as the mother and in his old age when he is no longer able to earn for himself, he stands in need of as much help and support as the mother does and it is highly unfair to exclude him from Class I of simultaneous heirs. I, therefore, strongly recommend the inclusion of the father in Class I of the schedule with a consequential change in Rule 2 of Clause 10.

4.3 Agnatic and Cognatic Heirs: After the failure of Class I and Class II heirs, inheritance goes to agnates. The rule of agnatic preference reasserts itself among the remote heirs; in fact it is having its sway. If there are no Class I and Class II heirs, the property will first go to agnates, howsoever remote they might be. It is only on the failure of the agnates that property goes to cognates.

Before, we proceed with a discussion of law of succession among agnates and cognates. The following preliminary observations should be kept in view.

1. Here by agnates and cognates we mean those agnates and cognates who have found no place in Class I and Class II.

2. Agnates and cognates are unenumerated heirs since no limits are laid down as to their degrees of ascent and decent. An agnate howsoever remote will

\(^50\) Ibid., p. 96.
inherit on the failure of Class I and Class II heirs. Similarly, on the failure of Class I, Class II and agnates, a cognate, howsoever remote he might be will succeed.

3. The classification of agnates and cognates and rules of preference and distribution of the property among them are same.

4.3.1 Rules of preference and distribution of property, among the agnates and cognates.

1. When the claimant-relations are descendants, ascendants and collaterals the descendants are preferred over the latter two. On the failure of descendants, inheritance goes to ascendants, and on their failure, it goes to collaterals.

2. When all the claimant relations are descendants, the one having fewer degrees of descent will be preferred, and if degree of descent are the same, they will inherit simultaneously and among them share equally or per capita.

3. When all claimant relations are ascendants, the one having fewer degrees of all ascent will be preferred, and where the degrees of ascent are the same all will inherit simultaneously and equally.

4. When all claimant-relations are collaterals the rule of distribution of property and preferences will be:

(a) Among the claimant collaterals those who have fewer degrees of ascent will be preferred.

(b) Among the claimant collaterals when the degrees of ascent are the same, those who have fewer, degrees of decent will be preferred.

(c) Among the claimant collaterals where degrees of ascent and decent are the same, all inherit simultaneously and among themselves share equally i.e., per capita.\(^{51}\)

In the views of Renu Chakravartty, Parvathi Krishnan, S. V. L. Narasimham\(^{52}\) the joint Committee has departed from the principle of giving equal rights of inheritance to male and female heirs of succession in the case of agnates and cognates. While accepting the principle of succession through kinship we feel that it

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should have been sufficient to limit it as it was done in the original Bill to the fifth
degree. We feel that the agnates and cognates should have been treated equally
inheriting together under the common degrees of ascent and decent.

Thus Section 8 of the Hindu Succession Act gives preference to agnates over
cognates in the matters of succession of a Hindu male dying intestate. Moreover, there
are no degrees of relationship beyond which kinship is not recognized, so that an
agnate howsoever remotely related to the intestate is entitled to succeed as an heir.
The consequence of this will be that an agnate will be able to succeed to the
intestate’s property no matter how remotely connected he/she is and no matter how
closely connected the cognate is. It is submitted that this is blatantly discriminatory
and there is no justification or any sort of logic in preferring agnates over cognates.

4.4 Effect of Amending Act of 2005: By the Amendment Act of 2005 to create parity
between sons and daughters, the 4 new heirs in Class 1 of the schedule have been
added. This step is taken to end gender discrimination persisted under the Hindu
Succession Act. Now the total number of class I heirs is 16. Out of these 11 are
females and 5 are males. The 4 new included heirs are:
Son of a predeceased daughter of a predeceased daughter (DDS);
Daughter of a predeceased daughter of a predeceased daughter (DDD);
Daughter of a predeceased daughter of a predeceased son (SDD);
Daughter of a predeceased son of a predeceased daughter (DSD).

But while doing so premutatively, 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 seemed to
be no rational for this omission. The Law Commission of India has now taken note of
this omission in its 204th Report presented to the Union Minister of Law and Justice
by the Chairmen of the Commission on February 5, 2008 and recommended the
incorporation of the said two heirs in Class I by removing them along with four
others from Class II of the Schedule. The Commission calls this omission as a part of
“legislative inadvertences” which need rectification53.

The Amending Act of 2005 has not affected any amendment in this class II
category heirs and father is still class II category heir. But now the proposal is made
by Law Commission of India in its 204th Report regarding the relocation of the

53 Virendra Kumar, Gender Matters; Tackle persisting bias in Hindu succession law, The Tribune (9
April, 2008).
position of ‘Father’ of the deceased. In this respect, the Commission has rightly recommended that the ‘Father’ as heir should be shifted from Class II (Entry I) to the category of ‘preferential heirs’ included in Class I of the schedule. The argument advanced by the Commission is mainly two-fold;

Firstly, ‘Father’ is certainly a close relative than anyone else placed in Class II, and there seems to be no reason not to prefer him over the third generation persons remotely connected with the deceased in the matter of succession. Secondly, if it is the paramount legal obligation of the children to maintain their parents, say, under the recently enacted “Senior Citizens (Maintenance, Protection and Welfare) Act, 2007,” it would indeed be logical to include ‘father’ along with ‘mother’ who is already placed in Class I—the class of preferential heirs.

Pursuant to this proposal, the Commission has further proposed to recommend for the revision of distribution of property among heirs in Class I of the Schedule. This of course requires the revision of the various rules as laid down in Section 10 of Act of 1956. Inter alia, the commission has proposed to recommend the incorporation of a rule where by the mother and the father, if both survive at the intestate death, shall take between them together, one share.

Such a proposal however is regressive in character. It shrinks the share of the mother to one-half in the presence of the father. Do we wish to demean her dignity or lower her status as mother while raising the status of father as an heir? This is not done even in the case of partition between the father and the sons. If in the Hindu joint family governed by the Mitakshara law partition takes place between the father and his sons, the mother takes an equal share along with sons. Therefore, the mother should continue to take one share despite the elevation of father from Class II to Class I, who should of course also be given one share quite independently of the mother.54

The Law Commission in its present Report has made two other proposals to amend the Hindu Succession Act 1956 as amended by the Act of 2005. One of these relates to ‘Father’s widow’ and second is for the up-gradation of step-mother.

In this respect, the proposal to recommend is on two counts. On one count it is purely clarifying in nature, in as much as the term ‘father’s widow’ in Entry VI of Class II of the Schedule refers to the stepmother of the deceased male Hindu, as distinguished from the term ‘mother’ included in Class I, which refers to his own real

54 Ibid.
mother. Thus, this recommendation merely makes it express what is otherwise clearly implied.

On second count, the proposal is made for up-gradation of step mother (term as ‘father’s widow’) from Entry VI to Entry II. The reason adduced by the Commission for this shift is that “if mother of the intestate takes her share as Class I heir, then nothing will remain for the step-mother, if any to succeed.”

But this reasoning is highly misplaced, because, apart from several other reasons that might have initially promoted the legislature to place the step-mother after the persons closely related to the deceased (both descendents and collaterals), under section 8 of the Act that deals with the general rules of succession, it is clearly stipulated that the property would devolve upon the heirs specified in Class II of the Schedule only if “there is no heir of Class I.”

Among the class of Agnatic and Cognatic heirs, even the Amending Act of 2005 has not effected any change in the preference of agnates and thus this discrimination goes on.

5. SECTION 14

Fourthly, Section 14 of the Hindu Succession Act, 1956 opens a new era for female’s in the matter of their property rights. It abolishes the concept of limited ownership to females and introduces absolute ownership of property rights to females. If we analyse the position of the female’s property right before coming into force of section 14 of Hindu Succession Act, it gives us clear picture that at every stage property right were given to women whether they are unmarried, married or widow. But these property rights are given to them only to a limited extent. They are not free to deal with these rights as absolute owners, rather restriction has been imposed on their power of disposal i.e. limited ownership rights are given to those females.

Even if we analyse the position of stridhan i.e. which is purely the ‘dhan’ of ‘stri’ females have limited power to dispose of her stridhan. Stridhan comprised, generally speaking, property received by ways of gifts and presents given to a women by her parents, husband, close relations of parents or husband, either at the time of marriage or on other occasions, or at the time of the performance of ceremonies, of ‘sulka’ or bride price, of property acquired by her own exertions and ability or by adverse possession of bequests from stranger or relations, of money or property given

55 Ibid.
to her in lieu of maintenance or its arrears, and of savings or purchases made with stridhan.

Non-stridhan comprised what she inherited from a male or a female relation. There was a further divergence within this category of stridhan, into ‘saudayika’ and ‘non-saudayika’, as regard the power of a woman to alienate it. Saudayika, that included gifts, presents or property received by way of bequests from parents and other relations, conferred on her an absolute power of alienation, irrespective of her marital status. But over the non-saudayika, that included property received from non-relations, her power of alienation were curtailed after marriage, as the husband’s consent was necessary before she could part with it by way of a transfer. Non-stridhan property included the one that was inherited by her from a male or a female relation, including the husband, or property received at the time of partition. She was called a limited owner of this property. The limitation was with respect to the power over its disposal and the inability to transmit this estate to her own heirs, but other wise she had full powers to enjoy it and appropriate the income coming out of it. It was the power to transfer it that was denied to her. Except in the case of need, or for the performance of indispensable religious and charitable purposes, including for according spiritual benefits to her husband, she could not transfer it. During her lifetime, no person had any vested right of succession in it, as her restricted powers of alienation were not for the benefit of the heirs of her husband, but were the essential feature of the estate that she took. The heirs of the husband had no powers to dispose it off till she was alive. Regarding succession to stridhan property female constitute independent stock of descent.

Under the Hindu Women’s Right to property Act, 1937, the old Hindu law of all schools was amended so as to confer greater rights on women. It conferred upon the widow, whether governed by the Mitakshara or Dyabhaga law, rights of inheritance to her husband’s property, even where the husband left male issue. Similarly, rights were conferred upon the widows of a predeceased son and the predeceased son of a predeceased son. The widow of a deceased coparcener was allowed to take her husband’s interest in the Mitakshara undivided family property and was given power to claim partition. But in all these cases the widow was given

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only a limited interest known as a “woman’s estate” in the property even under the Act.

The object of the present section is two-fold, firstly to remove the disability of a female to acquire and hold property as an absolute owner; secondly to convert any estate already held by a woman on the date of commencement of the Act as a limited owner, into an absolute estate. In the case of her death intestate she becomes a fresh stock of decent and the property devolves by the succession on her own heirs.

Section 14 is not ultra vires of Article 14 of the Constitution. Section 14 was challenged as being discriminatory and therefore violative of Article 14 of the Constitution on the ground that while the restrictions on the power of a male to alienate coparcenary property were maintained, similar restrictions on the powers of a Hindu female were removed, the Court negatives the contention holding that women form a distinct category for the amelioration of which Article 15(3) of the constitution specially permits legislation.

The Constitutional validity of section 14 was challenged in the Supreme Court in the case of Partap Singh v. Union of India\(^{57}\) on the ground of hostile discrimination against men, as it benefited only one section of the community, viz, the women. The contention of the petitioner that section 14 was an example of hostile discrimination, as it favoured only one section of the community, i.e. the women, was dismissed by the Court in the view of Art 15(3) of the Constitution, which permits the State to enact special provisions in the favour of women and children, and overrides the constitutional provisions that the state shall not discriminate on the grounds of religion, race, caste, sex or place of birth. The court said that section 14(1) of the Act was enacted to remedy to some extent, the plight of Hindu women, who could not claim an absolute interest in the property inherited by them from her husbands, but could only enjoy them with all the restrictions attached to the widow’s estate under the Hindu law. Expressing surprise, the Court said that there was hardly any justification for the male belonging to Hindu community, to raise any objection to the beneficial provisions contained in the Act, on grounds of hostile discrimination. The Court accordingly, dismissed the petition.

**5.1 Section 14(1):** This section provides that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held

by her as full owner thereof and not as limited owner. The meaning of the term property is explained in explanation to section 14 itself which provides that in this sub-section “property” include both movable and immovable property acquired by a female Hindu by inheritance or devise, 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, and also any such property held by her as Stridhana immediately before the commencement of this Act.

A Hindu woman inherited a limited interest in the property of her deceased husband under the Hindu Widow’s Right to Property Act 1937, and also received his share in the coparcenary property that he had held as an undivided member of a Mitakshara coparcenary. Similarly a woman might have inherited a limited estate from her husband or father-in-law, under any other Act. Such limited interest would be converted into absolute interests by the virtue of this Act. In the case of Bhikabai v. Mamtabai58 where a Hindu man died, leaving behind two widows who inherited his properties in 1946, the nature of the estate that they had inherited was a limited estate. This interest matured into a absolute estate on the passing of this Act. One of the widows died in 1974, without any heirs, and the other widow succeeded to the entire property as per the laws of succession available under the Act.

Similarly, in another case, AK Laxmangounda v AK Jayaram59 the husband bequeathed his property in favour of his sons and created a life interest in favour of his widow, in lieu of her maintenance. After 1956, the widow sold her share to meet the marriage expenses of her daughter. This sale deed was for a valid consideration. The sons challenged the validity of the sale deed executed by the mother, on the ground that she was merely a limited owner of the property and consequently, incompetent to alienate it. The Court upheld the validity of the alienation on the ground that after the passing of the act, the limited interest that was bequeathed to her by her husband, had matured into an absolute interest, conferring on her, the power of disposal over this property, as a full owner.

In Tulasamma v. Seshareddi60 it was held that the woman in a Hindu family is having an existing right to be maintained and has rights against the family property. It

is, therefore, based upon that right that the mother is given a share in the family property at the time of partition by coparceners. Consequently, the partition deed is not one which creates a new right in her. It does not amount to creating a new right for the first time in her in property. It cannot therefore be said that she acquired property by virtue of that deed and consequently sub-section (2) is not attracted and sub-section (1) only would apply; thereby enlarging her rights in the property as absolute rights not withstanding any recitals in the deed.

In the case of *Gulab v. Vithal*, where upon the death of the husband, the widow, under a partition deed, was allotted a one-third portion of the house for her residence and the partition deed stated this, and she occupied the same, her one-third share matured into an absolute ownership after the coming into the force of this Act.

Similarly, in *Kuthala Kannu Ammal v Lakshmana Nadar*, where the sons affected a partition between themselves, and the mother was allotted a share in 1954, in lieu of her maintenance, her limited interest in the property ripened into an absolute interest. Accordingly a gift deed executed by her in 1968, of this property, in favour of one of her grandsons, was held as perfectly valid.

Where the widow receives property in lieu of her maintenance, under a compromise before the Act, her limited rights mature into absolute rights. The mode of acquisition is immaterial if it is received in lieu of maintenance. It may be received under a Will, a compromise at the time of a partition or through any other settlement. Where the property comes to the female in recognition of her pre-existing rights of maintenance, she will acquire full ownership in it under section 14(1). It is irrespective of the fact that she was given a right of residence only.

In another case before the Apex Court i.e. *V Muthusami v Angammal*, on the death of the husband, his father received his property. Under a settlement deed was executed in 1946, he gave some property to the widow of his son, for her maintenance, but to be enjoyed by her during her lifetime. This settlement deed was executed upon the intervention of the Panchayat. In 1974, she executed a sale deed with respect of this property and the same was challenged on the ground that since she received the property under a settlement deed, upon the intervention of the Panchayat, it was contractual in nature and would remain a life interest. The Court held that the

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61 2000, AIHC 913 (Bom).
Panchayat had merely helped the parties to arrive at a settlement in recognition of her pre-existing rights of maintenance and therefore, the interest in it was converted into an absolute interest.

In the case of Bai P. Perma Bai v. M. Govardhanagiri Naidu\(^\text{64}\), it was held that testator has executed registered will directing that the property would devolve on the plaintiffs. Wife of the testator given right to remain in possession till her life in lieu of her maintenance with no right of alienation. In case of a female heir and widow, right to property in joint family or in property of her husband was only to a limited estate i.e. right to her maintenance. But by virtue of section 14(1) of 1956 Act, this pre-existing right, limited estate enlarged into an absolute right. Thus section 14(2) not attracted.

In the case of Chandrika Singh v. Sarjug Singh\(^\text{65}\), it was held that where a widow of deceased got limited interest in property under a Will in 1943 from her husband, she became absolute owner of the property under section 14(1) of Hindu Succession Act. Further it was held that if that widow gifted away house to daughter in 1962, the gift deed is valid because the right conferred on widow was in recognition of her pre-existing right. After the Act of 1956, such right was transformed into an absolute right by virtue of section 14(1).

In Sadhu Singh v. Gurdwara Sahib Narike\(^\text{66}\), it was held that when a male Hindu dies after 17-6-1956 leaving his widow as his sole heir, his widow gets the property as class 1 heir and there is no limit to her estate or limitation on her title. But if she takes it, as an heir under a devise, gift or other transaction, and any restriction is placed on her right the restriction will have play in view of Section 14(2) of the Act.

In H Ananthappa, Davanagere v. H.M. Bhojappa\(^\text{67}\), in this case suit property which was allotted to the appellant's mother under partition deed with a condition to sell it for the marriage of her children was utilized for the same purpose and the same was sold. Court held that transfer affected by the mother is valid as she has absolute owner of that property by virtue of section 14(1).

In Rati Ram v. Basanti Devi\(^\text{68}\), it was held that where a property acquired by a female for life time under a compromise deed of the court, she cannot become the

\(^{64}\) 2007 (2) H.L.R., (Kar.) 398.
\(^{65}\) 2007 (1) H.L.R., (S.C.) 471.
\(^{66}\) 2007 (1) H.L.R., (S.C.) 1.
\(^{67}\) 2008 (1) H.L.R. (Kar.) 139.
\(^{68}\) 2008 (1) H.L.R. (Pb. & Har.) 342.
absolute owner of that property as no pre-existing right in the property was in her favour. So her claim does not fall within the provisions of section 14(1), whereas provisions of section 14(2) are applicable.

Thus, section 14(1) of the Act removes the incapability of a woman to acquire property as a full owner. The property could have been acquired by her before the commencement of the Act. It is interesting to note that except for section 14, there is no other provision in the entire Hindu Succession Act 1956, which specifies the nature of interest that a Hindu woman takes the property that she may inherit under this Act. Had it not been for the phrase used in the section, whether acquired before or after the commencement of the Act, controversies and conflicts, genuine or due to vested interest of the parties, were bound to surface. It is these words that enable a woman to inherit the property as an absolute owner under the Act.

But only that property is converted into her absolute estate over which she has a possession. The word “possessed” is used in a broad sense. A property is said to be possessed by a person if she is its owner even though she may, for the time being, be out of actual possession or even though she is in the constructive possession. The expression “possessed of” in this section is intended to cover all cases of possession in law. However, mere possession without a right is no possession, as in the case of a female who inherited property but did not actually enter into possession or who entered into possession but subsequently was dispossessed, is also legal possession unless such right is barred by lapse of time and the other person in possession has perfected his or her title by adverse possession.

The expression used is “possessed by a female Hindu” and not “in the possession of a female Hindu” this indicates that the female should have some right or interest ask in to ownership with a right to possession. It need to be actual possession. It is sufficient if she can be said that she had constructive possession which Court accepts as having possession in law.

A property is possessed by a woman only when (1) there is a right to possession of the property, (2) she is in possession actually or constructively. A Hindu widow remaining in possession without any kind of right whatsoever to such possession will not get absolute rights in the property under this section. Under section 110 of the Evidence Act a person in possession is presumed to have title also and the burden is on the person who denies to prove that he had no title. Two elements constitute possession viz, (1) animus possidendi; (2) corpus possessionis the
intention or animus to possess and the actual realisation of the intention of the act of possession. Thus, if without an intention to possess, a woman is in the possession that will not be sufficient for section 14(1) to confer absolute power on her. Again, if she has an intention to possess property unless she is in actual possession or constructive possession, she cannot get benefit under section 14(1)

In case of Dwarkadas v. Sholapur Spg. & Wvg. Co. Ltd 69, (a case under the Constitution of India), the Supreme Court observed the expression 'property' must be construed in the widest sense as connoting a bundle of rights exercisable by the power in respect thereof and embracing within its purview both corporeal and incorporeal rights. In the absence of a restrictive definition in the relevant stature, it is not proporeal rights. In the absence of a restrictive definition in the relevant stature, it is not proper to restrict its scope and comprehensiveness. It is in this sense that the term 'property' has been interpreted under section 14(1) 70.

Another question which arises here is that where the woman's estate is in the possession of a trespasser at the time when the Act came into force, does this property also become her absolute property; it seems that if trespasser has perfected his title by adverse possession, the woman's title obviously is lost. But in case his title has not been perfected, then on the assumption that trespasser's possession is no possession, the Andhra Pradesh, Madras, Patna, Calcutta and Bombay High Courts hold the view that the Hindu female would become the absolute owner of this property. In Marudakkal v. Arumugha 71, the Madras High Court observed that instead of filing a suit for possession against the trespasser, she could sell the property as the full owner and the vendee could sue the trespasser for possession.

In Yamunabai v. Ram Maharaj 72, the court observed that she might sue only for a declaration and injunction. On the other hand, in Sansir Patelin v. Satyabati Naikani 73, the orissa High Court took the view that the Hindu female did not become the full owner on the commencement of the Act as she was not possession, and trespasser's possession could not be treated as her possession. In Gammalapura Taggiina v. Setra Veerawea 74, the Supreme Court, after a review of these cases,

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71 A.I.R., 1958, Mad. 255.
72 (1959) 61 Bom. L.R., 1316.
73 A.I.R., 1958, Ori. 75.
approved the view of the Calcutta High Court. Referring to the opening words of 
Section 14, 'property possessed by a Hindu female, Supreme Court observed, it
clearly contemplate the female's possession when the Act came into force. That
possession might have been either actual or constructive or in any form recognized
by law, but unless the female Hindu whose limited estate under this particular section,
was at least in such possession, taking the word 'possession' in its widest connotation,
when the Act came into force, the section will not apply.

Thus, the term 'possession' has a very wide connotation. It includes actual as
well as constructive possession. Even when she is entitled to the possession of
property, she is considered to be in its constructive possession. Similarly, if the
property is in the actual possession of a mortgagee, lessee or licensee, the female has
the constructive possession. In the broader sense, the term 'possession' is co-extensive
with the ownership. In Mangal Singh v. Ratno\textsuperscript{75}, a Hindu widow, who had entered
into possession of land belonging to her deceased husband in 1917 and had been
illegally dispossessed by the collaterals of her deceased husband in 1917 and had been
illegally dispossessed by the the collaterals of her husband in 1954, brought a suit for
possession. During the pendency of suit the Act came into force, and subsequently in
1958 the widow died and her legal representative was brought on record. The
Supreme Court held that since he land was possessed by the widow when she died in
1958, her legal representative must be deemed to have succeeded to those rights, but it
her possession over the property is that of a trespasser, she cannot be said to be in
possession of property. Explanation to section 14(1) has expanded the notion of
ownership and includes all types of property by mode mentioned in the Explanation.

Similarly before the Supreme Court decision in Radha Rani v. Hanuman
Prasad\textsuperscript{76}, there was an acute controversy among the High Courts. In some cases it
was held that section 14 had been given a retrospective effect with the result that after
June 17, 1956, there was nothing like woman's estate, and, if there was nothing like
woman's estate, there was also nothing like reversioner after that date. Accordingly,
the answer to both the questions was given in the negative, neither the suit filed before
the commencement of the Act is to be continued nor a fresh suit is field after the
coming into force of the Ac. It should be obvious that in its actual application this
view will benefit the alieenee and not the Hindu female.

\textsuperscript{75} A.I.R., 1967, S.C. 1786.
\textsuperscript{76} A.I.R., 1966, S.C. 216.
In some cases a different view was taken, and it is this view which has now been confirmed by the Supreme Court in Radha Rani's case. The basic assumption underlying Section 14 is that the provision is meant to confer a benefit on the Hindu female and not on the alienee. Keeping this view, the word 'possessed' was deliberately used in section 14(1). Only that woman's estate stands transformed into Stridhan over which the Hindu female has possession when the Act came into force. If she has no possession when Act came into force, Section 14(1) does not apply. If section 14 does not apply, then the old Hindu law continues apply. Thus, the answer to both our questions will be in the affirmative and a suit filed before the commencement of the Act can be continued and a fresh suit can be filed after the commencement of the Act.

The relevant date on which the property should be possessed by the Hindu female under this section is the date on which the Act come into force or the date when the property is acquired by her subsequently. If any kind of ownership is there and the right to possess exists the section applies. The Act came into force on 17th June 1956.

5.2 **Section 14(2):** It is an exception to sub-section (1). Sub-section (2) would not come in the way of operation of sub-section (1). Both the sub-sections speak of gift, will or any other instrument by which any property might be acquired by any female Hindu. Sub-section (1) speaks about the property possessed by a female Hindu in whatever manner the property was acquired by the date of the Act. This acquisition is further, in a way, defined in the Explanation by referring to various methods of acquisition. On a reading of sub-section (1) with Explanation, it is clear that whether the property was possessed by female Hindu as a limited estate, it would become on and from the date of commencement of the Act, her absolute owner thereof. However, if she acquires property after the Act with a restricted estate, sub-section (2) applies. Such acquisition may be under the terms of a gift, will or other instrument or a decree or order or award.

In case of *Smt. Himi v. Smt. Hira Devi*, it was held that section 14(1) applies only if property is acquired by female Hindu in lieu of maintainence or by virtue of any pre-existing right or at partition and such acquisition is not covered by section 14(2) which is a proviso to section 14(1). Similarly, in the case of *Beni Bai v."

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77 1996 (2) S.C.J., 450.
Raghubir Prasad\(^{78}\), it was held that sub-section (1) of section 14 applies to the cases where the conferment of right to a Hindu widow was in lieu of maintenance or in recognition of her pre-existing right as provided under the Shastric Law and Hindu Women's Right to Property Act. Sub-section (2) of section 14 of the Act would apply only to such cases where grant conferred a fresh right or title for the first time and while conferring the said right certain restrictions were placed by the grant or transfer.

In *Nraini devi v. Ramo Devi*\(^{79}\) the Supreme Court held, where, by an award an interest was created in the favour of widow, that she should be entitled to rent out the property for her lifetime, it amounted to a restricted estate by virtue of an instrument within the meaning of sub-section (2) and sub-section (1) did not apply and the widow did not get absolute rights in the property.

The decision in *Tulsamma v. Seshareddy* of the Supreme Court was followed and reiterated in *Bai Vijaya v. Thakurbai*\(^{80}\). The legal position established in the aforesaid two decisions is:

1. The Hindu female’s right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the relationship between the husband and the wife and is recognized Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists from Yajnavalkya to Mannu. If a charge is created for the maintenance of a female, the said right become a legally enforceable one. At any rate, even without a charge, the claim for maintenance is doubtless a pre-existing right, so that any transfer declaring or recognizing such right does not confer any new title but merely endorses or confirms the pre-existing rights.

2. Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in the favour of female so as to advance the object of the Act and promote the socio-economic ends, sought to be achieved by this long needed legislation.

Sub-section (2) of section 14 is in the nature of a proviso to sub-section (1) and should not be construed in a manner so as to destroy the effect of main provision

\(^{78}\) 1999 (2) S.C.J., 68.


or the right conferred by section 14(1) or in a way so as to become totally inconsistent with the main provision.

Section 14(2) applies to instruments decrees, awards, gifts etc. which create independent and new title in favour of females for the first time and has no application where the instruments concerned merely seek to confirm, endorse, declare or recognize pre-existing rights. The creation of a restricted estate in favour of a female is legally permissible and section 14(1) will not operate in such a case. Where property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by section 14(1) despite any restrictions placed on the powers of the transferee.

In the case of, Balwant Kaur & Others v. Chanan Singh & Others\(^{81}\), it was held that where the father bequeathed life interest in self acquired property to widowed daughter with remainder interest to his brother, then section 14(1) is not applicable, Hence the claim of daughter that she became absolute owner by virtue of section 14(1) by taking the plea that she had pre-existing legal right to inherit estate under section 8 was not accepted. Court held that she had a spes successionis and not a pre-existing legal right.

In the case of Velamuri Venkata Sivaprasad v. Kothuri Venkateswarlu\(^{82}\), it was held that where a Hindu widow was given properties, some with absolute right and others with life estate in 1942. When the widow got remarried in 1953, her life estate did not become absolute property by virtue of section 14. Court observed that in order to have provision of section 14 applicable there must be pre-existing right. Widow's right got divested on her remarriage in 1953 by virtue of section 2 of Hindu Widow's Re-marriage Act. Remarriage of widow prior to Hindu Succession Act would divest her of even limited ownership of her husband's property in view of section 2 of Hindu Widow's Remarriage Act.

In the case of Naresh v. Shaksh,\(^{83}\) Widow having a life interest in certain properties. She sold them prior to coming into force of Hindu Succession Act. Sale assailed by reversioners and sale was declared void. Pending appeal Hindu Succession Act came into force. Widow died in 1957 and reversioners filed suit for possession in

\(^{81}\) 2000 (1) S.C.J., 617.
\(^{82}\) 2000 (1) S.C.J., 14.
\(^{83}\) 1999 (1) S.C.J., 477.
1959. Alienee pleads that on coming into force of the Act, widow became full owner and alienee became absolute owner. Court did not accept the contention of alienee and held that widow could not be said to be in possession of property when Act came into force as property was sold when Act came into force. Thus case does not fall under section 14(1) as sale itself was invalid. Further there being no sale even after Act came into force as after declaration of original sale as void alienee could not claim benefit under section 14(1).

6. SECTION 15

Fifthly, Section 15 of the Hindu Succession Act deals with the disposition of female’s property. As now by virtue of section 14 whereby female becomes absolute owner of the property, she constitutes independent stock of descent. Section 15 deals with succession to the property of a female Hindu. Before the commencement of this Act the law of succession to a female was very complicated. Her property was classified on the several grounds for this purpose. These grounds were:

1. The school by which she was governed.—there was difference between the Mitakshara and the Dayabhaga. Even in Mitakshara there were three sub-schools, (a) the Banaras and Madras, (b) the Mithila (c) the Mayukha.

2. Her marital status—there were different rules for the succession to married woman and to an unmarried woman. This distinction is quite natural because after marriage many of heirs comes into existence who cannot be even thought of without marriage e.g., the husband, the legitimate children and under the old law also the adopted son, etc.

3. Again her property was divided into stridhan and non-stridhan over stridhan with some restrictions, she had full fledge rights as it was her absolute estate but regarding non-stridhan she had limited rights and for this property, she could not constitute fresh stock of descent. Similarly rules of succession to these kinds of property are also different depending upon the source from where the property comes.

The two statutes that were enacted to improve her condition of life, i.e., the Hindu Law of Inheritance (Amendment) Act 1929, and the Hindu Women’s Right to Property Act 1937, concentrated on securing her rights, rather than on focusing on who, after her, will be eligible to take her property. The Hindu Succession Act, 1956, also retains two separate scheme of succession for men’s and women’s property. The
scheme of the succession for the heirs of women gives great importance to the source from which the woman had acquired her property. The preferential heirs under this scheme are a Hindu woman’s husband and children. In cases of women not survived by husband and children, the property inherited from her mother and father would go to the heirs of the father. If the property inherited from the husband or father-in-law, it would devolve on the heirs of the husband. Significantly, the Act does not provide for the transmission of property acquired by the woman herself. It is assumed that she is unlikely to acquire property and whatever she holds should go back to the rightful owners, namely, the family. In this sense, women are not seen as rightful owners of property.

Section 15 of the Act classifies the property of a Hindu female into three categories:

1. Property over which she has an absolute right of disposition on the date of her death after the commencement of the Act excluding the property in categories (2) and (3) below; or it is general property; Section 15(1).

2. Property inherited by the Hindu female from her father or mother; Section 15(2) (a).

3. Property inherited by her from her husband or father-in-law; Section 15(2) (b).

The expression “property” in section 15 refers to the property in which a Hindu woman is entitled to an absolute ownership on the date of the commencement of the Act. It means and includes movable and immovable acquired by the Hindu female in any manner whatsoever by the operation of law under section 14, by inheritance, by devise, by gift, by partition, etc and which is heritable on her dying intestate. If the Hindu woman had only limited or restricted interest in the property at the time of her death after the commencement of this Act, the line of succession will be governed by the traditional Hindu law or in accordance with the terms of the deed under which she had acquired the property.

The term general property refers to the property of a woman other than that which was inherited by her from her parents, husband or her father-in-law. The term used is ‘inherited’ and general property’ will include the property that she might have received from these relations through any other device, such as a gift, will or settlement, or even through a transfer for consideration. It will also cover properties that were herself-acquisitions or were received from any other source whatsoever,
including a gift received from a friend or a relative, or property inherited from other
relation. Property that a woman inherits from her brother, in the capacity of his sister
or from her husband’s brother as his brother’s widow, would be her general property
and would go under section 15(1).

6.1 Section 15(1): It provides general rules of succession in the case of female Hindu
if she dies intestate. On her death, the property devolves on following heirs;
Firstly upon the sons and daughters (including the children of any predeceased son or
daughter) and the husband:
Secondly, upon the heirs of her husband;
Thirdly, upon the mother and father;
Fourthly, upon the heirs of the father;
Lastly, upon the heirs of the mother;

6.1.1 Entry (a) Sons and daughters: The expression “sons and daughters” include
adopted sons and the daughters but not stepsons and stepdaughters. The Allahabad
High Court in Ram Katori v. Prakashvathy\textsuperscript{84} took the view that the expression “sons
and daughters” would include stepson and stepdaughter. The Allahabad High Court
said that in clause (a) of section 15(1), the words “sons and daughters” were
unqualified while in clause (a) and (b) of section 15(2), the words “sons and
daughters” are qualified by the words “of deceased” and therefore the unqualified
words “sons and daughters” in section 15(1)(a) of the Act indicated that they included
also the children of her husband by another wife, that is, stepson or stepdaughter
whereas a different view was taken by the High Court of Bombay in Rama Ananda
Patil v. Appa Bhima\textsuperscript{85}; by the High Court of Karnataka in Mallappa Fakirappa v. Shippa\textsuperscript{86}; and by the Punjab & Haryana High Court in Gurnam Singh v Ays Kaur\textsuperscript{87}.
The matter was set at the rest by the Supreme Court in where Their Lordship held that
the expression “sons and daughters” in section 15(1)(a) mean and could only mean
sons and daughters and not step-sons and step-daughter. Justice Venkatarmayya, who
delivered the judgment of the Supreme Court added that the distinction made by the
Allahabad High Court on the ground of absence or presence of the words “of the
deceased” in section 15(1) and section 15(2) are highly technical and the High Court
had tried to make a distinction where it did not actually exist. In Lachman Singh’s

\textsuperscript{84} 1968, ALL. LJ 484.
\textsuperscript{85} A.I.R., 1969, Bom. 205.
\textsuperscript{86} A.I.R., 1962, Mys. 140.
\textsuperscript{87} A.I.R., 1977, P&H 103. 
case, the Supreme Court has also taken the view and held that the expression “sons” included sons born out of the womb of the female by the same husband or by different husbands including illegitimate sons in view of section 3(I) (j) of the Act. The children of void marriages and voidable marriages which have been annulled are also entitled to succeed to their mother by the virtue of section 16 of the Hindu Marriage Act as amended by the Marriage Laws (Amendment) Act 1976. it is needless to point out that a posthumous child is also entitled to inherit its mother.

**Children of any predeceased son or daughter:** The first entry includes children of a predeceased son or predeceased daughter. The expression must be construed only as the issue of the first generation which alone is consistent with the intentention and scheme of the Act. Thus, great grandchildren are not entitled to succeed. Unfortunately, the section has left out the widow of a predeceased son. Section 8 of the Hindu Succession Act has made the widowed daughter-in-law as an heir. There is no rationale to the estate of a female Hindu under clause (a) of section 15(1) of the Act.

**Husband:** The expression “husband” means a person who was the lawfully wedded husband at the time of the death of the Hindu female. The expression does not include a divorced husband or the husband of a void marriage or annulled voidable marriage. But a deserted husband who is living separately under any agreement or decree of a Court will be entitled to inherit as he does not cease to be the husband. Even a husband who has converted himself to another religion or is leading a life of immorality is not disqualified.

**6.1.2 Entry (b) Heirs of the Husband:** In the absence of the heirs specified in sub-clause (a) and not until then, the property of a female Hindu dying intestate will devolve upon the heirs of the husband under this Entry. However, the property inherited by her from her father or mother, will not devolve upon them, but will devolve only upon the heirs of the father [section 15(2)(a)]. The order of the devolution will be according to the rules as would have applied if the property had belonged to the husband and he had died intestate immediately after the death of the female Hindu, which is governed as per the rules of succession laid down in section 8. Where a female intestate had remarried after the death of her first husband, the expression “heirs of the husband” would be the heirs of the second husband. The heirs

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of the husband are to be ascertained not on the date of the husband’s death, but as on
the date of the death of the female Hindu as if he died immediately after her death.

In *Seethalakshmiammal v. Muthuvenkatarama Iyengar* one Gomathiammal
died leaving behind her widowed daughter-in-law Seethalakshmi who filed the suit
for possession of her mother-in-law’s property against her mother-in-law brother’s,
who set up a will by Gomathiammal in his favour which was found against. However,
the High Court in second Appeal held that the daughter-in-law was not an heir of her
mother-in-law under section 15(1) of the Act. The reasoning was that at the time of
death of Gomathiammal’s husband their son Venkatraman was alive and his widow
Seethalakshmi could not be called the widow of the predeceased. The Supreme Court
held that heirship should be ascertained not on the date of death of Gomathiammal’s
husband but on the date of death of Gomathiammal when alone succession opened
and hence on the date when Gomathiammal died, the appellant Seethalakshmi was the
widow of the predeceased son and as heir to Gomathiammal’s husband, she was
entitled to the property of Gomathiammal under section 15(1)(b) of the Act. It would
have been better if in section 15(1)(a), the widow of the predeceased son had been
included as an heir along with the children of predeceased son or daughter.

6.1.3 Entry (c) Mother and Father: Failing all heirs in the previous two Entries, the
heirs in the Entry (c) will inherit. The expression “mother” and “father” include
natural as well as adoptive mother and father. The expressions in this Entry will not
however include stepmother and stepfather. Where the marriage between the father
and mother is void or is nullified, they will be entitled to inherit her by virtue of
section 16 of the Hindu Marriage Laws (Amendment) Act 1976. The mother of an
illegitimate daughter is entitled to succeed as her heir under this clause in view of
section 3(1) (j) of this Act, but her putative father would not. The remarriage of the
mother does not disentitle her from inheritance, or is unchastity aground to debar her
from inheriting her daughter. The father and the mother are clubbed together in this
Entry under section 15. It is not known why the mother and the father were disjoined
in the matter of inheritance to a male Hindu by placing the mother in Class 1 and the
father in Class II of the schedule.

6.1.4 Entry (d) Heirs of Father: In the absence of any heir in the previous three
Entries, this Entry will come into force. The devolution of property on the heirs of the

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father will be governed by the provisions of sections 8 to 13 of the Hindu Succession Act as if the father died immediately after the death of the daughter. Where a Hindu female dies without leaving any other heir except the stepmother, she will inherit as heir to her father she being Class 1 heir of her husband i.e., father of the propositus.

6.1.5 Entry (e) Heirs of Mother: In the absence of any heirs in any of the above four Entries, this Entry will come into the play. The heirs of the mother will be determined on the application of section 15 read with section 16. The heirship to the mother will have to be determined with reference to the date on which the intestate died as if she (the mother) died immediately after her daughter’s death, by means of a legal fiction. As the heirs of the mother, the deceased’s brother and sister by the uterine blood as well as an illegitimate brother or an illegitimate sister can succeed to the property of the female intestate. The proviso to section 3(1)(j) lays down that illegitimate children shall be deemed to be related to their mother and to one another and their legitimate descendants shall be deemed to be related to them and to one another.

6.2 Section 15 (2): It is in the nature of a proviso or exception to sub-section (1) and has been introduced on the recommendations of the joint Parliamentary Committee in order to “prevent” the properties passing into the hands of persons to whom justice would demand they should not pass. Section 15(2) provides that:

Notwithstanding anything contained in the sub-section (1), any property inherited by a female Hindu from her father or mother shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein but upon the heirs of her father.

Section 15(2) relates to properties inherited by a female Hindu and can have no application to properties acquired by her under a will or at a partition or in lieu of maintenance or arrears of maintenance or by gift or by her own skill or exertion or by purchase or by prescription or in any other manner whatsoever and also any such property held by her as stridhan.

There can be no question of “heirs of father” within the meaning of section 15(2) (a) during the life time of the father as there can be heirs only after a person is dead and until is death there will be only heirs apparent. Considering this aspect, the words “upon the heirs of the father” should be read as “upon the father and in default of the father upon the heirs of the father” on the application of the maxim *Ut res
Such a situation may arise where intestate has inherited from her mother and her father survives the daughter.

In *Bhagat Singh v. Teja Singh*[^90^], two sisters inherited the property from their mother. On the death of one, who died as an issueless widow, the other sister took the property as her father’s heir and entered into an agreement to sell the same to a person X. the deceased sister’s husband’s brother challenged the validity of this sale and claimed the property as her heir under section 15(1) (b). the Supreme Court held that since both the conditions were fulfilled, viz, she had inherited the property from one of her parents (mother) and had died issueless, the property would revert to the father’s heirs i.e., the sister in this case and the brother of her deceased husband would not be entitled to succeed.

In another case from Delhi, *Yoginder Parkash Duggal v Om Parkash Duggal*[^91^], an unmarried female inherited the property from her mother and died leaving her brother and a widow of another brother. The brother claimed the total property on the ground that he was the sole heir. The court held that as the property is to revert to her father and will devolve as if it belonged to the father, on his heirs, the deceased brother would be the son of the father and another brother’s widow would be related to the father as the widow of a predeceased son. Thus, both of them will inherit the property as class 1 heirs of the father, in equal shares.

In the case of *N. Irappa Sarawari v. Bhimappa Shidramappa Lakamoji*[^92^], it was held that if any property inherited by a female Hindu from her parents, shall devolve in the absence of any son or daughter of the deceased (including the children of any pre-deceased son or daughter) and not upon the other heirs referred to in in sub-section (1) in the orders specified therein, but upon the heirs of the father. Similarly, if a female Hindu inherited the property from her husband or from her father-in-law, shall devolve upon the heirs of the husband in the absence of a child.

This section provides that the property inherited from the father, would revert to the heirs of the father in case the female Hindu dies issueless. It also provides that where she inherits property from her mother, it would also revert to the father’s heirs and not to mother’s heirs. Thus, the mother and the mother’s heirs are excluded. If the mother was alive at the time of her daughter’s death, she will inherit as heir to her

[^91^]: 2000, AIHC 2905 (Del.)
[^92^]: 2007 (1) H.L.R. (Kar.) 84.
husband that is, father of the deceased female as Class 1 heir under section 8 of the Act. But if the mother is not then alive, her heirs will have no right of inheritance even if the property had been inherited exclusively from the mother. This is unjust and unfair. Justice, equity and good conscience demand that the property inherited by a female Hindu from the father should go to the heirs of the father and the property inherited from the mother should go to the heirs of the mother.

Section 15(2) (b) provides: Any property inherited by a female Hindu from her husband or from her father-in-law, shall devolve, in the absence of any son or daughter of the deceased (including the children of any predeceased son or daughter) not upon the other heirs referred to in sub-section (1) in the order specified therein, but upon the heirs of the husband.

The question arises whether the heirs of the husband mentioned in this clause are heirs of the predeceased husband or the heirs of the husband whom she might have remarried after the death of the first husband as pointed out by Mulla\textsuperscript{93}, the heirs of the husband must mean the husband whose property she had inherited as his widow and in the case of property inherited from her father-in-law, the heirs contemplated are the heirs of the husband from whose father she had inherited the property. If she remarried after inheriting the property from the deceased husband and died leaving behind issues from her second husband, she had not died issueless and the children and second husband will succeed to the property. But if she dies issueless, the second husband will not get anything and the property will revert to the first husband’s heirs. Similarly, where a woman inherited property from her second husband and died leaving behind a son from the first husband, the son would take the property.

In a recent judgment, the Gauhati High Court\textsuperscript{94} has ruled that for the purposes of inheriting the property of the mother, which was inherited by her from her deceased husband, ‘sons and daughters’ would mean the son and daughter of that husband from whom or from whose father, she had inherited the property. Here, a woman died leaving behind a son and a daughter, born to her from the husband whose property she had inherited. She also had a son from previous marriage. The court held that the son born of the previous marriage was not entitled to get the property and will be excluded from inheritance, as it was the property that was inherited by the woman

\textsuperscript{94} A.I.R., 2003, Gau. 92.
from her second husband and he was not the progeny of that husband. But expression
son and daughter would include all kinds of sons and daughters, whether legitimate,
illegitimate from one husband or from another husband. They are the only relations
that are described with the reference to her and not with reference to her father or
husband or mother. Her children would include all of her children. All children have
equal rights over the property of their mother and it is only in the case of their
absence, that the question of the source of the property becomes relevant. The court is
creating a contradiction between clauses (a) and (b) of section 15(2).

6.3 Loophole under the Principal Act: The patrilineal assumption of a dominant
male ideology is clearly reflected in laws governing a Hindu female who dies
intestate. Section 15 of the Act, which deals with succession of Hindu female
property, makes a distinction between the property inherited by her from her parents
and from her husband and father-in-law. The former devolved on the heirs of the
father and the latter devolves on the heir of her husband provided she died issueless.
This provision is indicative again of a tilt towards the male as it provides that the
property continues to be inherited through the male line from which it came either
back to her father's family or back to her husband's family. The devolution of the
property of a male Hindu is not to depend upon, or vary, according to the source of
acquisition, it is difficult to appreciate as to why it would do so in the case of a female
Hindu, unless we still want to perpetuate in somewhat different from the old
outmoded view that women’s ownership of property cannot be full, but must be
somewhat limited. This unusual rule can only be explained in terms of not seeing
women as rightful owners of properties they inherit, but only seeing them as
caretakers of the properties that devolve on them. This rule of Hindu law is
discriminatory in nature and cannot be sought to be justified in any way whatsoever.

Further section 15 does not specifically mention about the properties earned by a
female out of her own exertion or gains of learning. Similarly where a widow dies
issueless, her property will devolve on the heirs of her husband and not on her blood
relations. In view of practical reality, this provision is not consistent with equity and

95 Property Rights of Women: Proposed Reforms under Hindu Law, Law Commission of India, 174th
fairness. Usually, a widow does not find her deceased husband's house as a fit place to live in and she quite often turns to her parent's place for help\textsuperscript{97}.

Another way in which separate schemes for men and women intestates is discriminatory is that under section 15 of the Act, the property of a female Hindu dying intestate shall devolve, firstly upon the sons and daughters and the husband. In the case of a male Hindu, the mother is also a Class 1 heir and inherits equally with the children and the wife of the deceased son; but in the case of a female, the mother stands excluded by the children and the husband of the deceased daughter. The provisions cannot be justified on any conceivable ground and is patently prejudicial to the interest of the mothers.

**6.4 Effect of the Amendment Act of 2005:** The new amendment does not alter Section 15 of the principal Act. So the discrimination under Section 15 still goes on. Rather the impact of new Amendment on Section 15 tends to destroy the family peace. Now, if the daughter gets the property at the time of partition as a coparcener (the character of the property is not the property which is inherited by her from parents), thus it would be governed by Section 15(1) (a). Now if the daughter dies issueless this property would be inherited by her husband, in the absence of her husband it would go to the heirs of her husband. Thus her father’s property which was so dear to the joint family up till 9-9-2005 would immediately goes into the hands of strangers through their own daughter, thus resulting in the fragmentation of joint family property at the instance of strangers.

Now coming to the next situation, suppose if female dies without claiming any such partition, then after her death, as per section 6(3) the 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. That means her share will be determined by affecting a notional partition. Section 6(3) further lays down that if such notional partition takes place then the daughter is allotted the same share as is allotted to the son, and if there is any pre-deceased child the share of the pre-deceased child shall be allotted to the surviving child of the pre-deceased child. Here there is a contradiction between section 6(3) and section 15(1), because as per section 15(1) along with the children, including the children of any

pre-deceased son or daughter the husband is also the heir. But if the property is divided under section 6(3), the husband is not at all included.

7. SECTION 23

Sixthly, Section 23 of the Act of 1956 effects the proprietary position of female Hindu, as it provides that if a dwelling-house wholly occupied by the members of the family of the deceased devolves on both male and female heirs, then “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”. The section further provides that “the female heir shall be entitled to a right of residence therein”, but “if such female heir was a daughter, she shall be entitled to a right of residence only if she was unmarried or has been deserted by or has separated from her husband or is a widow”.

This section was based on the same principle as section 4(1) of the Partition Act, 1983. Section 4(1) of that Act provides as follows: “where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a share holder shall undertake to buy the share of such transferee, makes a valuation of such share in such manner as it thinks fit and direct the sale of such share to such share holders and may give all necessary and proper directions in that behalf”.

7.1 Definition of Dwelling House: The Act does not contain definition of dwelling-house. A dwelling-house means the house which is wholly occupied by the members of the family of the intestate. It is possible that the Hindu intestate may have more than one dwelling-house situated at the same place or at the different places. In such a case provisions of this section will apply to the dwelling-house which is wholly occupied by the members of his family. It will not apply to the dwelling-house which is not wholly occupied by the members of his family. If all the dwelling-houses are wholly occupied by members of his family, section 23 will apply to all.

7.2 Object of the Section: The object of this restriction on a female heir was to prevent the fragmentation of a family dwelling house at the instance of the female heirs and thus avoid to the hardship and difficulties of the male heirs. The reason for imposing the restriction on the female heir was that if she was given the right to ask

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for the partition of the dwelling-house equal to the male heirs, the likelihood of the partition would be much more increased. The daughter on her marriage becomes the member of the family of her husband. When she gets a share in the family house, she would like to separate her share by partition for converting it into cash in order to take it with her. This argument may not hold equally good in the case of the mother, widow’s son’s widow or son’s son’s widow. They remain in the family in which they inherit. On their marriage, of course, the likelihood of the claim of dividing the house even without any friction in the family may arise. The heirs of Class 1 succeeding to a dwelling house may be either entirely males, entirely females, or males and females. It is only in the last case where the heirs are both males and females of Class 1, that is the right of a female heir to effect a partition is postponed till the male heirs choose to decide their respective shares therein.

In Narashima Murty v. Susheelabai, the Supreme Court points out that the expression, “dwelling-house”, though not defined in the Act, the context would indicate that is referable to the dwelling-house in which the intestate Hindu was living at the time of his/her death; he/she intended that his/her children would continue to normally occupy and enjoy it. He or she regarded it as his or her permanent abode. On his or her death, the members of the family can be said to continue to preserve the same to perpetuate his/her memory. A dwelling-house is that house which is in actual, physical, inhabited possession of the other members of the family in stricto sensu, and some are absent due to exigencies of service or vocations, the dwelling-house remains available to them to re-enter without any obstruction or hindrance and on that pretext enabling the female heir to assert a right of entry and residence, therefore, tenanted house does not fit into this description. The section protects the dwelling house, which means a house wholly inhabited by one or other members of the family of the intestate, where some or the entire family members even if absent for some temporary reason, have the animus revertendi.

The rule laid down in section 23 postpones the right of such female heir to claim partition of the dwelling-house until the male heirs choose to divide their respective shares therein. Further on the question whether, where there was only one male heir and one or more female heirs of the intestate, the restriction on claim of

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partition of the dwelling-house by a female heir operates or not, there was a sharp cleavage of judicial opinions among the High Courts. One view was that the restriction does not operate in such a case. The reasoning was Section 23 postpones the right of a female heir to claim partition of the dwelling-house until the male heirs choose to divide their respective shares therein. The words “their respective shares” occurring in the section make it clear that the words “male heirs” would not include the singular, i.e., “male heirs” as in such event, it would be repugnant to the context in which the said words are used. The restriction imposed by section 23 has been intended to prevent partition of a dwelling–house wholly occupied by the members of the family, until the male heirs choose to divide their respective shares therein. The legislature, by using the expression “male heirs” which is in plural and again using the expression “their respective shares” has rather expressed its intention not to apply the restriction in the case of single male heir inheriting along with one or more female heirs.\(^{100}\)

The other view was that the restriction on partition operates even in such a case. The reasoning for this view is that Section 23 makes it clear that the legislature does not approve of division of a dwelling-house at the behest of a female heir against the “will” of the male member. The object was to prevent fragmentation or disintegration of the family dwelling-house at the instance of the female heir to the hardship and difficulties to which male heir may be put to. The bar was removed only on the happening of the contingency, namely, when the male heir chooses to divide the dwelling –house. It may be that there is one male heir and one female heir and there may not be any change of that contingency to happen, but that will be no ground to say that section 23 is inapplicable.\(^{101}\)

Disapproving the view of the High Courts that the restriction on partition will not operate in the case of only one male member, the Supreme Court in *Narashimaha v Susheelabai* points out that singular includes plural under section 13(2) of the General Clauses Act and may be applied to section 23 as it is not inconsistent with the context or subject. Even without resorting to it or having its aid for interpretation, by applying common sense, equity, justice and good conscience, justice would be

\(^{100}\) *Anant v Jankibai*, A.I.R., 1984, Bom 319; *Venkateshvarlu v Porise Pullamma*, 1994(1) HLR 70 (AP).

\(^{101}\) *Janabai v Palani Mudaliar*, A.I.R 1981, Mad 62; *Ponnuswamy v Meenakshi Ammal*, 1990(2) HLR 1; *Rajammal v Aasathambi*, 2001, AIHC 2209.
mitigated. After, all the purpose of law is to prevent brooding sense of justice. It is not
the words of the law but the spirit and internal sense of it that makes the law
meaningful. The letter of the law is the body but the sense and the reason of the law is
the soul. Therefore, pragmatic approach would further ends of justice and relieve the
male or female heir from hardship and prevent unfair advantage to each other. It
would therefore, be just and proper for the Court to adopt common sense approach
keeping at the back of its mind justice, equity and good conscience and consider the
facts and circumstances of the case on hand. The right of the residence to the male
member in the dwelling-house of the Hindu intestate should be respected and the
dwelling house may be kept impartiable during the life time of the sole male heir of
the Hindu intestate or until he chooses to divide and gives a share to his sister or
sisters or alienate his share to a stranger or lets it out to others, etc. until then, the right
of the female heir or hers is deferred and kept in abeyance. Therefore, where a Hindu
intestate leaves surviving him a single male heir and one or more female heirs
specified in Class 1 of the Schedule, the provisions of section 23 keep attracted to
maintain the dwelling-house impartable as in the case one or more than one male
heir, subject to the right of re-entry and residence of the female heirs so entitled, till
such time the single male heir chooses to separate his share; this right of his being
personal to him, neither transferable nor heritable. Accordingly, section 23 applies
and prohibits partition of the dwelling-house of the deceased Hindu male or female
intestate, who left surviving sole male heir and female heir/heirs and the right to claim
partition by female heir is kept in abeyance and deferred during the life of the male
heir or till he partitions or ceases to occupy and enjoy it or lets it out or till at a
partition action, equities are worked out.

Even a transferee from female heir was not entitled to claim partition in view
of the restriction imposed by this section, because a transferee cannot claim a right
higher to that of his transferor. The prohibition on seeking partition by a female heir
of a dwelling-house inherited from intestate male or female will not operate in certain
cases like, if the first floor of the dwelling-house is in occupation of the joint family
including the son and daughter, the partition of this floor cannot be directed, but the
other parts of the house which are not in occupation of the members of family can be
asked by a female heir to be partitioned. Therefore, if the dwelling-house is not only
in the occupation of the members of the family of the intestate but also in the
occupation of the strangers, bar under this section will not operate against the female
heirs to seek partition. The words appearing in section 23 ‘until male heirs choose to divide their respective shares therein’ do not indicate that there should be actual partition. It merely signifies the intention of the members to have partition and when such intention is clear by pleading of acts of such male member; the requirement of this section is complied. Therefore, in the case of Madhavrao v Jankabai a suit field by a female member claiming her share in the family property including dwelling-house if the male members give consent to the partition of the dwelling-house also or plead that partition has already taken place, the female members shall be entitled for her share in the dwelling-house. Pleading of the acts of the male members in such a case would amount to choosing to have partition even if the finding of fact recorded by the Court is otherwise.

It may be observed that section 23 prohibits partition of a dwelling-house obtained by way of inheritance from a male or female intestate by a female heir including male heir(s), but it does not operate where the house property is obtained by way of testamentary disposition, i.e., will. In such a case, a female heir of the testator can obtain partition of her share in the dwelling-house. If the only male member inheriting with female heir chooses to introduce a stranger into the dwelling-house by parting with his half share in the property, then it would not be satisfying the usual concomitants which are attached to and integrated with a dwelling-house. Once the only male member of the family, in the presence of the other female member, chooses to alienate his half share in dwelling-house, it would be no longer be a dwelling-house as mentioned in the special provision made under section 23. Section 23 would not, in such circumstances, bar the female member from suing for partition and possession of her share in the property.

Though section 23 interdicts claim of partition by a female heir of the intestate in the presence of male heirs, the provision guarantees right of residence to the female heir in the dwelling-house. However, the proviso to this section lays down that where such female is a daughter, she will be entitled to right of residence in the dwelling-house, only if:

1. she is unmarried; or
2. she has been deserted by her husband; or
3. she has separated from her husband; or

Moti Chand v Lakhabai, 1995(2) HLR 459 MP.
1994(2) HLR 227 Bom.
she is widow.

As pointed out by the Supreme Court in *Narashimaha v. Susheelabai*, it may be appear that female heirs other than the daughter are entitled without any qualification to a right of residence, but the daughter is so entitled only if she suffers from any of the aforementioned disabilities.

### 7.3 Loopholes under the Principal Act

The views for the incorporation of section 23 was that if the females succeeding equally and unqualifiedly as full co-heirs with the males is that allotment of shares to them, particularly when they are married, would bring in serious complications to the disadvantage of the male heirs and the married female heirs, expected to reside elsewhere with the members of their respective families, would be tempted to reside in the same house or may transfer their shares to the strangers.

The reason for the inclusion of this Section in the Hindu Succession Act was explained by the Mardras High Court in *Mookkammal v. Chitravadivammal* 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 on 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 that memorable intention of Hindu families, Parliament took that auspicious aspect into consideration while codifying the Hindu Law.

Thus, even in cases where there was 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 (heirs) in the family of the intestate and not when there is a single male heir. 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 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.

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Thus, the reasoning given for the incorporation of section 23 appears to be incorrect on the face of it. The sister is not even looking at the share of the brother. She wants what rightfully belongs to her as she is also the progeny of the same parents who were the owner of the house. Yet our legislature and judiciary tell her to wait till her brother on his own decides to give her share. The brother on the other hand has his share well protected, and is using the share of the sister also and if he is not allowed to do so, the judiciary says it is injustice to him. Recently, in *Narashimaha Murthy v. Susheelabai*, the Court not only adopted an orthodox approach, but went on to hold the expression ‘male heirs’ used in section 23 includes a single male heir; and even where the intestate has left behind a single male heir; and though the fact of the partition would never arise; the sister has no option but to wait till the brother on his own decides to give her, her share. The Hon’ble judge failed to note, that the matter had come to the court only because the brother had refused to part with her share, and has been contesting on the grounds of incapability of the sister to affect a partition.

The court further held that the daughter would also like to preserve the sanctity of the dwelling house, so it should not be partitioned at her instance. The reverence to preserve the ancestral house in the memory of the father or the mother is not exclusive preserve of the son alone. Daughter to would be anxious and more reverential to preserve the dwelling house to perpetuate the parental memory. K. Ramaswamy J. gave various examples to show how the application of section 23 as interpreted in the current case would prevent the brother from being thrown on roads. He said that take a case of a Hindu male or female owning a flat in metropolis or major cities, like Bombay etc. with 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 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/shelter less.

But in this case judiciary failed to visualize one situation i.e., what would be the outcome, if instead of there being one brother and one sister, there were only two brothers? How then the partition of that house took place, but ignoring all these situations section 23 was interpreted restrictively even by the Supreme Court. Thus this discrimination between brother and sister or daughter and son apparently exists in the Act. The restriction imposed on daughter was because of the fact that daughter
leaves the house of her parents on marriage and goes somewhere else, why is the disability imposed on the mother of the intestate or the widow of the intestate, who not only are living here but have already spent a longer time period in the house, in comparison with the son, and have no likelihood of leaving it in the future? Secondly why was the restriction not operative on a son, who separate from his parents during their lifetime, and lives elsewhere with his family members? Thirdly, the Court recognizes the duty of the daughters and imposes it on her, when it comes to maintaining her parents, on exactly the same lines as on the son, but 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.

Further under the Act, a deceased daughter’s (marital status irrelevant) son and daughter are class-1 heirs. The prohibition to ascertain her share and a denial of the right of residence in this property is appended to a daughter, and also to daughter’s daughter, but a daughter’s son does not suffer from any such disability. For example, a man having a son and a 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 class-1 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 capable of partitioning it. Thus again the discrimination between daughter and son is there.

7.4 Effect of the Amendment Act of 2005: Because of this gender discrimination section 23 is deleted by the Amending Act and thus treats son and daughter on equal footing. In the latest case of Puspa Mukherjee v. Smritikana Mukherjee, Calcutta High Courts also decided it in the light of Amendment. In this case, suit was field by two female heirs of Class 1 claiming partition of lands and a dwelling house. Plaintiff having 2/9th share in respect of entire suit property. Meanwhile during the pendency of appeal Section 23 of Hindu Succession Act was omitted by the Amending Act.


106 2008 (1) H.L.R. (Cal.) (D.B.) 647.
Court held that embargo created under section 23 now cannot come in the way of plaintiffs claiming partition. By the Amending Act No. 39 of 2005, the impediment of the female heirs of Class 1 in claiming partition of a dwelling house as indicated in section 23 of the Hindu Succession Act having been lifted and at the same time, by said Amending Act, the pending proceedings of partition not having been protected, the respondents are no longer entitled to resist the demand of partition of the plaintiff/appellant. Thus the appeal was allowed and decree passed by the learned trial Judge was modified by declaring 2/9th share of the plaintiff in the entire suit property including the dwelling house and the defendants are directed to amicably partition the entire property including the dwelling house within three months.

But amusingly, with this deletion the Amendment put adverse effect on the status of daughter. With this Amendment dowry has been made obligatory under the provision of law. What is going to happen that people having property, especially the land-owning classes, will become more prone to committing foeticide of girl child in order to save their property and land from sub-division and going to girls in–laws. There will be more pressure from the in-laws of the girl to sell their share of paternal properties and bring that money to their in-laws family. This will lead to cruelty on unwilling brides and increase the incident of killing of the brides by greedy in-laws and suicide by frustrated brides, who may refuse to ask for a division of paternal properties out of strong bond of love with parents and brothers. If the bride agrees to get her share of ancestral property, this can be usurped by the in-laws and the bride is liable to be divorced afterwards out of greed for another dowry. If the girl gets the ancestral property divided and takes away her share, brother-sister bond will be shattered, and in times of difficulty or trouble created by the in-laws, the brother and even parents may not come to rescue of the girl107.

8. SECTION 24
Seventhly, Section 24 of the Principal Act deals with the women’s property rights. It was laid down under this section that any heir who is related to an intestate as the widow of a predeceased son, the widow of a predeceased of a predeceased 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. This section

107 S.S Johl, Daughters at a disadvantage; Hindu Succession Act change doesn’t help them, The Tribune, (March 20, 2006).
imposes remarriage as a ground for disqualification in respect of three categories of widows, viz.,

1. widow of a predeceased son;
2. widow of a predeceased son of a predeceased son;
3. widow of a brother.

8.1 Object of the Section: The principle under laying this clause was that the widow is the surviving half of her husband and, therefore, when she remarries, she ceases to continue to be such (Section 2 of the Hindu Widows’ Remarriage Act 1856, also contains a somewhat similar provision). As the law stands, remarriage disables a widow of a gotraja sapinda from succeeding to the property of a male Hindu when on the date the succession opens; she has ceased to be the widow of a gotraja sapinda by reason of marriage. This rule is being applied to the widows mentioned in the Schedule who are the only widows now entitled to succeed.

A mother, not being specified in section 24, does not cease to be an heir to her son even after remarriage as has also been pointed out by the Supreme Court in Kasturi Devi v. Deputy Director of Consolidation 108, On such remarriage, the mother no doubt, ceases to be the widow of the deceased son’s deceased father, that is, the husband of her earlier marriage. But since she is not succeeding to her son as any widow, but as her mother, not on the strength of any relation by marriage, but by blood, she remains a fully qualified heir even after her remarriage. 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 three other three widows, whose remarriage before the opening of succession, disqualifies them from inheriting the property of the deceased. In the 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 (stepmother) 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 stepson. But

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she nevertheless succeeds, not on the strength of any direct blood or other relation, but only as a widow, namely, father’s widow and the moment she remarries, she ceases to be a father’s widow any longer and ought to have been excluded from inheritance on the principle on which section 24 is grounded.

The words “as such widow” in section 24 are significant. The disqualification attached to these three widows to succeed to the property of the intestate is in their capacity as widows of the persons concerned. Where these widows claim to succeed to the intestate by the virtue of some other relationship with the intestate, her remarriage is no bar.

8.2 Effect of the Amendment Act 2005: Under the Amending Act Section 24 of the principal Act which lays down that certain widows on their remarriage shall not be entitled to inherit the property of intestate, is also omitted. Now it means that widow of a son, or pre-deceased son of a predeceased son, Brother’s widow though remarried on the date when the succession opens shall be entitled to inherit the property of her husband’s father, grandfather and brother. Under the Act of 1956 two types of relatives are recognized as heirs of intestate, one through blood, second through marriage. Marriage or remarriage of blood relatives does not have any consequences but remarriage of those who got related to the intestate through marriage would make a difference. On the remarriage of these relatives (especially son’s widow, son’s son’s widow, brother’s widow), they ceased to be the members of intestate’s family. So now the question arises that when these relatives do not have any relation with the intestate’s family, how these would inherit the property of intestate? The amendment Act is silent on this question and thus again creates a conflicting situation.

In the view of Poonam Pradhan Sexena, with the deletion of section 24, it does not mean that the situation and the eligibility criteria have been changed. Even without section 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 alert the situation at all. Because remarriage of son’s widow, son’s son’s widow, or brother’s widow would mean that they cease to be member 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. But in order to avoid the confusion the Amendment Act must mention the effect of the deletion of section 24. Unfortunately the Amendment is silent on this aspect.
9. SECTION 30
Lastly, Section 30 of the Act of 1956 put its negative effect on women’s property rights. Section 30 of the enactment concerns itself with the testamentary capacity of a male Hindu. The chapter on Testamentary Succession is to be found in the draft of the Hindu Code prepared by the Hindu Law Committee in 1947, by the Selection Committee in 1948 and later on by the Government in 1951. In these drafts the chapter consisted of merely one section confirming the existing law that the testamentary capacity of the Hindu is governed by the Indian Succession Act, 1925. Later on the idea of an all covering code had to be given up and separate Bill relating to succession was introduced in the Rajaya Sabha. The title of the Bill, as also of present Act still is, was “a Bill to amend and codify the law relating to Intestate Succession among Hindus”. This Bill also embodied the clause relating to wills. The reason assigned was that the clause confirms the existing law that a Hindu may dispose of by testamentary disposition any property which he is capable of disposing of.

9.1 Provision Contained in Section 30: This section lies down that any Hindu may dispose of by will or other testamentary disposition any property which is capable of being so disposed of by him, in accordance with the provisions of Indian Succession Act, 1925, or any other law for the time being in force. The Explanation further clarified that the interest of a male Hindu in Mitakashara coparcenary property or interest of a member of a tarwad, tavazhi, illom or Kutumba or Kavru, shall be deemed to be property capable of being disposed of by him or by her within the meaning of this section. Prior to this Act, a Hindu governed by Mitakshara could dispose of his property by will or other testamentary disposition if it was his separate property; and secondly if he was the sole surviving coparcener of the joint family property. Under Dayabhaga law as there was no right by birth in the other coparcenary members of the family till the father’s death, the father was in the position to dispose of by will the whole of the joint family property. Now under the present section, according to Explanation, a Hindu member of a coparcenary governed by the Mitakshara or a member of a tavazhi, tarwad, illom, kutumba or kavaru is given for the first time a right enabling him to dispose of his undivided interest in the property. Thus the disability of a coparcener in disposing of his undivided interest in the property by will or other testamentary document under the old Hindu law is removed by this section.
The power under this section to make a testamentary disposition does not extend to the making of a gift, and so, a coparcener cannot make a gift inter vivos of his undivided share. This provision also does not apply to other modes of alienation inter vivos which will continue to govern by the ordinary Hindu law. But if we see it effect of this section along with Explanation on section 6, the net result is that section 6 would become complete failure because by the virtue of this section, the interest of a male Hindu in Mitakshara coparcenary property can be by him by means of a will and thus the rights of females under section 6 will totally be abrogated. Besides this giving unrestrained testamentary power, the legislature has facilitated the circumvention of even other rights of inheritance conferred on female Hindus.

Under the Hindu Succession Act, 1956 besides section 30 there are various other provisions and devices which intend to defeat or reduce the right of female heir, like (a) renunciation of interest in coparcenary. A perusal of the parliamentary debates indicates that the legislature overlooked the implications of renunciation of interest in coparcenary while enacting section 6 of the Hindu Succession Act. No specific formality is required for the relinquishment of the interest beyond the expression of a clear intention to that effect. On such renunciation, the releaser is deemed to have separated from the joint family. But this does not affect the joint status of other members of the coparcenary. A renunciation can effectively defeat the rights of succession of female heirs mentioned in Class I of the Schedule. Thus, renunciation is an effective mode of defeating the rights of female heirs, especially of daughters.

The second mode of disinheritance is Conversion of self-acquired property into coparcenary property. Self-acquired property will equally devolve upon class I heirs. However, self-acquisitions can be converted into joint-family properties with great facility. A Hindu governed by the Mitakshara law, by an expression of an intention to that effect and without any formal act on his part can convert his self-acquired properties into joint-family properties. Moreover, the transformation of self-acquisitions into joint-family properties is frequently effected to reduce the burden of taxation or for the evasion of tax.

Another, important question is that whether the properties acquired under a gift or will of the father will be treated as separate or ancestral properties in the hands of the donee or legatee? If these are ancestral his (donee’s or legatee’s) sons will acquire the right by birth; whereas, if they are considered separate properties, they will equally devolve on intestacy. On this point, formally the High Court in India differed in their views, but it is now authoritatively settled by the Supreme Court in
Arunachala Mudaliar v. Muruganatha Mudaliar\(^{109}\), there the substantial question was whether the properties the defendant got under the will of his father were to be regarded as ancestral or self-acquired properties in his hands. If ancestral, his (defendant’s) sons would acquire a right by birth in them. The Supreme Court pointed out that the father is quite competent to expressly provide when making the gift that the donee would exclusively take it for himself or that the gift would be for the benefit of his branch of the family. In the absence of clear words the Supreme Court pointed out that the intention should be gathered from the surrounding circumstances. Mukherjea, J., stated that the material question which the Court would have to decide in such cases is, whether taking the document and all the relevant facts into consideration, it could be said that the donor intended to confer a bounty upon his son exclusively for his benefit and capable of being dealt with by him at his pleasure or that the apparent gift was an integral part of a scheme for partition.

Such a right conferred on the donor to burden the property with the incidents of ancestral property, either expressly or impliedly, is open to two objections. First, it will be restricting the free alienability of the property. Second, the recognition of such a right will mean the denial of equal rights of intestate succession among the children of the donee. If the donor intended to confer a specific bounty in favour of his son’s sons he should expressly free to do so\(^{110}\).

9.2 Effect of Amendment Act 2005: Though except section 30, these other devices which intends to defeat the rights of female heirs looses their practical significance after the Amendment made in principal Act by the Amending Act of 2005 as now by section 6 of Amending Act, daughter is also a coparcener along with son. So if father renounces his share in coparcenery. It does not effect the position of a daughter. Similarly, even if self-acquired property is converted into coparcenary property, then also daughter would get equal rights in this property along with sons.

So far, as section 30 is concerned the Amendment Act does not put any positive effect on it. In general, the law in India, with the exception of the Muslim law, has not evolved any restriction testation. Therefore, disinheritance by execution of a will can be availed of by all Hindus under the Hindu Succession Act whether they are governed by the Mitakshara, Dayabhaga or Marumakattayam law. The reason for absence of any restraint on testation is that at the time when the English concept of


will was taking its root in India, the trend at common law was to remove fetters on freedom of testation. But since then there has been a change in the outlook. During the debates on Hindu Succession Bill, the fear was voiced that the rights of female heirs will be defeated by executing wills. As stated by Seth Govind Das, “Then again another thing will happen. The Honourable Dr. Ambedkar wants that the daughters should also be given the right of succession to the property. Then I would submit that in our society which is undivided at present, when the fathers execute the will, they will not bequeath anything to their daughters, but would give to the sons alone, and thus this would defeat the very object with which you want to confer the right of succession on the women.

Brushing aside, these fears the Minister for Law, Honourable Pataskar said: “I believe that a normal father will never do any such thing and if at all he has to do it for any reason, he will surely make a provision for his daughter when he is going to deprive her of her share by will.”

It is submitted that the above statement is an over-simplification of a serious problem. The postponement of a consideration of imposing restraints on testation may be justified as the Government was anxious to proceed with the essential feature of the Bill, namely, to remove the disability of females to inherit; and that the imposition of restraints involving the accomplishment of a satisfactory balance between an individual’s right of disposition and the protection of the members of his family, which is a task of considerable difficulty in any legal system. However, to ignore the existence of the problem is not justified. The above statement of the Minister for Law is questionable on the following grounds: first, advanced legal systems like that of France, Germany, Switzerland and also the USSR thought it necessary to restrain testamentary freedom. Even in England, the Inheritance (family provision) Act, 1938, and the Intestate’ Estates Act, 1952 envisage restrictions on testation. Second, in a country where the practice of Sati prevailed until 1829, where in certain parts female infanticide used to be common, it is illogical to that persons nurtured in traditional attitudes would hesitate to disinherit the daughters. These attitudes derive considerable support even now by the importance attached to the existence of a son in the scriptures.

But Amending Act, 2005 gives such power of Testamentary disposition to females also. Now Section 30 reads as: “any Hindu may dispose of by will or by other

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111 Constituent Assembly of India Debates (Legislative) dated 24 February (1949), p. 865.
112 (1955) 5 Lok Sabha Debates, col. 8379.
testamentary disposition any property, which is capable of being so [disposed of by him or by her], in accordance with the provisions of the Indian Succession Act, 1925 (39 of 1925), or any other law for the time being in force and applicable to Hindus.

But again by the Amending Act, confusion has been created in Explanation to section 30. Because in Explanation it is written as “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.

So the meaning of Explanation is that only the interest of a male Hindu in Mitakshara coparcenary property be disposed of by will where as the interest of a female is not capable of being disposed of by will. Thus the use of this word ‘male’ in Explanation creates a confusion regarding the power of male and female in the matter of Testamentary disposition.

So far as Testamentary succession is concerned even the Report of the committee on the status of women in India, 1974 recommended that the right of testation should be limited under the Hindu Succession Act, so as not to deprive legal heir completely. In this respect, Muslim law is better as under Muslim law there are restrictions on person’s right of testation. A Muslim can bequeath only one-third (1/3) of his estate. Further under Muslim law a bequest to a stranger is valid without the consent of heirs, (if it does not exceed one-third of the estate) but a bequest to an heir without the consent of other heirs is invalid. The consent of heirs to a bequest must be secured after the succession has opened, and any consent given to a bequest during the lifetime of the testatory can be retracted after his death. As the testamentary power exercised by a deceased in favour of an heir operates at the expense of other heirs, it is not an unnatural attitude to refuse consent to such bequests. But unfortunately so far as Hindu Succession Act is considered this device which intended to defeat inheritance to female heir is still available.

Thus, these eight provisions of Hindu Succession Act 1956 deals and effect the women’s property rights in India.