SESSION 2

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JOINT FAMILY PROPERTY PARTITION

What is joint family property?

In V.D. Dhanwatey v. CIT: AIR 1968 SC 683 it was held: “4. The general doctrine of Hindu law is that property acquired by a karta or a coparcener with the aid or assistance of joint family assets is impressed with the character of joint family property. To put it differently, it is an essential feature of selfacquired property that it should have been acquired without assistance or aid of the joint family property. The test of self acquisition by the karta or coparcener is that it should be without detriment to the ancestral estate. It is therefore clear that before an acquisition can be claimed to be a separate property, it must be shown that it was made without any aid or assistance from the ancestral or joint family property.”

Coparcener has interest by birth in joint family property

In Guramma Bhratar Chanbasappa Deshmukh v. Mallappa Chanbasappa: AIR 1964 SC 510 it was held: *"A coparcener, whether he is natural born or adopted into the family, acquires an interest by birth or adoption, as the case may be, in the ancestral property of the family. A managing member of the family has power to alienate for value joint family property either for family necessity or for the benefit of the estate. An alienation can also be made by a managing member with the consent of all the coparceners of the family. The sole surviving member of a coparcenary has an absolute power to alienate the family property, as at the time of alienation there is no other member who has joint interest in the family. If another member was in existence or in the womb of his mother at the time of the alienation, the power of the manager was circumscribed as aforesaid and his alienation would be voidable at the instance of the existing member or the member who was in the womb but was subsequently 4 born, as the case may be, unless it was made for purposes binding on the members of the family or the existing member consented to it or the subsequently born member ratified it after he attained majority. If another member was conceived in the family or inducted therein by adoption before such consent or ratification, his right to avoid the alienation will not be affected."*

There can be more than one preliminary decree in a partition suit

In **Phoolchand v. Gopal Lal, AIR 1967 SC 1470** , the Court held:

“ It is not disputed that in a partition suit the court has jurisdiction to amend the shares suitably even if the preliminary decree has been passed if some member of the family to whom an allotment was made in the preliminary decree dies thereafter.

So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal.”

Powers of a father to alienate the joint family property.

In **Virdhachalam Pillai v. Chaldean Syrian Bank Ltd., : AIR 1964 SC 1425** it was held: "(1) A father can by incurring a debt, even though the same be not for any purpose necessary or beneficial to the family so long as it is not for illegal or immoral purposes, lay the entire joint family property including the interests of his sons open to be taken in execution proceedings upon a decree for the payment of that debt.

(2) The father can, so long as the family continues undivided alienate the entirety of the family property for the discharge of his antecedent personal debts subject to their not being illegal or immoral. In other words, the power of the father to alienate for satisfying his debts, is co-extensive with the right of the creditors to obtain satisfaction out of family property including the share of the sons in such property.

(3) Where a father purports to burden the estate by a mortgage for purposes not necessary and beneficial to the family, the mortgage qua mortgage would not be binding on the sons unless the same was for the discharge of an antecedent debt. Where there is no antecedency, a mortgage by the father would stand in the same position as an out and out sale by the father of family property for a purpose not binding on the family under which he receives the sale price which is utilised for his personal needs. It need hardly be added that after the joint status of the family is disrupted by a partition, the father has no right to, deal with the family property by sale or mortgage even to discharge an antecedent debt, nor is the son under any legal or moral obligation to discharge the post-partition debts of the father. (4) Antecedent debt in this context means a debt antecedent in fact as well as in time i.e. the debt must be truly independent and not part of the mortgage which is impeached. In other words, the prior debt must be independent of the debt for which the mortgage is created and the two transactions must be dissociated in fact so that they cannot be regarded as part of the same transaction." This was reiterated in Manibhai v. Hemraj, (1990) 3 SCC 68.

In **Faqir Chand v. Harnam Kaur, AIR 1967 SC 727** it was held:

“In Brij Narain v. Mangla Prasad the Privy Council laid down five propositions, of which the following three are material for the decision of this appeal:

“(1) The managing member of a joint undivided estate cannot alienate or burden the estate qua manager except for purposes of necessity; but

(2) if he is the father and the 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 proceeding 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 an antecedent debt, it would not bind the estate.”

What is the remedy of a purchaser of undivided interest of a coparcener?

In **M.V.S. Manikayala Rao v. M. Narasimhaswami, : AIR 1966 SC 470** the Court held: " it is well settled that the purchaser of a coparcerner's undivided interest in joint family property is not entitled to possession of what he has purchased. His only right is to sue for partition of the property and ask for allotment to him of that which on partition might be found to fall to the share of the coparcener whose share he had purchased. His right to possession "would date from the period when a specific allotment was made in his favour".

Coparcenary idea under Hindu Law was mainly by the male member of the family where just children, grandsons and great-grandsons son who have a right by birth, who has an interest in the coparcenary property.

No female of a Mitakshara coparcenary could be a coparcener but she will always be a part of the Joint Family. So under Mitakshara a son, son's son, son's son's son can a coparcenary i.e. father and his three lineal male descendants can be a coparcener.

There is no concept of Joint Family under the Dayabhaga School as compared to the Mitakshara. There is no coparcenary consisting of Father, son, son's son, son's son's son. The existing of Dayabhaga coparcenary comes only after the death of the father, by that the son will inherit the property of him and constitute a coparcenary.

The concept of Dayabhaga is followed only in certain parts of India like West Bengal, Assam etc. in this school there is no right by birth given to son. Son can inherit the property on his father's death. Likewise when son dies his heir's male or females can succeed his property. If suppose the son dies leaving behind widows or daughter's then they can succeed the property and becomes coparcener.

The main difference between both the schools is that here the females can become coparcener. Here the each coparceners takes a definite shares, unity of possession.

Section 6 of the Hindu Succession Act, 1956 after its amendment in 2005 by amending Act 39 of 2005

According to the new Section 6, daughter of a coparcener becomes a coparcener by birth in her own right and liabilities in the same manner as the son w.e.f. 09-09-2005 except (a) where the dispossession or alienation including any partition has taken place before 20-12-2004 and (b) where testamentary dispossession of property has been made before 20-12-2004.

In Ganduri Koteswaramma and another Vs. Chakiri Yanadi… (2011) 9 SCC 788, where a preliminary decree was passed in a partition suit prior to the coming into effect of the Hindu Succession (Amendment) Act, 2005 and after it came into force, the daughters filed application invoking Section 6 (as amended) for passing another preliminary decree so as to include coparcenery properties in their share, which had been excluded by operation of law existing prior to 2005 Act, the Supreme Court held that the trial Court shall do so and amend the preliminary decree.

It observed that the suit for partition is not disposed of by passing of the preliminary decree, that only by a final decree, joint family property is partitioned by metes and bounds, that after passing of a preliminary decree, the suit continues until the final decree is passed, and if in the 19 interregnum events occur necessitating change in shares, the Court can amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation.

Law applicable to joint family property governed by the Mitakshara school prior to the amendment in 2005 by Act 39 of 2005 is set out in **Anar Devi v. Parmeshwari Devi, 2006 (8)SCC 656** in the following terms:

"11. ... 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 **Uttam Vs. Saubhag Singh and others 2016(4) SCC 68** the Court summed up in the following terms:

"(i) When a male Hindu dies after the commencement of the Hindu Succession Act, 1956, having at the time of his death an interest in Mitakshara coparcenary property, his interest in the property will devolve by survivorship upon the surviving members of the coparcenary (vide Section 6).

(ii) To proposition (i), an exception is contained in Section 30 Explanation of the Act, making it clear that notwithstanding anything contained in the Act, the interest of a male Hindu in Mitakshara coparcenary property is property that can be disposed of by him by will or other testamentary disposition.

(iii) A second exception engrafted on proposition (i) is contained in the proviso to Section 6, which states that if such a male Hindu had died leaving behind a female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative surviving him, then the interest of the deceased in the coparcenary property would devolve by testamentary or intestate succession, and not by survivorship.

(iv) In order to determine the share of the Hindu male coparcener who is governed by Section 6 proviso, a partition is effected by operation of law immediately before his death. In this partition, all 18 the coparceners and the male Hindu's widow get a share in the joint family property.

(v) On the application of Section 8 of the Act, either by reason of the death of a male Hindu leaving self-acquired property or by the application of Section 6 proviso, such property would devolve only by intestacy and not survivorship.

(vi) On a conjoint reading of Sections 4, 8 and 19 of the Act, after joint family property has been distributed in accordance with Section 8 on principles of intestacy, the joint family property ceases to be joint family property in the hands of the various persons who have succeeded to it as they hold the property as tenants-in-common and not as joint tenants."

The Hindu Succession Act (‘the act’) enacted in 1956 is the governing piece of legislation concerning the transfer and devolution of property amongst Hindus in India. It codified the existing laws of inheritance while also introducing certain changes. It sought to redress some anomalies created by traditional Hindu Law. However, it was a compromise between tradition and modernity that could not lead to full equality.

The desire to retain the Mitakshara coparcenary along with principals of intestate succession in the act led to complexities.While a daughter would get only a share from the presumed partitioned property of her father, the sons continued to get a share in the coparcenary property as well as the notionally partitioned property.To redress these problems, the act was amended in 2005. It gave women a right by birth in the property of their father by including them in the coparcenary.This was a huge blow to patriarchy institutionalized by law and paved way for women to have true economic and social equality. However, post the amendment, there have been inconsistencies in the interpretation of § 6 concerning the devolution of interest in the coparcenary property. This has hindered the achievement of the objectives of the amendment act.

Possession of joint family property by a member is not adverse to other members

In **Annasaheb Bapusaheb Patil v. Balwant, AIR 1995 SC 895 ::1995 (2)SCC 543**, it was held:

"16. In the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenary property. The mere fact that one of the coparceners is not in joint possession does not mean that he has been ousted."

Case law on Sec.14 of the Hindu Succession Act,1956

In **V. Tulasamma v. Sesha Reddy, AIR 1977 SC 1944** : "(1) that the provisions of Section 14 of the 1956 Act must be liberally construed in order to advance the object of the Act which is to enlarge the limited interest possessed by a Hindu widow which was in consonance with the changing temper of the times;

(2) it is manifestly clear that sub-section (2) of Section 14 does not refer to any transfer which merely recognises a pre- existing right without creating or conferring a new title on the widow. This was clearly held by this Court in Badri Pershad case.

(3) that the Act of 1956 has made revolutionary and far-reaching changes in the Hindu society and every attempt should be made to carry out the spirit of the Act which has undoubtedly supplied a long felt need and tried to do away with the invidious distinction between a Hindu male and female in matters of intestate succession;

(4) that sub-section (2) of Section 14 is merely a proviso to sub-section (1) of Section 14 and has to be interpreted as a proviso and not in a manner so as to destroy the effect of the main provision."

When a coparcener of a joint Hindu Family, receives share in property after partition, in his hands it continues to be joint family property

(a) **In N.V. Narendranath v. CWT, (1969) 1 SCC 748, at page 754** it was held that "There were joint family properties of that Hindu Undivided Family when the partition took place between the appellant, his father and his brothers and these properties came to the share of the appellant and the question presented for determination is whether they ceased to bear the character of joint family properties and became the absolute properties of the appellant.

it is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property of the undivided family'.

It continues to be ancestral property in his hands as regards his male issue for their rights had already attached upon it and the partition only cuts off the claims of the dividing coparceners.

But the effect of partition did not affect the character of these properties which did not cease to be joint family properties in the hands of the appellant. Our conclusion is that when a coparcener having a wife and two minor daughters and no son receives his share of the joint family properties on partition, such property in the hands of the coparcener belongs to the Hindu Undivided Family of himself, his wife and minor daughters and cannot be assessed as his 5 1957 Appeal Cases 540 (Privy Council) 10 individual property."

(b) **In Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe, AIR 1986 SC 79 :**

“The character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property.”

What is Devolution of interest of coparcenary property? What is Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom?

Devolution of interest of coparcenary property and Devolution of interest in the property of a tarwad, tavazhi, kutumba, kavaru or illom are defined under section 6 and 7 of Hindu Succession Act 1956. Provisions under these Sections are:

Section 6 of Hindu Succession Act "Devolution of interest of coparcenary property"

Section 6. When a male Hindu dies after the commencement of this Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

Explanation 1: For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

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

Section 7 of Hindu Succession Act

Section 7. (1) When a Hindu to whom the marumakkattayam or nambudri law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an interest in the property of a tarwad, tavazhi or illom, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the marumakkattayam or nambudri law.

Explanation : For the purposes of this sub-section, the interest of a Hindu in the property of a tarwad, tavazhi , or illom, shall be deemed to be the share in the property of the tarward, tavazhi or illom, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the tarwad, tavazhi or illom, as the case may be, then living, whether he or she was entitled to claim such partition or not under the marumakkattayam or nambudri law applicable to him or her and such share shall be deemed to have been allotted to him or her absolutely.

2) When a Hindu to whom the aliyasantana law would have applied if this Act had not been passed dies after the commencement of this Act, having at the time of his or her death an undivided interest in the property of a kutumba or kavaru, as the case may be, his or her interest in the property shall devolve by testamentary or intestate succession, as the case may be, under this Act and not according to the aliyasantana law.

Explanation : For the purposes of this sub-section, the interest of a Hindu in the property of a kutumba or kavaru shall be deemed to be the share in the property of the kutumba or kavaru, as the case may be, that would have fallen to him or her if a partition of that property per capita had been made immediately before his or her death among all the members of the kutumba or kavaru, as the case may be, then living, whether he or she was entitled to claim such partition or not under the aliyasantana law, and such share shall be deemed to have been allotted to him or her absolutely.

(3) Notwithstanding anything contained in sub-section (1), when a sthanamdar dies after the commencement of this Act, sthanam property held by him shall devolve upon the members of the family to which the sthanamdar belonged and the heirs of the sthanamdar as if the sthanam property had been divided per capita immediately before the death of the sthanamdar among himself and all the members of his family then living, and the shares falling to the members of his family and the heirs of the sthanamdar shall be held by them as their separate property.

Explanation : For the purposes of this sub-section, the family of a sthanamdar shall include every branch of that family, whether divided or undivided, the male members of which would have been entitled by any custom or usage to succeed to the position of sthanamdar if this Act had not been passed.

Property Rights of women under the act before the amendment

The Concept of Hindu Coparcenary

Traditional Hindu Coparcenary consisted of four generations of male members in a family, starting from the oldest surviving member. The undivided coparcenary property belonged to all the members of the coparcenary where each coparcener held a share by birth, and thus it devolved by the rule of survivorship. Such an arrangement left the female relatives of the deceased without any protection as the property rights were vested solely in men who were a part of the coparcenary. The exclusion of women was a result of the notion that women lacked the potency to perform religious obligations, such as providing offerings to ancestors and performing funeral rituals. Thus, traditional laws of succession were ridden with gender bias and hindered any possibility of equality for women.

Devolution of property

Mitakshara School

The right to coparcenary property accrued to a coparcener on his birth itself is a striking feature of Mitakshara coparcenary. Thus, the existence of male owner of the property was not a hindrance to the acquisition of coparcenary property, because the factum of birth was enough to bestow the right to property. Therefore, it is said that a coparcener has an “unobstructed heritage” to coparcenary property i.e. the right to such property is not obstructed by the existence of the male ancestor i.e. father, grandfather and great-grandfather. The allocation of the inherited property was based on the law of possession by birth.

Further, under the Mitakshara school, the property devolved as per survivorship i.e. on the death of the last male holder property will devolve in equal share to those coparceners who are surviving within the coparcenary. This means that if one of the coparceners other than the last male holder dies, then his (deceased) probable share would be distributed among the surviving members of the coparcenary. He leaves nothing behind that can be called his own share in the joint property.

For example, a coparcenary comprises the father and his two sons. Each of them has a probable 1/3rd share in the property until the undivided status is maintained. On the death of one of the sons, his probable 1/3rd in the property is taken by the surviving coparceners ie father and the surviving brother and the deceased will die without any share in the coparcenary property. The share of the father and the surviving son will be increased to a probable half. The right of survivorship is one of the basic rights of a coparcener. Thus, the quantum of interest of an individual coparcener is not fixed as it fluctuates with deaths and births in the family.

This can also be understood as because there is a community of ownership (co-owners) and unity of possession of coparcenary property by the coparceners, their specific share is not fixed or they cannot call a specific portion of coparcenary property as their own until a partition takes place. There is a common enjoyment of coparcenary property by the coparceners.
This concept of survivorship has been removed after the 2005 amendment to Hindu Succession Act, now the only way for devolution of property is either by a will (testamentary) or by the rules of intestate succession given under Hindu Succession Act.

Dayabhaga School

There is no concept of a joint family under the Dayabhaga school as compared to the Mitakshara. There is no coparcenary consisting of father, son, son's son (grandson), son's son's son(great-grandson). The existence of a Dayabhaga coparcenary comes only after the death of the father, after which the son will inherit the property of him and constitute a coparcenary. In this school, there is no right by birth given to the son. There is also no distinction between separate and coparcenary property and the entire concept is based on inheritance, i.e. that the sons inherit the property of their father after his death.
In a Dayabhaga joint family, the father has absolute powers of management and disposal over the separate as well as the coparcenary property and the sons have only a claim of maintenance. It is because of this reason there is no concept of fluctuating interest of coparceners in Dayabhagha family, as births and deaths of coparceners, does not affect the absolute right to the father to the property.

Unlike under the Mitakshara school, in which a coparcener has a right to the property since his birth, under Dayabhaga the right to inherit property arises only on the death of the father. Thus, the birth has nothing to do with the right to inherit the property, therefore it is said that under Dayabhaga school, a coparcenary has unobstructed heritage. The property is inherited in the Dayabhaga school after the death of the person who was in possession of it.

Since the coparceners under Dayabhaga have no right to property because of their birth in the family, the father thus has absolute right to dispose of all kinds of property, separate as well as ancestral, by sale, gift or through a will. Thus, there is no unity of possession and common ownership of coparcenary property. In other words on the death of the father, where he is survived by two or more of his sons, all of them inherit his property jointly and hold it as tenants-in-common. Under Dayabhaga the father has an absolute right of alienation of property, whether it is self-acquired or ancestral.

When the act was being framed, B. N Rau and B. R Ambedkar recognized these problems and had, in fact, proposed to do away with the concept of Mitakshara coparcenary altogether. This proposition was met with fierce opposition. The idea of making daughters a part of the coparcenary was also pioneered but was not accepted. Thus the act was a product of a middle ground. The Mitakshara coparcenary was retained but more protection was offered to women than what was offered under traditional Hindu law.

PROTECTION OFFERED TO WOMEN UNDER THE 1956 ACT

In light of the principles of equality enshrined in the constitution, the act tried to alleviate the position of women by giving them a share in father's separate property. Daughters were introduced as class I heirs and this enabled the daughters to get a certain share out of their father's property through the concept of a notional partition.

A Hindu male can hold two types of property. The first one is ancestral property that devolves by the rule of survivorship. The second one is separate property that devolves according to the rules of intestate succession. After partition, the property is considered to be separate property of the man which devolves upon his heirs by intestate succession. Thus, the concept of notional partition was introduced in explanation I of Section 6 of the 1956 Act. It mandated a legal presumption that a partition had taken place immediately before the death of the coparcener who had, either a female relative specified in class I of the schedule of the Act, or a male relative who claimed through such a female relative. This entailed that the property would devolve by intestate succession and not by the rule of survivorship. This legal fiction was created to protect the interests of the daughter of the deceased. As the notionally partitioned property would be considered to be separate property, she would be entitled to a share out of it.

This assured the daughter some interest in the father's property. Before the act, entire undivided property would devolve to surviving coparceners as per the rule of survivorship, leaving the daughter remedy-less. This was the first step, though a cursory one, is ensuring that there is parity between male and female successors. However, the result of this provision was that sons of the deceased coparcener could claim both as heirs and later as surviving coparceners. This is because notional partition is only a tool to demarcate the share that the deceased would have received and it does not disrupt the coparcenary property as whole. Hence, the rest of the undivided property continues as coparcenary property. This enabled the male members to get a share larger than their female counterparts.

II. Position Post Amendment

It was observed that granting daughters a share in the notionally partitioned property of their fathers still did not place them on the same level as their male counterparts. In light of this, there could be only two ways in which equality could be truly achieved in this regard. Either the concept of coparcenary property had to be abolished or daughters had to be made a part of the coparcenary. Kerala followed the first route while the second model of making daughters a part of the coparcenary was introduced by Andhra Pradesh and was later followed by Maharashtra, Tamil Nadu et al. These state amendments were an effort to realize the constitutional mandate of equality. It was also to eradicate the practice of dowry which was believed to have stemmed from this exclusion of women from holding property. However, some of these amendments excluded married daughters from their ambit.

In 2000, the 174th Law Commission Report suggested a number of reforms with regards to women's right to property. It also pointed out another bias in Section 6 of the Act wherein, when property devolves according to Section 8, it considers male line of descent up to two degrees, but the female line only up to one degree. It also proposed to delete Section 23 of the act that excludes female heirs from claiming a partition of the dwelling house.

In 2005, the amendment was passed along the lines of various state amendments and the Law Commission Report. This had the effect of overriding the state amendments. After the amendment the fundamental principles of the Hindu coparcenary were challenged. Daughters were made a part of the coparcenary and were granted the same rights over the coparcenary property as their male counterparts. Further, earlier daughters were barred from becoming kartas because they were not a part of the coparcenary. However, by the application of the amended Section 6 they can now act as kartas. The Parliament also proceeded to obliviate the distinction between a married and an unmarried daughter. This was path-breaking blow to institutionalized patriarchy as it made women economically independent. However, problems still persist regarding concepts like reunification which are governed by uncodified Hindu law.

III. Issues in Interpretation

Prakash v. Phulavati

In the present case the suit for partition and for inheritance was filed in the year 1992 by the daughter of the deceased. During the pendency of this suit, the amendment of 2005 was enacted and the plaintiff amended her plaint to be able to benefit from this amendment.

The court held that the amendment act can only be effective if the death of the father occurs after the date of enactment. In absence of any express provisions, it was held that the act cannot be applied retrospectively, even if it is a social legislation. Thus, the amended shall only apply to “living daughters of living coparceners” at the time of enactment and the transactions prior shall remain unaffected.

Dannamma v. Amar

In this case, the appellants were the daughters of a coparcener who had died in 2001.The respondents were the sons of the deceased who had filed a suit for partition of the property in 2002. They claimed that the daughters were born prior to 1956, the enactment of the act. The trial court had denied any share to the daughters. The appeals to High Court were also dismissed.

However, the Supreme Court reversed the impugned judgements. The question was whether by the virtue of the amendment, the daughters would become coparceners “in the same right as the sons.”While relying on the case of Anar Devi, it held that the concept of notional partition exists only for the computation of the interests of the shares of the heirs and does not disrupt the coparcenary as a whole.Further, the court reiterated the principles laid down by the Phulavati case. It said the purpose of the amendment was to realize the constitutional mandate of equality.

Ambiguities in Interpretation

The judgement in Danamma thus brought back the controversy from its grave. Though the judgement agrees with the ratio in Phulavati, it does not apply it. By giving the daughters the benefit of the amended act even though the father had died before the amendment, the judgement directly goes the against the ratio of Phulavati which prescribed that the amendment shall only apply to "living daughters of living coparceners." Since the Phulavati case still continues to be good law, a daughter whose father had died before the amendment cannot claim the benefit of the amendment act. However, going by the ruling in Danmma, a daughter will be entitled to the benefits of the amendment act in a pending suit filed after 2005 regardless of when the father died. The distinction between fresh suits for partition and pending suits does not a have sound basis.

By the literal interpretation of the statute, the ruling in Phulavati is legally sound. It is also more pragmatic to set a clear date for the application of the amendment act. The rationale in Danamma focuses of the objective of the amendment to give the daughters "inherent right to property by birth."If this rationale is followed, then in case of father's death before the amendment a daughter should be allowed to institute a claim for partition based on this right. However, the ruling restricts itself to pending suits or suits filed by a male coparcener. In contrast, noticing that the ruling in Phulavati is an "authoritative precedent," a female has no rights under the amendment act if the father had died before enactment.

A three judge bench of the Supreme Court in this case overruled the judgment *of Prakash & Others v. Phulvati & Others* in its entirety. The crux of the judgement was that since the daughter is a coparcener by birth, therefore it would not be necessary for the father coparcener to be alive when the Amendment Act 2005 came into force.

The verdict given by court in this case is based on the ground that the intent behind the Amendment of Section 6 in Amendment Act 2005 was neither to give benefits to daughters prospectively nor to give those benefits retrospectively, but it was to confer benefits to daughters retroactively.

Retroactive application of legislation means that benefits are conditional upon an eligibility which may arise even before such legislation is passed. The court here while explaining the concept of retroactively application of 2005 amendment held that daughters have benefits of succession same as the sons, by birth.

The court while giving the judgment was also aware of the fact that under the Act, a distinction must be made between the right to claim a share and to what extent that share can be claimed.

A coparcener maintains stable right to claim a share in the coparcenary property but the specific share which may become available to the coparcener may fluctuate with the deaths and births in the family and it only becomes determined at partition time.

Therefore the court held that the notional partition which the proviso of Section 6 of the un-amended Act prescribes only affects the extent of share which may be claimed by a coparcener and not affect the coparcener's right to claim a share in the very first place.

The Supreme Court in present judgement in the view of express language of Section 6(1)(a) held that, the requirement for a daughter to claim her right as a coparcener is not at all dependent on the fact that her father must be alive at the time when the 2005 Amendment Act came into force.

The court gave the reasoning that since the coparcenary is right by birth, therefore it is an unobstructed heritage under Mitakshara law and so whether the father existed or not at the time of 2005 amendment act becomes irrelevant.

Revocation of probates and letter of administration:

The revocation of Will differs from the revocation of probate and letter of administration. In the revocation of Will, there was no involvement of the court. However, in revoking probate and letters of administration the district judge under whose jurisdiction such probate/ letter of administration falls has the power to pass an order for revocation. However, if the probate/letter of administration is beyond the limits as specified in Section 57 of the Act, no district judge can accept the applications for revocation until and unless the state government vide a notification authorizes them to do so.

It is well established that the probate court while granting probate in respect of a will decides only the question of the genuineness and validity of the will and does not go into the question of title much less decide the said question in respect of any of the items said to belong to the said estate.

Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others, wherein it is held that-

The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a decerned person was duty executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.

Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others,

It was held that questions of title tire not decided in proceedings for the grant of probate or letters of administration whatever therefore might have happened in those proceedings would not establish the title.

Where on an application for letters of administration-

Questions of title are not decided in proceedings for the grant of probate or letters of administration. Whatever therefore might have happened in those proceedings would not establish the title. Where on an application for letters of administration certain preliminary issues were framed one of which related to estoppel with respect to the opposite party's right to a property and the application was obviously dismissed under Order 27 Rule 2 Civil P.C. for the reason that the applicant did not appear no question of res judicata as to the title to that property can arise against the applicant by reason of that dismissal.

Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, : It was held following the dictum in Ishwardeo Narain Singh's case.

In Ishwardeo Narain Supreme Court held that the Court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate court.

Therefore the only issue in a probate proceedings relates to the genuineness and due execution of the will and the court itself is under duty to determine it and preserve the original will in its custody. The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other way. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character- of the executor. Probate court does not decide any question of time or of the existence of the property itself.

Ghulam Quadir v. Special Tribunal 2001 AIR SCW 4022: wherein it was held:

There cannot be any dispute to the legal proposition that the grant of probate establishes conclusively as to the appointment of the executor and the valid execution of the will However, it does not establish more than the factum of the will as probate court does not decide question of title or of the existence of the property mentioned herein.

Banarsi Dass v. Teeku Dutta ILR 2005 Kar. 3270 (SC) The Supreme Court while dealing with the scope of a succession certificate held

14. The main object of a succession certificate is to facilitate collection of debts on succession and afford protection to the parties paying debts to the representatives of deceased persons. All that the succession certificate purports to do is to facilitate the collection of debts, to regulate the administration of succession and to protect person who deal with the alleged representatives of the deceased persons. Such a certificate does not give any general power of administration on the estate of the deceased. The grant of a certificate does not establish title of the grantee as the heir of the deceased. A succession certificate is intended as noted above to protect the debtors, which means that where a debtor of a deceased person either voluntarily pays his debt to a person holding a certificate under the Act, or is compelled by the decree of a Court to pay it to the person, he is lawfully discharged. The grant of a certificate does not establish a title of the grantee as the heir of the deceased, but only furnishes him with authority to collect his debts and allows the debtors to make payments to him without incurring any risk.