CHAPTER V
CRITICAL ANALYSIS OF THE RECENT AMENDMENTS IN HINDU SUCCESSION ACT
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5.1 Devolution of Interest in Coparcenary Property after passing of Hindu Succession (Amendment) Act, 2005:

After the passing of the Hindu Succession (Amendment) Act, 2005, the daughters have an equal hold onto the share of her father’s coparcenary property. The daughter born in a family which is governed by Mitakshara law has –

a) by birth become a coparcener in her own right in the same manner as the son;

b) have the same rights in the coparcenary property as she would have had if she had been a son;

c) be subject to the same liabilities in respect of the said coparcenary property as that of a son.212

This Hindu Succession (Amendment) Act, 2005 is enacted to empower women, especially daughters in order to hold property through their ancestral coparcenary property. This coparcenary property held by a daughter after 2005 shall be held by her with the incidents of coparcenary ownership and shall be regarded as property being capable of disposal as by her by testamentary disposition. Where a Hindu dies after the commencement of Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by Mitakshara law, shall be devolved by testamentary or intestate succession, as the case may be,

212 Section 6, the Hindu Succession Act, 1956
under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if partition had taken place and –

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

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

c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or daughter, as the case may be.

Section 6 of the Act before the Amendment of 2005 dealt with devolution of interest of a male Hindu in coparcenary property and recognized the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the females in it meant that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughters from participating in the coparcenary ownership not only contributed to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution of India having regard to the need to render social justice to women. Thus, in 2005 the Parliament after much agitation thought of amending this provision and on 9-9-2005 the said Section 6 was amended providing the daughters with equal rights and liabilities in the acquisition of ancestral coparcenary property by them, same as equivalent to the share of a male Hindu coparcener in a family governed by Mitakshara law. Section 6 after amendment also conferred an absolute right
in a female heir in respect of partition of property occupied by joint family\textsuperscript{213}.

The Hindu Succession (Amendment) Act, 2005 has widely affected the concept of Mitakshara Hindu Coparcenary. Hindu Succession (Amendment) Act, 2005 has totally damaged the concept of Mitakshara Coparcenary because the daughter has been treated like a son under Hindu Succession (Amendment) Act, 2005. She becomes entitled to a share in coparcenary by birth. She by birth becomes a coparcener in her own right in the same manner as the son. She is not only conferred the coparcenary right as the son; she has been given all the rights possessed by the son in the coparcenary and similarly, she is also bound by the similar liabilities as a son. The major achievement lies in including all daughters especially married daughters, as coparcenary in joint family property.\textsuperscript{214}

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

In addition, the Act makes the heirs of predeceased sons and daughters more equal, by including as class-1 heirs two generations of children of predeceased daughters, as was already the case for sons. The main significant change making all daughters (including married ones) coparceners in joint family property is also of great importance for women, both economically and symbolically. Economically, it can enhance women’s security by giving them birth rights in property that cannot be willed away by men. In a male-biased society where wills often disinherit women, this is a substantial gain. Also, as noted, women can become kartas of the property. Symbolically, all this signals that daughters and sons are


\textsuperscript{214} Prof. U.P.D. Kesari, \textit{Modern Hindu Law} 10th edition 2015, p. 270
equally important members of the parental family. It undermines the notion that after marriage the daughter belongs only to her husband’s family. If her marriage breaks down, she can return to her birth home by right, and not on the sufferance of relatives. This will enhance her self-confidence and social worth and give her greater bargaining power for herself and her children, in both parental and marital families.

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

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

In *Nagammal v. N. Desiyappan*, the Madras High Court held that unmarried daughters of Hindu coparcener shall become coparcener by birth and unmarried daughters of deceased are to be treated equally with son and is entitled to equal share.

### 5.2 Females as Karta:

The position of the Karta is regulated by birth and is guided by seniority. For being a Karta and to be entitled to manage the family affairs,

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

Since a female is not a coparcener, she cannot be a Karta, nor is she empowered to represent the family generally. However, Nagpur High Court has held that under certain special situations, even a female can act as a Karta and her decision would be binding on the family members. This decision does not appear to be correct, as she is neither a coparcener, not is she entitled to a share in the coparcenary property. On behalf of a minor coparcener, she can act as a guardian, but that would not make her the Karta. A mother, therefore, cannot be a Karta. A wife cannot act as the Karta in absence of her husband, nor can she act as the Karta in a joint family comprising her husband and her son. Similarly, a Hindu widow cannot be a Karta, even if rights are conferred on her, in the deceased husband’s coparcenary property.

Beginning with 1985, till 1994, the states of Andhra Pradesh (1985), Tamil Nadu (1989), Maharashtra and Karnataka (1994) have introduced the possibility of unmarried daughters being coparceners in the same manner as a son. Since now, in these states, upon marriage, a daughter continues to

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218 Sahdeo Singh v. Ramchabila Singh AIR 1978 Pat 285
220 Mangubti v. Lingaraj AIR 1956 Ori 1
222 Radha Ammal v. Commissioner of Income Tax 1951 ILR Mad 56.
be a coparcener; she fulfils the requirements for becoming a Karta. Born in the family, she acquires an interest in the coparcenary property and therefore, she can be a Karta, if she is the senior most members in the family and she will be entitled to represent the family in all legal proceedings.\textsuperscript{223}

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

\textbf{5.3 Rule of Survivorship:}

The first part of the section makes it clear that in case a Mitakshara coparcener dies intestate leaving behind only male heirs of class I of the Schedule and there is no female heir mentioned in that list of class I, the rule of survivorship shall come into operation with respect to undivided share of the deceased coparcener in the coparcenary property.

In Mitakshara, the rule of survivorship applied with respect to coparcenary interest of a coparcener who dies intestate. According to the rule, coparcenary interest devolved upon only male surviving coparceners not on females. For example, A, B, C three brothers constitute a coparcenary. On the death of A, his interest in the coparcenary property devolved on B and C, i.e., his two surviving brothers not on his own heirs, i.e., his widow and daughter.\textsuperscript{224}

In \textit{Bhaga Pruseth v. Purni Devi},\textsuperscript{225} the court observed that if coparcenary property was on devolution and a member of joint family died during jointness of family without male issue, his married daughter will not be entitled for any share in coparcenary property because devolution of property is by survivorship.

\begin{footnotes}
\item[224] AIR 1972 Mad. 284
\item[225] Bhaga Pruseth v. Purni Devi AIR 2003 NOC (Orissa) p. 171
\end{footnotes}
Proviso to Section 6 confers new rights upon the specified females heirs mentioned in class I of the Schedule and superimposes upon the entire structure of Mitakshara law of survivorship a rule whereby female heirs would replace such coparceners who have not found place in class I of the Schedule. Thus for practical purposes the rule of survivorship has become redundant. Class I of the Schedule includes 12 heirs out of which 8 are female heirs and four are male heirs but out of them one male heir claims through a female i.e., deceased daughter's son. The list is as under:


The only male relative claiming through such female relatives is the son of a predeceased daughter.

In view of above large number of female relatives it is hardly conceivable that there would be an occasion to attract the rule of survivorship. Thus where a Mitakshara coparcener dies intestate having his interest in the coparcenary property and leaves behind him any of the above female relatives or a male relative claiming through female, his interest would devolve according to the provisions of this Act which provides for the equal shares among the male and female relatives of class I of the Schedule.

5.4 Judicial decisions on survivorship:

In *G.V.S. Kishan Rao v. Andhra Pradesh State*, the Court observed that where a Mitakshara coparcener dies leaving his interest in the coparcenary property and behind him there is some female relative mentioned in class I of the Schedule, his interest would devolve according to the provisions of this Act. In the instant case a male Hindu died leaving

226 *G.V.S. Kishan Rao v. Andhra Pradesh State* AIR 1987 AP at 239
behind his widow and three sons and two daughters. Here the widow at first would be entitled to an equal share along with her sons. Thus just before the demise of her husband, if his coparcenary interest had been partitioned, it would have been divided into five equal shares and so her husband three sons and herself would be entitled to 1/5th share each. By fictional partition she would be entitled to 1/5th share as if partition has been effected between her husband and three sons. Thereafter 1/5th share of the deceased husband will be equally divided among the three sons, two daughters and the widow. Accordingly each one of them would be getting 1/30th.

In Sushilabai v. Narayanrao Gopairao, the Bombay High Court observed: "The effect of the proviso read with Explanation 1 thereto is that when there is an heir of the nature specified in the proviso, the share of the deceased coparcener has to be determined on the assumption and deemed fiction that a partition of the property has taken place immediately before his death as the Explanation points out that such legal fiction has to be given effect to, irrespective of the fact whether the deceased coparcener is entitled to claim partition or not.

The widowed daughter-in-law can claim a share in the coparcenary interest of her father-in-law after he dies intestate in a joint family as she is class I heir to him as mentioned in the Schedule to Section 8.227

Where there is a coparcenary between A B and C and A dies leaving behind his widow and daughter the 1/3rd share of A in coparcenary property will devolve on the widow and daughter together and each one will take 1/6 share. Later on B also dies intestate leaving no heirs mentioned in class I of the Schedule. The 1/3rd share of B shall devolve on C as he is the only surviving coparcener. The widow and daughter of deceased A would get nothing out of the share of deceased coparcener B.228

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227 Basavalingamma v. Shardamma. AIR 1984 Karn 27
228 Raghutmath Tewari v. Mt. Rikhityn, AIR 1985 Pat. 29
Where a Mitakshara Coparcener dies leaving behind his son and a son of the predeceased daughter. His interest in the coparcenary property would devolve upon them in equal shares, as both are class I heirs. Thus, 1/2 share of the deceased coparcener shall be taken in equal shares by the son and the predeceased daughter’s son.\(^\text{229}\)

**Explanation 1 - Computation of Interest of a Deceased Coparcener**

In a Mitakshara coparcenary the interest of a deceased coparcener is not defined but the fluctuating interest of the coparcener has been settled by the Explanation 1 of the section for purposes of devolution. Explanation 1 lays down that for purposes of this section the interest of a Hindu Mitakshara coparcener shall be the share which he would have got had there been a partition immediately before his death irrespective of the fact whether he was entitled to claim partition or not. The language of the Explanation expressly indicates that, though fictional partition to ascertain the share of the deceased is presumed to have taken place immediately before his death, it does not automatically result in the disruption of family. To determine the share ordinary rule of Hindu law will be applied.

The Explanation 1 incorporates the concept of notional partition. This notional partition is for the purpose of determining the interest which was otherwise liable to devolve by survivorship and for the ascertainment of the share of the relatives mentioned in class I of the Schedule out of the interest of the deceased coparcener. The operation of the notional partition and its inevitable corollaries and incidents is to be only the purposes of this section, namely, devolution of interest of the deceased in the coparcenary property. It need not to be taken to be an actual partition.\(^\text{230}\)

The Supreme Court made a very important pronouncement in *Gurupada Khandappa vs. Heerabai\(^\text{231}\)* on Explanation 1 of Section 6 which

\(^{229}\) *Rang Natham Chettiar v. Annamalai Mudaliar*, 82 Mad L.W. 258  
^{231}\) *Gurupada Khandappa vs. Heerabai* AIR 1978 SC 1239.
has set at rest the controversy between the Bombay, Orissa and Gujarat High Courts on the one hand and Allahabad and Delhi High Courts on the other hand regarding the interpretation of the Explanation 1 of Section 6. Some of the writers on Hindu law also agreed with the two interpretations of the Explanation 1 which was an incorrect approach. The confusion arose on account of not taking into account the provisions of Hindu Women's Right to Property Act, 1937 which conferred new rights on widows of coparceners. In 1960, Section 31 of the Hindu Succession Act, 1956 was amended as a result of which Hindu Women's Right to Property Act, 1937 was revived and according to the concept of notional partition (as incorporated in the Explanation 1) a specific share would be allotted to her along with her husband (deceased) and sons in the coparcenary property and thereafter the concept has the effect of vesting in the widow her aliquot share in the interest of deceased\(^\text{232}\).

In the above case, one Khandappa died leaving behind his wife, Heerabai two sons and three daughters after coming into force of the Act. His wife, Heerabai filed a suit for partition and separate possession of 7/24 share in the joint family property on the basis of Section 6 of the Act. She claimed that if a partition, had taken place between her husband and two sons immediately before the death of her husband Khandappa, she, her husband and two sons would have each been allotted a one fourth share in the family property and on the death of her husband the one fourth share which would have been allotted in her favour had devolved in equal shares on her two sons and three daughters. Thus she claimed the one fourth share which had to be allotted in her favour on the notional partition and 1/24th share, (which was one sixth of the one fourth share of her husband) i.e. in all 7/24th share. The court accepted the claim and decree the suit. The court made the following observation:

\(^{232}\) Ibid
“In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant’s 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 a 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. That 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 to it.”

In *State of Maharastra v. Narayan Rao*, the Supreme Court accepted the rationale of the above case to the effect that when a female member who inherits an interest in the joint family property under Section 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to get both the interest she has inherited and the share which would have been notionally allotted to her, as stated in Explanation 1 to Section 6 of the Act. But it cannot be an authority for the proposition that she ceases to be a member of the family on the death of a male member of the family whose interest in the family property devolves on her without her volition to separate herself from the family. A legal fiction should no doubt be carried to its logical end and to carry out the purposes for which it is enacted but it cannot be carried beyond that.

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It is thus clear that notional partition does not disrupt the joint family nor does it bring the coparcenary to an end. However, the Mitakshara concept of coparcenary and the rule of survivorship, one of the necessary corollary of coparcenary have necessarily been eroded.

In *Smt. Raj Rani v. Chief Settlement Commissioner*, the court reiterated the view expressed in Gurupada Khandappa case. In this case A, a male Hindu, died leaving behind him three sons, three daughters and one widow. In the division of coparcenary property between the deceased A and his three sons as per notional partition, the property shall be divided into five shares, i.e., A, the widow and three sons getting one fifth share each. Thereafter one fifth share of the deceased A was equally divided amongst the three sons, three daughters and the widow each getting 1/35th share out of 1/5 share left.

In *Vidya Ben v. Jagdish Chandra*, a coparcener died leaving behind a widow, a son and four daughters. It was held by the Gujarat High Court that the coparcenary property according to Explanation I to the section would be divided into three shares, deceased coparcener being entitled to 1/3 share, widow 1/3 share and son also entitled to one third share. Thus the 1/3 share of the deceased coparcener would thereafter devolve upon his heirs of class I namely, widow, the son and four daughters, each one of them will be entitled to 1/18th share as per present law.

In *Rangubhai v. Laxman*, A died leaving behind his widow W and an adopted son S. The question arose as to the shares of W and S. According to Bombay High Court, as per rule of notional partition A’s share shall be determined as 1/3 (one third) as also the share of W and S being determined 1/3 each. Subsequently 1/3 share of deceased, A would

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236  *Vidya Ben v. Jagdish Chandra* AIR 1974 Guj. 23
237  *Rangubhai v. Laxman* AIR 1966 Bom 169
be equally divided into W and S i.e., each getting 1/6 share. Thus 1/3+1/6 that is 1/2 would be the share of W and S each.

In Aiiand Naik v. Haribandhu Naik, the Orissa High Court as early as in 1967 interpreted the rule of notional partition as above. A died leaving behind his widow W. two sons S1 and S2 and five daughters D1, D2, D3, D4 and D5. It was held that in order to determine the share of the deceased coparcener, A, notional partition has to be assumed and accordingly his share would be deemed to be one fourth (1/4). Thus, the shares of S1 and S2 and the W would be 1/4 (one fourth) each. The one fourth share of deceased A would be divided into eight parts equally and each son each daughter and the widow i.e., W, S1, S2, D1, D2, D3, D4 and D5 would get 1/32. Thus, W will get 1/4+1/32, S1 and S2 will get 1/4+1/32 each and D1, D2, D3, D4 and D5 will get 1/32 each.

Explanation 2 — Separated Member of the Coparcenary –

Whenever there is a partition in the Mitakshara coparcenary, each coparcener gets an equal share. The partition may be absolute or partial. When it is partial i.e. one coparcener separates from the others and others remain joint or become united, on the death of any one of the coparceners who remained joint the proviso will come into operation but the separated coparcener or his heirs cannot claim any share in the interest of the deceased coparcener in the coparcenary. This explanation is not applicable to a female heir, as she is not a coparcener.

Explanation (2) of Section 6 will not be attracted in such cases and it cannot be said that the sons will not be entitled to any share. Explanation 2 excludes the son who has separated himself from the coparcenary to claim any share from the coparcenary' interest of the father, but where all the sons have separated on account of a general partition, Explanation 2 will not apply as in that case all the sons are equally placed. The Patna

238 Aiiand Naik v. Haribandhu Naik AIR 1967 Orissa 194
High Court in *Satya Narayan Mahto v. Rameshwar Mahto*,\(^{239}\) clearly maintained that it is not correct to say that in view of Explanation 2 to Section 6, because the deceased had separated from his sons, the sons or their heirs cannot claim a share in his property and that his widow shall be sole successor. Under Explanation 2, the undivided person excludes the divided one from succession. Where a Hindu father who has separated from all his sons dies leaving behind a widow, two daughters, one son and heirs of two predeceased sons, Section 8 and proviso to Section 6 would apply to the succession of the coparcenary property owned by the deceased. The property has to be divided equally and each set of heirs has to take 1/6 share.

The Hon’ble Supreme Court in the case of *Ganduri Koteshwaramma v. Chakiri Yanadi*\(^{240}\) held that the new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son.”

In another case, the Hon’ble Bombay High Court in *Ms. Vaishali Satish Ganorkar & Anr. v. Satish Keshorao Ganorkar & Ors.*\(^{241}\) held that ipso facto upon the passing of the Amendment Act in 2005 all the daughters of a coparcener in a coparcenary or a joint HUF do not become

\(^{239}\) *Satya Narayan Mahto v. Rameshwar Mahto* AIR 1982 Pat 44.

\(^{240}\) *Ganduri Koteshwaramma v. Chakiri Yanadi* AIR 2012 SC 169

\(^{241}\) *Ms. Vaishali Satish Ganorkar & Anr. v. Satish Keshorao Ganorkar & Ors.* AIR 2012 Bombay 101
coparceners. The daughters who are born after such dates would certainly be coparceners by virtue of birth, but, for a daughter who was born prior to the coming into force of the amendment Act she would be a coparcener only upon devolution of interest in coparcenary property taking place. Until a coparcener dies and his succession opens and a succession takes place, there is no devolution of interest and hence no daughter of such coparcener to whom an interest in the coparcenary property would devolve would be entitled to be a coparcener or to have the rights or the liabilities in the coparcenary property along with the son of such coparcener. A reading of Section as a whole would, therefore, show that either the devolution of legal rights would accrue by opening of a succession on or after 9 September, 2005 in case of daughter born before 9 September, 2005 or by birth itself in case of daughter born after 9 September, 2005, upon them.

However, another bench of Hon’ble Bombay High Court, in various appeals before it, disagreed with the law laid down by the Bombay High Court in the Vaishali Ganorkar’s case and referred the matters to a bench of two or more Judges by formulating questions of law. Hon’ble Bombay High Court constituted a full bench on the said reference and proceeded to decide the questions of law raised in the said matters. Hon’ble Bombay High Court in that case of Badrinarayan Shankar Bhandari and others v. Omprakash Shankar Bhandari242 differed from the view taken by the Division Bench in Vaishali Ganorkar’s case. It was observed that, if a daughter born prior to amendment will get right only on the death of her father, it will postpone the conferment of valuable property rights on crores of daughters, who may also lose everything upon the father and other coparceners disposing of the property in the lifetime of father. The legislature did not and could not have intended such eventuality.

242 Badrinarayan Shankar Bhandari and others v. Omprakash Shankar Bhandari 2014 (5) Mh.L.J. 434
The Hon’ble Bombay High Court in Bhandari’s case observed that, the clause (b) in amended Section 6 was not referred to in Vaishali Ganorkar’s case. It was also observed that a bare perusal of sub section (1) of section 6 would, thus, clearly show that the legislative intent in enacting clause (a) is prospective i.e. daughter born on or after 09/09/2005 will become a coparcener by birth, but the legislative intent in enacting clauses (b) and (c) is retroactive, because rights in the coparcenary property are conferred by clause (b) on the daughter who was already born before the amendment, and who is alive on the date of Amendment coming into force. Hence, if a daughter of a coparcener had died before 09/09/2005, since she would not have acquired any rights in the coparcenary property; her heirs would have no right in the coparcenary property. Since section 6 (1) expressly confers right on daughter only on and with effect from the date of coming into force of the Amendment Act, it is not possible to take the view being canvassed by learned counsel for the appellants that heirs of such a deceased daughter can also claim benefits of the amendment. Two conditions necessary for applicability of amended section 6 (1) are:

i. The daughter of the coparcener (daughter claiming benefit of amended section 6) should be alive on the date of amendment coming into force;

ii. The property in question must be available on the date of the commencement of the Act as coparcenary property.”

The Hon’ble Bombay High Court in this judgment held that, amended Section 6 of the Hindu Succession Act is retroactive in the nature. The Bombay High Court also considered the applicability of the amended provision to daughter born prior to 17.06.1956 and after 17.06.1956 but prior to 09.09.2005. It was held that, it is imperative that the daughter who seeks to exercise such a right must herself be alive at the time when the Amendment Act, 2005 was brought into force. The Principal Act was
applicable to all Hindus irrespective of their date of birth, when it came into force. The date of birth was not a criterion for the application of the Principal Act. The only requirement is that when the Act is being sought to be applied, the person concerned must be in existence or alive. So, to ensure the rights which are already settled the Parliament has specifically used the word “On and from the commencement of Hindu Succession (Amendment) Act, 2005”. It was observed and laid down that, the Amendment Act applies to all daughters born prior to 09.09.2005 and who are alive on the date of commencement of that Act i.e. on 09.09.2005. The case of coparcener who died before 09.09.2005 would be governed by pre-amended Section 6 (1) of the Act. It is only in case of a coparcener on or after 09.09.2005 that, the amended Section 6(3) of the Act would apply. The provisions of amended Section 6(3) do not and cannot impligned upon or curtail or restrict the rights of daughters born prior to 09.09.2005. Sub section (1) and (2) of amended Section 6 and sub section (3) operate in two different fields.244

This judgment of Hon’ble Bombay High Court has laid down the minute details to be considered by all the Courts and has laid down the law in respect of the Amendment Act of 2005. The ratio has paved way to many women, who are aspiring to assert their rights in coparcenary property. It has given a huge relief to the daughters to fight with the discrimination on the ground of gender and the consistent oppression and negation of their fundamental right of equality.

The rule laid down in Section 6 has very wide and extensive application and has to be read in a comprehensive manner. It overrides inter alia, the old law on the subject of stridhana in respect of all property possessed by a female, whether acquired by her before or after the commencement of the Act and this section declares that all such property shall be held by her as full owner. It confers full heritable capacity on the

244 Ibid
female heir and this section dispenses with the traditional limitations on
the powers of a female Hindu to hold and transmit property. The effect of
the rule laid down in this section is to abrogate the stringent provisions
against the proprietary rights of a female which are often regarded as
evidence of her perpetual tutelage and to recognize her status as
independent and absolute owner of property. 245

In Punithavalli v. Ramalingam, 246 the Supreme Court pointed out
that the estate taken by a female Hindu under sub-s (1) is an absolute one,
and is not defeasible and its ambit cannot be cut down by any text or rule
of Hindu law or by any presumption or any fiction under that law.

In Eramma v. Veerupana, 247 the Supreme Court examined the ambit
and object of this section and observed that the property possessed by a
female Hindu, as contemplated in the section is clearly property to which
she has acquired some kind of title, whether before or after the
commencement of the Act. It may be noticed that the Explanation to
Section 14 (1) sets out the various modes of acquisition of the Property a
female Hindu and indicates that the section applies only to property to
which the female Hindu has acquired some kind of title, however restricted
the nature of her interest may be. The words ‘as full owner thereof and not
as a limited owner’ in the last portion of sub-s (1) of the section clearly
suggest that the legislature intended that the limited ownership of a Hindu
female should be changed into full ownership.

In other words, Section 14(1) of the Act contemplates that a Hindu
female, who, in the absence of this provision, would have been limited
owner of the property, will now become full owner of the same by virtue of
this section. The object of the section is to extinguish the estate called
‘limited estate’ or ‘widow’s estate’ in Hindu law and to make a Hindu
woman, who under the old law would have been only a limited owner, a

full owner of the property with all powers of disposition and to make the
estate heritable by her own heirs and not revertible to the heirs of the last
male holder. It does not in any way confer a title on the female Hindu
where she did not in fact possess any vestige or title.  

The trend of more recent decisions of the Supreme Court has been to
lay stress on the Explanation to sub-s (1). In one such decision, the
Supreme Court adopted the approach of giving ‘a most expansive
interpretation’ to the sub-section with a view to advance the social purpose
of the legislation which is to bring about a change in the social and
economic position of women.

The section should be read with S.4 which gives overriding effect to
the provisions of this Act with respect to all matters dealt with in the Act
and also enumerates matters which are not affected by this Act. Reference
may also be made to S.5.

The expression ‘female Hindu’ in the section would, as explained by
the Supreme Court in Vidya v. Nand, means and include any female Hindu.
A daughter being a female Hindu would be covered within the ambit of the
section. Thus when a father put his daughter in possession of property,
such daughter would become full owner on this Act coming into force.

The expression ‘any property’ possessed by a female Hindu read
with the expression in any other manner whatsoever in the explanation to
the sub-section is wide enough so as to envisage a female Hindu coming
into possession of property otherwise than by the modes prescribed in the
earlier part of the explanation. The use of the above words demonstrates
that the legislature also envisaged other legal modes by which a female
Hindu could come into possession of property.

5.5 Doctrine of Pious Obligation – Position Before & After Amendment Act 39 of 2005:

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

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

According to Gautam, money due by a surety, a commercial debt, a fee (due to the parents of the bride), debts contracted for spirituous liquor or in gambling and a fine shall not involve the sons (of the debtor). Yajnavalkya in this respect declared that a son has not to pay in this world his father’s debt incurred for spirituous liquor, for gratification of lust or gambling, nor a fine nor what remains unpaid of a toll; nor (shall he make good) idle gifts. Narada is not far behind when he said that a father must not pay the debt of his son but a must pay a debt contracted by his father excepting those debts which have been contracted from love, anger,
spirituous liquor, games or bailments. According to Vyasa, the son has not to pay a fine or the balance of a fine or a tax (or toll) or its balance (due by the father) nor that which is not proper.

**Effect of the judicial decisions on the doctrine:**

The doctrine, as formulated in the original texts has been modified in some respects by judicial decisions. Under the law, as it now stands, the obligation of the son is not a personal obligation, existing irrespective or the receipt of any assets. It is a liability confined to the assets received by him in his share of the joint-family property or to his interest in the same. The obligation exists whether the sons are major or minor or whether the father is alive or dead. If the debts have been contracted by the father and they are not immoral or irreligious, the interest of the sons in the coparcenary property can always be made liable for such debts.\(^{251}\)

The fundamental rule is that a Hindu son is not liable for debt contracted by his father, which Ayavaharika, i.e., illegal, dishonest or immoral. The facts, circumstances and conduct of the father are to be looked into to ascertain the nature and character of the debt.\(^{252}\)

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

**Liability when arises:** The son’s pious duty to pay off his father’s debt not contracted for illegal or immoral purposes, is present liability annexed to both the father’s and son’s interests in the ancestral property and does not depend on the facts whether the father is alive or dead. His liability arises the moment the father fails to pay or the father’s share in the joint

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\(^{251}\) *Sidesh v. Budeshrar*, AIR 1943 SC 487.

\(^{252}\) *Bipro Charan Sabato v. Vairi Sabato* (1979) 47 CIT 553.
property or his self-acquired properties are found insufficient to meet debts.

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

**Son’s liability** – The liability of a son to pay the debts of the father is not personal; it is limited only to the son’s interest in the coparcenary property. This view was again supported by Gujarat High Court in *Jayanti Lal v. Srikant.*[^253] The Court held that the doctrine of pious obligation applies to the debts contracted by the father before partition but it does not apply to debts incurred after partition. The sons even after partition are under pious obligation to pay off the debt incurred by their father before partition.

**Privy Council on son’s liability:** -

Their Lordship of the Privy Council have laid down the following five propositions in respect of father’s power to contract the debts and son’s liability to pay it.[^254]

1. The managing member of a joint undivided estate cannot alienate or burden the estate ‘qua’ manager except for purpose of necessity, but,

2. If he is the father and other members are the sons he may, by incurring debt so long as it is not for an immoral purpose lay the estate open to be taken in execution upon a decree for payment of that debt.

3. If he purports to burden the estate by mortgage then unless that mortgage is to discharge antecedent debt, it would not bind the estate.

[^254]: *Raja Brij Narayan Rai v. Mangla Prasad Rai* (1923) 15 IA 129
Antecedent debt means antecedent in fact as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached.

There is no rule that this result is affected by the question whether father, who contracted the debt or burdened the estate, is alive or dead.

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

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

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

decree for payment of the debt by the sale of property. If there is just debt owing by the father, it is open to the creditor to realize the debt by the sale of the property in execution of the decree or with the sale of the property in the execution proceedings unless he can show that the debt for which the property is sold is either non-existent or is tainted with immorality or illegality.  

Thus, under the Mitakshara School of Hindu Law:

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

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

**Liability to Pay Debts:**

The Hindu Law maintains high sense of morality as regards payment of debts as it is deemed necessary for the salvation of the debtor's soul. The sons, grandsons and great-grandsons have, therefore, been made liable to pay the debts of their ancestors if they have not been incurred for immoral or illegal purposes. According to 'Smritis' the non-payment of a debt was regarded as a sin, the consequences of which follow the debtor after his death. A test which is attributed to Katyayana observed that he who having received a sum lent or the like does not repay it to the owner, will be born hereafter in the creditor's house a slave, a servant, a woman or a quadruped. There are other texts which say that a person in debt goes to hell. Hindu Law-givers, therefore, imposed a pious duty on the descendants of a man including his son, grandson and great-grandsons to pay off the debts of their deceased ancestor and relieve them of torments of hell consequent on non-payment. Thus, Narada opined that the son, born,

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should without keeping his self-interest in mind, liberate his father from
debt earnestly so that he (father) may not go to hell.

The researcher has analyzed that the father, grandfather and great-
grandfather as karta, of a joint family, have authority to contract debts for
‘necessity’ or ‘benefits’ of the family and the whole joint-family property,
including the interest of sons, grandsons and great-grandsons, is liable for
the payment of that debt. This liability has not been abolished by the Hindu
Succession (Amendment) Act, 2005.

But the sons are also liable to pay the debts contracted by their
father, for his own personal benefit, during the time of their jointness;
provided such debts are not contracted with “immorality”, i.e., they were
not contracted for illegal or immoral purposes.\textsuperscript{257}

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

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

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

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

\textsuperscript{257} \textit{Sideshwar v. Bhuleshwar}, AIR 1953 SC 487.
Nature of liabilities-Three-fold - According to Mayne, the liabilities of a Hindu to pay debts contracted by another arises from three different sources.

1. Religious- The religious duty of discharging the debtor from the sin of his debts-obligations in the case of the son and grandsons only.

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

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

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

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

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

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

(b) Any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the

259 ibid
rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.260

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

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

Special Rules relating to Dwelling House: -

Under the Hindu Succession Act, the general provision is that the rights of a son and daughter are equal. It is without reference to the type of property available for succession. An impression is created therefore, that whatever may be the type of property, be it a house, cash, clothes, vehicle, shop or even household goods, a daughter has an equal claim over it, not merely of ownership, but also of a right to possess, enjoy and alienate it in the same manner as a son. But where the inherited property comprises a dwelling house that was in the occupation of the male members of the family of the intestate, special rules have been provided for its devolution.261

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Section 23 of Hindu Succession Act, 1956 reads as under:\textsuperscript{262}

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

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

and a daughter inherit a house. The daughter is married. Though she owns half of the house, she cannot possess it or live in it without the permission of her brother, even though he owns only half of it.

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

Essential Conditions for application of Section 23:

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

(ii) It does not apply in case of testamentary succession, where the property goes under a will.\(^{263}\)

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

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

(v) Such dwelling house should have been wholly occupied by members of the intestate family. The term wholly means that not even some portion of the house should be in possession of non-family members. Where the whole house or a portion of it is let out to tenants, who

\(^{263}\) Rajeshwari Devi v. Laxmi Devi (1997) 1 HLR 590 (All.)
are total strangers, the house is not wholly occupied and the section is not applicable. Servants and relatives are not family members and if the house is occupied by them, the restriction on female members would not apply. Similarly, wholly occupied does not mean that only the covered area should be occupied. If there is plenty of space around the house which even exceeds the share of the female the dwelling house is not wholly occupied and can be partitioned.²⁶⁴  

(vi) The restriction applies on the females to ascertain their shares till the male heirs do not destruct their joint status which means that they divide by a formal partition and specification of their shares. If they choose to enter into an informal arrangement and occupy different portions of the house, they have not destructed their joint status formally and Section 23 continues to apply. Even if one of the male heirs remains ex parte in a suit for partition the joint status is maintained as is not divided.²⁶⁵ But where the sole male heir sells his half share in the property, it indicates his desire to affect a partition and the female heirs can claim partition.²⁶⁶  

Though a suit for partition and separate possession in a dwelling house is not maintainable until the male heirs themselves destruct their joint status, there is no bar on any adjustment of interests of the parties in the house or in other properties, without destroying the dwelling house as unit and where the male heir expresses his inclination or desire to have a division in the written statement, it is sufficient to enable the female heir to ascertain her share.²⁶⁷  

In other words, till the male heir or heirs are occupying the house and they do not wish to demarcate their shares formally, all class I female heirs suffer from a disability to ascertain their shares. For example, a

²⁶⁴ Purushotam Behera v. Rangabati Barik 1999 AIHC 4760 (Ori).  
²⁶⁷ L. Geeta v. G. Shekhar 2001 AIHC 3264 Mad.
Hindu male dies, leaving behind a widow and son and a house that was being used for residential purposes by his these family members. The son has the ownership of half of this house and this ownership gives him all the rights of an owner, viz., of its possession, enjoyment, demarcation and alienation at his pleasure. He can let it out to anyone, sell it, gift it or simply live in it. He does not have to seek the permission of anyone to do it. But if we look at it from the point of view of the widow, she is the owner of half of the house as well, but her ownership is limited to only a right of residence in it. She cannot ascertain which half belongs to hers, and accordingly, in which corner of the house she would live, will be decided by the son. She cannot let out her portion as it cannot be ascertained. If she sells her probable half, the transferee would stand in her shoes and would also be incapable of ascertaining the share. 268

Take another example, an intestate dies, leaving behind a son and a married daughter and a dwelling house which was in occupation of the son. The son is the owner of half of it, and the daughter is the owner of the other half. If we look at the ownership of the daughter, she is an owner on paper, but as she is married, she has no right even to live in it, unless she is a widow, or is deserted by the husband or is divorced. If she does not fit into the description of a widow, divorcée or a deserted woman, she is not empowered to even step inside her portion of the house, without the permission of her brother. If her husband is transferred out of station for reasons of his employment, and she, having no other place to live, looks for an accommodation, she may be forced to live in tenanted premises, but she cannot live in her own property because she is married. The present set up is vastly different and it may not be feasible for a married woman to follow her husband wherever he is transferred. With a growing number of women taking up employment, and the education of children at a particular place becoming a predominant consideration, spouses without a marital

268 Saroj Kumari v. Anil Kumar 1979 HLR 237.
break-up, may have two different places of residences. The daughter owns property but because it is a share in the house which is occupied by her brother and his family, she cannot live in it.\textsuperscript{269}

This is therefore, merely a paper ownership. If we take a look at the entitlement of the son, he is the owner of half of the property, the other half belonging to the married daughter but as the expression used in Section 23, indicates that the house should be ‘wholly occupied’ by male heirs, the son has legal right to possess and enjoy the share of the sister against her wishes and without any monetary return. He owns only half of the house, but Section 23 gives him a right to enjoy the whole house. An equitable division of property is what the legislature expects sharers to give effect to, but here, there are no rules requiring the brother, who now has a legal permission to enjoy the share of the sister, to give her something in return.\textsuperscript{270}

This ‘free for life use’ of the share of a female by a male heir, without her consent, is in the nature of deprivation of one for the unjust enrichment of another. This deprivation is of the right of the female, so that the male heirs can live comfortably in her share. The legislature has not fixed even a time frame within which the brothers should demarcate their shares and there for, the law made it very convenient for them to appropriate the share of their married sisters. The only thing that they cannot do is to sell her share, but Section 23 gives physical possession and enjoyment of her share, to the male heirs.

Maximum hardship is done to a married daughter. The acquisition of property as an owner carries with it, all the basic incidences of ownership, i.e., a right to the title, a right to possess and enjoy the property and a right to sell it at the owner’s pleasure. Section 23 gives a married daughter a title, but no right to possess and enjoy the property and consequently even

\textsuperscript{269} \textit{Ibid}
\textsuperscript{270} \textit{Ibid}
though in theory the right to sell the property is not denied, it is inconceivable that this interest, which is without the right of possession, will be purchased by anyone. The practical implication of this statutory interdict on a married daughter to claim partition of the house, till the male heirs decide otherwise, results in the denial of any claim of enjoyment of the dwelling house.

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

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

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

Section 23 of The Hindu Succession Act, appearing in the chain of sections of the codified Hindu law, is intended to respect one of the ancient Hindu tenets which treasured the dwelling house of the family as an impartible asset as between a female member and a male member. In order to perpetuate those memorable intentions of Hindu families; Parliament took that auspicious aspect into consideration while codifying the Hindu Law. The Supreme Court has observed that the reverence to preserve the ancestral house in the memory of the father or mother is not the exclusively preserve of the son alone.

5.6 Absolute Ownership of Females under the Hindu Succession Act, 1956:

The Hindu women’s limited estate is abolished and any property possessed by a female Hindu howsoever acquired is now held by her as absolute property and she has full power to deal with or dispose of it by will as she likes. The restraint and limitations on her power cease to exist even in respect of existing property possessed by a female Hindu at the date of the Act coming into force whether acquired by her before or after the commencement of the Act. It is now held by her as full owner and not as limited owner (Section 14).

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271 *Mookkammal v. Chitravadivammal* AIR 1980 Mad 241
272 *Narsimha Murthi vs. Sushila Bai* AIR 1996 SC 1826.
The absolute property belonging to a woman was called Stridhan. Stridhan varied in form. On the basis of nature of manage and source of Stridhan. The Act by Section 15 abolishes all this and propounds a uniform scheme of succession to the property of a female Hindu who dies intestate after the commencement of the Act. The section groups heirs of a female dying intestate into five categories described in entries (a) to (e) and specified in sub-section (I) but these provisions do not apply to persons governed by Marumakkattayam and Aliyasantana laws, as will be clear from the provisions of Section 17 of the Act.

Section 14 of the Act 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 a limited owner. This section explicitly declares the law that a female holds all property in her possession whether acquired by her before or after the commencement of the Act as an absolute owner and not as a limited owner. The rule applies to all property movable and immovable howsoever and whenever acquired by her.

Explanation – In this sub-section, ‘property’ includes 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 form 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\textsuperscript{274}.

(2) Nothing contained in sub-section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award where the terms of the

\textsuperscript{274} \textit{Ibid}
gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

Under the Hindu law in operation prior to the coming into force of this Act, a woman's ownership of property was hedged in by certain delimitations on her right of disposal by acts inter-vivos and also on her testamentary power in respect of that property. Doctrinal diversity existed on the subject. The ancient texts purported to enumerate heads of Stridhana, but without comprehensive signification. Some of the expressions used in those texts were merely supplementary and there was no logical classification. Divergent authorities only added to the difficulties surrounding the meaning of a term to which it sought to give a technical significance. The result was that, a term not difficult to comprehend in its etymological sense came to be understood in a narrower and arbitrarily limited connotation. 275

Absolute power of alienation was not regarded, in case of a female owner, as a necessary concomitant of the right to hold and enjoy property and it was only in case of property acquired by her from particular sources that she had full dominion over it. Even so the ancient law laid down in the texts and interpreted by the Nibandhakars was considerably more liberal in its recognition of her power of alienation, than the rules of Roman law affecting a woman’s peculium and other systems of law under which, till recent times, incorporated and merged the legal existence of the wife during coverture with that of the husband. The restrictions imposed by Hindu law on the proprietary rights of a woman depended on her status as a maiden, as a married woman and as a widow. They also depended on the source and nature of the property. The order of succession to stridhana was different from that in case of property of a male owner and it varied under the different schools. All this gave rise to a branch of law the most complicated of its kind- one which till the passing of the present Act

275 Ibid
continued to be regarded as a complex and very difficult subject. As already pointed out in the introductory chapter, there was some fragmentary legislation, which only added to the number of anomalies already existing and gave rise to conundrums. Section 14 (1) is not violative of Article 14 or 15 (1) of the Indian Constitution.

It is an established position of law that a female in possession of property even as a limited owner becomes an absolute owner by the operation of Section 14 (1) of the Act. Thus, where a widow was put in possession of property by a deed executed by her husband giving her life estate in 1945, she was held to have become absolute owner by virtue of Section 14 (1). Any alienation made by her, could not, therefore, be challenged by other heirs of the deceased husband. So also in *Gulab v. Vuhai* where a widow after the death of her husband was residing in one-third portion of the house with her brother-in-law, it was held that after the coming into force of the Act she became the absolute owner of the portion notwithstanding the fact that in the partition deed made in 1938 it was stated that she has only a right of residence therein. A registered gift deed executed by her in 1965 was consequently held to be valid. A widow's limited interest in the property of her deceased husband given to her in lieu of maintenance by way of compromise prior to the Act was held to have ripened into full ownership right after the Act.

When first wife died in 1923 before the death of the deceased husband, and two widows who were surviving in 1946 inherited as widow’s estate as joint tenants, they became absolute owners on the coming into force of the Act in 1956. On the death of one of them in 1974 without any heirs, the sole surviving widow would succeed to the entire property by

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276 Hindu Women’s Rights to Property Act, 1937
277 *Agasti Karuna v. Cherukuri Krishnaiah*, 2000 AIHC 84(AP)
278 *Gulab v. Vuhai* 2000 AIHC 913 (Bom)
279 Annual Survey of Indian Law Institute, 2000, Vol. XXXVI, pg. 308
survivorship. The daughter of the widow who died in 1923 was held not entitled to property which devolved on the surviving widow. In A. K. Laxmanagounda v. A.K. Jayaram a sale deed was challenged by the sons on the ground that the mother had only a life interest in the property. The facts were that the deceased had bequeathed the property to the sons and life interest was created in favour of the widow in lieu of maintenance. Her life interest blossomed into absolute ownership by virtue of section 14(1) of the Act. The widow sold the properties to meet the marriage expenses of her daughter and the sale deed executed by her was for valid consideration. The alienation was held to be legal and valid.

Likewise, in Kuthala Kannu Animal v. L Nadar where the widow was granted property during partition in recognition of her right of maintenance and subsequently the Act came into force, it was held that, her limited right transformed into full ownership entitling her to execute a gift deed of the same to her grandson. Yamanappa Dudappa Marve v. Yellubai a part of joint family property was settled upon the widow in lieu of her right towards maintenance, by the father-in-law. In a suit for partition filed by the widow the father-in-law admitted that the property was given to the widow. It was held that such admission made by the father-in-law was binding on the other son who challenged the widow’s absolute ownership.

On the other hand in Gulabrao Balwant Rao Shinde v. Chhabubai Balwant Rao Shinde and Anoop Kaur v. Anup Singh Grewal the widows were held to be only limited owners. In the former case, the

283 Kuthala Kannu Animal v. L Nadar AIR 2001Mad 320
286 Anoop Kaur v. Anup Singh Grewal AIR 2003 P&H 241
dispute was between the children of two widows. The deceased had remarried after death of the first wife. Children of the first wife filed a suit for recovery of half share of property left by their father whereas the respondents, children of second wife, claimed ownership of entire property on the plea that their mother was the absolute owner of those properties. The high court held that the second wife possessed properties left by the husband in lieu of maintenance and after coming into force of the HSA, her right enlarged into full ownership. On appeal by the children of first wife, the court held that in the absence of any pleadings and evidence to the effect that deceased had given the property to the widow in lieu of maintenance, the high court was wrong in holding that property in her possession became her absolute property. Moreover, the property in the hands of the deceased being ancestral, entire property could not have been given to the wife by way of maintenance.

In *Gorachand Mukherjee v. Malabika Dutta* 287 where a widow who had no pre-existing right of maintenance was given right of possession to the suit property till the death of her maternal uncle and aunt it was held that her life interest could not ripen into absolute title under section 14(1). The court held that the maternal uncle or aunt had no moral or legal obligation to maintain their niece and the right to possession of property given to her by them is not in lieu of maintenance and so it does not ripen into absolute right.

In *Komireddy Venkata Narasamma v. Kondareddy Narasimha Murthy* 288 a childless couple brought up the wife’s niece as their own child and also married her off. The husband executed a deed of settlement in 1961, created a vested remainder in favour of the wife and a life interest in his own favour. In 1963, he executed a will creating a life interest in favour of his wife and after her death the property was to devolve on the

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287 *Gorachand Mukherjee v. Malabika Dutta* AIR 2002 Cat. 26
288 *Komireddy Venkata Narasamma v. Kondareddy Narasimha Murthy* AIR 2006 AP 40
niece absolutely. After the death of the husband, the wife though has a life interest in her favour, executed a deed of settlement of the same property in favour of X. The question before the court was whether the right created in favour of the wife by the husband had enlarged into an absolute right. Was it a right primarily to secure her maintenance rights, i.e., in lieu of her pre-existing rights of maintenance? Since this property was in the nature of a residence, the question before the court was whether a residence is akin to maintenance or it can be distinguished as conferring a mere right of residence.

The court relied on its earlier decision and concluded that the right of residence is a facet of maintenance and what was created in favour of the wife was not a right of maintenance alone but right to enjoy the property during her life time without the right to alienated. This right by operation of Section 14 (1) of the Act, enlarged into an absolute right. Since the wife had an absolute right in her favour, the settlement made by her in favour of X was capable of taking effect in law and thus the vested remainder created in favour of the niece did not materialize.

Under the law as it stood prior to 1956, a Hindu widow had only a limited interest in the property of her husband on his death, and on her death the property was to revert on the reversioners. However, under Section 14 of the Act, the property possessed by a Hindu widow, whether acquired before or after the enactment of the Hindu Succession Act, would be held by her as an absolute owner thereof. The term acquired would include the property acquired by the widow through succession and she would hold it as an absolute owner with full powers of alienation.

According to Section 14(2), the owner of a property is competent to confer a limited estate in favour of any Hindu female voluntarily and such limited estate would not mature into an absolute one. The reason is that the

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291 Managal Singh v. Kehar Singh, AIR 2007 (NOC) 212 (P&H)
owner has a liberty to make a disposition of the property in accordance with his wishes. However, where under a will the property was given to the Hindu female in lieu of her pre-existing maintenance rights. Such property notwithstanding the fact that it was bequeathed to her as a limited estate, would mature into an absolute ownership. Thus, where the husband settled the property in favour of his wife through the will, in lieu of her maintenance rights, such property would become her absolute estate on the commencement of the 1956 Act, in the provision of Section 14 (2) would not be attracted.292

Section 14 of the Act contains revolutionary provisions in respect293 of Hindu women’s proprietary rights and is a step towards gender justice. “The effect of the rule laid down in this section is to abrogate the stringent provisions against the proprietary rights of female which are often regarded as evidence of her perpetual tutelage and to recognized her status as independent and absolute owner of property.”294

Before the enactment of this Act, the Hindu woman's property commonly known as Stridhan was of two kinds: (i) absolute property and (ii) limited estate. She had the absolute right to deal and dispose of the former kind of property but with respect to limited estate, no such rights were available. It was a peculiar kind of property almost unknown in any other system of jurisprudence. The present Act has conferred absolute ownership on Hindu females with respect to also that kind of property which was known as her ‘limited estate.’ In this way, this section has enlarged the limited estate of Hindu woman into her absolute property. Moreover, the pre-Act textual and judicially developed law of woman's limited estate, which was very complicated; has now been simplified. It may be noted that the enhancement of woman’s limited estate into absolute interest is within the spirit of the Constitution of India, and is not violative

293 R.K. Aggarwala, Hindi Law, 22nd Ed. 2007, p. 279-80
294 Mulla, Principles of Hindu Law, Ed. xvi (reprint 1994) p. 806
of fundamental right (to equality) guaranteed under Articles 14 or 15 (1) of the Constitution.\footnote{295 Pratap Singh v. Union of India, AIR 1985 SC 1694.}

From a plain reading of Section 14 (1) it is clear that the estate taken by a Hindu female under that provision is an absolute one and is not defeasible under any circumstance. The ambit of that estate cannot be cut by any text, rule or interpretation of Hindu Law. In \textit{Sukhiram v. Gauri Shanker},\footnote{296 Sukhiram v. Gauri Shanker, AIR 1968 SC 356.} their Lordships of the Supreme Court held that though a male member of a Hindu family governed by the Banaras School of Hindu Law is subject to restriction qua alienation of his interest in the joint family property but a widow acquiring an interest in that property by virtue of Hindu Succession Act is not subject to any such restriction. It has also been held by the Supreme Court\footnote{297 Commissioner of I.T. v. Kakila Devi, AIR 1970 SC 1730.} that Section 14 clearly says that the property possessed by a female Hindu on the date the Act came into force whether acquired before or after the commencement of the Act, shall be held by her as full owner thereof. That provision makes a clear departure from the Hindu Law texts or rules. Those texts or rules cannot be used for circumventing the plain intendment of the provisions.

In \textit{Koppurswami v. Veeravva},\footnote{298 Koppurswami v. Veeravva AIR 1959 S.C. 577.} the Supreme Court approving the view of Calcutta High Court observed that "the opening words of Section 14, i.e., property possessed by a female Hindu, obviously mean that to come within the preview of the Section the property must be in possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's possession when the Act came into force.

The possession must have been either actual or constructive or in any form recognized by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute 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 would not apply.” The court further observed that the object of the Act was to improve the legal status of Hindu women, enlarging their limited interest in property inherited or held by them to an absolute interest, provided they were ill possession of the property when the Act came into force and, therefore, in a position to take advantage of the beneficial provisions, but the Act did not intend to benefit alienee who with their eyes open purchased the property from the owners without justifying necessity before the Act came into force and at a time when the vendors had only a limited interest in the property.”

In 1987, the Supreme Court decided a landmark case in *Jagannathan Pillai v. Kunjithapadam Pillai*,299 in which the scope of Section 14(1) was considerably enlarged. The court observed that “the expression “possessed” has been used in the sense of having a right to the property or control over the property. The expression any property possessed by a Hindu female whether acquired before or after the commencement of the Act” on an analysis yields to the following interpretation: (1) Any property possessed by Hindu female acquired before the commencement of the Act will be held by her as a full owner thereof and not as a limited owner. (2) Any property possessed by a Hindu female acquired after the commencement of the Act will be held as a full owner thereof and not as date of coming into operation of the Act is not the sine qua non for the acquisition of full ownership in property. In fact, the intention of the legislature was to do away with the concept of limited ownership in respect of the property owned by a Hindu female altogether.

In the above case a widow before the commencement of the Act inherited certain property of which she was a limited owner. She disposed of that property through a registered sale deed before the Act came into force. After the commencement of the Act the transferee again transferred

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the same property to the widow for consideration. The court held that she became absolute owner of the property. She has regained possession of the property subsequent to the commencement of the Act upon the retransfer of the very same property to her by the transfer in whose favour she had transferred it prior to the commencement of the Act; she would become its ‘absolute owner’. When she bought the property from the alienee to whom she had sold the property prior to the enforcement of the Act, she acquired the property within the meaning of the Explanation to Section 14(1) of the Act. Where the property was alienated before the commencement of the Act and the widow trespassed on the property and had physical possession as a trespasser without any title, she cannot claim the benefit of Section 14(1).

5.7 **Daughters Right to Partition Dwelling House of Father after the Hindu Succession (Amendment) Act, 2005**

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

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300 Prof. U.P.D. Kesari, Modern Hindu Law, 10th ed., 2015, p. 249-50

to all proceedings whether original or appellate involving adjudication of rights of parties and pending as on this date or initiated after it.

In Santosh Kumar’s case the prayer for a partition of the dwelling house was contested by the brother on two grounds, firstly, that the daughter does not have a right to have her share ascertain under the act, and secondly, that since he had made substantial improvements in the house at his own cost the same should be reserved for him. Strangely enough the trial court granted the verdict in his favour and the matter was carried in appeal by his sister. The high court reserve the ruling of lower court and held that if one co-sharer makes improvements or modifications in the common property without the consent of other sharers he does it at his own peril and at best can claim only an equitable consideration for the allotment of the house to him after its valuation. With respect to the second issue, during the pendency of this appeal the Hindu succession act was amended and section 23 was deleted and the brother contended that the petition should be considered in light of the facts and the legal position as it stood and existed on the day of the filing of the petition and not in light of the subsequently changed legal and factual scenario. The court held and rightly so that this right of the brother or any male heir under section 23 was personal in character and was neither transferable nor heritable and if it was held that the situation and legal position existing on the date of presentation of the petition only should be considered and regard should not be had to subsequent events then it would mean that this right could become heritable, i.e., a defeasible right of a male heir would get defeated the movement his personal right ceases. Such personal right of the male heir is taken away by the omission of section 23. The effect of such commission would be retroactive. Holding that one co-sharer cannot build on the common property in such a way as to defeat the legitimate rights of other co-sharer when the extent of property is small, such construction would make it impossible to partition the property in specie among all co-
sharers. The law does not recognize any such right in one co-sharer to make improvement in co-ownership property without express consent granted by other co-owners. The entitlement to get share in a co-ownership property is a very valuable right and it cannot be defeated by one co-owner by constructing a building in it without the consent of the other co-owners. He cannot thereafter claim to allot the entire property including the building without valuating the structure. Such unauthorized acts of a co-owner in a co-ownership property would defeat the rights of other co-sharers who have equal hare in the property. The situation would be grave if the extent of the property is small. The courts, thus, rejected the claim of the brother as he had only 1/6th share in the total property, and allowed the plea of the sister for ascertaining her share in the property.

5.8 Disqualification from Inheriting the Family Property:

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

(i) Mental Infirmities: These included congenital idiocy and insanity.

(ii) Physical Defects: absolute and complete lameness, a person born blind, deaf, dumb, an impotent or a eunuch.

According to Yajanavalkya, “An impotent person, an outcaste and his issue, one lame, a madman, an idiot, a blind man and a person affiliated with an incurable decease, are persons not entitled to a share and are to be maintained.” Vijaneshwara says that the above mentioned person must be supported by an allowance of food and raiment only. Manu says, “Impotent person and outcastes, persons born blind or deaf, the insane, idiot and the dumb, as well as those deficient in any organ (action or succession) receive no share.” See Yajanavalkya, vol II, p. 140; Mitakshara, II, X, P. 5, 10; Manu, vol. IX, p. 201; also see Poonam Saxena Family Law lectures Family Law-II, 2nd edition 2007, p. 490.
(iii) **Diseases:** Virulent form of leprosy and other incurable and chronic diseases.

(iv) **Conduct:** An outcaste and his issue, a person entering a religious order by becoming a hermit or a sanyasi, a murderer disqualified on ground of public policy, and in case of a woman, on grounds of her unchastity.

**5.8.1 Hindu Inheritance (Removal of Disabilities) Act, 1928:**

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

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

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

The disqualification on grounds of change of religion, loss of caste or excommunication, had already been removed by The Caste Disabilities Removal Act, 1850, and therefore, it was congenital idiocy and lunacy, that disqualified an heir from inheriting. Yet, at the same time, a murderer continued to be disqualified on the grounds of public policy. As the Act was silent on the aspect of disqualification based on the unchastity of females, it continued despite the passing of the act.
5.8.2 Disqualifications under the Hindu Succession Act, 1956:

The present law provides for three types of disqualifications only, which are based on a violation of the fundamental principles of inheritance.\(^{303}\)

(a) Convert’s Descendants:

The Hindu Succession Act, 1956, applies to Hindus. Therefore, not only the intestate, but the heir must also be a Hindu. If the heir is of a different religion, he or she is not eligible for inheriting the property of the Hindu relative under the Hindu Succession Act, 1956. Under Hindu law, a person who was excommunicated or who ceased to be a Hindu by converting to another religion, lost the right to inherit the property of his Hindu relatives, despite the closeness of blood relationship. For example, if a son has converted, he will lose the right to inherit his father’s property. This general rule, which was applied strictly, was modified by the enactment of the Caste Disabilities (Removal) Act 1850. This Act was also known as The Freedom of Religion Act 1850, and it removed the disabilities that a person suffered from, on his conversion to another religion or in his excommunication, and one of the disabilities that it removed was the ‘inability to inherit the property of a relative of the former religion.’ This act was general in application and was not confined to only Hindus and Muslims.

Though directed primarily at protecting the inheritance rights to the convert, it enabled a non-Hindu to inherit from Hindu, thereby making an inroad into the basic principle of succession of this religion based law, viz., the sameness of religion of the intestate and the convert. But beyond protecting the convert personally, it did not extend the protection any further, i.e. to his descendants, not did it affect the rule of similarity of religion of the intestate and the heir, in any other manner. Therefore, a

convert, irrespective of his/her religion, inherits from the Hindu intestate, not because Hindu law permits it, but because of the statutory protection conferred on him by the Caste Disabilities Removal Act 1850. Hindu law did not permit a convert to inherit, but this rule was expressly abolished by the legislation. A convert’s descendants, born to him after such conversion, if not Hindus, will be disqualified from inheriting the property of the intestate.

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

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

(b) **Born after Conversion:**

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

After the birth of SS, S and SW convert to the Muslim faith and a daughter SD is born to them. Shortly, thereafter, S dies. Now, on the death of the father F, SW will retain her inheritance rights as she is a convert and her rights are statutorily protected. SS will inherit as he is the son of a predeceased son, born to him before conversion, but SD will be disqualified as even though she is a class I heir, she was born to the Hindu father after his conversion to Muslim faith, and since, at the time of her birth, both parents were Muslims, she is a Muslim by birth, and not a Hindu.

A Hindu male H, gets married to a Hindu female W and Son S, is born to him. On the death of W, H converts to the Muslim faith and gets married to a Muslim girl W2 and son S1 is born to him from her.

**Let us consider three situations:**

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

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

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

A convert’s descendants should be Hindus in order to inherit the property of the intestate, at the time when the succession opens. It is the time of the death of the intestate that is material for determining whether the convert’s descendant is eligible to inherit the property or not. If the descendant was not a Hindu at the time of opening of the succession, but converts to the Hindu faith subsequently, he would still not be entitled to succeed.

Remarriage of Widow\textsuperscript{306}:

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

5.9 Certain Widows Disqualified in Remarriage – Law Prior to and After The Hindu Succession (Amendment) Act, 2005:

For a male intestate, his own ‘widow’ will become a widow when he dies and therefore, there is no question of her being married at the time of the opening of the succession. With respect to the father’s widow, the term

would include both the intestate’s own mother as well as a stepmother. The intestate’s own mother is related to her son by blood, and not by marriage to the father only. She inherits in her own right and she does not cease to be the mother by her remarriage, and so, her rights are not affected by her marital status.307

The stepmother on the other hand, is a relation introduced in the family by her marriage to the father of the intestate, and upon her remarriage, she ceases to be a member of this family and her position should not be any different from that of the other three windows, whose remarriage before the opening of succession, disqualifies them from inheriting the property of the deceased. In the original Hindu Succession Bill 1954 (Bill No. 13), the father’s widow was in fact, included in this category, along with the other three widows, whose remarriage disqualified them from inheritance. But there was no differentiation between a biological or adoptive mother and any other widow of the father (step mother) of the intestate. Rather than differentiating between the two, the legislature removed this category from the disqualification clause and created an anomalous situation. Now a stepmother can remarry after the death of the father of the intestate, and still retain her rights of succession in the property of her step son. They could have retained the expression father’s widow along with the brother’s sons and son’s son’s widows, with an explanation, ‘that the expression father’s widow does not include the mother of the intestate.’ By not doing this, it has created a distinction between her and the widows of the other deceased male members, which is not based on any logical explanation.308

Under Section 24, three widows, who have been specified by their relationships, namely, the widow of a predeceased son, the widow of a predeceased son of a predeceased son or a widow of a brother, shall not be

308 Ibid
entitled to succeed to the property of the intestate as such widows, if on
the date the succession opens, they have remarried.\textsuperscript{309}

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

\textbf{Marital Status relevant on the Date of Opening of the Succession:}

The date of opening of the succession is the date when the intestate
dies, and therefore, the marital status of the widows is material as on that
date. If on that date, the widows fit the description of widows of the
respective male relations, they will be entitled to inherit and their
subsequent remarriage will not divest them of the property already vested
in them.\textsuperscript{310}

Let us examine three situations here again:

(i) A dies and is survived by his brother B\textsubscript{1} and a widow of his
predeceased son. As the widow of the son is a class I heir, she will
inherit the property and the brother will not get anything.

(ii) A dies in 1990 and is survived by his brother B\textsubscript{1} and the widow of
his predeceased son SW, who remarries after two days of A’s death.
Here again, as SW did fit the description of a widow of a

\textsuperscript{309} \textit{Ibid}

predeceased son on the date of opening of the succession, i.e. the
date of the death of the intestate, the property vests in her the
moment the succession opens. A day or two days later, when she
remarries, she will not be divested of the property already vested in
her.

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

The disqualification on the ground of remarriage applies in case any
of these three widows remarry yet, claim to inherit as widows. For
example, the widow of a predeceased son, remarrying before the death of
the intestate, cannot succeed to his property as his son’s widow, but if she
claims to inherit in some other capacity, then the fact that she was once his
son’s widow will not disqualify her if she is otherwise entitled to inherit.
Under Hindu law, the prohibited degrees of relationship are so
contemplated, that ordinarily, the widow of a male relation, who is an heir
to the intestate, cannot marry another male relation, on whom death, she
could still be an heir of the intestate, unless there is a custom to the
contrary in the community to which both the parties belong. The widow of
a lineal descendant and the widow of a predeceased brother are under the
prohibited degrees of relationship under the Hindu Marriage Act 1955, and
a marriage solemnized in violation of this degree, will be a void marriage
in the eyes of law, conferring no benefits unless the parties establish a
contrary custom.
Section 24 has been deleted by the amending Act. However, it does not mean that the situation and the eligibility criteria have changed. Even without 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 alter the situation at all.\(^{311}\)

Under the Hindu succession Act 1956 two categories of relatives are recognized as heirs to the intestate. One who were related to the deceased through blood and second who were related to the deceased through marriage i.e, who entered the family of the deceased through marriage to the male members. The disqualification of remarriage is attached to those heirs who entered the family by marriage, became widows on the death of the respective male members to whom they were married, and went out of the family again by a remarriage. Marriage or remarriage of blood relatives such as daughters, sisters, and mother is of no consequence, but remarriage of son’s widow, son’s son’s widow, or brother’s widow would mean that they cease to be members of the intestate’s family, and their inheritance rights would be created in the family they are married into. After remarriage, they would be related to the intestate neither as blood relatives nor by marriage and therefore would not be eligible to be his heirs.\(^{312}\)

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


\(^{312}\) *Ibid*
furtherance of the succession to which he or she committed or abetted the commission of the murder.

Commission of Murder means to kill or to assassinate and it is to be understood in its popular sense, and not in the technical, rigid and beyond reasonable doubt proof oriented sense of the Indian Penal Code. An acquittal from the criminal courts on the basis of benefit of doubt, or because the prosecution could not prove the case beyond reasonable doubt, may still disentitle a person from inheriting the property of the intestate whom he killed. A murder committed under grave and sudden provocation, or even to save one’s own life or the life of some other person, might be looked upon sympathetically under criminal law, but it would not place the heir differently from a case where he kills the intestate through meticulous planning and a well-executed murder. The civil courts are not bound, normally, by the verdict of the criminal court and they can assess the case independently. However, if there is a finding of the criminal court that the claimant is not the murderer and the deceased had committed suicide, then there is no bar to the claimant being granted a share in the property of the deceased.313

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

5.10 Decision of Supreme Court on Property Rights of Women:

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

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

The Supreme Court in Narashimah Murthy v. Sushilabai, held that a female heirs right to claim partition to the dwelling house of the Hindu dying intestate under Section 23 of the Hindu Succession Act, 1956 would be deferred or kept in abeyance during the life time or even a sole surviving male heir of the deceased until he choose to separate his share or ceases to occupy it or lets it out. The idea of this section is to prevent the fragmentation and disintegration of the dwelling house at the instance of the female heirs, the detriment of the male heirs in occupation of the house, by rendering the male heir homeless or shelterless.

314 Gurupad v. Heerabai AIR 1978 SC 1239
317 AIR 1996 SC 1826
The more important observation was made by Supreme Court in a case\textsuperscript{319} where it was held that the eligibility of married daughter must be placed at par with an unmarried daughter for, she must have been once in that state, so as to claim the benefit. Hence, once a daughter is made a coparcener on the same footing as a son then the right as a coparcener should be real in spirit and content. Hence his spirit inspired the Indian Parliament to omit Section 23 in toto from the Hindu Succession Act of 1956.

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

In case of \textit{Radhika v. Aghnu Ram Mahto},\textsuperscript{320} the Supreme Court in respect of property right of daughter of second wife, held that, for the property inherited by a female Hindu from her father or mother, a female’s paternal side in the absence of her son, daughter or children of the predeceased son or daughter, the succession opens to the heirs of the father or mother and to the class I heirs, in the order specified in sub-section (1) of Section 15 and in Section 16 of the Hindu Succession Act of 1956.

The Apex court in \textit{P.S. Sairam v. P.S. Rama Rao},\textsuperscript{321} held that the shares of the parties in the joint Hindu family property have to be determined in accordance with the provisions of Section 6 of the Hindu Succession Act, 1956 and accordingly decreed in favor of seven daughters of the joint family along with male heirs accordingly.

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In one case\textsuperscript{322} the court had gone negative with women’s right to property and disqualified the daughter in laws right to father in laws property on the ground that the son had murdered his own father. The court went through the matter on the ground of justice, equity and good conscience. Here in this case the sole male survivor, the son incurred disqualification by murdering his own father. He could not inherit property of father in view of Section 25 and 27 of the Hindu Succession Act, 1956. His wife, who claimed to the property through him, could not have a better claim to property of her deceased father in law.

The Supreme Court in dealing with the gift related property held that the father can gift of ancestral immovable property within a reasonable, limits in favour of his daughter.\textsuperscript{323}

The court observed in a case,\textsuperscript{324} that the benefit of Section 29A of the Hindu Succession Act, 1956 can be invoked only by major daughters if they are not married prior to the commencement of Section 29A of the Act.

If the property held by a female was inherited from her father or mother, in absence of any son or daughter of the deceased including the children of any predeceased son or daughter, it would only devolve upon heirs of the father and his sister who was the only legal heir of her father. Deceased female Hindu admittedly inherited the property in question from her mother. The intent of the legislature is clear that if the property is originally belonged to the parents of deceased female, should go to the legal heirs of the father. Further the fact that a female Hindu originally had a limited right and later acquired the full right in any way, would not alter the rules of succession, given in sub-section (2) of Section 15 of the Hindu Succession Act, 1956.\textsuperscript{325}

\begin{itemize}
\item \textsuperscript{322} Valikanu v. R. Singaperumal, AIR 2005 SC 2587.
\item \textsuperscript{323} R. Kappayee v. Raja Gounder, AIR 2004 SC 1284.
\item \textsuperscript{324} B. Chandershekhar Reddy v. State of AP, AIR 2003 SC 2322.
\item \textsuperscript{325} Vithabai Krishanjee Patil vs. Banubai w/o Baby Payamal, AIR 1994 SC 481
\end{itemize}
The Supreme Court in case of *Kalawatibai v. Soiryabai*,[^326] in the matter of widow’s right to property held that a female Hindu possessing the property on the date of the Hindu Succession Act of 1956 came into force, could become absolute owner only if she was a limited owner. The legislature did not intend to extend the benefit of enlargement of estate to any or every female Hindu irrespective of whether she was a limited owner or not.

Both brother and sister are class I heirs under Hindu Succession Act, 1956 and they share property equally.[^327] Under Section 3 of the Hindu Women’s Right to Property, Act, 1937 (now repealed) a widow succeeds as an heir to her husband.

The chance of daughter to succeed to her father’s estate in case of father died intestate not a pre-existing legal right. The destitute widowed daughter has a right to claim maintenance from her father both during his lifetime and also against his estate after his death.[^328] The illegitimate daughter cannot claim heirship as per section 15 of the Hindu Succession Act, 1956.[^329]

The Supreme Court’s stake on women right to ancestral property is very much clear. The court has observed that the father would have to be alive on 9th September, 2005, if the daughter were to become a co-sharer with her male siblings. This, however, seems to restrict the right of women seeking equal share in ancestral property, but the Supreme Court is clear on its terms that the 2005 amendment in the Hindu Succession Act will not give property rights to a daughter if her father died before the amendment came into force. This is because the amended provisions of Hindu Succession (Amendment) Act, 2005 could not have retrospective effect despite being a social legislation. The Hindu Succession Act, 1956

originally did not give daughters any inheritance rights in the ancestral property. They could only ask for a right to sustenance from a joint Hindu family. But this disparity was removed by an Amendment on 9th September, 2005.

The apex court has now added another disqualification for women regarding their right of inheritance. Until now, they could not ask for a share if the property had been alienated or partitioned before December 20, 2004, the date the Bill was introduced. This judgment makes it imperative for the father to have been alive when the amendment came into force.

Settling the law in the wake of a clutch of appeals arising out of high court judgments, a bench of Justices Anil R Dave and Adarsh K Goel held that the date of a daughter becoming coparcener (having equal right in an ancestral property) is “on and from the commencement of the Act”. The bench overruled the view taken by some high courts that the amendment being a gender legislation that aimed at according equal rights to the daughter in ancestral property by removing discrimination should be applied retrospectively. Interpreting statutory provisions, the top court shot down the argument that a daughter acquires right by birth, and even if her father had died prior to the amendment, the shares of the parties were required to be redefined. The text of the amendment itself clearly provides that the right conferred on a ‘daughter of a coparcener’ is ‘on and from the commencement’ of the amendment Act. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text.\textsuperscript{330}

Further, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intent, adding even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature.

\textsuperscript{330} \textit{Ibid}
About applicability of the amendment to the daughters born before it was brought, the bench held that the new law would apply irrespective of the date of birth. All that is required is that the daughter should be alive and her father should also be alive on the date of the amendment. The court also held that alienation of ancestral property, including its partition, which may have taken place before December 20, 2004, in accordance with the law applicable at that time, would remain unaffected by the 2005 amendment, and those partitions can no longer be reopened by daughters.331

In another case of Prakash v. Phulwati332 the Supreme Court held that the law, which gave equal right to daughters in ancestral property under the Hindu Succession Act, is prospectively enforceable and not with retrospective effect.

The Apex Court was dealing with the only issue which has been raised in this batch of matters, whether Hindu Succession (Amendment) Act, 2005 will have retrospective effect. Here, the plea of retrospectivity had been upheld in favour of the respondents by which the appellants were aggrieved. According to the case, the suit properties were acquired by her late father Yeshwanth Chandrakant Upadhye by inheritance from his adoptive mother Smt. Sunanda Bai. After the death of the father on 18th February, 1988, she acquired the share in the property as claimed. The suit was contested mainly with the plea that the plaintiff could claim share only in the self-acquire property of her deceased father and not in the entire property. During pendency of the suit, the plaintiff amended the plaint so as to claim share as per the Amended Act of 2005.

The Karnataka High Court held that daughters would be entitled to equal share even if father had died prior to September, 9th, 2005, when litigations over partition were pending in courts. The defendants-appellants questioned the Judgment and Order of the High Court with the contention

332 Civil Appeal No. 7217 of 2013 (Supreme Court).
that the amended provision of Section 6 has no application in the present case. Father of the plaintiff died on 18th February, 1988 and was thus, not a coparcener on the date of commencement of the Amending Act. The plaintiff could not claim to be the daughter of a coparcener at the time of commencement of the Act which was the necessary condition for claiming the benefit.

The amendment of 2005 gave equal right to daughters in coparcener properties by removing the discrimination that existed in the original enactment, the Hindu Succession Act, 1956 against Hindu women on rights over ancestral properties. The apex court observed that the rights under the Hindu Succession (Amendment) Act, 2005 are applicable to living daughters of living coparceners (those persons sharing the inheritance of an undivided property equally with others) as on September, 9th, 2005, irrespective of when such daughters were born.

The text of 2005 Amendment clearly provides that the right conferred on a ‘daughter of a coparcener’ is ‘on and from the commencement’ of the Hindu Succession (Amendment) Act, 2005. In view of the plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. In the present Amendment Act of 2005, “There is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect.”

The Supreme Court was unable to find any reason to hold that birth of the daughter after the amendment was a necessary condition for its applicability. All that was required was that daughter should be alive and her father should also be alive on the date of amendment.333

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333 Prakash v. Phulwati, Civil Appeal No. 7217 of 2013 (Supreme Court).
In the opinion of the researcher, the SC in pronouncing this judgment has provided the much-needed clarity that the Amendment Act is prospective in its application, i.e., with respect to a Hindu family governed by Mitakshara law, a daughter would have a right in the ancestral property inherited by the father only if both the daughter and the father are alive at the time of commencement of the Amendment Act. No distributions of such properties of persons who passed away prior to 9th September, 2005 can be re-opened or questioned by daughters. For the sake of clarity, it may be noted that the position with regard to succession to any self-acquired property (as against coparcenary property) of a Hindu male dying intestate remains unchanged, with the daughter being entitled to a simultaneous share in such self-acquired property as the son (in the absence of a will stating anything to the contrary).

5.11 Decisions of Various High Courts in India on Property Rights of Women:

Before the Hindu Succession Amendment Act, 1956 for giving the women their right to property in 2005, the States like Andhra Pradesh, Maharashtra, Karnataka and Tamil Nadu have made provisions pertaining to the women’s rights to property for their respective states. Accordingly, the High Courts of these states have used these provisions in favour of the women for their property rights. Besides, other high courts have shown their pitiable concern over such rights of women.

The Karnataka Hindu Succession Act, 1994 under Sections 6 and 6A of the Hindu Succession Act, 1956 stated that unmarried daughters are entitled to equal status of a coparcener and are entitled to equal rights with son.

In case of Mallipedy (died) v. Narendra Tulasamma (died), the Andhra High Court gave its verdict on the property right in favour of first
wife of the deceased husband. It held that second wife being not legally wedded wife, would not be entitled to any property. The first wife is entitled to the entire property since there was no other survivor. The Karnataka high court in another case\textsuperscript{335} held that widow of deceased son not being class I heir “V” who died intestate sons of “V” cannot claim the right of pre-emption.

The Andhra Pradesh high court in another case of \textit{Prakash v. Pushpa Vani},\textsuperscript{336} in the matter of concubine property right held that concubine is entitled to the maintained by her paramour till her death. The right was not taken away by Hindu’s Women’s Right of Property Act, 1937. The life interest in the house which is given to her in lieu of maintenance before the commencement of the Hindu Succession Act, 1956, would enlarge into full estate after the commencement of the Hindu Succession Act, 1956.

The Calcutta High Court in dealing with the female’s right to property in case of \textit{Kamal Basu Majumdar v. Usha Bhadra Chaudhary},\textsuperscript{337} held that right of female to house property does not disappear if the tenants vacates premises during pendency of suit. In this case the female south for petition and such house was partly occupied by tenant. In relation to the widow’s right to property Jharkhand high Court in \textit{Naresh Jha v. Rakesh Kumar},\textsuperscript{338} showed this corner over devolution of property.

In \textit{Subbayyajoga Naik v. Narayani} \textsuperscript{339} male Hindu died leaving behind a widow and two sons. His death occurred prior to coming into force of Hindu Women’s Right to Property Act, 1937 repealed by Hindu Succession Act, 1956. His property would devolve upon his two sons in equal shares and no share in property would devolve upon widow.

\textsuperscript{335} Ganeshappa (D) by LRs v. V. Krishanama, AIR 2005 Karn 160.
\textsuperscript{336} Prakash v. Pushpa Vani AIR 2004 NOC 463 (AP).
\textsuperscript{337} Kamal Basu Majumdar v. Usha Bhadra Chaudhary, AIR 2004 Cal 185.
\textsuperscript{338} Naresh Jha v. Rakesh Kumar AIR 2004 Jharkhand 2.
\textsuperscript{339} Subbayyajoga Naik v. Narayani AIR 2004 Karn 430.
The Madras High court in *R. Deivanai Ammal case*\(^{340}\) where a female heir claimed partition right held that provision of Section 23 (now omitted by the Hindu Succession Amendment Act, 2005) of the Hindu Succession Act, 1956 is not an absolute bar to claim the partition right.

The properties purchase by Hindu widow with savings from joint Hindu family lands prima facie should be regarded as her own self acquisition unless the person claiming a share in them has pleaded and proved that the widow treated them accretion to joint family estate.\(^{341}\)

Thus, the various High Courts in dealing with the women’s right to property in the line of provision of Hindu Succession Act, 1956, concern of the legislative intent of the act in to. But they face the problem of divergent laws of succession among the Hindus because the succession varies with the variation of principles of different schools of Hindu law in the scale of uncodified provision of Hindu law. This is so because before the enactment of the Hindu Succession Act, 1956 the country was with fundamental concept of Hindu law and the same was not taken away fully in the said Act. Hence, the conflict between codified Hindu law and uncodified Hindu law confuses the courts in India to interpret the provisions of any law in the light of succession and property rights. Though not fully, the Hindu Succession Amendment Act, 2005 can enable the courts to protect the women’s right to property without any ambiguity and passion. Without passion because the amendment provision of the Hindu Succession Act, 1956 is the complete code for the protection of women’s right to property and the omission of Section 23 and 24 can supply more fuel to serve the long awaited purpose of the Indian women.

*Anar Devi & Ors. v. Parmeshwari Devi & Ors.*\(^{342}\) The Court quoted, with approval, the following passage from the authoritative treatise of

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342 *Anar Devi & Ors. v. Parmeshwari Devi & Ors.* (2006) 8 SCC 656
Mulla, Principles of Hindu Law\textsuperscript{343}, wherein the learned author made following remarks while interpreting Explanation 1 to Section 6:

“...Explanation 1 defines the expression ‘the interest of the deceased in Mitakshara coparcenary property’ and incorporates into the subject the concept of a notional partition.

It is essential to note that this notional partition is for the purpose of enabling succession to and computation of an interest, which was otherwise liable to devolve by survivorship and for the ascertainment of the shares in that interest of the relatives mentioned in Class I of the Schedule. Subject to such carving out of the interest of the deceased coparcener the other incidents of the coparcenary are left undisturbed and the coparcenary can continue without disruption. A statutory fiction which treats an imaginary state of affairs as real requires that the consequences and incidents of the putative state of affairs must flow from or accompany it as if the putative state of affairs had in fact existed and effect must be given to the inevitable corollaries of that state of affairs.”

The learned author further stated that: “[T]he operation of the notional partition and its inevitable corollaries and incidents is to be only for the purposes of this section, namely, devolution of interest of the deceased in coparcenary property and would not bring about total disruption of the coparcenary as if there had in fact been a regular partition and severance of status among all the surviving coparceners.”

According to the learned author\textsuperscript{344}, the undivided interest “of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place

\textsuperscript{343} Mulla, Principles of Hindu Law, 17th Edn., Vol. II, p. 250
\textsuperscript{344} Ibid at pp. 253-34
immediately before his death and such person would have to be ascertained according to the law of joint family and partition. The rules of Hindu law on the subject in force at the time of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition”.

Thereafter the Court spelled out the manner in which the statutory fiction is to be construed by referring to certain judgments and summed up the position as follows:

“Thus we hold that according to Section 6 of the Act when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative specified in that class claiming through such female relative, his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener, by survivorship but upon his heirs by intestate succession. Explanation 1 to Section 6 of the Act provides a mechanism under which undivided interest of a deceased coparcener can be ascertained and i.e. that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. It means for the purposes of finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and the same shall devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition.”

In *Danamma v. Amar*\(^{345}\) at para 20 the court has stated that:

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\(^{345}\) *Danamma vs. Amar & Ors. (2018) 3 SCC 343*
That apart, we are of the view that amendment to the aforesaid Section vide Amendment Act, 2005 clinches the issue, beyond any pale of doubt, in favour of the appellants. This amendment now confers upon the daughter of the coparcener as well the status of coparcener in her own right in the same manner as the son and gives same rights and liabilities in the coparcener properties as she would have had if it had been son. The amended provision reads as under:

“6. Devolution of interest in coparcenary property.—(1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005346, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall,—

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

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

(c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004.

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

346 Section 6 Hindu Succession (Amendment) Act, 2005 (39 of 2005)
(3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005\textsuperscript{347}, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,—

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

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

(c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be.

Explanation.—For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005\textsuperscript{348}, no court shall recognize any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

\textsuperscript{347} Hindu Succession (Amendment) Act, 2005 (39 of 2005)
\textsuperscript{348} Ibid
Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-section shall affect—

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

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

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

(5) Nothing contained in this section shall apply to a partition, which has been effected before the 20th day of December, 2004.

Explanation.— For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act or partition effected by a decree of a court.

The effect of this amendment has been the subject matter of pronouncements by various High Courts, in particular, the issue as to whether the right would be conferred only upon the daughters who are born after September 9, 2005 when Act came into force or even to those daughters who were born earlier. Bombay High Court in Vaishali Satish Gonarkar v. Satish Keshorao Gonarkar had taken the view that the provision cannot be made applicable to all daughters born even prior to the

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349 Registration Act, 1908 (16 of 1908)
350 Vaishali Satish Gonarkar v. Satish Keshorao Gonarkar AIR 2012 Bom 110
amendment, when the Legislature itself specified the posterior date from which the Act would come into force. This view was contrary to the view taken by the same High Court in Sadashiv Sakharam Patil v. Chandrakant Gopal Desale\textsuperscript{351}. Matter was referred to the Full Bench and the judgment of the Full Bench is reported as Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari\textsuperscript{352}. The Full Bench held that clause (a) of sub-section (1) of Section 6 would be prospective in operation whereas clause (b) and (c) and other parts of sub-section (1) as well as sub-section (2) would be retroactive in operation. It held that amended Section 6 applied to daughters born prior to June 17, 1956 (the date on which Hindu Succession Act came into force) or thereafter (between June 17, 1956 and September 8, 2005) provided they are alive on September 9, 2005 i.e. on the date when Amended Act, 2005 came into force. Orissa, Karnataka and Delhi High Court have also held to the same effect\textsuperscript{353}.

The controversy now stands settled with the authoritative pronouncement in the case of Prakash & Ors. v. Phulavati & Ors.\textsuperscript{354} which has approved the view taken by the aforesaid High Courts as well as Full Bench of the Bombay High Court. Following discussion from the said judgment is relevant:

“The text of the amendment itself clearly provides that the right conferred on a “daughter of a coparcener” is “on and from the commencement of the Hindu Succession (Amendment) Act, 2005”. Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a

\textsuperscript{351} Sadashiv Sakharam Patil v. Chandrakant Gopal Desale 2011 (5) Bom CR 726
\textsuperscript{352} Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari AIR 2014 Bom 151
\textsuperscript{354} Prakash & Ors. v. Phulavati & Ors. (2016) 2 SCC 36
substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective. (*Shyam Sunder v. Ram Kumar*<sup>355</sup>),

In the present case<sup>356</sup>, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.

The contention of the respondents that the amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment. Thus, no other interpretation is possible in view of the express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20-12-2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20-12-2004. Notional partition, by its very nature, is not covered either under the proviso or under sub-section (5) or under the Explanation.

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<sup>355</sup> *Shyam Sunder v. Ram Kumar* (2001) 8 SCC 24, paras 22 to 27
<sup>356</sup> *Prakash & Ors. v. Phulavati & Ors.*
Interpretation of a provision depends on the text and the context. Normal rule is to read the words of a statute in ordinary sense. In case of ambiguity, rational meaning has to be given. In case of apparent conflict, harmonious meaning to advance the object and intention of legislature has to be given. There have been number of occasions when a proviso or an explanation came up for interpretation. Depending on the text, context and the purpose, different rules of interpretation have been applied.

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

In this background, we find that the proviso to Section 6(1) and sub-section (5) of Section 6 clearly intend to exclude the transactions referred to therein which may have taken place prior to 20-12-2004 on which date the Bill was introduced.

Explanation cannot permit reopening of partitions which were valid when effected. Object of giving finality to transactions prior to 20-12-2004 is not to make the main provision retrospective in any manner. The object is that by fake transactions available property at the introduction of the Bill is not taken away and remains available as and when right conferred by the statute becomes available and is to be enforced. Main provision of the amendment in Sections 6(1) and (3) is not in any manner intended to be

359 District Mining Officer v. TISCO, (2001) 7 SCC 358
360 S. Sundaram Pillai v. V.R. Pattabiraman, (1985) 1 SCC 591
361 Keshavji Ravji & Co. v. CIT, (1990) 2 SCC 231
affected but strengthened in this way. Settled principles governing such transactions relied upon by the appellants are not intended to be done away with for period prior to 20-12-2004. In no case statutory notional partition even after 20-12-2004 could be covered by the Explanation or the proviso in question.

Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.”

The law relating to a joint Hindu family governed by the Mitakshara law has undergone unprecedented changes. The said changes have been brought forward to address the growing need to merit equal treatment to the nearest female relatives, namely daughters of a coparcener. The section stipulates that a daughter would be a coparcener from her birth, and would have the same rights and liabilities as that of a son. The daughter would hold property to which she is entitled as a coparcenary property, which would be construed as property being capable of being disposed of by her either by a will or any other testamentary disposition. These changes have been sought to be made on the touchstone of equality, thus seeking to remove the perceived disability and prejudice to which a daughter was subjected. The fundamental changes brought forward about in the Hindu Succession Act, 1956\(^{362}\), are perhaps a realization of the immortal words of Roscoe Pound as appearing in his celebrated treaties, The Ideal Element in Law that “the law must be stable and yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change.”

\(^{362}\) by amending it in 2005
Section 6, as amended, stipulates that on and from the commencement of the amended Act, 2005, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognizes the rights of coparceners of daughters as well since birth.

The section uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by virtue of birth. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and as is well recognized. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-s (1)(a) and (b).

Reference to the decision of this Court, in the case of State Bank of India v. Ghamandi Ram363 in essential to understand the incidents of coparcenryship as was always inherited in a Hindu Mitakshara coparcenary:

“According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be

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363 State Bank of India v. Ghamandi Ram 1969 AIR 1330
The incidents of coparcenership under the Mitakshara law are:
first, the lineal male descendants of a person up to the third generation,
acquire on birth ownership in the ancestral properties is common;
secondly, that such descendants can at any time work out their rights by
asking for partition; thirdly, that till partition each member has got
ownership extending over the entire property, conjointly with the rest;
fourthly, that as a result of such co-ownership the possession and
enjoyment of the properties is common; fifthly, that no alienation of the
property is possible unless it be for necessity, without the concurrence of
the coparceners, and sixthly, that the interest of a deceased member lapses
on his death to the survivors.”

Hence, it is clear that the right to partition has not been abrogated.
The right is inherent and can be availed of by any coparcener, now even a
daughter who is a coparcener365.

This Court366 in Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi
& Anr.367 held that the rights of daughters in coparcenary property as per
the amended S. 6 are not lost merely because a preliminary decree has been
passed in a partition suit. So far as partition suits are concerned, the
partition becomes final only on the passing of a final decree. Where such
situation arises, the preliminary decree would have to be amended taking
into account the change in the law by the amendment of 2005.

In Vineeta Sharma vs. Rakesh Sharma & Others368, the Hon’ble
Supreme Court by three judge bench, in order dated 27/11/2018 have stated
that:

“*There is a conflict of opinion in two Division Bench Judgments of
this Court i.e. Prakash vs. Phulavati, (2016) 2 SCC 36 and Danamma @*

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364 See Mitakshara, Ch. I. 1-27
365 AIR 1969 SC 1330
366 Supreme Court of India
367 Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr (2011) 9 SCC 788
368 Vineeta Sharma vs. Rakesh Sharma & Others368, [ civil appeal diary No. 32601 of 2018]
Suman Surpur vs. Amar, (2018) 3 SCC 343 with regard to interpretation of Section 6 of the Hindu Succession Act, 1956 as amended by Hindu Succession (Amendment) Act of 2005. In view thereof, this matter has to be heard by a Bench of three Judge. Though we are sitting in combination of three Judge Bench, learned counsel for the respondent has drawn our attention to Order VI Rule 2 of the Supreme Court Rules, 2013 as per which the matter is to be referred to Hon’ble the Chief Justice and it is for the Hon’ble Chief Justice to constitute a Bench for hearing the matter."

The matter is still pending before the Hon’ble Supreme Court, for its adjudication.

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

No doubt the daughters were empowered for their rights in the ancestral property as if they are sons. But once a daughter became a coparcener on the equal scale as her brother in real spirit and content, the relationship that stands from dawn of civilization i.e., love to sister and daughter will cease to continue impassionedly. In this respect it can be rightly quoted that:

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