USHA VATS
& ASSOCIATES

"AN ANALYSIS OF HINDU SUCCESSION LAWS IN VIEW OF THE DECISION RENDERED BY THE HON'BLE APEX COURT IN VINEETA SHARMA'S CASE"

"AN ANALYSIS OF HINDU SUCCESSION LAWS IN VIEW OF THE DECISION RENDERED BY THE HON'BLE APEX COURT IN VINEETA SHARMA'S CASE"

INDEX

"AN ANALYSIS OF HINDU SUCCESSION LAWS IN VIEW OF THE DECISION RENDERED BY THE HON'BLE APEX COURT IN VINEETA SHARMA'S CASE"

INTRODUCTION

A Daughter though not a coparcener under traditional Hindu Law (Mitakshara Law) is made a coparcener under progressive enactments to meet gender equality enshrined in our Constitution and to confer upon her the right over ancestral property in her paternal home. ***Under the Hindu Succession Act, 1956, a daughter was not a coparcener.*** However, she was conferred with the status of Class I Legal heir and could inherit her father's property along with other Class I Legal heirs only if her father died intestate, leaving behind some inheritable property. However, for the first time, the State of Andhra Pradesh enacted the ***Hindu Succession (Andhra Pradesh Amendment) Act, 1986, which came into force on 05.09.1985*** whereby it conferred coparcenery status to a daughter. Thereafter the state of Tamil Nadu enacted a similar enactment titled the ***Hindu Succession (Tamil Nadu Amendment) Act, 1989 effective from 25.03.1989.*** Subsequently, the state of Maharashtra enacted the ***Hindu Succession (Maharashtra Amendment) Act 1994 which came into force on 22.06.1994.*** Our State of Karnataka too enacted the ***Hindu Succession (Karnataka Amendment) Act, 1990 which came into effect from 30.07.1994 whereby it inserted Section 6A to 6C***. By these State

Amendments, the respective states for the first time conferred coparcenary status on a daughter and gave her an equal footing as that of a son.

The Parliament of India much later amended Section 6 of Hindu Succession Act, 1956 by way of enacting the Hindu Succession (Amendment) Act, 2005 effective from 09.09.2005 and conferred coparcenary status on daughters across India. In its Statement of Object & Reasons, it applauded the efforts of the above State Legislatures which strived to drive in equality between a son and a daughter in a Joint Hindu family governed by Mitakshara law.

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others & Others, reported in (2020) 9 SCC 1 at Page No. 33 Para 21** has held as under

> ***"Besides the various sources, custom, equity, justice, and conscience have also played a pivotal role in the development of Hindu law, which prevailed. When the law was silent on certain aspects, Judicial decisions also acted as a source of law. Hindu law was not static but always progressive. Slowly necessity was felt for the codification of Hindu law. In particular, women's rights were taken care of, and attempts were made to remove the anomalies and unscrupulous practices. Necessity was also felt after the independence, given the constitutional imperatives to bring about equality of status, the codified law has been amended from time to time. The latest attempt has been made by way of amending the Hindu Succession Act concerning rights of daughter to be a coparcener in Mitakshara***

coparcenary and has been given the rights equal to that of a son".

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page No.52 Para 57** has held as under

"It is apparent from the provisions of section 6 that the discrimination with the daughter has been done away with, and they have been provided equal treatment in the matter of inheritance with Mitakshara coparcenary. In several States viz., Andhra Pradesh, Tamil Nadu, Karnataka, and Maharashtra, the State Amendments in the Act of 1956 were made to extend equal rights to daughters in Hindu Mitakshara coparcenary property. An amendment was made on 30.7.1994 by the insertion of Section 6A by Karnataka Act 23 of 1994 in the Act of 1956. In State of Andhra Pradesh, the amendment was made, w.e.f. 5.9.1985, Tamil Nadu w.e.f 25.3.1989 and Maharashtra w.e.f. 26.9.1994 by the addition of Section 29A in the Act of 1956. In Kerala, the Act was enacted in 1975".

Considering the above enactments, the position of a daughter as regards our State of Karnataka is concerned, is as under:

- **From 17/06/1956 till 29/07/1994, daughter was not a Coparcener under Hindu Succession Act, 1956.**

- **From 30/07/1994 till 08/09/2005, daughter was a Coparcener under the Hindu Succession (Karnataka Amendment) Act, 1990.**

- **From 09.09.2005 till date, a daughter is a Coparcener under the Hindu Succession (Amendment) Act, 2005.**

An attempt is made in this article to study the position of a daughter under different enactments, minutely in the light of the Hon'ble Supreme Court and Hon'ble High Courts' decisions and to also examine the applicability of Hindu Succession (Karnataka Amendment) Act, 1990 even after enactment of Hindu Succession (Amendment) Act, 2005[1]. It is important that we remain objective in approach and not become victims of subjective prejudices while deciding cases including partition suits.

It is also to be noted that in major part of Karnataka, we follow the Madras Mitakshara school of Hindu law. In a few parts such as Bagalkot, Belagavi, Bijapur, Gadag, Haveri and Hubli-Dharwad etc., the succession would be governed by the Bombay School of Mitakshara Hindu Law, hence, a reference is made towards the end of the article regarding rules of succession under Mitakshara Bombay School pertaining to females but the rest of the discussion under this article pertains to the Madras Mitakshara School.

As partition suits account for majority of the suits filed before Trial Courts, an attempt is also made to discuss the various facets that we may

[1] **The extract of unamended Section 6 of Hindu Succession Act, 1956, Amended Section 6 of Hindu Succession (Amendment) Act, 2005 and Section 6A to 6C of Hindu Succession (Karnataka Amendment) Act, 1990 are given at the end of the article for kind reference of readers.**

come across while deciding them. With a fervent hope that this article would benefit the reader in some way, let us begin our discussion.

Before discussing about the legal status of a daughter as a coparcener under the two enactments and the applicability of the Hindu Succession (Karnataka Amendment) Act, 1990 even after passing of the Hindu Succession (Amendment) Act, 2005, it is important to understand the following concepts:

2. THE JOINT HINDU FAMILY

A Joint Hindu Family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. Conservatively, a daughter ceases to be a member of her father's family on marriage and becomes a member of her husband's family. However, subsequent to the enactment of the Hindu Succession (Karnataka Amendment) Act, 1990 and also the Hindu Succession (Amendment) Act, 2005, a daughter even after her marriage is considered to be a coparcener in her parental home for all practical purposes of succession, if she satisfies the other conditions of the said enactments, which we will discuss below under separate heads.

The Hon'ble Apex Court of India between ***Surjit Lal Chhabda v. CIT,*** **reported in (1976) 3 SCC 142 at page 148 Para 13 and 14 has held as under**

> ***"Outside the limits of coparcenary, there is a fringe of persons, males and females, who constitute an undivided or joint family. There is no limit to the number of persons who can compose it nor to their remoteness from the common ancestor and to their relationship with one***

another. <u>A joint Hindu family consists of persons lineally descended from a common ancestor and includes their wives and unmarried daughters.</u> The daughter, on marriage, ceases to be a member of her father's family and becomes a member of her husband's family. The joint Hindu family is thus a larger body consisting of a group of persons who are united by the tie of sapindaship arising by birth, marriage or adoption:

The fundamental principle of the Hindu joint family is the sapindaship. Without that it is impossible to form a joint Hindu family. With it as long as a family is living together, it is almost impossible not to form a joint Hindu family. It is the family relation, the sapinda relation, which distinguishes the joint family, and is of its very essence. [Per Beaman, J. in Karsondas v. Gangabai, (1908) 32 Bom 479, 493: 10 Bom LR 184. See also Hindu Law in British India by S.V. Gupte, 2nd Edn., p. 59]

The Joint Hindu Family, with all its incidents, is thus a creature of law and cannot be created by an act of parties, except to the extent to which a stranger may be affiliated to the family by adoption".

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 33 Para 22** by referring the decision of Hon'ble High Court of Madras between Sri Raghunadha v. Sri Brozo Kishore, reported in 1876 (1) Mad. 69 = 3 IA 154 has held as under

"A joint Hindu family is a larger body than a Hindu coparcenary. A joint Hindu family consists of all persons lineally descended from a common ancestor and include their wives and unmarried daughters. A joint Hindu family is one in worship and holds joint assets. After separation of assets, the family ceases to be joint. Mere severance in food and worship is not treated as a separation."

3. THE CONCEPT OF COPARCENERY

Coparcenery is defined as a joint heirship or a joint ownership of a property and is the product of ancient Hindu jurisprudence which later on became an integral part of the Mitakshara school of Hindu law. ***The conception of a Joint Hindu Family constituting a Coparcenery is that of a common male ancestor with his lineal descendants in the male line within four degrees counting from, and inclusive of, such ancestor or three degrees exclusive of the ancestor.***

The Hon'ble Apex Court of India between ***State of Maharashtra v. Narayan Rao*, reported in (1985) 2 SCC 321 at page 328** held that ***a Hindu Coparcenery is, however, a narrower body than the joint family. Traditionally, only males who acquire by birth an interest in the joint or Coparcenery property can be members of the Coparcenery or become coparceners. Thus, a male member of a joint family and his sons, grandsons and great grandsons constitute a Coparcenery.*** A coparcener acquires a right in the Coparcenery property by birth but his right can be ascertained in definite terms only when a partition takes place. When the family is joint, the extent of the *share of a coparcener* cannot be

determined in definite terms since it is always capable of *fluctuating* as *it increases by the death of a coparcener and decreases on the birth of a coparcener.*

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 34 Para 26** has held as under

> ***"For interpreting the provision of section 6, it is necessary to ponder how coparcenary is formed. The basic concept of coparcenary is based upon common ownership by coparceners. When it remains undivided, the share of the coparcener is not certain. Nobody can claim with precision the extent of his right in the undivided property. Coparcener cannot claim any precise share as the interest in coparcenary is fluctuating. It increases and diminishes by death and birth in the family".***

4. THE RULE OF FOUR DEGREES

Though every Coparcenery must have a common ancestor to start with, it is not to be supposed that every extant Coparcenery is limited to four degrees from the common ancestor. A member of a joint family may be removed more than four degrees from the common ancestor (original holder of Coparcenery property), and yet he may be a coparcener. Whether he is so or not, depends on the answer to the question whether he can demand a partition of the Coparcenery property. If he can, he is a coparcener, otherwise, not. The rule is that partition can be demanded by any member of a joint family who is not removed more than four degrees from the last holder, however remote he may be from the common ancestor or original holder of the property. When a member of a joint family is removed more

than four degrees from the last holder, he cannot demand a partition, and therefore he is not a coparcener. **(Hindu Law by Mulla, 23rd Edition (Reprint 2019) page 319 and 320)**

It would mean that if we consider the propositus (original holder) to be the great grandfather, then the great grandfather, grandfather, father, son would be the coparceners and can demand partition. But if the fifth line of descent that is if the son's son were to be born, then such son's son can be called a coparcener and can demand partition only upon the death of the great great grandfather. And such descent of succession would continue upto four generations no matter how far the generation goes from the original holder. But it is important and necessary that such successive line remains within the four degrees of succession and the fifth line of descent would get a right to be called a coparcener and demand partition only when his first line (link) dies.

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 34 Para 23** has held as under

> ***"Hindu coparcenary is a much narrower body. It consists of propositus and three lineal descendants. Before 2005, it included only those persons like sons, grandsons, and great grandsons who are the holders of joint property. For example, in case A is holding the property, B is his son, C is his grandson, D is great grandson, and E is a great great grandson. The coparcenary will be formed up to D, i.e., great grandsons, and only on the death of A, holder of the property, the right of E would ripen in coparcenary as coparcenary is confined to three lineal descendants. Since grandsons and great grandsons***

become coparceners by birth, they acquired an interest in the property".

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 34 Para 25** has held as under

"Coparcener heirs get right by birth. Another method to be a coparcener is by way of adoption. As earlier, a woman could not be a coparcener, but she could still be a joint family member. By substituted section 6 with effect from 9.9.2005 daughters are recognised as coparceners in their rights, by birth in the family like a son. Coparcenary is the creation of law. Only a coparcener has a right to demand partition. Test is if a person can demand a partition, he is a coparcener not otherwise. Great great grandson cannot demand a partition as he is not a coparcener. In a case out of three male descendants, one or other has died, the last holder, even a fifth descendant, can claim partition. In case they are alive, he is excluded".

4.1 <u>ILLUSTRATION</u>

"A" inherits certain property from his father "X". He has a son "B" and a grandson "C", both members of an undivided family. A, B, and C are coparceners. A son "D" is then born to "C". "D" becomes a coparcener by birth with "A", "B" and "C". Subsequently, a son "E" is born to "D". "E" is not a coparcener, for being fifth in descent from "A", he cannot demand a partition of the family. On "A"s death, however "B" will become

the head of the joint family and "E" will step into the Coparcenery as the great-grandson of "B", though he is fifth in descent from "A", the older. Likewise, on "B"s death, "F" ("E"s son) will step into the Coparcenery as the great-grandson of "C", the head of the family for the time being, though he is sixth in descent from "A", the original holder. **(Hindu Law by Mulla, 23rd Edition (Reprint 2019) page 319 and 320)**

5. "UNOBSTRUCTED HERITAGE" AND "OBSTRUCTED HERITAGE".

Mitakshara divides property into two classes, namely

(1) **Apratibandha daya or Unobstructed heritage and**

(2) **Sapratibandha daya or Obstructed heritage**

5.1 UNOBSTRUCTED HERITAGE

Property in which a person acquires an interest by birth is called unobstructed heritage, because the accrual of the right to it is not obstructed by the existence of the owner. Thus, property inherited by a Hindu from his father, father's father or father's father's father, but not from his maternal grandfather, is unobstructed heritage as regards his own male issue, i.e., his son, grandson and great-grandson. His male issues acquire an interest in it from the moment of their birth. Their right to it arises from the mere fact of their birth in the family, and they become coparceners with their paternal ancestor in such property immediately on their birth, and in such cases ancestral property is unobstructed heritage.

5.2 OBSTRUCTED HERITAGE

The property, the right to which accrues not by birth but on the death of the last owner without leaving a male issue is called obstructed heritage. It is called obstructed, because the accrual of right to it is obstructed by the existence of owner.

Thus, property which devolves on parents, brothers, nephews, uncles, etc., upon the death of the last owner, is obstructed heritage. These relations do not take a vested interest in the property by birth. Their right to it arises for the first time on the death of the owner. Until then, they have a mere spes successionis, or a bare chance of succession to the property, contingent upon their surviving owner. ***Unobstructed heritage devolves by survivorship; obstructed heritage, by succession. (Hindu Law by Mulla, 23rd Edition (Reprint 2019) page 324)***

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 47 Para 48 and 49** has held as under

> ***"48. In Mitakshara coparcenary, there is unobstructed heritage, i.e., apratibandha daya and obstructed heritage i.e., sapratibandha daya. When right is created by birth is called unobstructed heritage. At the same time, the birthright is acquired in the property of the father, grandfather, or great grandfather. In case a coparcener dies without leaving a male issue, right is acquired not by birth, but by virtue of there being no male issue is called obstructed heritage. It is obstructed because the accrual of right to it is obstructed by the***

owner's existence. It is only on his death that obstructed heritage takes place".....

"49. It is apparent that unobstructed heritage takes place by birth, and the obstructed heritage takes place after the death of the owner. It is significant to note that under section 6 by birth, right is given that is called unobstructed heritage. It is not the obstructed heritage depending upon the owner's death. Thus, coparcener father need not be alive on 9.9.2005, date of substitution of provisions of Section 6".

6. CLASSIFICATION OF PROPERTIES UNDER HINDU LAW

The property under Hindu Law can be classified under two heads:

(1) Coparcenery property and

(2) Separate property.

6.1 THE COPARCENERY PROPERTY

Coparcenery property means the property which consists of ancestral property and a coparcener would mean a person who shares equally with others in inheritance in the estate of common ancestor. Coparcenery is a narrower body than the joint Hindu Family and before the Karnataka Amendment Act, 1990 and the Hindu Succession (Amendment) Act, 2005 came into effect, only male members of the family used to acquire by birth an interest in the Coparcenery property. **The term 'joint family property' is synonymous with 'Coparcenery property'.**

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 34 Para 24** has held as under:

> **"Coparcenary property is the one which is inherited by a Hindu from his father, grandfather, or great grandfather. Property inherited from others is held in his rights and cannot be treated as forming part of the coparcenary. The property in coparcenary is held as joint owners".**

6.2 COPARCENERY PROPERTY IS AGAIN DIVISIBLE INTO

(i) Ancestral property and
(ii) Joint family property which is not ancestral.

6.3 THE ANCESTRAL PROPERTY

Ancestral property is a species of Coparcenery property. Ancestral property is acquired by unobstructed heritage. The Hon'ble Apex Court of India between ***Shyam Narayan Prasad v. Krishna Prasad*, reported in (2018) 7 SCC 646 at page 651 para 12,** defined ***"Ancestral Property" as 'the property inherited by a male Hindu from his father, father's father or father's father's father is an ancestral property***. The essential feature of ancestral property, according to Mitakshara Law, is that the sons, grandsons, and great grandsons of the person who inherit it, acquire an interest and the rights attached to such property at the moment of their birth. The share which a coparcener obtains on partition of ancestral property is ancestral property as regards his male issue.

If a Hindu inherits unobstructed heritage i.e., property from his father, it becomes ancestral in his hands as regards his son. In such a

case, it is said that the son becomes a coparcener with the father as regards the property so inherited, and the Coparcenery consists of the father and the son. However, this does not mean that Coparcenery can consist only of the father and his sons. It is not only the sons, but also the grandsons and great-grandsons, who acquire an interest by birth in the Coparcenery property.

6.4 <u>ILLUSTRATION</u>

> If "A" inherits property from his father and he has two sons "B" and "C", they both become coparceners with him as regards the ancestral property. If "B" has a son "D", and "C" has a son "E", the Coparcenery will consist of the father, sons and grandsons, namely "A", "B", "C", "D", and "E". Further if "D" has a son "F" and "E" has a son "G", the Coparcenery will consist of the father, sons, grandsons and great-grandsons, in all it will consist of seven members. However, if "F" has a son "X", "X" does not become a coparcener, for a Coparcenery is limited to the head of each stock, and his sons, grandsons, and great-grand sons. "X" being the great-great-grandson of "A", cannot be a member of the Coparcenery so long as "A", the holder of the joint family, is alive. **(Hindu Law by Mulla, 23rd Edition (Reprint 2019) page 318)**

The Hon'ble Apex Court of India between ***Rohit Chauhan v. Surinder Singh*, reported in (2013) 9 SCC 419 page 423 para 11** held that ***on partition the ancestral property comes into the hands of individual persons/coparceners, then it has to be treated as a separate property and such a person shall be entitled to dispose of the Coparcenery property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth***

cannot be questioned. But, the moment a son is born, the property still intact with such individual, then such property becomes a Coparcenery property and the son would acquire an interest in that and become a coparcener.

The Hon'ble High Court of Karnataka between **Pushpalatha N.V. V/s. V.P. Padma & Others, reported in ILR 2019 KAR 3205 (DB)** at Page 3220 Para 21, has held that **whenever a partition of ancestral property takes place, the share that a coparcener gets continues to be ancestral if on the date of partition he has a son. Further held that he holds such property as his absolute property if no son exists on the date of partition, but if a son is born subsequently, the ancestral character revives. After commencement of Hindu Succession (Amendment) Act of 2005, the presence of a daughter or birth of a daughter subsequently has the same effect, but her entitlement to a share being a coparcener is subject to the riders found in the amended Section 6.**

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 35 Para 28** by referring the decisions rendered between *Sheela Devi v. Lal Chand*, (2006) 8 SCC 581, *M. Yogendra & Ors. v. Leelamma N. & Ors.*, (2009) 15 SCC 184, *Smt. Sitabai & Anr. v. Ramchandra*, AIR 1970 SC 343 and *Dharma Shamrao Agalawe v. Pandurang Miragu Agalwe & Ors.*, (1988) 2 SCC 126 has held that ***in case coparcenary property comes to the hands of a 'single person' temporarily, it would be treated as his property, but once a son is born, coparcenary would revive in terms of the Mitakshara law.***

6.5 JOINT FAMILY PROPERTY WHICH IS NOT ANCESTRAL

Property acquired with the aid of ancestral property and property acquired by individual coparceners without such aid, but treated by them as property of the whole family. There must have been a nucleus of joint family property before an ancestral joint family property can come into existence because the word ancestral connotes descent and hence, pre-existence. Where there is ancestral joint family property, every member of the family acquires in it a right by birth which cannot be defeated by individual alienation or disposition of any kind except under certain peculiar circumstances. This is equally true of joint family property, where a sufficient nucleus of the property in the possession of the members of a joint family has come to them from a paternal ancestor, the presumption is that the whole property is ancestral and any member alleging that it is not, will have to prove his self-acquisition. Similarly, where property is admitted or proved to be joint family property, which may not have been acquired with the aid of ancestral property, but if the same has been treated by them as the property of the whole family, it is subject to exactly the same legal incidents as the ancestral joint family property ***(K.Madhava Raja Nayak V/s K.Sridhara Nayak, 2009 SCC OnLine Kar 614: (2010) 1 ICC 494 at page 500 Para 15)***.

6.6 PROPERTY THROWN INTO COMMON STOCK (DOCTRINE OF BLENDING)

Sometimes, it may so happen that ***property which was originally separate or self-acquired property of a member of joint family is voluntarily thrown by him into common stock with the intention of abandoning all individual claims over such property. If this is done, such property becomes joint family property by operation of doctrine of blending.*** The act by which a coparcener throws his separate property

into the common stock is a unilateral act. As soon as he declares his intention to do so, the property assumes the character of joint family property.

However clear intention to waive his separate right must be established and such intention cannot be inferred from the mere fact that he allowed the other members of family to use such property jointly with himself. Acts of generosity or kindness are not to be mistaken for admission of legal obligation. Generally, presumption is against blending of self-acquired property with joint family property. The onus of proof is on person who alleges such a blending.

It can be concluded that ***Coparcenery property means and includes (1) ancestral property, (2) acquisitions made by the coparceners with the help of ancestral property, (3) joint acquisitions of the coparceners even without such help provided there was no proof of intention on their part that the property should not be treated as joint family property and (4) separate property of the coparceners thrown into the common stock. (K.Madhava Raja Nayak V/s K.Sridhara Nayak, 2009 SCC OnLine Kar 614: (2010) 1 ICC 494 at page 500 Para 16)***.

6.7 SEPARATE PROPERTY

All property other than Coparcenery or joint family property is separate property. Even if a Hindu is a member of a joint family, he may possess separate property. The term self-acquired indicates that the property has been acquired by a coparcener by his own exertion without assistance of family funds. **'Separate' property includes 'Self-acquired' property.**

6.8 WHEN SEPARATE PROPERTY/SELF ACQUIRED PROPERTY BECOMES ANCESTRAL PROPERTY

Sometimes we may encounter suits seeking partition but the suit property may be separate property of plaintiff's father. An averment may be made that such property is ancestral property and he being the coparcener is entitled for a share in it. In such situations, we must tread cautiously, otherwise the person who possesses separate property will be put to great hardship. Let me illustrate this situation in the following way

6.9 ILLUSTRATION

One "A" in the year 1965 out of his own earnings without the assistance of joint family funds purchased a landed property and got married in the year 1970 and out of the wedlock, a son "B" was born in the year 1972. "B" after attaining majority got married in the year 1993 and a son "C" was born to him in the year 1995. The said "A" died in the year 2000 leaving behind only "B" as his Class-I legal heir to succeed to the said property and 'B' gets changed the revenue records and is in possession and enjoyment over the said landed property. Now in the year 2020, "C" files a partition suit against his father "B" that the said property was purchased by his grand-father "A" and after his death, the said property has become ancestral property and he being one of the coparceners is entitled for an equal share alongwith his father and prays for decreeing the suit. The said "B" enters appearance and files written statement and thereby admits that the suit property was purchased by his father "A" out of his own earning. 'B' further admits that during his life time, 'A' did not effect partition but seeks for dismissal of suit on the ground that suit property is not ancestral.

C" files application under Order 12 Rule 6 of CPC on the ground that his father "B" admitted the nature of acquisition by "A" and sought for passing the decree as he need not to prove anything. **Can court pass Judgment and Decree by allowing application filed under Order 12 Rule 6 of CPC as there is an admission on the part of "B" that the said landed property was acquired by his father?**

In the year 2000, when "A" died intestate leaving behind his self-acquired/separate property, "B" being Class I legal heir of "A" had succeeded to the said property under Section 8 of the Hindu Succession Act, 1956 which deals with General rules of Succession in the case of males and ***therefore the property in the hands of "B" is his separate property and "C" has no right over that property, till the death of "B" dying intestate***. Hence the application filed under Order 12 Rule 6 of CPC deserves to be rejected.

For example, if "B" died intestate, then "C" being the Class I legal heir of "B" will get the said property. ***Now the question is, whether the children of "C" during the life time of "C" can maintain a suit for partition that the said property is ancestral property and they being coparceners have right in the said property by birth?***. We have already discussed "Ancestral Property" as 'any property inherited up to four generations of male lineage from the father, father's father or father's father's father i.e. father, grandfather, great grandfather is termed as ancestral property. In the case on hand the said property purchased by "A" is in the hands of "C" who is the third generation. ***"C" succeeded to the said property under Section 8 of Hindu Succession Act, 1956, hence still the said property in the hands of "C" also is***

his separate property. The Children of "C" have no right over the said property during his life time. "C" has absolute right to dispose of the said property during his life time. If "C" disposes off the said property during his life time to some third parties and died, then the children of "C" have no right against the said purchaser. **Only if "C" died intestate, then the said property is converted as ancestral property and the same is inherited by children of "C" i.e., fourth generation as unobstructed heritage. It can be concluded that a property purchased by great-grand father out of his self-exertion without the aid of joint family funds, then after his death, in the hands of his son (grand-father) and after his death in the hands of his son (Father) is separate property. Only if Father died intestate, then the said property which passes on from third generation to fourth generation as unobstructed heritage is converted as "ancestral property".**

Therefore, merely because an admission is made by 'B' that the said property was purchased by his father, "A" such property does not become 'ancestral', hence suit cannot be decreed.

The Hon'ble Apex Court of India between **Commissioner of Wealth Tax, Kanpur V/s. Chander Sen, reported in (1986) 3 SCC 567**, while interpreting Section 4 and 8 of Hindu Succession Act, 1956 has held that *Under Section 8 of the Hindu Succession Act, 1956, the property of the father who dies intestate devolves on his son in his individual capacity and not as Karta of his own family. Section 8 lays down the scheme of succession to the property of a Hindu dying intestate. The Schedule classified the heirs on whom such property should devolve. Those specified in class I took simultaneously to the exclusion of all other heirs. A son's son was not*

mentioned as an heir under class I of the Schedule, and therefore, he could not get any right in the property of his grandfather under the provision.

Further held that the right of a son's son in his grandfather's property during the lifetime of his father which existed under the Hindu law as in force before the Act, was not saved expressly by the Act, and therefore, the earlier interpretation of Hindu law giving a right by birth in such property "ceased to have effect". *So construed, Section 8 of the Act should be taken as a self-contained provision laying down the scheme of devolution of the property of a Hindu dying intestate.* ***Therefore, the property which devolved on a Hindu on the death of his father intestate after the coming into force of the Hindu Succession Act, 1956, did not constitute Hindu Un-divided Family property consisting of his own branch including his sons.***

Further held that the Act makes it clear by Section 4 that one should look to the Act in case of doubt and not to the pre-existing Hindu law. It would be difficult to hold today that the property which devolved on a Hindu under Section 8 of the Act would be Hindu Un-divided Family in his hand vis-a-vis his own son; *that would amount to creating two classes among the heirs mentioned in class I, the male heirs in whose hands it will be joint Hindu family property and vis-a-vis sons and female heirs with respect to whom no such concept could be applied or contemplated.*

Further held that under the Hindu law, the property of a male Hindu devolved on his death on his sons and the grandsons as the grandsons also have an interest in the property. However, by reason of Section 8 of the Act, the son's son gets excluded and the son alone

inherits the property to the exclusion of his son. As the effect of Section 8 was directly derogatory of the law established according to Hindu law, the statutory provisions must prevail in view of the unequivocal intention in the statute itself, expressed in Section 4(1)of the Ac which says that to the extent to which provisions have been made in the Act, those provisions shall override the established provisions in the texts of Hindu Law.

The Hon'ble High Court of Karnataka between **Pushpalatha N.V. V/s. V.P. Padma & Others, reported in ILR 2019 KAR 3205 (DB)** at Page 3220 Para 21, has held that **if succession to self acquired property of a male Hindu takes place among his heirs in accordance with Section 8 of the Hindu Succession Act, the share that every member takes will be held by each of them as his or her separate property.**

The Hon'ble Apex Court of India between ***Arshnoor Singh V/s Harpal Kaur and Others*, reported in (2020) 14 SCC 436 at para 7.3** held that ***under Mitakshara law, whenever a male ancestor inherits any property from any of his paternal ancestors upto three degrees above him, then his male legal heirs upto three degrees below him, would get an equal right as coparceners in that property.*** Further at para 12.5 held that after the Hindu Succession Act, 1956 if a person inherits a self-acquired property from his paternal ancestors, the said property becomes his self-acquired property, and does not remain Coparcenery property.

The Hon'ble Apex Court of India between **Govindbhai Chhotabhai Patel and Other V/s Patel Ramanbhai Mathurbhai, reported (2020) 16 SCC Page 255 para 11** held that ***Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be taken by his male descendants.*** It was held that it was not possible to hold that such property bequeathed or gifted to a son must

necessarily rank as ancestral property. It was further held that ***a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor.*** Further held that once the property in the hands of Donor is held to be self-acquired property, he was competent to deal with his property in such a manner he considers as proper including by executing a gift deed in favour of a stranger to the family'.

6.10 HOW TO DETERMINE IF A PROPERTY IS ANCESTRAL OR SEPARATE PROPERTY?

1. PROPERTY INHERITED FROM A PATERNAL ANCESTOR IS ANCESTRAL PROPERTY.
2. PROPERTY INHERITED FROM A MATERNAL GRANDFATHER IS NOT ANCESTRAL PROPERTY,
3. BUT IT IS HIS SEPARATE PROPERTY.
4. PROPERTY INHERITED FROM COLLATERALS OR FROM FEMALES WILL BE HIS SEPARATE
5. PROPERTY.
6. SHARE ALLOTTED ON PARTITION OF ANCESTRAL PROPERTY IS ANCESTRAL PROPERTY FOR
7. HIS CHILDREN.
8. PROPERTY OBTAINED BY GIFT OR WILL FROM A PATERNAL ANCESTOR WHETHER IT WILL
9. BE ANCESTRAL PROPERTY DEPENDS ON FACTS OF CASE.
10. ACCRETIONS:- ACCUMULATIONS AND ACCRETIONS OF INCOME OF ANCESTRAL
11. PROPERTY ARE ANCESTRAL PROPERTY. SO ALSO PROPERTY PURCHASED OR ACQUIRED
12. OUT OF THE INCOME OR WITH THE ASSISTANCE OF ANCESTRAL PROPERTY WOULD BE

13. ANCESTRAL PROPERTY. PROPERTY PURCHASED OUT OF SALE PROCEEDS OF ANCESTRAL
14. PROPERTY IS ALSO ANCESTRAL PROPERTY.

7. INCIDENTS OF JOINT FAMILY OR COPARCENERY PROPERTY

While deciding a partition suit with respect to ancestral property, one should know the rights and liabilities of coparceners, ***the nature of acquisition of Coparcenery property, the right to work out their shares by seeking partition, effect of death of coparcener, the right of alienation of undivided share etc. These aspects are called as Incidents of 'Coparcenery ownership'.*** When a daughter has been conferred the status of coparcener under the two enactments i.e., State Act of 1990 and Central Act of 2005, then while deciding the rights of daughter in ancestral property, it is necessary to know the Incidents of Coparcenery ownership.

The Hon'ble Apex Court of India between **State Bank of India v. Ghamandi Ram, (1969) 2 SCC 33 at page 36 para 5** laid down ***six incidents of co-parcenership under the Mitakshara law*** which are as under:

1. ***The lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person;***
2. ***Secondly, that such descendants can at any time work out their rights by asking for partition;***

3. ***Thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest;***

4. ***Fourthly, that as a result of such co-ownership, the possession and enjoyment of the properties is common;***

5. ***Fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and***

6. ***Sixthly, that the interest of a deceased member lapses on his death to the survivors.***

As regards the fifth incident of Coparcenery ownership, no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, the Hon'ble Apex Court between ***Hardeo Rai v. Sakuntala Devi*, (2008) 7 SCC 46 at page 52 para 26** *has dissented with the said fifth incident of Coparcenery ownership as laid down in* ***State Bank of India v. Ghamandi Ram (supra)*** *on the ground that in the said case while laying down the fifth incident of Coparcenery ownership, the binding precedent between* ***M.V.S. Manikayala Rao V/s M. Narasimhaswami and Others, reported in AIR 1966 SC 470*** *was not noticed. It is further held in* ***Hardeo Rai (supra)*** *that* ***even a Coparcenery interest can be transferred subject to the condition that the purchaser without the consent of his other coparceners cannot get possession and the purchaser acquires a right to sue for partition.***

The Hon'ble Apex Court of India between ***Danamma v. Amar*, reported in (2018) 3 SCC 343 at page 356 para 23 and 25** has held that Daughter as a coparcener shall be responsible for all the debts and liabilities as that of a son, with respect to the property which comes into her hands as a

coparcener. ***One of the incidents of Coparcenery 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-sections (1)(a) and (b) of Section 6***. Hence, it is clear that the right to seek partition has not been abrogated. ***The right is inherent and can be availed of by any coparcener, now even a daughter who is a coparcener***.

8. INCIDENTS OF SEPARATE OR SELF-ACQUIRED PROPERTY

A Hindu, even if he be joint, may possess separate property. Such property belongs exclusively to him. No other members of Coparcenery, not even his male issue, acquires any interest in it by birth. He may sell it, or he may make a gift of it, or bequeath it by Will, to any person he likes. It is not liable to partition, and, on his death intestate, it passes by succession to his heirs, and not by survivorship to the surviving coparceners. **(Hindu Law by Mulla, 23rd Edition (Reprint 2019 page 326)**

9. JOINT TENANTS AND TENANTS-IN-COMMON VIS-A-VIS SURVIVORSHIP AND SUCCESSION

While deciding a partition suit, we need to know the concepts of Survivorship and Succession Vis-a-Vis Joint Tenants and Tenants-in-Common. Otherwise we may not be able to determine the rights of the parties effectively.

The concept of Joint Tenancy applies to Hindu Coparcenery. Except in case of Coparceneryship between members of a Hindu Undivided Family, the concept of Joint-Tenancy is unknown in India. When property is a co-owned property, the co-owners may hold the

property, either as Joint-Tenants or Tenants-in-common. The two concepts may be distinguished as under:

(1) Joint-Tenancy implies unity of title as well as unity of possession. Tenancy-in-common signifies only the unity of possession

(2) Where the co-owners hold property in Joint-Tenancy, upon the death of any one of them his share goes to the Survivors. But where the co-owners hold it as Tenants-in-common, upon the death of a co-owner his share goes to his heir or representative.

9.1 ILLUSTRATION FOR JOINT TENANCY

"A" and "B" are coparceners governed by Hindu Mitakshara Coparcenery. "B" is unmarried and died in the year 1985 and he is not survived any one of the Class I Legal heirs as per the Schedule of Hindu Succession Act, 1956. As per unamended Section 6 of Hindu Succession Act, 1956, the interest of "B" in a Mitakshara Coparcenery property will devolve on "A" by Survivorship as he is the surviving member of the Coparcenery.

9.2 ILLUSTRATION FOR TENANTS-IN-COMMON

"A" and "B" are coparcenears governed by Hindu Mitakshara Coparcenery. "B" died in the year 1990 leaving behind his mother "C", widow "D" and a daughter "E". As per the proviso of unamended Section 6 of Hindu Succession Act, 1956 and as per Section 6(3) of Hindu Succession (Amendment) Act, 2005, the interest of "B" in a Mitakshara Coparcenery property will not devolve on "A" by Survivorship and on the contrary, the

interest of "B" will devolve on his Class I legal heirs specified in the Schedule by way of Notional Partition. Till effecting the actual partition between "A" and the legal heirs of "B", the legal heirs of "B" i.e., "C", "D" and "E" will hold the property as Tenants-in-common.

The Hon'ble Apex Court of India between **M. Arumugam V/s Ammaniammal and Others, reported in (2020) 11 SCC 103 at Para No.15** has held that ***when two or more heirs succeed together to the property of an intestate, they shall take the property per capita and as tenants in common and not as joint tenants. Further held that this also clearly indicates that the property was not to be treated as a joint family property though it may be held jointly by the legal heirs as tenants in common till the property is divided, apportioned or dealt with in a family settlement.***

The Hon'ble Apex Court of India between ***Hardeo Rai v. Sakuntala Devi*, reported in (2008) 7 SCC 46 at page 51 para 22** has held that ***once the share of a coparcener is determined, it ceases to be a Coparcenery property. The parties in such an event would not possess the property as "joint tenants" but as "tenants-in-common".***

The Hon'ble Apex Court of India between ***Uttam v. Saubhag Singh*, reported in (2016) 4 SCC 68 page 80 para 18** while summarising the law applicable to joint family property governed by the Mitakshara School, prior to the amendment of 2005, ***has discussed the concept of Joint-Tenancy and Tenancy-in-common Vis-a-Vis Survivorship and Succession*** *by laying down the following principles:*

(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 Coparcenery property, his interest in the property will devolve by survivorship upon the surviving members of the Coparcenery (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 Coparcenery 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 Coparcenery 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 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.

10. <u>THE CONCEPT OF SURVIVORSHIP IS GIVEN A COMPLETE GO-BY UNDER SECTION 6(3) OF HINDU SUCCESSION (AMENDMENT) ACT, 2005</u>

Prior to Mysore Hindu Law Women's Rights Act, 1933 and the Hindu Women's Right to Property Act (XVIII of) 1937, under Mitakshara Coparcenery, if a coparcener died, his undivided interest lapsed on to the survivors. As per these two enactments, if a coparcener died leaving behind a widow, then his undivided interest devolved upon such widow and not on the surviving coparceners. ***After enactment of the Hindu Succession Act, 1956, the concept of Survivorship was further restricted and as per the proviso to unamended Section 6, only in the absence of surviving female relative specified in Class I of Schedule, then the interest of the deceased coparcener devolved by survivorship upon the surviving members of the coparcenery.*** A daughter being one of the Class I legal heirs is entitled for a share out of the property fallen to the share of the deceased coparcener i.e. her father, when notional partition is effected. ***Under 6B of the Hindu Succession (Karnataka Amendment) Act, 1990***

also, similar restriction is imposed on the concept of survivorship as that of unamended Section 6 of the Hindu Succession Act, 1956.

But Section 6(3) of the Hindu Succession (Amendment) Act, 2005 has given a complete go-by to the concept of Survivorship. As per the said provision, where a Hindu dies after 09.09.2005, then his interest in the property of a Joint Hindu Family, shall devolve by testamentary or intestate succession as the case may be as per the provisions of the Act and not by survivorship. ***The Hindu Succession (Amendment) Act, 2005 recognises only Testamentary Succession or Intestate Succession and not succession by way of Survivorship.*** Under the unamended Section 6 of Hindu Succession Act, 1956 in the absence of female Class I legal heirs, then such interest devolved upon survivors and not on Class II legal heirs, Agnates and Cognates. But as per Section 6(3) of the Hindu Succession (Amendment) Act, 2005, the share of a deceased Hindu will devolve upon the heirs shown in Schedule I & II as per Section 8 to 12 of the Act.

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 55 Para 66** has held as under

> ***"With respect to a Hindu who dies after the commencement of the Amendment Act, 2005, as provided in section 6(3) his interest shall pass by testamentary or intestate succession and not by survivorship, and there is a deemed partition of the coparcenary property in order to ascertain the shares which would have been allotted to his heirs had there been a partition. The daughter is to be allotted the same share as a son; even surviving child of predeceased daughter or son are given a share in case child has also died then surviving child of such predeceased child of a predeceased son or***

predeceased daughter would be allotted the same share, had they been alive at the time of deemed partition. Thus, there is a sea change in substituted section 6. In case of death of coparcener after 9.9.2005, succession is not by survivorship but in accordance with section 6(3)(1). The Explanation to section 6(3) is the same as Explanation I to section 6 as originally enacted. Section 6(4) makes a daughter liable in the same manner as that of a son. The daughter, grand daughter, or great grand daughter, as the case may be, is equally bound to follow the pious obligation under the Hindu Law to discharge any such debt. The proviso saves the right of the creditor with respect to the debt contracted before the commencement of Amendment Act, 2005. The provisions contained in section 6(4) also make it clear that provisions of section 6 are not retrospective as the rights and liabilities are both from the commencement of the Amendment Act".

11. SUCCESSION CAN NEVER BE IN ABEYANCE

It is important to note that succession can never be in abeyance, i.e., it can never lie in a vacuum. The moment a person dies intestate, his heirs (in order of succession) become entitled to succeed to his property. If there is a will, the succession will be as per the will.

The Hon'ble High Court of Karnataka in ***Kalamma v. K.B. Dhanalakshmi*, reported in ILR 2014 Kar 2305 page 2313 para 22** while discussing the rules of succession under the Hindu Succession Act, 1956

has held that **"It is well settled that succession never remains in abeyance and takes effect immediately at the exact moment of the death of a person by operation of law".**

11.1 ILLUSTRATION

"A" and "B" are brothers/coparceners governed by Hindu Mitakshara Coparcenery. "B" died in the year 1990 leaving behind his mother "C", widow "D" and a daughter "E". As per the proviso of unamended Section 6 of Hindu Succession Act, 1956, the undivided interest of "B" in a Mitakshara Coparcenery property immediately after his death will devolve on his Class I legal heirs specified in the Schedule I i.e., his mother "C", widow "D" and a daughter "E" as per Section 8 to 10 of Hindu Succession Act, 1956.

12. DUTIES OF COURT WHILE DECIDING PARTITION SUITS

While deciding partition suits, courts must take extreme care and caution regarding the nature of property i.e. whether ancestral property or self-acquired property, whether the property is absolute property of female under Section 14 of the Act, 1956, the date of death of coparceners, which law to be applied to the facts involved i.e., whether unamended Section 6 of the Hindu Succession Act, 1956, Section 6A to 6C of the Hindu Succession (Karnataka Amendment) Act, 1990 or Amended Section 6 of the Hindu Succession (Amendment) Act, 2005, whether all the properties are included in the suit, whether all the parties are joined in the suit etc. Further, while passing the preliminary decree, the operative portion must clearly indicate the share of the Plaintiffs and Defendants. If the court without taking into consideration of these aspects proceeds to pass the preliminary decree, then in the Final Decree proceedings, it will be difficult to effect the partition by metes and bounds.

The Hon'ble Apex Court of India between **Shasidhar *v. Ashwini Uma Mathad*, (2015) 11 SCC 269 page 276** held that **when a suit is filed by a co-sharer, coparcener, co-owner or joint owner, as the case may be, for partition and separate possession of his/her share qua others, it is necessary for the court to examine**;

(1) ***The nature and character of the properties in suit such as who was the original owner of the suit properties, how and by which source he/she acquired such properties, whether it was his/her self-acquired property or ancestral property, or joint property or Coparcenery property in his/her hand and, if so, who are/were the coparceners or joint owners with him/her as the case may be.***

(2) ***How the devolution of his/her interest in the property took place consequent upon his/her death on surviving members of the family and in what proportion, whether he/she died intestate or left behind any testamentary succession in favour of any family member or outsider to inherit his/her share in properties and if so, its effect.***

(3) ***Whether the properties in suit are capable of being partitioned effectively and if so, in what manner?***

(4) ***Whether all properties are included in the suit and all co-sharers, coparceners, co-owners or joint owners, as the case may be, are made parties to the suit?***

These issues, being material for proper disposal of the partition suit, have to be answered by the court on the basis of family tree, inter se relations of family members, evidence adduced and the principles of law applicable to the case.

13. THE CONCEPT OF DISRUPTION OF COPARCENARY BY STATUTORY FICTION / NOTIONAL PARTITION AND WHEN DOES SUCCESSION OPEN?

While deciding a partition suit, sometimes a doubt may arise as to the applicability of the latest amendment to Section 6 of the Hindu Succession (Amendment) Act, 2005. The confusion may pertain to which Act should be made applicable to the given set of facts. Whether unamended Section 6 of the Hindu Succession Act, 1956 applies or Hindu Succession (Karnataka Amendment) Act 1990 applies or Amended Section 6 of Hindu Succession (Amendment) Act 2005 applies?

13.1 THE POSITION OF LAW REGARDING DISRUPTION OF COPARCENARY BY STATUTORY FICTION / NOTIONAL PARTITION BEFORE THE DECISION OF HON'BLE APEX COURT OF INDIA BETWEEN VINEETA SHARMA V/S RAKESH SHARMA & OTHERS (SUPRA)

Before the decision of Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra),** the position of law was, ***when a coparcener dies, there will be a disruption of coparcenery by statutory fiction/Notional partition and accordingly succession opens*** *as on the* ***date of death of coparcener*** *and* ***the law applicable as on that date should be applied.***

The Hon'ble Apex Court of India between ***Sheela Devi v. Lal Chand,*** **reported in (2006) 8 SCC 581 at page 590 para 21** while interpreting Hindu Succession (Andhra Pradesh Amendment) Act 1987 has held that though Parliament of India, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted the Hindu Succession (Amendment) Act, 2005, but such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. ***The Apex Court further held that the succession having opened in 1989, evidently, the provisions of the Amendment Act, 2005 would have no application and Hindu Succession (Andhra Pradesh Amendment) Act 1987 applies to the facts involved.***

The Division Bench of Hon'ble High Court of Karnataka between ***M. Prithviraj v. Leelamma N*****, reported in ILR 2009 Kar 3612 at page 3632 para 19,** while interpreting unamended Section 6 of Hindu Succession Act, 1956 and Amended Section 6 of Hindu Succession (Amendment) Act, 2005 has held that ***when coparcener K. Doddananjundaiah died in the year 1969, the succession was opened and the shares to be determined as per the Hindu Succession Act in force in 1969 and the amended provisions of Hindu Succession Act, 2005 are not applicable to the facts involved since the succession had already opened in the year 1969 on the demise of K. Doddananjundaiah.***

The Apex Court of India wile interpreting Section 6 of Hindu Succession (Amendment) Act 2005, between **Prakash and Another V/s Phulavati and Others, reported in (2016) 2 SCC 36 at page 51 para 27.1** has held that the view taken by Apex Court in ***Sheela Devi v. Lal Chand (supra)*** **and the Division Bench of High Court of Karnataka in M. Prithviraj v. Leelamma N (supra)** are correct and further at page 49 para 23 held that ***rights under Section 6 of Hindu Succession (Amendment) Act 2005 applicable to***

living daughters of living coparceners as on 09.09.2005 irrespective of when such daughters are born.

The Hon'ble High Court of Karnataka between **Balavant Rao v. Geeta, reported in ILR 2017 Kar 2882 at page 2919,** held that if a piece of substantive law is amended, then such a law would have prospective operation unless made retrospective, either expressly or by necessary intendment. The reason being that all vested rights prior to the amendment are protected and not divested pursuant to the amendment. ***Therefore, if the death of a coparcener has occurred prior to the 2005 amendment, the law as it stood then would apply in the matter of succession.***

Further the Hon'ble High Court of Karnataka at page 2932 Para 32 has held as under

> As already noted, in the instant case, ***the male coparcener Praveen (son of defendant Nos. 1 and 2) died way back in the year 1991 and succession to his estate opened in the year 1991 itself. The vested right of the deceased coparcener in the suit schedule properties, which was crystallized on his death and which would devolve on his legal heirs cannot be negated by virtue of fee amendment made to Section 6.*** *In fact, that is precisely what has been enunciated by the Hon'ble Supreme Court in Prakash v. Phulavati (supra) by holding that the amendment made to Section 6 is prospective in nature and in its operation... Further, on a reading of paragraph Nos. 17 and 18 of the judgment of the Hon'ble Supreme Court, it becomes clear that the statutory notional partition has not been given a go bye on account of the amendment made to Section 6.* ***Any***

other interpretation would cause havoc to the rights of the successors of a deceased male coparcener, who has died prior to amendment made to Section 6 of the Act in the year 2005.

13.2 THE POSITION OF LAW REGARDING DISRUPTION OF COPARCENARY BY STATUTORY FICTION / NOTIONAL PARTITION AFTER THE DECISION OF HON'BLE APEX COURT OF INDIA BETWEEN VINEETA SHARMA V/S RAKESH SHARMA & OTHERS (SUPRA)

The Hon'ble Apex Court, while interpreting Section 6 of Hindu Succession (Amendment) Act, 2005 **at Para 23 in Prakash and Another V/s Phulavathi and Others (Supra)** held that when the father coparcenar died before coming into the force of Hindu Succession Amendment Act, 2005, then the daughter of such deceased coparcenar would not get the benefit of the Amendment Act 2005 and such daughter will get the share out of the notional share which will be allotable to the deceased coparcenar. Suffice it to say that in order to claim coparcenary rights by daughter, both daughter and her father coparcenar must be alive as on 09.09.2005. But the Hon'ble Apex Court in the case of **Vineeta Sharma V/s Rakesh Sharma & Others (Supra)** by over-ruling the ratio laid down **in Prakash and Another V/s Phulavathi and Others (Supra) at Page 79 Para 107** has held as under:

"Once the constitution of coparcenary changes by birth or death, shares have to be worked out at the time of actual partition. The shares will have to be determined in changed scenario. The severance of status cannot

come in the way to give effect to statutory provision and change by subsequent event. The statutory fiction of partition is far short of actual partition, it does not bring about the disruption of the joint family or that of coparcenary is a settled proposition of law. For the reasons mentioned above, we are also of the opinion that mere severance of status by way of filing a suit does not bring about the partition and till the date of the final decree, change in law, and changes due to the subsequent event can be taken into consideration".

The Hon'ble Apex Court between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 80 Para 109** has held as under:

"When the proviso to unamended section 6 of the Act of 1956 came into operation and the share of the deceased coparcener was required to be ascertained, a deemed partition was assumed in the lifetime of the deceased immediately before his death. Such a concept of notional partition was employed so as to give effect to Explanation to section 6. The fiction of notional partition was meant for an aforesaid specific purpose. It was not to bring about the real partition. Neither did it affect the severance of interest nor demarcated the interest of surviving coparceners or of the other family members, if any, entitled to a share in the event of partition but could not have claimed it. The entire partition of the coparcenary is not provided by deemed fiction; otherwise, coparcenary could not have

continued which is by birth, and the death of one coparcener would have brought an end to it".

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 81 Para 112** has held as under:

"In case coparcenary is continued, and later on between the surviving coparceners partition takes place, it would be necessary to find out the extent of the share of the deceased coparcener. That has to be worked out with reference to the property which was available at the time of death of deceased coparcener whose share devolved as per the proviso and Explanation I to section 6 as in case of intestate succession".

The Hon'ble Apex Court between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 57 Para 71** has held as under:

"As per the Mitakshara law, no coparcener has any fixed share. It keeps on fluctuating by birth or by death. It is the said principle of administration of Mitakshara coparcenary carried forward in statutory provisions of section 6. ***Even if a coparcener had left behind female heir of Class I or a male claiming through such female Class I heir, there is no disruption of coparcenary by statutory fiction of partition. Fiction is only for ascertaining the share of a deceased coparcener, which would be allotted to him as and when actual partition takes place. The deemed fiction of partition is for that limited purpose.*** *The classic Shastric Hindu law excluded the daughter from being*

coparcener, which injustice has now been done away with by amending the provisions in consonance with the spirit of the Constitution".

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others and others (Supra) at Page 57 Para 74** has held as under

*"....**It is only when a female of Class I heir is left, or in case of her death, male relative is left, the share of the deceased coparcener is fixed to be distributed by a deemed partition, in the event of an actual partition, as and when it takes place as per the proviso to unamended section 6. The share of the surviving coparcener may undergo change till the actual partition is made.** The proviso to section 6 does not come in the way of formation of a coparcenary, and who can be a coparcener. The proviso to section 6 as originally stood, contained an exception to the survivorship right. The right conferred under substituted section 6(1) is not by survivorship but by birth. **The death of every coparcener is inevitable. How the property passes on death is not relevant for interpreting the provisions of section 6(1). Significant is how right of a coparcener is acquired under Mitakshara coparcenary.** It cannot be inferred that the daughter is conferred with the right only on the death of a living coparcener, by declaration contained in section 6, she has been made a coparcener. The precise declaration made in section 6(1) has to be taken to its logical end; otherwise, it would amount to a denial of the very right to a daughter expressly conferred by the legislature..."*

In order to understand the ratio laid down by Apex Court of India in **Vineeta Sharma V/s Rakesh Sharma & Others (Supra)** regarding disruption of coparcenary, when does succession open and to determine as to which law would be applicable to the facts involved in the said case, let us discuss with the help of following illustration:

13.3 ILLUSTRATION

In the year 1985 "A" being coparcener died at Tumkur leaving behind his widow "B", two sons i.e., "C" and "D", a daughter "E" and his mother "F". No partition was effected during the life time of "A" and even after his death, the ancestral property is intact. In the meanwhile, Hindu Succession (Amendment) Act, 2005 came into force with effect from 09.09.2005 and "E" daughter filed suit for partition and separate possession in the year 2018 and the same is pending for consideration.

(1). As per the ratio laid down by Apex Court in Prakash and Another V/s Phulavathi and Others (Supra), "E", daughter would not become a coparcener as her father "A" died in the year 1985 and succession opened in the year 1985 i.e., as on the commencement of Hindu Succession (Amendment) Act, 2005 her father "A" was not alive, hence the said "E" daughter is not considered as coparcener. As per the said ratio of Apex Court, When "A" died in the year 1985, then succession opened and unamended Section 6 of Hindu Succession Act, 1956 would apply to the facts on hand. As per unamended Section 6, notional partition has to be effected and "A" and his two sons "C" and "D" will get 1/3rd share each as

coparceners and the widow "B", daughter "E" and mother "F" along with two sons "C" and "D" will get equal share as Class I legal heirs of "A" as per Section 8 to 10 of Hindu Succession Act, 1956 out of the 1/3rd share allotted to "A".

(2). As per the ratio laid down by Apex Court in Vineeta Sharma V/s Rakesh Sharma & Others and another (Supra), though "A" died in the year 1985, there would be no disruption of coparcenery and share of "A" has to be ascertained (Notional Partition) as on the date of effecting actual partition among the surviving coparceners and not as on the date of death of "A" i.e., in the year 1985. Further held that once the constitution of coparcenary changes by birth or death, shares have to be worked out at the time of actual partition. The shares will have to be determined in changed scenario. The severance of status cannot come in the way to give effect to statutory provision and change by subsequent event. The statutory fiction of partition is far short of actual partition, it does not bring about the disruption of the joint family or that of coparcenary is a settled proposition of law.

In the given illustration, "D" daughter is alive as on 09.09.2005 and by virtue of amended Section 6 of Hindu Succession (Amendment) Act, 2005, she has become coparcener as the requirement of both daughter and coparcener i.e., father should be alive as on 09.09.2005 held in **Prakash and Another V/s Phulavathi and Others (Supra)** is overruled. The Apex Court of India in **Vineeta Sharma V/s Rakesh Sharma & Others and another (Supra)** has held that as per Section 6(3) of Hindu Succession (Amendment) Act, 2005, notional partition has to be effected as on the date of effecting actual partition and "A", his two sons "C" and "D" and daughter "E" will get 1/4th share each as

coparceners and the widow "B", daughter "E" and mother "F" along with two sons "C" and "D" will get share as Class I legal heirs of "A" as per Section 8 to 10 of Hindu Succession Act, 1956 out of the 1/4th share allotted to "A".

(The share of Widow changes in Bombay School of Mitakshara, which is discussed under separate heading)

After considering the ratio laid down by the Hon'ble Apex Court between **Vineeta Sharma and Rakesh Sharma & Others and Others (Supra),** we can safely come to the conclusion that there would be no disruption of coparcenery by death of any one of the coparceners and the share of deceased coparceners has to be ascertained (Notional Partition) as on the date of effecting actual partition and not as on the date of death of such coparceners.

14. POSITION OF DAUGHTERS BEFORE THE ENACTMENT OF THE HINDU SUCCESSION ACT, 1956

Under Mitakshara school of Hindu law, a woman though had right to sustenance, the control and ownership of the family property was not vested in her. The earliest legislation for upliftment of Hindu women in the society by bringing females into the scheme of inheritance was the Hindu Law of Inheritance Act 1929 conferring inheritance rights on three female heirs, namely son's daughter, daughter's daughter and sister. The next landmark legislations which conferred ownership rights on women was the Mysore Hindu Law Women's Rights Act, 1933 and the Hindu Women's Right to Property Act (XVIII of) 1937 which brought about revolutionary changes in all schools of Hindu law pertaining to the rules of Coparceneryship, rules of inheritance and rules of partition. Though the Act of 1937 brought about important changes in the law of succession conferring a share on the widow equal to that of a son, they were found to be flawed on certain grounds such

as no inheritance rights for the daughter and the widow entitled only to a limited share in the property of the deceased, leaving much to be desired.

The founding fathers of the Indian constitution taking heed of this discriminatory and subordinated position of women in the society took positive steps to provide her with equal status as that of the man under Article 14, Art.15(2), 15(3) and Art.16 of the Indian Constitution as a part of Fundamental Rights guaranteed by the Constitution. Under Part IV of the constitution containing the Directive Principles, Article 39(d) provides for the State to ensure equality between man and woman by implementing the policy of equal pay for equal work for both men and women. Notwithstanding the Fundamental Rights and Directives given by the Indian constitution, a woman continued to be neglected and discriminated in the family of her birth as well as her matrimonial family due to the contra provisions in personal laws. ***(Article written by Mayank Samuel, Second Year Student of National Academy of Legal Studies and Research (NALSAR), Hyderabad, which was published in www.kayadepundit.com)***

15. SUBSEQUENT ENACTMENTS WHICH CONFERRED RIGHTS ON DAUGHTERS:

1. **THE HINDU SUCCESSION ACT, 1956**
   (A) Unamended Section 6 of Hindu Succession Act, 1956
   (B) Section 14 of Hindu Succession Act, 1956

2. **THE HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990**
   Section 6A to 6C of the Act, 1990

3. **HINDU SUCCESSION (AMENDMENT) ACT, 2005**
   Amended Section 6 of the Act, 2005

15.1 THE HINDU SUCCESSION ACT, 1956

15.2 (A) Unamended Section 6 of Hindu Succession Act, 1956

As per Section 6 of the Act, 1956 if a male Hindu dies after the commencement of the Act, his interest in the property shall devolve by survivorship upon the surviving members of the Coparcenery.

However, as per the proviso to Section 6 of the Act, 1956, if the deceased had left him surviving female relative specified in class I of the schedule or a male relative specified in that class who claims through such female relative, then his interest in the Mitakshara Coparcenery property shall devolve by testamentary succession or intestate succession, as the case may be, under this Act and not by survivorship.

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 52 Para 53** has held as under

> ***"Before the amendment, section 6 provided that on the death of a male Hindu, a coparcener's interest in Mitakshara coparcenary shall devolve by survivorship upon the surviving members of the coparcenary under the uncodified Hindu law and not in accordance with the mode of succession provided under the Act of 1956. It was provided by the proviso to section 6, in case a male Hindu of Mitakshara coparcenary has left surviving a female relative of Class I heir or a male relative who claims through such female relative of Class I".***

Further at Para 59 it has held as under

"In view of the provisions contained in section 6 when a coparcener is survived by a female heir of Class I or male relative of such female, it was necessary to ascertain the share of the deceased, as such, a legal fiction was created. The Explanation I provided legal fiction of partition as if it had taken place immediately before his death, notwithstanding whether he had the right to claim it or not. However, a separated Hindu could not claim an interest in the coparcenary based on intestacy in the interest left by the deceased"

Note : Please refer the illustrations given for Joint Tenants and Tenant-in-common for unamended Section 6 and proviso appended thereto.

15.3 (B) Section 14 of Hindu Succession Act, 1956 – Property of a female to be her absolute property –

Before discussing further, let us discuss the scope of Section 14(1) and 14(2) of Hindu Succession Act, 1956 on the property rights of a female.

As per Section 14(1) of Hindu Succession Act 1956, if any property is possessed by a female Hindu, whether acquired before or after the commencement of this Act, it shall be held by her as full owner thereof and not as a limited owner.

The Explanation to Section 14(1) of Hindu Succession Act, 1956 deals with the mode of acquisition of property by a female Hindu. As per the said explanation, a female Hindu can acquire a property by way of inheritance or devise, or at a partition or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion or by purchase or by prescription,

or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

As per Section 14(2) of Hindu Succession Act, 1956, if any property is acquired by a female 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 gift, will or other instrument or the decree, order or award, prescribe a restricted estate on her, then she does not become absolute owner with respect to the said property as per Section 14(1) and Explanation appended thereto.

In order to understand the scope of Section 14(1), Explanation appended thereto and Section 14(2) of the Act, 1956 on the property rights of a female, it is just and necessary to refer the ratio laid down by the Hon'ble Apex Court of India *between* ***V. Tulasamma v. Sesha Reddy*****, reported in (1977) 3 SCC 99 page 120-21, para 30** while interpreting Section 14(1) and Section 14(2) of Hindu Succession Act, 1956, in the said decision, the Hon'ble Apex Court has held as under:

> *"In the light of the above decisions of this Court the following principles appear to be clear:*
>
> ***(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 Prasad case [Badri Prasad v. Kanso Devi, (1969) 2 SCC 586] .

(3) that the 1956 Act has made revolutionary and far-reaching changes in the Hindu society and <u>every attempt should be made to carry out the spirit of the Act</u> 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) <u>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.</u>"

Further the Hon'ble Apex Court in the above said case at Page 135-36, para 61 has summarised the interpretation of Section 14(1) and 14(2) of Hindu Succession Act, 1956 as under:

"We would now like to summarise the legal conclusions which we have reached after an exhaustive considerations of the authorities mentioned above on the question of law involved in this appeal as to the interpretation of Sections 14(1) and (2) of the 1956 Act. These conclusions may be stated thus:

(1) The Hindu female's right to maintenance is not an empty formality or an illusory claim being conceded as a matter of grace and generosity, but is a tangible right against property which flows from the spiritual relationship between the husband and the wife and is recognised and enjoined by pure Shastric Hindu Law and has been strongly stressed even by the earlier Hindu jurists

starting from Yajnavalkya to Manu. Such a right may not be a right to property but it is a right against property and the husband has a personal obligation to maintain his wife and if he or the family has property, the female has the legal right to be maintained therefrom. If a charge is created for the maintenance of a female, the said right becomes a legally enforceable one. At any rate, even without a charge the claim for maintenance is doubtless a pre-existing right so that any transfer declaring or recognising such a right does not confer any new title but merely endorses or confirms the pre-existing rights.

(2) ***Section 14(1) and the Explanation thereto have been couched in the widest possible terms and must be liberally construed in favour of the females so as to advance the object of the 1956 Act and promote the socio-economic ends sought to be achieved by this long-needed legislation.***

(3) Sub-section (2) of Section 14 is in the nature of a proviso and has a field of its own without interfering with the operation of Section 14(1) materially. The proviso should not be construed in a manner so as to destroy the effect of the main provision or the protection granted by Section 14(1) or in a way so as to become totally inconsistent with the main provision.

(4) Sub-section (2) of Section 14 applies to instruments, decrees, awards, gifts, etc. which create independent and new titles in favour of the females for the first time and has no application where the instrument concerned

merely seeks to confirm, endorse, declare or recognise pre-existing rights. In such cases a restricted estate in favour of a female is legally permissible and Section 14(1) will not operate in this sphere. Where, however, an instrument merely declares or recognises a pre-existing right, such as a claim to maintenance or partition or share to which the female is entitled, the sub-section has absolutely no application and the female's limited interest would automatically be enlarged into an absolute one by force of Section 14(1) and the restrictions placed, if any, under the document would have to be ignored. Thus, where a property is allotted or transferred to a female in lieu of maintenance or a share at partition, the instrument is taken out of the ambit of sub-section (2) and would be governed by Section 14(1) despite any restrictions placed on the powers of the transferee.

(5) *The use of express terms like 'property acquired by a female Hindu at a partition', 'or in lieu of maintenance', 'or arrears of maintenance', etc. in the Explanation to Section 14(1) clearly makes sub-section (2) inapplicable to these categories which have been expressly excepted from the operation of sub-section (2).*

(6) *The words 'possessed by' used by the legislature in Section 14(1) are of the widest possible amplitude and include the state of owning a property even though the owner is not in actual or physical possession of the same. Thus, where a widow gets a share in the property under a preliminary decree before or at the time when the 1956 Act had been passed but had not been given actual possession under a final decree, the property*

would be deemed to be possessed by her and by force of Section 14(1) she would get absolute interest in the property. It is equally well settled that the possession of the widow, however, must be under some vestige of a claim, right or title, because the section does not contemplate the possession of any rank trespasser without any right or title.

(7) That the words 'restricted estate' used in Section 14(2) are wider than limited interest as indicated in Section 14(1) and they include not only limited interest, but also any other kind of limitation that may be placed on the transferee.'"

The Hon'ble Apex Court of India has interpreted the scope and limitation of Section 14(1) and Section 14(2) of Hindu Succession Act, 1956, hence while deciding the rights of a female under Section 14 of the Hindu Succession Act, 1956, the court should rightly construe the said provision in favour of the females so as to advance the object of the 1956 Act.

16. PROPERTY STANDING IN THE NAME OF MOTHER (DAUGHTER COPARCENER) AND SUIT FOR PARTITION FILED BY HER CHILDREN

When a property is standing in the name of mother (Daughter Coparcener), can her children file a suit for partition on the ground that the said property is Joint Hindu Family property?

Sometimes we may come across cases where a property is standing in the name of mother and her children file a suit for partition with respect to the said property against their mother during her life time on the ground that the said property is Joint Family property and their mother had no

independent source of income to purchase the property. The mother appears before the court and pleads that the said property is her self-acquired property and seeks for dismissal of the suit.

Undoubtedly, sale is also one of the modes of acquiring property by a female as per Section 14(1) of Hindu Succession Act, 1956. Normally when a property is standing in the name of a female, which was purchased in her name under a registered document and when there is no reference in the said sale deed that the said property was purchased out of the income of the Joint Hindu Family, then instead of giving colour of Joint Family property to the said property, it is necessary to hold that the said property is the absolute property of a female as per Section 14(1) of the Hindu Succession Act, 1956. Another important aspect to be noted here is that when a father being Karta of the Undivided Joint Family was managing the affairs of the family like purchasing the immovable properties and selling the same in his individual name, then what was the necessity for him to purchase the property in the name of his wife?. When he had purchased some property in the name of his wife apart from purchasing some other properties in his own name as a Karta, then one thing is clear that he wanted to secure the life of his wife in the hands of his children after his death. Out of his natural love and affection towards her for her invaluable service rendered for the upliftment of the family, he could have purchased the property in the name of his wife in order to secure her life after his death. Hence such property standing in the name of such female would become her absolute property as per Section 14(1) of Hindu Succession Act, 1956 and her children would have no right over the said property on the ground that the said property is their Joint Hindu Family property.

The Hon'ble Apex Court of India between ***Om Prakash Sharma v. Rajendra Prasad Shewda and Others*, reported in (2015) 15 SCC 556 at page 560 Para 10 has held as under:**

"The purchase of property by a husband in the name of his wife is a specie of benami purchase that had been prevalent in India since ancient times. Such a practice appears to have been prevalent on account of the position of Hindu women to succession until the enactment of the Hindu Succession Act and the amendments made thereto from time to time. In a situation where a Hindu widow had a limited right to the estate of the deceased husband under the Hindu Women's Rights to Property Act, 1937, ***the purchase of immovable property by a husband in the name of the wife in order to provide the wife with a secured life in the event of the death of the husband was an acknowledged and accepted feature of Indian life*** *which even finds recognition in the explanation clause to Section 3 of the Benami Transactions (Prohibition) Act, 1988.* ***This is a fundamental feature that must be kept in mind while determining the nature of a sale/purchase transaction of immovable property by a husband in the name of his wife along with other facts and circumstances*** *which has to be taken into account in determining what essentially is a question of fact, namely, whether the property has been purchased benami".*

The Hon'ble Apex Court in the above said case further held at page **562** **Para 13 as under:**

"Applying the aforesaid principles to the facts of the present case we find that the High Court was ***perfectly justified in coming to the conclusion that the property though purchased from the funds of Jagannath Joshi was really for the benefit of his widow Moni Debi and therefore***

Moni Debi was the real owner of the property. In this regard, the entries of the name of Moni Debi in the Municipal and Land Revenue records; the fact that the brothers of Jagannath Joshi were no longer alive (according to the plaintiff the property was purchased by Jagannath Joshi in the name of his wife to protect the same from his brothers) are relevant facts that have been rightly taken into account by the High Court. The fact that the property was managed by Jagannath Joshi which fact accords with the ***practice prevailing in a Hindu family where the husband normally looks after and manages the property of the wife, is another relevant circumstance that was taken note of by the High Court to come to the conclusion that all the said established facts are wholly consistent with the ownership of the property by Moni Debi".***

The Hon'ble Apex Court has clearly held that although the consideration money for purchasing the property by wife is given by her husband, still the said property has become her absolute property.

But there may also be situations where a father dies leaving behind his wife and minor children and there is a sufficient income for the Joint Family, then in such circumstances if properties are purchased in the name of the mother out of the income of the Joint Family, then it can be said that the properties standing in the name of their mother are joint Hindu family properties. Sometimes, it may so happen that the husband becomes insane and the children are minors and no one is there to look after the family affairs and in such circumstances, if properties are purchased by wife out of the joint family income, then said properties may be considered as Joint Hindu Family properties.

In a recent decision, **the Division Bench of Honb'le High Court of Karnataka** in R.F.A No.916/2014 C/w R.F.A. CROB. 8/2019 (PAR) between **Padmavathi and Another V/s Smt. Jayamma and Others, decided on 15th May, 2020** has considered the scope of Section 14 of Hindu Succession Act, 1956. The Hon'ble High Court has clearly held that the husband while he was alive paid the sale consideration and after his death a property got registered in the name of his wife and out of the income of the Joint Family business, construction was made on such property, hence the said property standing in the name of mother is considered as Joint Family Property. The Hon'ble High Court further held that out of the income of Joint Family business another property was acquired by the mother after the death of her husband, hence such property is also considered as Joint Family property.

In the light of the ratio laid down in the above said cases, it can be said that while considering Section 14(1) and the Explanation thereto, the intent of the legislature has to be borne in mind and a sincere attempt be made to ensure that the benefit of the protection given to the females under the above mentioned provisions, reaches them.

17. SECTION 15 OF HINDU SUCCESSION ACT, 1956 – GENERAL RULES OF SUCCESSION IN THE CASE OF FEMALE HINDUS

When a female Hindu dies intestate after the commencement of Hindu Succession Act, 1956, then her property devolves as per the rules contained under Section 15 and 16 of the Act of 1956. Section 15(1) of the Act, 1956 gives a list of persons who will succeed to the property of a female who dies intestate. It is as follows:

(a) Firstly, upon the sons and daughters (including the children of any pre-deceased son or daughter) and the husband;

(b) Secondly, upon the heirs of the husband;

(c) Thirdly, upon the mother and father;

(d) Fourthly, upon the heirs of the father; and

(e) Lastly, upon the heirs of the mother.

One thing to be noted here is that the rules contained under Section 15 and 16 apply only when a female Hindu dies intestate. Before her death if she had bequeathed the property by way of executing a Will, then upon her death, the rules contained under Section 15 and 16 are not applicable and on the contrary, the property will go to the legatee as per the Will executed by the Testatrix.

As per Rule 1 of Section 16 of the Act of 1956, though (a) to (e) heirs are shown under Section 15(1) of the Act, 1956, but those in one entry shall be preferred to those in any succeeding entry and those included in the same entry shall take simultaneously. For example, when a female Hindu dies intestate leaving behind her a son, a daughter, husband, brother-in-law i.e., brother of her husband, sister-in-law i.e., sister of her husband, her father, mother, brother, sister and her maternal uncle, then the deceased female's son, daughter and her husband would fall under the first entry under Section 15(1)(a) of the Act of 1956. Brother-in-law i.e., brother of her husband and sister-in-law i.e., sister of her husband would come under the second entry under Section 15(1)(b) of the Act. Father and mother of the deceased female would be covered under the third entry under Section 15(1)(c) of the Act. Brother and sister of such deceased female constitute the fourth entry under Section 15(1)(d) of the Act. Maternal uncle of the deceased female constitutes the fifth entry under Section 15(1)(e) of the Act.

In the given example, the deceased female's son, daughter and her husband as heirs under the first entry under Section 15(1)(a) of the Act are alive to succeed to the property, they will exclude all others in the other entries shown at Section 15(1)(b) to (e). In the absence of heirs under Section 15(1)(a), if the heirs are available under Section 15(1)(b), such heirs in the second entry shall succeed to the property and they shall exclude other persons shown at Section 15(1)(c) to (e) and so on and so forth. This

rule of succession has to be scrupulously followed while deciding partition suits.

Another important aspect to be noted here is that those persons who come under one entry will take simultaneously and equally the property of the deceased. For example if a female dies leaving behind her son, daughter and husband who come Section 15(1)(a) of the Act of 1956, they will take 1/3rd share each simultaneously in the said property by excluding the other heirs shown under Section 15(1)(b) to (e) of the Act.

18. SECTION 15(1) IS CONTROLLED BY SUB-SECTION (2) OF SECTION 15 OF THE HINDU SUCCESSION ACT OF 1956

While deciding a partition suit regarding the property of a deceased female who dies intestate, one should remember that section 15(1) of the Act of 1956 is controlled by Sub-Section (2) of Section 15 of the Act of 1956.

18.1 SECTION 15(2)(A) OF THE ACT OF 1956- PROPERTY INHERITED BY A FEMALE HINDU FROM HER FATHER OR MOTHER AND RULE OF DEVOLUTION

As per Section 15(2)(a) of the Act of 1956, if a female had inherited a property from her father or mother and died intestate, then in the absence of any son or daughter (including the children of any pre-deceased son or daughter), the property which was inherited by her will not go to other heirs specified under Section 15(1) of the Act, 1956 but upon the heirs of her father.

Let me illustrate Section 15(2)(a) by way of giving four illustrations:

18.2 ILLUSTRATION NO.1

"A" is the father and "B" is his son and "C" is his married daughter. "D" is the husband of "C". "A" has got number of self-acquired properties and out of love and affection; he gifted a landed property infavour of "C" under a registered Gift Deed. Subsequently, "C" dies issueless leaving behind her husband "D" as her legal heir. After her death, "D" approaches the revenue authorities to change the revenue entries in his name as he is the only legal heir of "C". The father and brother of "C" contend that as per Section 15(2)(a) of Hindu Succession Act, 1956, in the absence of a son or a daughter to "C", "D" is not entitled to succeed to the said landed property which was gifted to their sister by their father and therefore they file a suit against "D" for recovery of possession of the said landed property. Would they succeed in the suit? Or the property will go to "D" in the absence of children to "C".

It is to be noted that the restriction contained under Section 15(2)(a) of the Act of 1956 applies where a female ***inherits*** the property from her father or mother. ***But in the given case, "C" had not inherited the said landed property either from her father or mother after their death, but on the contrary "C" had acquired the said landed property through her father under a registered Gift Deed as per the provisions of Transfer of Property Act, 1882.*** Hence the restriction contained under Section 15(2)(a) of the Act of 1956 is not at all applicable to the facts on hand and the suit fails and property will go to "D". While deciding these types of suits, one should make a distinction between acquisition of property by

inheritance and acquisition of property by other modes such as Gift and Sale.

18.3 ILLUSTRATION NO.2

"A" is the father and "B" is his son and "C" is his married daughter, who has husband, a son and a daughter. There is an ancestral property for her paternal family. "A" died in the year 1990 leaving behind "B" and "C" as his Class I legal heirs and "C" filed suit for partition against "B" in the year 1992. The Court while deciding the suit in the year 1993 applied proviso to unamended Section 6 of Hindu Succession Act, 1956, by way of effecting notional partition, both "A" and "B" being coparceners take ½ share each in the ancestral property. "B" and "C" being Class I legal heirs of "A" entitled ½ share each out of the ½ share of "A". "B" being coparcener acquired ½ share along with his father and as class I legal heir of "A", acquired ½ share each out of ½ share of his father. "C" after inheriting the said property got changed the revenue records in her name and is in possession and enjoyment over her share. During her life time, "C" in accordance with law bequeathed her inherited property from her father infavour of one "X", who is her Aunt and subsequently dies.

Now the question is, as per Section 15(1)(a) and Section 16(1) of the Act of 1956, whether her husband, son and daughter will succeed to the property of the deceased female or that property will go to "X"?. The important aspect to be noted here is that "C" during her life time bequeathed the said property infavour of "X", hence it cannot be said that "C" died intestate, hence as per Section 15(1)(a) and Section 16(1) of the Act of 1956, her

husband, son and daughter will not get the said property and on the contrary the said property will go to "X".

18.4 ILLUSTRATION NO.3

In the above illustrated example, if "C" during her life time had not bequeathed her inherited property in favour of anybody and died leaving behind her husband, a son and a daughter, then in such a case, the deceased's husband, son and daughter being heirs specified under Section 15(1)(a) of the Act, would succeed to 1/3rd share each as per Section 16(1) of the Act of 1956.

18.5 ILLUSTRATION NO.4

In the above illustrated example, if "C" during her life time had not bequeathed her inherited property infavour of anybody and died issueless leaving behind only her husband as her legal heir, whether her husband will succeed to the said property of "C"?

As per Section 15(2)(a) of the Act of 1956, the husband of deceased female will succeed to the property only if his wife died leaving behind either a son or daughter. But in the given example, "C" died issueless, hence the property inherited by "C" from her father "A", will not go to her husband and on the contrary, the said property will revert to her paternal family and as per Rule 3 of Section 16 of Hindu Succession Act, 1956, her paternal family members will succeed to the said property. The intention of Section 15(1)(a) of the Hindu Succession Act, 1956 is that if a deceased female is not survived by any children and survived only by her husband, then the property

which the deceased female had inherited from her parents should revert to the family of her parents and must not go to the family of her husband.

Saint Shishunala Sharifa has beautifully captured this concept way back in 18th Century in his unique style when he says **"mohada hendati teerida balika mavana maneya hanginyako".** It means, once a loving wife is dead, then husband should not take the shelter under his in-laws. This is exactly what is contained under Section 15(2)(a) of the Act of 1956 with respect to the position of a husband over the inherited property of his wife, from her parents, if she dies issueless.

18.6 SECTION 15(2)(B) OF THE ACT OF 1956 - PROPERTY INHERITED BY A FEMALE HINDU FROM HER HUSBAND OR FATHER-IN-LAW AND RULE OF DEVOLUTION.

As per Section 15(2)(b) of the Act of 1956, if a female inherited a property from her husband or from her father-in-law and died intestate, then in the absence of any son or daughter (including the children of any pre-deceased son or daughter), the property which was inherited by her will not go to other heirs specified under Section 15(1) of the Act, 1956 but upon the heirs of her husband.

Let me illustrate Section 15(2)(b) by way of giving three illustrations:

18.7 ILLUSTRATION NO.1

"A" is the husband and "B" is his wife and out of the wedlock, a son by name "C" and a daughter by name "D" are born. There is a self-acquired property for "A" and "A" died in the year 1990 leaving behind "B", "C", "D" i.e., wife, son and daughter

respectively and also his mother "E" as his Class I legal heirs. As per Section 8 to 10 of Hindu Succession Act, 1956, "B" to "E" would succeed to 1/4th share and accordingly they all are enjoying their respective portions. "B" during her life time, in accordance with law, bequeathed the said property which she had succeeded from her husband infavour of one "X", who is her Aunt and died.

Now the question is, as per Section 15(1)(b) of the Act of 1956, whether her son "C" and daughter "D" will succeed to that property as per Section 16(1) or will that property go to "X"?. The important aspect to be noted here is that "B" during her life time bequeathed the said property infavour of "X", hence it cannot be said that "B" died intestate, hence as per Section 15(1)(a) of the Act of 1956, her son "C" and daughter "D" will not get the property, on the contrary the said property will go to "X"

18.8 ILLUSTRATION NO.2

In the above illustrated example, if "B" during her life time had not bequeathed her property which she had succeeded from her husband infavour of anybody and died intestate leaving behind her son "C" and daughter "D", then such deceased's son and daughter being heirs specified under Section 15(1)(a) of the Act, will succeed to ½ share each in the said property as per Section 16(1) of the Act of 1956.

18.9 ILLUSTRATION NO.3

In the above illustrated example, if "B" during her life time had not bequeathed her property which she had succeeded from her

husband infavour of anybody and died issueless leaving behind her mother, father, brother, sister, brother-in-law i.e., brother of her husband and sister-in-law i.e., sister of her husband, then who will succeed to the property of "B"?

As per Section 15(2)(b) of the Act of 1956, "B" died issueless, hence the property succeeded by "B" from her husband "A", will not go to her father, mother or her brother and sisters who are shown in Section 15(1)(c) and 15(1)(d) respectively but on the contrary the brother-in-law i.e., brother of her husband and sister-in-law i.e. sister of her husband who fall under Section 15(1)(b) will get the property of "B" by excluding "B"'s father and mother or her brother and sisters as per Section 16(1) of the Hindu Succession Act, 1956.

The intention of Section 15(1)(b) of the Hindu Succession Act, 1956 is that if the deceased female is not survived by any children and is survived by her father, mother, her brothers and sisters and also the legal heirs of her deceased husband, then the deceased husband's property must to back to his family and not to her parental family consisting of her father, mother, brother and sister etc. Parliament has thought this situation and passed the legislation by mentioning that in the absence of children of deceased female, the said property should revert back to her husband's family and would not go to deceased female's parental family.

19. POSITION OF DAUGHTERS AFTER THE ENACTMENT OF THE HINDU SUCCESSION ACT, 1956

The Hindu Succession Act 1956 which came into force on 17th June, 1956 despite the resistance provided by some sections of Hindu society, repealing the Hindu Women's Right to Property Act of 1937 aimed at removing the disparities and prejudice suffered by Hindu women by giving

them greater property rights. The long title of the Hindu Succession Act, 1956 states that it is an act to amend and codify the law relating to intestate succession among Hindus. The Act of 1956 laid down a uniform and comprehensive law of succession with an attempt to ensure equality in inheritance rights between sons and daughters, amongst Hindus, Buddhists, Jains and Sikhs. The Act of 1956 reformed the Hindu law by giving absolute ownership rights to women under Section 14 and granting daughters an interest in the property of their deceased father under proviso to Section 6 aiming equality between men and women. ***(Article written by Mayank Samuel, Second Year Student of National Academy of Legal Studies and Research (NALSAR), Hyderabad, which was published in www.kayadepundit.com)***

20. SOUTHERN STATES HAVE CARRIED OUT THEIR RESPECTIVE STATE AMENDMENTS TO SECTION 6 OF HINDU SUCCESSION ACT, 1956 TO CONFER STATUS OF COPARCENER ON DAUGHTERS

Five southern states of India namely, Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka have enacted remedial legislations in the last two to three decades to remove the discrimination against daughters. The first state to address such discriminating features against daughters was Kerala when, in 1976, the legislature passed the Kerala Joint Family System (Abolition) Act 1976 abolishing the right by birth under the Mitakshara law and the Marumakattayam law. The Andhra Pradesh legislature enacted the Hindu Succession (Andhra Pradesh) Amendment Act 1986 equating the rights of the daughter to those of the son by conferring the right by birth on unmarried daughters on the date of enforcement of the Act. Tamil Nadu in the year 1989, Maharashtra in the year 1994 and Karnataka in the same year made similar amendments on the lines of Andhra model in their respective states.

21. THE HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990

21.1 STATEMENT OF OBJECTS AND REASONS

In the statement of objects and reasons, it is stated that with a view to achieve the goal of equality enshrined in Articles 14 and 15(1) of the Constitution and to eliminate discrimination against daughters, who were deprived of their right to participate in the Coparcenery property, the Karnataka Legislature amended the Hindu Succession Act, 1956 and inserted Sections 6-A to 6-C for ensuring that the unmarried daughters get equal share in the Coparcenery property. ***Social justice requires that a woman should have economic independence and social security. The Mitakshara personal law in respect of Mitakshara Coparcenery property, while conferring right by birth to sons in Coparcenery property excludes the daughters. The exclusion of daughters from participating in Coparcenery ownership merely by reason of their sex is unjust. Improving their economic condition and social status by giving them right by birth equal to that of sons is a long felt social need.*** It will also go a long way in eradicating the evils of dowry system prevailing in our society. It was proposed to amend the Hindu Succession Act, 1956 in its application to the State of Karnataka suitably to achieve the object.

The Hindu Succession (Karnataka Amendment) Act, 1990 came into force from 30.07.1994 and the same was in force till commencement of Hindu Succession (Amendment) Act, 2005 from 09.09.2005.

21.2 SECTION 6A OF HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990 – EQUAL RIGHTS TO DAUGHTER IN COPARCENERY PROPERTY

As per Section 6A(a) of the Act of 1990, Coparcenery status is conferred on a daughter in a Mitakshara Coparcenery in her own right in the same manner as the son. Further rights and liabilities are conferred on daughter with respect to Coparcenery property like that of a son including the right to claim survivorship.

As per Section 6A(b) of the Act of 1990, while effecting partition in a Joint Hindu Family, equal share has to be allotted to a daughter as is allotable to a son. If a daughter died leaving behind her son or daughter, then her share would be allotable to such children of predeceased daughter or son.

As per Section 6A(c) of the Act of 1990, the daughter who becomes entitled to Coparcenery property shall be held by her with the incidents of Coparcenery ownership and capable of being disposed of by her by Will or other Testamentary disposition.

21.3 CONDITIONS TO BE FULFILLED BY A DAUGHTER TO CLAIM A STATUS OF COPARCENER IN A JOINT HINDU FAMILY UNDER KARNATAKA AMENDMENT ACT 1990

Though Coparcenery status is conferred on a daughter as per Section 6A(a) and (b) of the Karnataka Amendment Act of 1990, but the State legislature as per Section 6A(d) of the Act of 1990 has laid down the conditions to be fulfilled by a daughter to claim the status of Coparcenery. They are

(1) As on 30.07.1994 Daughter remained unmarried.

(2) As on 30.07.1994 no partition had been effected in the family.

21.4 AS ON 30.07.1994 DAUGHTER REMAINED UNMARRIED

The constitutional validity of Section 6A of Hindu Succession (Karnataka Amendment) Act 1990 was challenged before the Hon'ble High Court of Karnataka, on the ground that the Act discriminates between married daughters and unmarried daughters as on 30.07.1994, hence the said provision has to be declared as unconstitutional. The Division Bench of Hon'ble High Court of Karnataka between ***Nanjamma v. State of Karnataka*, reported in ILR 1999 Kar 1094 at page 1098 para 8** while upholding the constitutional validity of Karnataka Amendment Act, 1990 has held as under:

> "A revolutionary change was made in the Hindu Law by insertion of Section 6A vide Karnataka Act No. 23 of 1994, by which a daughter of a coparcener was declared to become a Coparcenery property as were available to a son inclusive of the right to claim by survivorship and be subject the same liabilities and disabilities in respect thereto as the son. ***It was further provided that upon partition in such a Joint Hindu Family the Coparcenery property shall be so divided as to allot to a daughter the same share as is allottable to a son.*** However, by virtue of clause (d) a classification was made between married daughters. ***The married daughters prior to the commencement of the Amendment Act were deprived of the right to claim the share in the Coparcenery property as was available to an unmarried daughter or a married daughter after the enforcement of the said Act. The alleged discrimination***

cannot be termed to be either unreasonable or irrational and without basis. The offending portion of clause (d) of Section 6A is intended to achieve an objective. The two types of married daughters as contemplated by the offending portion of the Section are the well defined classes in themselves".

The Hon'ble High Court of Karnataka between ***Gourawwa v. Basappa*, reported in ILR 2003 Kar 1491 at page 1498 para 17** has held that ***according to Section 6-A of the Hindu Succession Act, 1956, as amended in Karnataka State, married daughters would not be entitled for a share in the property if their marriage was solemnised prior to the Act coming into force.***

The Hon'ble Apex Court of India between ***R. Mahalakshmi v. A.V. Anantharaman*, (2009) 9 SCC 52 at page 58 para 20** while interpreting Section 29-A of the Hindu Succession (Tamil Nadu Amendment) Act, 1989, has held that ***the daughters who have got married prior to 1989 may not have equal share as that of a son but the daughters who got married after 1989 would have equal share as that of a son. In other words, daughters who got married after 1989 would be treated on a par with son having the same share in the property.***

By applying the ratio laid down by Apex Court of India and the Hon'ble High Court of Karnataka in the above said cases, it can be safely concluded that ***the married daughter whose marriage took place before 30.07.1994 cannot claim the status of coparcener in the ancestral property and only unmarried daughters as on 30.07.1994 can claim the status of coparcener in the ancestral property.***

21.5 AS ON 30.07.1994 NO PARTITION HAD BEEN EFFECTED IN THE FAMILY

The Division Bench of Hon'ble High Court of Karnataka between ***Nanjamma v. State of Karnataka*, reported in ILR 1999 Kar 1094 at page 1100 para 9** while discussing the classification of married daughters and unmarried daughters for applicability of Karnataka Amendment Act, 1990 has held as under:

> "The object of excluding the married daughters and ***the cases of partition already effected from the application of the Act appears to be reasonable, intended to avoid reopening of the partition, which were effected in the family and the settled rights of the brother and the sister***. Extending the benefit of the Act to a married daughter even prior to the commencement of the Amendment Act is likely to unsettle things which stood settled long back in the family and may even affect the third parties, who had acquired valid rights and title in the property on the basis of such settled rights or partitions. We are satisfied that there is a definite object between the classifications made, which has been intended to be achieved by the legislature by making a provision in the form of clause (d) to Section 6A of the Act".

The Hon'ble High Court of Karnataka between **P.S. Sairam and Another V/s P.S. Rama Rao Pisey and Others, reported in ILR 2001 Kar 2209 page 2252-2253,** while interpreting Section 6A(a) and (b) regarding the position of married daughters and partition already effected before coming to force of Karnataka Amendment Act, 1990 has held as under:

> *"A reading of Section 6A of the Hindu Succession (Karnataka Amendment) Act, 1990 (Karnataka Act No. 23 of 1994) perse reveals that with the insertion of Section 6A a daughter on*

account of her birth has been provided to become a coparcener in her own right in a Joint Hindu Family governed by Mitakshara law if existing on the date of enforcement of Act 23/1994 and she automatically will become a coparcener in her own right in the same manner as the son and she has been conferred with the same rights in Coparcenery property as she would have had if she had been a son including the right by survivorship. It also provides that she shall be subject to the same liabilities and disabilities in respect thereto as the son. ***A reading of clause (a) with clause (b) really indicates that Section 6A will apply to the cases where the joint family exists and there has been no severance of the joint family by partition in the eye of law. Clause (b) indicates that if a partition takes place in the joint family after the coming into force of this amending Act, then in that partition of the Joint Hindu Family taking place after the commencement of this Act, the property shall be so divided as to allot a share to the daughter the same share as is eligible to a son.*** *Clause (d) which is material for our purpose as has been quoted above provides exception to the cases where clause (b) of Section 6A will not apply. As per clause (d) of Section 6A a daughter who has been married before coming into force of this amendment or amending Act she shall not be entitled to any share in joint family Coparcenery property on partition taking place. In other words, the married daughters have been excluded from getting any share in the joint family Coparcenery property. It further provides that clause (b) will not affect any partition of joint Hindu family Coparcenery property if the partition had already taken place before coming into force of Karnataka Act No. 23 of*

1994, meaning thereby ***that if partition has already been effected actually or in the eye of law before coming into force of Karnataka Act No. 23 of 1994 it will not be effected by clause (b) of Section 6A. In cases where partition of joint Hindu family had already been held by metes and bounds, or by and under deeming clause by necessary implication before coming into force of the amending Act those concluded partitions will not be reopened".***

21.6 SECTION 6B OF HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990 - INTEREST TO DEVOLVE BY SURVIVORSHIP ON DEATH.

The Karnataka Amendment Act, 1990 conferred Coparcenery status on a daughter and she can hold the said Coparcenery interest with the incidents of Coparcenery ownership. We have already discussed the incidents of Coparcenery ownership and one of the incidents of Coparcenery ownership is survivorship. ***As per Section 6B of Karnataka Amendment Act, 1990, as on 30.07.1994 if the daughter remains unmarried and no partition is effected in the joint family, then she is considered to be coparcener and if she dies, then her interest in a Mitakshara Coparcenery shall devolve by survivorship upon the surviving members of the Coparcenery and not by succession.***

As per proviso to Section 6B of the Karnataka Amendment Act, 1990, if the deceased daughter had left any child (son or daughter), then her interest in the Mitakashara Coparcenery property shall devolve by testamentary or intestate succession as the case may be as

per the provisions of the Karnataka Amendment Act, 1990 and not by survivorship.

21.7 ***ILLUSTRATION REGARDING DEVOLVING UNDIVIDED INTEREST OF DAUGHTER BY SURVIVORSHIP AS PER SECTION 6B OF KARNATAKA AMENDMENT ACT, 1990***

"A" is the father and "B" is his son and "C" is his daughter. As on 30.07.1994 she remains unmarried and no partition was effected in the family. By virtue of Karnataka Amendment Act, 1990, "C" has become coparcener along with "A" and "B". "C" married one "D" on 01.01.1995 and in the year 1998 she met up with an accident and died intestate and also issueless leaving behind her husband "D" as her legal heir. But as per Section 6B of the Act, the undivided interest of "C" in Mitakshara Coparcenery property will not devolve on her husband "D" as per the rules of succession (As per Section 15(1)(a) of Hindu Succession Act, 1956, her husband "D" will take the interest of "C" along with children of the deceased and in the absence of children, he will not get the interest of deceased "C") and on the contrary her undivided interest will devolve on "A" and "B" by way of survivorship.

21.8 **ILLUSTRATION REGARDING DEVOLVING UNDIVIDED INTEREST OF DAUGHTER BY SUCCESSION AS PER THE PROVISO OF SECTION 6B OF KARNATAKA AMENDMENT ACT, 1990**

"A" is the father and "B" is his son and "C" is his daughter. As on 30.07.1994 she remains unmarried and no partition was effected in the family. By virtue of Karnataka Amendment Act,

1990, "C" has become coparcener along with "A" and "B". "C" married one "D" on 01.01.1995 and out of the wedlock a son and daughter were born to "C" and "D". In the year 1998 she met up with an accident and died intestate leaving behind her son and daughter and husband "D" as her legal heirs. Now as per the proviso to Section 6B of the Act, the undivided interest of "C" in Mitakshara Coparcenery property will not devolve on "A" and "B" on survivorship and on the contrary her interest will devolve on her husband "D", her son and daughter as per the rules of succession contained under Section 15(1)(a) and 16 of the Hindu Succession Ac, 1956.

When once the share of "C" was succeeded by her husband and children as per the provisions of Section 15(1)(a) and 16 of the Hindu Succession Act, 1956, then they will hold the said interest along with "A" and "B" as Tenants-in-common and not as Joint Tenants till effecting the partition. The said right of deceased daughter has vested with her husband and children as on the date of her death by operation of law and they can file a suit for partition against "A" and "B" to get the share of "C".

22. APPLICABILITY OF HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990 EVEN AFTER ENACTMENT OF THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

Someone may argue that in view of enactment of Hindu Succession (Amendment) Act, 2005, the Hindu Succession (Karnataka Amendment) Act, 1990 cannot have any effect and even for the cases covered under Karnataka Amendment Act, 1990, courts have to apply only Hindu Succession (Amendment) Act, 2005. They may also state that the Karnataka Amendment Act, 1990 has become void in view of Central Amendment Act,

2005. In order to answer this line of argument, let us discuss the following decisions of Hon'ble High Court of Karnataka:

"The Hon'ble High Court of Karnataka between **Sugalabai V/s Gundappa A. Maradi and Others, reported in I.L.R 2007 Kar 4790 at page No.4834 para 42** held that as a result of substitution of Section of the Principal Act by way of the Central Amendment Act of 2005, the State Act, which is earlier in point of time, cannot have any effect. Supremacy of Parliament, therefore renders Section 6-A(d) of the Karnataka Amendment Act, 1990 void. Further at page No.4838 para 50 held that Section 6-A(d) of the Karnataka Amendment Act, 1990, cannot, but be termed as repugnant to the Central Act of 2005 and as such, the said provision contained in Section 6-A(d) which excludes a daughter, married prior to coming to force of the Karnataka Amendment Act, 1990, from being entitled to be treated as a coparcener, is void and ceases to have any effect.

However, in the latest decision discussed below, the above view is turned around and the time period till when the Karnataka Amendment would have effect is clearly stated.

In a recent decision, **the Division Bench of Honb'le High Court of Karnataka** in R.F.A No.916/2014 C/w R.F.A. CROB. 8/2019 (PAR) between **Padmavathi and another V/s Smt. Jayamma and others, decided on 15th May, 2020** at Para No. 65 and 66 has held as under

> ***Para 65. The Hon'ble Apex Court has held that the Central Amendment Act would come into force from 09.09.2005. The eclipse of the Karnataka amendment being prospective from 09.09.2005, the period prior to 09.09.2005 going back to 30.07.1994 would, therefore, be occupied by the Karnataka Amendment, the same not***

having been repealed by the Karnataka Legislature, but having only been eclipsed by the Central Amendment.

Para 66. In view of the above discussion, we are of the opinion that there are three-time lines which would be in operation in the State of Karnataka, viz.,

(i) From 1956 – 29.07.1994 – When unamended Section 6 of Hindu Succession Act would be applicable.

(ii) 30.07.1994 – 08.09.2005 – When the Karnataka Amendment to the Hindu Succession Act would be applicable; and

(iii) Post 09.09.2005 – Subject to the conditions in Phulavati's case (supra) being satisfied, Section 6 of the Hindu Succession Act as amended by the Central Amendment Act, would be applicable.

Further the Division Bench of Honb'le High Court of Karnataka at page No.189 at para 60 discussed Section 6A of Karnataka Amendment Act and at para 61 it was observed as under:

"It is this amended provision which was applicable in Karnataka till the Parliament amended the HSA by 2005 Act, the said amendment coming into force in the year 2005, i.e. with effect from 9.09.2005. In view of the coming into force of the Central amendment, there was some divergence of judicial opinion as to the applicability of the State amendment, the period to

which it is applicable and from the period when the Central enactment would come into force".

The Hon'ble High Court at Page 86 Para 19, framed 6 points for consideration, out of which, 3rd point for consideration is as under:

> **(iii) Whether the Karnataka amendment to the HSA in terms of Section 6-A, 6-C would apply from 30.07.1994 to 08.9.2005 in view of the ratio laid down in Prakash Vs. Phulawati (supra) and 2005 amendment is prospective and would apply from 9.09.2005 ?**

Further the Division Bench of Honb'le High Court of Karnataka at Page 192 by considering the ratio laid down in **Sugalabai V/s Gundappa A.Maradi and Others (supra)** at page 196 and at 197 Para 71 has answered the above said 3rd point for consideration as under:

> **In view of the above we answer Point No. (iii) by holding that the <u>Karnataka Amendment to the HSA in terms of Section 6-A, 6-C would apply from 30.07.1994 to 08.9.2005 in view of the ratio laid down in Prakash vs. Phulawati (supra), the Central Amendment would apply from 09.09.2005,</u> the applicability being predicated on when succession opens and availability of the property/ies for partition, i.e., they are neither partitioned or sold by way of a registered instrument.**

The Hon'ble Apex Court between Vineeta Sharma Vs. Rakesh Sharma & Others (Supra) at Page 52 Para 57 has recognised the State amendments carried out by the State of Andhra Pradesh, Tamilnadu, Karnataka and Maharashtra. The Apex Court in the said judgment has

no where stated that in view of Hindu Succession (Amendment) Act, 2005, the above said State Amendments to the Hindu Succession Act, 1956 are inoperative. The Apex Court by overruling the ratio laid down in Prakash V/s. Phulavathi (Supra) and Mangammal and Another Vs. T.B. Raju, reported in (2018) 15 SCC 662, while interpreting Hindu Succession (Amendment) Act, 2005 and Tamilnadu Hindu Succession (Amendment) Act, 1989 held that in order to give the benefit of Hindu Succession (Amendment) Act, 2005 and Tamilnadu State Amendment Act, 1989, the father coparcener need not be alive as on 09.09.2005 and 25.03.1989 respectively and only daughter must be alive as on the said dates for giving the benefit of the said enactments to the daughter coparceners. The Apex Court in Vineetha Sharma's case has impliedly held that even if the daughters who have complied with the conditions prescribed under the State Amendments can avail the benefit of the State Amendments in order to seek equal share in the coparcenery property.

After considering the ratio laid down by the Apex Court in Vineetha Sharma's case (Supra) and the ratio laid down by the Division Bench of Honb'le High Court of Karnataka in Padmavathi and Another V/s Jayamma & Others (Supra), it can be safely concluded that for the cases covered under Hindu Succession (Karnataka Amendment) Act, 1990 from 30.07.1994 till 08.09.2005, the Hindu Succession (Karnataka Amendment) Act, 1990 has to be applied.

23. PASSING OF ANOTHER PRELIMINARY DECREE TO GIVE THE BENEFIT OF THE HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990

Whether after passing the preliminary decree and before passing the final decree, if in the interregnum, the Hindu Succession (Karnataka Amendment) Act, 1990 came into force, then the court can pass another preliminary decree or amend the preliminary decree to give benefit of new legislation to unmarried daughter as on 30.07.1994?

Sometimes it may so happen that after passing the preliminary decree and before passing the final decree, if in the interregnum, Hindu Succession (Amendment) Act, 1990 came to force from 30.07.1994, in such cases can the court amend the preliminary decree or pass another preliminary decree re-determining the rights and interest of parties having regard to the changed situation and thereby give the benefit of new legislation to unmarried daughter as on 30.07.1994?. Let me explain this scenario in the following way:

23.1 <u>ILLUSTRATION</u>

> "A" is the father and "B" is his son and "C" is his unmarried daughter. There is an ancestral property for the said Hindu Joint family. Suit for partition and separate possession was filed by "B" against "A" in the year 1990 and in the said suit "C" was arrayed as a formal party (Before 30.07.1994, only "A" and "B" are coparceners and "C" was not conferred with Coparcenery status and only from 30.07.1994, she was conferred with Coparcenery status by virtue of Hindu Succession (Karnataka Amendment) Act, 1990). The said suit came to be decreed in the year 1993 by declaring that "A" and "B" being coparceners are entitled for ½ share each in the suit schedule property and "C" is not entitled for any share in the

suit schedule property as she is not the coparcener and accordingly preliminary decree was drawn.

Thereafter on 01.01.1994, "B" initiated final decree proceedings and the same is pending for consideration and no final decree was drawn. Meanwhile Karnataka Legislature brought an amendment to Section 6 of Hindu Succession Act, 1956 by inserting 6A to 6C of Hindu Succession (Karnataka Amendment) Act, 1990 which came into force from 30.07.1994. The said "C" during the pendency of final decree proceedings on 01.09.1994 filed an application for drawing one more preliminary decree as she has become coparcener as per Hindu Succession (Karnataka Amendment) Act, 1990 and thereby declare she is entitled for 1/3rd share each along with "A" and "B". Now the question is, in the final decree proceedings, can the court draw one more preliminary decree or amend the preliminary decree passed earlier to give benefit of Hindu Succession (Karnataka Amendment) Act, 1990 to daughter who has become coparcener from 30.07.1994?

The answer is yes. After passing the preliminary decree and before passing the final decree by dividing the property by metes and bounds, in the interregnum, if the law changes as in the present case the Hindu Succession (Karnataka Amendment) Act 1990 came into force from 30.07.1994, then the benefit of this new legislation has to be given to daughter "C" and the court can either pass one more preliminary decree or amend the preliminary decree and thereby declare "A", "B" and "C" are entitled for 1/3rd share each in the suit schedule property and accordingly proceed to dispose of the said final decree proceedings. But before coming to force of Hindu Succession (Karnataka Amendment) Act, 1990, if already final

decree was concluded between "A" and "B", then "C" will not get any share.

This position of law is explained by Hon'ble Apex Court of India in the following two decisions.

The Hon'ble Apex Court of India between ***S. Sai Reddy v. S. Narayana Reddy*, reported in (1991) 3 SCC 647 at page 650 Para 7,** while considering the ***effect of passing Section 29A of Hindu Succession (Andhra Pradesh Amendment) Act, 1986 after passing the preliminary decree and before passing the final decree has held as under:***

> ……A partition of the joint Hindu family can be effected by various modes, viz., by a family settlement, by a registered instrument of partition, by oral arrangement by the parties, or by a decree of the court. When a suit for partition is filed in a court, a preliminary decree is passed determining shares of the members of the family. The final decree follows, thereafter, allotting specific properties and directing the partition of the immovable properties by metes and bounds. ***Unless and until the final decree is passed and the allottees of the shares are put in possession of the respective property, the partition is not complete. The preliminary decree which determines shares does not bring about the final partition. For, pending the final decree the shares themselves are liable to be varied on account of the intervening events. In the instant case, there is no dispute that only a preliminary decree had been passed and before the final decree could be passed the amending Act came into force as a result of which clause (ii) of Section 29-A of the Act became applicable.*** This intervening event which gave shares to respondents 2 to 5 had

the effect of varying shares of the parties like any supervening development. Since the legislation is beneficial and placed on the statute book with the avowed object of benefitting women which is a vulnerable section of the society in all its stratas, it is necessary to give a liberal effect to it...."

The Hon'ble Apex Court of India between ***Prema v. Nanje Gowda,*** **reported in (2011) 6 SCC 462 at page 465 Para 1, the Hon'ble Apex Court framed the following point for consideration**

"The question which arises for consideration in this appeal is whether the appellant, who failed in her challenge to the preliminary decree passed in a suit for partition filed by Respondent 1 ***can seek enhancement of her share in the joint family property in the final decree proceedings in terms of Section 6-A inserted in the Hindu Succession Act, 1956 (for short "the Act") by the Hindu Succession (Karnataka Amendment) Act, 1990, which received the Presidential assent on 28-7-1994 and was published in the Karnataka Gazette dated 30-7-1994".***

The Hon'ble Apex Court while answering the said point for consideration at page 471 Para 16, it is observed as under:

"We may add that by virtue of the preliminary decree passed by the trial court, which was confirmed by the lower appellate court and the High Court, the issues decided therein will be deemed to have become final but as the partition suit is required to be decided in stages, the same can be regarded as fully and completely decided only when the final decree is passed. If in the interregnum any party to the partition suit dies, then his/her share is required to be allotted to the

surviving parties and this can be done in the final decree proceedings. ***Likewise, if law governing the parties is amended before the conclusion of the final decree proceedings, the party benefited by such amendment can make a request to the court to take cognizance of the amendment and give effect to the same. If the rights of the parties to the suit change due to other reasons, the court seized with the final decree proceedings is not only entitled but is duty-bound to take notice of such change and pass appropriate order"****.*

The Hon'ble Apex Court while answering the said point for consideration at page 472 para 17, it is observed as under:

"In this case, the Act was amended by the State Legislature and Sections 6-A to 6-C were inserted for achieving the goal of equality set out in the Preamble of the Constitution. ***In terms of Section 2 of Karnataka Act 23 of 1994, Section 6-A came into force on 30-7-1994 i.e. the date on which the amendment was published. As on that day, the final decree proceedings were pending. Therefore, the appellant had every right to seek enlargement of her share*** *by pointing out that the discrimination practised against the unmarried daughter had been removed by the legislative intervention and there is no reason why the court should hesitate in giving effect to an amendment made by the State Legislature in exercise of the power vested in it under Article 15(3) of the Constitution."*

After considering the ratio laid down by Hon'ble Apex Court of India in the above said cases, it can be safely concluded that after passing the

preliminary decree and before passing the final decree, if in the interregnum, Hindu Succession (Karnataka) Act, 1994 came into force from 30.07.1994, in such cases the court can amend the preliminary decree or pass another preliminary decree re-determining the rights and interest of parties having regard to the changed situation.

24. PASSING OF ANOTHER PRELIMINARY DECREE TO GIVE THE BENEFIT OF THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

Whether after passing the preliminary decree and before passing the final decree, if in the interregnum, the Hindu Succession (Amendment) Act, 2005 came into force, then can the court pass another preliminary decree or amend the preliminary decree to give benefit of new legislation to daughter?

In a given situation, after passing the preliminary decree and before passing the final decree, if in the interregnum, Hindu Succession (Amendment) Act, 2005 came to force from 09.09.2005, then in such a case, can the court amend the preliminary decree or pass another preliminary decree re-determining the rights and interest of parties having regard to the changed situation and thereby give the benefit of new legislation to daughter? Let me explain this scenario in the following way:

24.1 ILLUSTRATION

> "A" is the father and "B" is his son and "C" is his married daughter, whose marriage was solemnised in the year 1990. There is an ancestral property for the said Hindu Joint family. Suit for partition and separate possession was filed by "B" against "A" in the year 2000 and in the said suit "C" was arrayed as a formal party. (Even after Hindu Succession

(Karnataka Amendment) Act, 1990 came into force from 30.07.1994, "C" is not coparcener as her marriage was solemnised before 30.07.1994). The said suit came to be decreed in the year 2002 by declaring that "A" and "B" being coparceners are entitled for ½ share each in the suit schedule property and "C" is not entitled for any share in the suit schedule property as she is not the coparcener even under Hindu Succession (Karnataka Amendment) Act, 1990 and accordingly preliminary decree was drawn.

Thereafter on 01.01.2003, "B" initiated final decree proceedings and the same is pending for consideration and no final decree was drawn. Meanwhile Parliament of India brought an amendment to Section 6 of Hindu Succession Act, 1956 by enacting Hindu Succession (Amendment) Act, 2005 which came into force from 09.09.2005. The said "C" during the pendency of final decree proceedings on 01.12.2005 filed an application for drawing one more preliminary decree as she has become coparcener as per Hindu Succession (Amendment) Act, 2005 and thereby declare she is entitled for 1/3rd share each along with "A" and "B". Now the question is, in the final decree proceedings, can the court draw one more preliminary decree or amend the preliminary decree passed earlier to give benefit of Hindu Succession (Amendment) Act, 2005 to the daughter who has become coparcener with effect from 09.09.2005?

(The important aspect to be noted is that Hindu Succession (Amendment) Act, 2005 does not make any distinction between married daughter and unmarried daughter. *The Hon'ble Apex Court of India in* ***Vineeta Sharma V/s Rakesh Sharma & Others and Others (supra)*** *has clearly held that living daughter as on 09.09.2005 will get the*

benefit of Hindu Succession (Amendment) Act, 2005. ***Hence married daughters also become coparceners as per Amendment Act of 2005, if as on 09.09.2005 they were alive)***

After passing the preliminary decree and before passing the final decree by dividing the property by metes and bounds, in the interregnum, if the law changes as in the present case Hindu Succession (Amendment) Act 2005 which came into force from 09.09.2005, then the benefit of this new legislation has to be given to daughter "C" and the court can either pass one more preliminary decree or amend the preliminary decree and thereby declare that "A", "B" and "C" are entitled for 1/3rd share each in the suit schedule property and accordingly proceed to dispose of the said final decree proceedings. But before coming to into force of Hindu Succession (Amendment) Act, 2005, if already final decree was concluded between "A" and "B", then "C" will not get any share.

This position of law is explained by the Hon'ble Apex Court of India in the following decisions:

The Hon'ble Apex Court of India between ***Ganduri Koteshwaramma v. Chakiri Yanadi*****, reported in (2011) 9 SCC 788 at page 794 para 12,** while discussing the effect of Hindu Succession (Amendment) Act, 2005 on preliminary decrees passed before coming to force of the said Act of 2005 and Final Decree proceedings pending for consideration has held as under:

"The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section

6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before 20-12-2004; and (ii) where testamentary disposition of property has been made before 20-12-2004. Sub-section (5) of Section 6 leaves no room for doubt as it provides that this section shall not apply to the partition which has been effected before 20-12-2004. For the purposes of new Section 6 it is explained that "partition" means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a court. In light of a clear provision contained in the Explanation appended to sub-section (5) of Section 6, for determining the non-applicability of the section, what is relevant is to find out whether the partition has been effected before 20-12-2004 by deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on 19-03-1999 and amended on 27-09-2003 deprives the appellants of the benefits of the 2005 Amendment Act although final decree for partition has not yet been passed".

Further Hon'ble Apex Court of India at page 794 para 13, it has held as under:

"The legal position is settled that partition of a joint Hindu family can be effected by various modes, inter alia, two of these modes are (one) by a registered instrument of a partition and (two) by a decree of the court. ***In the present case, admittedly, the partition has not been effected before 20-***

12-2004 either by a registered instrument of partition or by a decree of the court. The only stage that has reached in the suit for partition filed by Respondent 1 is the determinations of shares vide preliminary decree dated 19-03-1999 which came to be amended on 27-09-2003 and the receipt of the report of the Commissioner".

Further Hon'ble Apex Court of India at page 794 para 14 has held as under:

"A preliminary decree determines the rights and interests of the parties. The suit for partition is not disposed of by passing of the preliminary decree. It is by a final decree that the immovable property of joint Hindu family is partitioned by metes and bounds. After the passing of the preliminary decree, the suit continues until the final decree is passed. ***If in the interregnum i.e. after passing of the preliminary decree and before the final decree is passed, the events and supervening circumstances occur necessitating change in shares, there is no impediment for the court to amend the preliminary decree or pass another preliminary decree re-determining the rights and interests of the parties having regard to the changed situation.***

Further the Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) at Page 90 Para 137.4** while answering the reference at Point No.(iv) has held that ***notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparceneary equal to that of a son in pending proceedings for final decree or in an appeal.***

After considering the ratio laid down by Hon'ble Apex Court of India in the above said cases, it can be safely concluded that after passing the preliminary decree and before passing the final decree, if in the interregnum, Hindu Succession (Amendment) Act, 2005 came into force from 09.09.2005, in such cases the court can amend the preliminary decree or pass another preliminary decree re-determining the rights and interest of parties having regard to the changed situation.

25. "MISTAKES APPARENT FROM THE RECORD" AND REVIEW OF THE JUDGMENT

Whether Court can review its Judgment on the ground that there are "Mistakes apparent from the Record" in the Judgment pronounced?

Sometimes it may so happen that the court while deciding a case without noticing the binding precedent of Hon'ble Apex Court of India or the Hon'ble High Court of Karnataka or without applying a relevant provision of applicable law to the facts involved in the case i.e., Hindu Succession (Karnataka Amendment) Ac, 1990 or Hindu Succession (Amendment) Act, 2005, decides the case and later on, a party approaches the very same court and pray for review of its judgment as there are "mistakes apparent on the record" as the court failed to apply the binding precedent or failed to apply the relevant provision of applicable law, then can the court review its judgment?. In order to know the answer the said question, it is relevant to refer the ratio laid down in the following decisions.

The Hon'ble High Court of Karnataka *between* ***Mrs. Mallika and Others V/s Chandrappa and Others, reported in (2008) 1 Kar.L.J 482*** held that though the facts are covered under Section 8 of Hindu Succession Act, 1956 and Hon'ble Apex Court of India between **Commissioner of Wealth-tax, Kanpur V/s Chander Sen, reported in (1986) 3 SCC 567** has

already laid down the ratio under Section 8 of the Hindu Succession Act, 1956, ***but in ignorance of the said binding precedent has passed the Judgment by applying Section 6 instead of Section 8 of the Act of 1956, hence it is just and necessary to review the Judgment and accordingly the Hon'ble High Court reviewed its Judgment.***

The Hon'ble High Court of Karnataka between ***Mysore Cements Limited v. Deputy Commissioner of Commercial Taxes (Assessment-V)*, 1993 SCC Online Kar 323 : (1994) 93 STC 464 at page 480 at Para 33, it has held as under**

> …. *"To encapsulate, the following will be* ***"mistakes apparent from the record"*** *relating to a question of law:*
>
> ***(a) An order made, ignoring or overlooking: (i) a binding decision of the Supreme Court or the concerned High Court rendered prior to the date of such order; and/or (ii) a relevant provision of existing law;***
>
> ***(b) An order, found to be erroneous: (i) by applying a subsequent enactment given retrospective effect; and/or (ii) by applying a subsequent decision of the Supreme Court or concerned High Court".***

The Hon'ble Federal Court between ***Musammat Jamna Kuer v. Lal Bahadur*, AIR 1950 FC 131 at page 160 para 8,** it is observed as under**:**

> ***……."Whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the court was not a circumstance which could affect the exercise of jurisdiction of the court to***

review its decision. We have no doubt that the error was apparent on the face of the record and in our opinion the question as to how the error occurred is not relevant to this enquiry. A mere look at the trial court's decision indicates the error apart from anything else".

The Hon'ble High Court of Calcutta between ***Tinkari Sen v. Dulal Chandra Das*, AIR 1967 Cal 518 at page 522 Para** 20 has held under

"Whether the error occurred by reason of the counsel's mistake or it crept in by reason of an oversight on the part of the Court was not a circumstance which could affect the exercise of jurisdiction of the Court to review its decision."

After considering the ratio laid down in the above said cases, **it can be safely concluded that while passing the Judgment, if the court committed error apparent on record without following binding precedent of Hon'ble Apex Court of India or the Hon'ble High Court of Karnataka or without applying a relevant provision of existing law to the facts involved in the case i.e., Hindu Succession (Karnataka Amendment) Act, 1990 or Hindu Succession (Amendment) Act, 2005, passed the Judgment, then such Judgment can be reviewed by the same court.**

26. <u>THE HINDU SUCCESSION (AMENDMENT) ACT, 2005</u>

26.1 STATEMENT OF OBJECTS AND REASONS

"Section 6 of the Act of 1956 deals with devolution of interest of a male Hindu in Coparcenery property and recognises the rule of devolution by survivorship among the members of the Coparcenery. The retention of Mitakshara Coparcenery property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. ***The law by excluding the daughter from participating in the Coparcenery ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution having regard to the need to render social justice to women, the states of Andhra Pradesh, Tamil Nadu, Karnataka and Maharastra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara Coparcenery property.*** The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975.

It is proposed to remove the discrimination as contained in Section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenery property as the sons have".

26.2 SECTION 6 OF HINDU SUCCESSION (AMENDMENT) ACT, 2005 - DEVOLUTION OF INTEREST IN COPARCENERY PROPERTY

Section 6(1)(a) of Act of 2005, declares that on and from the commencement of the Act of 2005, in a Joint Hindu Family governed by Mitakshara Law, the daughter of a coparcener shall by birth become a

coparcener in her own right in the same manner as the son. As per Section 6(1)(b) and (c) of the Amended Act of 2005, rights and liabilities are also conferred on daughters in the Coparcenery property as that of a son. The said provision has expressly declared that any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

26.3 CONDITIONS TO BE FULFILLED BY A DAUGHTER TO CLAIM A STATUS OF COPARCENER IN A JOINT HINDU FAMILY UNDER HINDU SUCCESSION (AMENDMENT) ACT 2005

(1). As on 09.09.2005, daughter (Married/Unmarried) should be alive

(2). No disposition, alienation including testamentary disposition had taken place prior to 20.12.2004.

(3). No partition had been effected either under registered deed of partition or by final decree prior to 20.12.2004.

26.4 WHETHER THE HINDU SUCCESSION (AMENDMENT) ACT, 2005 IS PROSPECTIVE OR RETROSPECTIVE IN NATURE AND A DAUGHTER WHO WAS BORN BEFORE 1956 WOULD GET SHARE IN THE ANCESTRAL PROPERTY AS A COPARCENER IN VIEW OF AMENDMENT TO SECTION 6 OF HINDU SUCCESSION (AMENDMENT) ACT, 2005?.

The Hon'ble Apex Court of India in **Prakash V/s. Phulavathi, reported in (2016) 2 SCC 36 at para No.23** has held that ***the rights under amendment are applicable to living daughters of living coparceners as on 09th September 2005 irrespective of when such daughters are***

born. The Hon'ble Apex Court further clarified the position that as on 09.09.2005, if both the father and the daughter are alive, then irrespective of the date of birth of the daughter, whether before 1956 or after 1956 she has become coparcener in her own right in the same manner as the son and she can maintain a suit for partition on her independent right against the father and her brothers with respect to ancestral property.

As per the ratio laid down by the Hon'ble Apex Court of India in **Prakash V/s. Phulavathi (Supra),** the amendment to Hindu Succession (Amendment) Act, 2005 is prospective in nature and while deciding a partition suit, as on 09.09.2005, if both father and daughter (irrespective of whether a daughter is married or unmarried or born prior to 1956 or after 1956) are alive and if the undivided ancestral property is available to effect partition, then the court can allot equal share to such daughters in the ancestral property on par with other male coparceners.

Recently the Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others and Others (Supra),** while discussing, whether Hindu Succession (Amendment) Act, 2005 is prospective or retrospective in nature has held at Page 53 Para No.60 as under

> *.....Though the rights can be claimed, w.e.f. 9.9.2005, the provisions are of retroactive application; they confer benefits based on the antecedent event, and the Mitakshara coparcenary law shall be deemed to include a reference to a daughter as a coparcener. At the same time, the legislature has provided savings by adding a proviso that any disposition or alienation, if there be any testamentary disposition of the property or partition which has taken place before 20.12.2004,*

the date on which the Bill was presented in the Rajya Sabha, shall not be invalidated.

Further Hon'ble Apex Court of India at Page 53 Para No.61 has held as under

"The prospective statute operates from the date of its enactment conferring new rights. The retrospective statute operates backward and takes away or impairs vested rights acquired under existing laws. ***A retroactive statute is the one that does not operate retrospectively. It operates in futuro. However, its operation is based upon the character or status that arose earlier. Characteristic or event which happened in the past or requisites which had been drawn from antecedent events. Under the amended section 6, since the right is given by birth, that is an antecedent event, and the provisions operate concerning claiming rights on and from the date of Amendment Act".***

Further Hon'ble Apex Court of India at Page 56 Para No.68 has held as under

Considering the principle of coparcenary that a person is conferred the rights in the Mitakshara coparcenary by birth, similarly, the daughter has been recognised and treated as a coparcener, with equal rights and liabilities as of that of a son. The expression used in section 6 is that she becomes coparcener in the same manner as a son. By adoption also, the status of coparcener can be conferred. The concept of uncodified Hindu law of unobstructed heritage has been given a concrete shape under the provisions of section 6(1)(a) and

6(1)(b). Coparcener right is by birth. ***Thus, it is not at all necessary that the father of the daughter should be living as on the date of the amendment, as she has not been conferred the rights of a coparcener by obstructed heritage.*** ***According to the Mitakshara coparcenary Hindu law, as administered which is recognised in section 6(1), it is not necessary that there should be a living coparcener or father as on the date of the amendment to whom the daughter would succeed.*** *The daughter would step into the coparcenary as that of a son by taking birth before or after the Act. However, daughter born before can claim these rights only with effect from the date of the amendment, i.e., 9.9.2005 with saving of past transactions as provided in the proviso to section 6(1) read with section 6(5).*

After considering the ratio laid down by the Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others and Others (Supra),** we can safely come to the conclusion that Hindu Succession (Amendment) Act, 2005 is not retrospective in nature and on the contrary it is retroactive in nature and will operate from 09.09.2005 subject to a condition that daughter must be alive as on 09.09.2005 irrespective of her date of birth. Further we can safely come to the conclusion that though the daughter's father died before coming into force of Hindu Succession (Amendment) Act, 2005, still the daughter has become coparcener if she alive as on 09.09.2005

26.5 EFFECT OF PARTITION THAT HAS TAKEN PLACE PRIOR TO 20TH DAY OF DECEMBER, 2004 IN CONTRAVENTION WITH SECTION 6A AND 6B OF HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990

26.6 LAW PREVAILING PRIOR TO 20.12.2004 GOVERNING THE COPARCENERY PROPERTY IN THE STATE OF KARNATAKA

Which was the law prevailing prior to 20.12.2004 (before coming to force of Hindu Succession (Amendment) Act, 2005) governing the coparcenery property of Joint Hindu Family governed by Mitakshara law in the state of Karnataka?

The Hon'ble Apex Court between **Prakash V/s Phulawati (Supra)** has held that **"as per Law applicable"** *prior to 20.12.2004, if any disposition or alienation including partitions which may have taken place, then they are protected under the provision to Section 6(1) of Hindu Succession (Amendment) Act, 2005*. Even in **Vineeta Sharma V/s Rakesh Sharma & Others (Supra) also this proportion of law is upheld.** Now the questions before us are, "which Law was in force before 20.12.2004 in the state of Karnataka governing the coparcenery rights of daughters in a Joint Hindu Family governed by Mitakshara Law"? What is the effect of contravening the provisions of Hindu Succession (Karnataka Amendment) Act, 1990 by male members of Joint Hindu Family while selling the undivided right of a daughter coparcener without her consent and knowledge? What is the effect of division of ancestral property made among male coparceners without the knowledge and consent of a daughter coparcener and who has not signed the said deed of partition? Whether these types of acts done by male coparceners in contravention with Section 6A to 6C of Hindu Succession (Karnataka Amendment) Act, 1990 are protected under proviso to Section 6(1) of Hindu Succession (Amendment) Act, 2005?

The Division Bench of Hon'ble High Court of Karnataka between **Padmavathi and another V/s. Smt.Jayamma and Others (Supra)** at para No. 65 has clearly held that ***the amendment to Hindu Succession***

(Amendment) Act, 2005 is prospective in nature from 09.09.2005 and prior to 09.09.2005 going back to 30.07.1994 was occupied by the Karnataka Amendment Act, 1990 and the same has not been repealed by the Karnataka Legislature, but having only been eclipsed by the Central Amendment Act, 2005 from 09.09.2005. The Hon'ble High Court further held at para No. 66 of the said Judgment that from 30.07.1994 to 08.09.2005, the Hindu Succession (Karnataka Amendment) Act, 1990 is applicable.

When the Coparcenery rights and liabilities of daughters are governed by Hindu Succession (Karnataka Amendment) Act, 1990 from 30.07.1994 till 09.09.2005 i.e., till coming into force of the Hindu Succession (Amendment) Act, 2005, then the undivided Joint Hindu Family members governed by Mitakshara Law had to follow the Hindu Succession (Karnataka Amendment) Act, 1990 for disposition or alienation including any partition or testamentary disposition of ancestral property. **The Hon'ble Apex Court between Prakash V/s. Phulavathi (Supra) at Para 23** has clearly held *that 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. This proposition of law is upheld even in* **Vineeta Sharma's case (Supra) by Apex Court**

The Hon'ble High Court of Karnataka between **P.S. Sairam and Another V/s P.S. Rama Rao Pisey and Others, reported in ILR 2001 Kar 2209 page 2252-2253,** held that a reading of clause (a) with clause (b) really indicates that Section 6A of Karnataka Amendment Act, 1990 will apply to the cases where the joint family exists and there has been no severance of the joint family by partition in the eye of law. ***Clause (b) indicates that if a partition takes place in the joint family after the coming into force of this amending Act, then in that partition of the Joint Hindu Family taking place after the commencement of this Act,***

the property shall be so divided as to allot a share to the daughter the same share as is eligible to a son. It further provides that clause (b) will not affect any partition of joint Hindu family Coparcenery property if the partition had already taken place before coming into force of Karnataka Act No. 23 of 1994, ***meaning thereby that if partition has already been effected actually or in the eye of law before coming into force of Karnataka Act No. 23 of 1994 it will not be affected by clause (b) of Section 6A.*** In cases where partition of joint Hindu family had already been held by metes and bounds, or by and under deeming clause by necessary implication before coming into force of the amending Act those concluded partitions will not be reopened.

In light of the ratio laid down by Hon'ble Apex Court of India in **Prakash V/s. Phulavathi (Supra), Vineeta Sharma V/s Rakesh Sharma & Others** and the Hon'ble High Court of Karnataka **in P.S. Sairam and Another V/s P.S. Rama Rao Pisey and Others (Supra),** let us discuss some of the scenarios to know, whether the partition that has taken place before 20.12.2004 i.e., before coming to force of Hindu Succession (Amendment) Act, 2005 in contravention with Hindu Succession (Karnataka Amendment) Act, 1990 are considered as **"As per law applicable"** and the same will affect the interest of daughter coparcener under Hindu Succession (Karnataka Amendment) Act, 1990.

26.7 ILLUSTRATION NO.1

Sometimes, an unmarried daughter coparcener under the Karnataka Amendment Act, 1990, who later on gets married and settles in her matrimonial home does not seek partition in her paternal family. The father and brothers before coming into force of Hindu Succession (Amendment) Act, 2005 i.e., prior to 20.12.2004 effected partition by way of registered

document and in possession and enjoyment over their respective shares. Meanwhile the Hindu Succession Amendment Act, 2005 came into force from 09.09.2005 and the said daughter files a suit for partition and separate possession of her share in the ancestral property? The defence put forth by the father and brothers is that the partition was already effected before 20.12.2004 by way of registered document, hence the suit is not maintainable. In this situation can a daughter is non-suited?

One of the incidents of coparcenery ownership is, as a result of such Coparcenery ownership, joint possession and enjoyment of the properties is common to all the coparceners including a daughter coparcener. Another incident of coparcenery ownership is, all the coparceners can at any time workout their right by asking for partition and this right can be exercised even by a daughter coparcener. Till the time, the Hindu Succession (Amendment) Act, 2005 came into force, the Karnataka Amendment Act, 1990 was in force and if a partition had to be effected among the coparceners, then it should be effected between all the coparceners (Father, Son and Daughter) as a daughter was already considered a coparcener under the Karnataka Amendment Act and should effect the partition in accordance with law. When the father and brothers have effected partition during the time period from 30.07.1994 till 20.12.2004 by including the share of a daughter coparcener too, without her consent and signature in contravention with the provisions of Karnataka Amendment Act, 1990, then the said partition is not binding on the interest of the daughter even after coming into force of Hindu Succession (Amendment) Act, 2005. Further the said partition entered into by the male

coparceners is not in accordance with law i.e., Section 6A and 6B of Hindu Succession (Karnataka Amendment) Act, 1990, hence not protected under Section 6(1) of the Hindu Succession (Amendment) Act, 2005. Further as per Karnataka Amendment Act, 1990, coparcenery right already vested with a daughter and the same cannot be taken away by her father or brothers by way of procedure not know to law.

26.8 ILLUSTRATION NO.2

A situation may also arise like, a daughter after becoming coparcener as per the Karnataka Amendment Act, 1990 died leaving behind her children and her husband. It is important to note that succession can never be in abeyance, i.e., it can never lie in a vacuum. The moment daughter dies intestate, her heirs (in order of succession) become entitled to succeed to her property as per Section 6B of Hindu Succession (Karnataka Amendment) Act, 1990 and as per Section 15 and 16 of Hindu Succession Act, 1956. The father and brothers of the deceased daughter/sister have effected partition before 20.12.2004 by way of registered document by including the share of that the deceased daughter was entitled to. However, though the daughter expired, her share of property upon her death gets vested on her legal heirs as per Section 15 and 16 of the Hindu Succession Act, 1956. So after coming into force of Hindu Succession (Amendment) Act, 2005, the children and husband of the deceased daughter file a suit for partition and separate possession on the ground that by operation of law, they are entitled to the property of the deceased daughter coparcener.

Again the father and brothers of the deceased daughter may come up with the same defence that in view of partition effected before 20.12.2004, the suit is not maintainable. As per Section 6B of Karnataka Amendment Act, 1990, when a daughter coparcener dies leaving behind her children and husband, immediately after her death, her rights in the ancestral property gets vested with the children and husband and the said right cannot abrogate by a registered partition though effected prior to 20.12.2004. It can be concluded that even after passing of Hindu Succession (Amendment) Act, 2005, the said vested right of children and husband of deceased daughter coparcener is not taken away by the Hindu Succession (Amendment) Act of 2005 and they will still be entitled for a share that originally would have gone to the daughter coparcener if she were alive. Therefore, the said partition deed or sale deed entered into by male coparceners, leaving out the legitimate share of a daughter, would not subsist under law and the father and brothers cannot take shelter under section 6(1) of the Hindu Succession (Amendment) Act as their action was in contravention of the then applicable law i.e. Karnataka Amendment Act of 1990.

27. EFFECT OF ORAL PARTITIONS

Let us discuss, whether oral partitions are permissible after enactment of Hindu Succession (Karnataka Amendment) Act, 1990 and under Hindu Succession (Amendment) Act, 2005? If such Oral Partitions are entered into, will it have the effect of depriving the rights of daughter coparceners in the ancestral property? Sometimes when a suit for partition is filed by the daughter coparcener or the legal heirs of daughter coparceners, then the male coparceners will come up with the defence that already oral partition

was effected among the father and sons, hence the suit for partition is not maintainable. Now the question is whether such defences of oral partition or family settlements are maintainable before the court?

27.1 PROVISO TO SECTION 6(1) AND EXPLANATION APPENDED TO SECTION 6(5) OF HINDU SUCCESION (AMENDMENT) ACT, 2005

Before discussing further, let us discuss the meaning of the term 'Partition'.

What is Partition : -

According to the true notion of an undivided Mitakshara family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, or that a particular number, has a certain definite share, one-third or one-fourth. ***Partition, according to Mitakshara Law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the Joint Property***. **(Hindu Law by Mulla, 23rd Edition (Reprint 2019) page 508)**

Under Mitakshara Hindu Law Oral Partition is also recognised. As per the law, if there is an Oral partition effected between the parties and subsequently the same is reduced into writing as 'Memorandum of Partition' in the Joint Family as evidence of partition, no registration is required.

Explanation appended to Section 6(5) of the Hindu Succession (Amendment) Act, 2005 defines the term **"Partition" as any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 or partition effected by a Decree of Court**.

Proviso to Section 6(1) of Hindu Succession (Amendment) Act, 2005 protects the disposition or alienation including any partition or testamentary

disposition of property which had taken place before the 20th day of December, 2004. The Hon'ble Apex Court between **Prakash V/s. Phulavathi (Supra) at Para 23** has further held ***that 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 uneffected. Any transaction of partition effected thereafter will be governed by the Explanation.***

If a partition had already taken place before 30.07.1994 i.e., before coming into force of the Karnataka Amendment Act, 1990, though daughter was unmarried as on 30.07.1994, she can't claim the status of coparcener in respect of the properties which were already divided in accordance with law. **After enactment of Hindu Succession (Karnataka Amendment) Act, 1990, if the coparceners want to enter into partition, then such partitions have to be done either by way of registered documents as per the provisions of Registration Act, 1908 or by way of final decree of the court.** Explanation to Section 6(5) of Hindu Succession Amendment Act, 2005 specifically states that in order to deprive the daughters to claim share in the coparcenery property, then when a partition is effected by a registered document or by passing of final decree by the court, only then daughter cannot seek to re-open partition and claim rights in the ancestral property. **Other than these two modes, if oral partition or family settlements have taken place to deprive the right of a daughter coparcener, then such family settlements and oral partitions have no sanctity in the eye of law and such mode of divisions are not binding on the interest of daughters**.

The Hon'ble Apex Court of India in **AIR 1968 SC 1299 between Siromani and Another V/s. Hemkumar and others at para No.4** has discussed about effect of unregistered partition deeds on the rights of coparceners. ***The Hon'ble Apex Court has held that when specific***

shares are given to the individual coparceners, then the document falls within the mischief of Section 17(1)(b) of Registration Act. It is further held that the unregistered partition deed is not admissible in evidence to prove the title of any of the coparceners to any particular property or to prove that any particular property has ceased to be joint family property. It is further held that of course the document is admissible to prove an intention on the part of the coparceners to become divided in status; in other words, to prove that the parties cease to be joint from the date of the instrument dated December 27, 1943.

The Hon'ble Apex Court of India between **S. Saireddy V/s. S. Narayana Reddy and others, reported in (1991) 3 SCC 647,** while discussing the scope of Hindu Succession (Andhra Pradesh Amendment) Act, 1986 at page No. 652 last portion of paragraph No. 7 has held that ***unless a partition of the property is effected by metes and bounds, the daughters cannot be deprived of the benefits conferred by the Act.*** Further held that any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment. ***The Hon'ble Apex Court in the year 1991 itself had smelt about these types of oral partition pleas*** which would be put forth by the family members of the daughter to deprive the rights of daughters in ancestral property and held that ***spurious family settlements, instruments of partitions not to speak of oral partitions will spring up and nullify the beneficial effect of the legislation depriving a vast section of women of its benefits.***

The Hon'ble Apex Court of India between **Bankey Behari v. Surya Narain, reported in (2004) 11 SCC 393 at page 394** held that ***the so-called family settlement arrived at between the appellant, his brother, the respondent herein and their father required registration***

and since the document was not registered, it was inadmissible in evidence. No reliance could be placed upon the so-called family settlement arrived at between the parties.

The Division Bench of Hon'ble High Court of Karnataka between **Umakanta Rao v. Lalitabai, reported in ILR 1988 Kar 2067 at page 2079 para 18** has held that ***Ex. D.1 is not a Memorandum of Partition recording the partition which had taken place anterior to the document. On the contrary, it is a document executed by defendants 1 and 3 and attested by three witnesses. It effects partition of the joint family properties in addition to moveables, the immoveable properties mentioned therein worth more than Rs. 100/- between defendants 1 and 3. As such, as required by Section 17(1)(b) of the Indian Registration Act, it ought to have been registered. Admittedly, the document Exhibit-D.1 has not been registered. As such it could not have been considered as a valid document affecting the immoveable properties mentioned therein and it could not have been received in evidence to prove the partition.***

The Division Bench of Hon'ble High Court of Karnataka in ***Lokamani v. Mahadevamma*, reported in ILR 2015 Kar 5095 Page No. 5121 Para 35 to 37** while interpreting Explanation to sub-Section (5) of Section 6 of the Hindu Succession (Amendment) Act, 2005 categorically declares that ***oral partition, palu-patti, unregistered Partition Deed are excluded from the purview of the word "partition" used in Section 6. It is only the partition effected by way of a registered Deed prior to 20th December 2004, which debars a daughter from staking an equal share with a son in a co-parcenary property.*** Further held that in the case on hand, admittedly there is no registered Partition Deed between Sannamadaiah and Mahadevappa, evidencing the alleged partition that took

place in the year 2000. ***Even if there was a partition, oral or by an unregistered Partition Deed of the year 2000 as contended by the defendants, it cannot be treated as partition for the purpose of Section 6*** and the rights of the daughters to claim an equal share as coparceners along with Sannamadaiah's son Mahadevappa remains unaffected.

The Hon'ble High Court of Karnataka between **Venkat v. Anitha and Others, reported in ILR 2020 Kar 539 (DB) at Page 554 Para 22 has held as under**

> ***"The next aspect is about oral partition which is a special feature of Hindu Law. There is no impediment for seeking declaration of title based on oral partition, but what is required is strict proof. If memorandum of partition is available, it must be produced and proved. Besides it must be proved that oral partition has been acted upon. It must be a time tested one".***

The Hon'ble Apex Court of India between **Vineeta Sharma V/s Rakesh Sharma & Others and Others (Supra)**, while interpreting proviso to Section 6(1) and Section 6(5) of Hindu Succession (Amendment Act) 2005, has held at Page 88 para 134 as under.

> ***The protection of rights of daughters as coparcener is envisaged in the substituted Section 6 of the Act of 1956 recognises the partition brought about by a decree of a court or effected by a registered instrument. The partition so effected before 20.12.2004 is saved.***

Further Hon'ble Apex Court at Para 135 and Para 136 has held as under

"135. A special definition of partition has been carved out in the explanation. The intendment of the provisions is not to jeopardise the interest of the daughter and to take care of sham or frivolous transaction set up in defence unjustly to deprive the daughter of her right as coparcener and prevent nullifying the benefit flowing from the provisions as substituted. The statutory provisions made in section 6(5) change the entire complexion as to partition. However, under the law that prevailed earlier, an oral partition was recognised. In view of change of provisions of section 6, the intendment of legislature is clear and such a plea of oral partition is not to be readily accepted. The provisions of section 6(5) are required to be interpreted to cast a heavy burden of proof upon proponent of oral partition before it is accepted such as separate occupation of portions, appropriation of the income, and consequent entry in the revenue records and invariably to be supported by other contemporaneous public documents admissible in evidence, may be accepted most reluctantly while exercising all safeguards. The intendment of Section 6 of the Act is only to accept the genuine partitions that might have taken place under the prevailing law, and are not set up as a false defence and only oral ipse dixit is to be rejected outrightly. The object of preventing, setting up of false or frivolous defence to set at naught the benefit emanating from amended provisions, has to

be given full effect. Otherwise, it would become very easy to deprive the daughter of her rights as a coparcener. When such a defence is taken, the Court has to be very extremely careful in accepting the same, and only if very cogent, impeccable, and contemporaneous documentary evidence in shape of public documents in support are available, such a plea may be entertained, not otherwise. We reiterate that the plea of an oral partition or memorandum of partition, unregistered one can be manufactured at any point in time, without any contemporaneous public document needs rejection at all costs. We say so for exceptionally good cases where partition is proved conclusively and we caution the courts that the finding is not to be based on the preponderance of probabilities in view of provisions of gender justice and the rigor of very heavy burden of proof which meet intendment of Explanation to Section 6(5). It has to be remembered that courts cannot defeat the object of the beneficial provisions made by the Amendment Act. The exception is carved out by us as earlier execution of a registered document for partition was not necessary, and the Court was rarely approached for the sake of family prestige. It was approached as a last resort when parties were not able to settle their family dispute amicably. We take note of the fact that even before 1956, partition in other modes than envisaged under Section 6(5) had taken place.

"136. The expression used in Explanation to Section 6(5) 'partition effected by a decree of a court' would mean giving of final effect to actual partition by passing the final decree, only then it can be said that a decree of a court effects partition. A preliminary decree declares share but does not effect the actual partition, that is effected by passing of a final decree; thus, statutory provisions are to be given full effect, whether partition is actually carried out as per the intendment of the Act is to be found out by Court. Even if partition is supported by a registered document it is necessary to prove it had been given effect to and acted upon and is not otherwise sham or invalid or carried out by a final decree of a court. In case partition, in fact, had been worked out finally in toto as if it would have been carried out in the same manner as if affected by a decree of a court, it can be recognized, not otherwise. A partition made by execution of deed duly registered under the Registration Act, 1908, also refers to completed event of partition not merely intendment to separate, is to be borne in mind while dealing with the special provisions of Section 6(5) conferring rights on a daughter. There is a clear legislative departure with respect to proof of partition which prevailed earlier; thus, the Court may recognise the other mode of partition in exceptional cases based upon continuous evidence for a long time in the shape of public document not mere stray entries then only it would not be in consonance with the spirit of the provisions of Section 6(5) and its Explanation.

27.2 <u>AFTER CONSIDERING THE RATIO LAID DOWN BY THE APEX COURT IN THE ABOVE SAID CASE, WHILE CONSIDERING THE ORAL PARTITION, THE COURT HAS TO TAKE THE FOLLOWING PRECAUTIONS:</u>

1. Plea of Oral partition not to be readily accepted.

2. Heavy burden of proof shall be placed on the party who has pleaded oral partition

3. Oral partition is to be followed by entry in the revenue records and other contemporaneous public documents

4. The court may accept the said revenue records and public documents most reluctantly while exercising all safeguards

5. False or frivolous oral partition defences to be rejected outrightly when such defences are made to deprive the daughter of her rights as a coparcener

6. The court has to be very extremely careful in accepting the oral partition and only if very cogent, impeachable and contemporaneous documentary evidence in the shape of public documents in support are available

7. The court should be cautious to ascertain, whether oral partition or memorandum of partition, unregistered partition can be manufactured at any point in time

8. Court can rely upon oral partition only in exceptional cases where partition is proved conclusively

9. The finding of the court on the oral partition is not based on preponderance of probabilities and more than that.

10. Even if the partition is supported by the registered document, it is necessary to prove it had been given effect to and acted upon and is not otherwise sham or invalid or carried out by a final decree of a court. The court may recognise the oral partition in

the exceptional cases based upon continuous evidence for a long time in the shape of public document not mere stray entries.

After considering the ratio laid down by the Hon'ble Apex Court of India and the Hon'ble High Court of Karnataka in the above said decisions, it can be safely concluded that oral partitions may be accepted in exceptional cases and if the same are evidenced in revenue records at the undisputed point of time and the same are continued for number of years. At the same time the court should interpret the partition in its letter and spirit as defined under Explanation to Section 6(5) of Hindu Succession (Amendment) Act, 2005 and to reject the false and frivolous oral partitions set up to deprive the rights of daughters in a coparcenery property.

28. CHANGE OF REVENUE ENTRIES ON THE BASIS OF ORAL PARTITION / UNREGISTERED PARTITION DEED AND ITS EFFECT ON THE RIGHTS OF A DAUGHTER COPARCENER

WHETHER CHANGE OF REVENUE ENTRIES ON THE BASIS OF ORAL PARTITION/UNREGISTERED PARTITION DEED EFFECTED AMONG MALE COPARCENERS WILL AFFECT THE RIGHTS OF A DAUGHTER COPARCENER IN THE ANCESTRAL PROPERTY?

Sometimes, the male coparceners on the basis of oral partition succeed in getting the revenue records changed to their names and when a suit for partition is filed by the daughter coparcener, then they come up with the defence that since partition is already taken place, suit may be dismissed. Now the question before us is, whether such revenue entries debar a daughter coparcener from seeking her legitimate share in the ancestral property? To answer this question, let us discuss the ratio laid down in the following cases:

The Hon'ble Apex Court of India between ***Bhimabai Mahadeo Kambekar v. Arthur Import & Export Co.*, reported in (2019) 3 SCC 191 at page 192 Para 6** has held that ***mutation of a land in the revenue records does not create or extinguish the title over such land nor has it any presumptive value on the title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question.***

The Hon'ble Apex Court of India between ***Sawarni v. Inder Kaur*, (1996) 6 SCC 223 at page 226 Para 7** held that ***mutation of a property in the revenue record does not create or extinguish title nor has it any presumptive value on title. It only enables the person in whose favour mutation is ordered to pay the land revenue in question.***

The Hon'ble High Court of Bombay between ***Mahadu Appa Wanjole v. Laxman Veerappa Wanjole*, reported in (2008) 5 Mah LJ 680 at page 688 Para 32** has held that the lower Appellate Court was not correct in holding on the basis of mutation entry in the revenue record that there was partition in 1960. ***Further held that the mutation entry is not a conclusive proof of the partition.*** Further held that the mutation entries in the revenue record are made only for the fiscal purpose of recovering the revenue and do not constitute a document of which title is created or has been conferred. ***Further held that the mutation entry itself in the absence of other evidence on record would not amount to a document which could be said to prove the partition.***

The Apex Court of India in Vineeta Sharma's case (Supra) has held that if the Oral partition is followed by revenue records and other contemporaneous public documents standing for a long period of time may be accepted and not the stray entries.

29. EFFECT OF DISPOSITION OR ALIENATION TAKEN PLACE PRIOR TO 20TH DAY OF DECEMBER, 2004 IN CONTRAVENTION WITH SECTION 6A AND 6B OF HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990

Proviso to Section 6(1) of Hindu Succession (Amendment) Act, 2005 also protects the disposition or alienation taken place before 20th day of December, 2004. The question that arises here is that, if a right which was already vested under Karnataka Amendment Act, 1990 to a daughter coparcener is subjected to disposition or alienation before 20.12.2004 by male coparceners without her signature to a deed of disposition, then the protection given by the proviso to Section 6(1) is available to such male coparceners and purchaser or not? In order to answer this question, let me give the following illustration:

29.1 ILLUSTRATION:

"A" is the father and "B" is his son and "C" is his daughter. As on 30.07.1994 she remained unmarried and no partition was effected in the family. By virtue of Karnataka Amendment Act, 1990 "C" has become co-parcener along with "A" and "B". "C" married one "D" on 01.01.1995 and out of the wedlock a son and daughter were born to "C" and "D". In the year 1998 she met up with an accident and died leaving behind her son and daughter and husband "D" as her legal heirs. As per the proviso to Section 6B of the Hindu Succession (Karnataka Amendment) Act, 1990, the undivided interest of "C" in Mitakashara Coparcenery property will not devolve on "A" and "B" on survivorship and on the contrary her interest will devolve on her husband "D", her son and daughter as per the rules of succession contained under Section15 and 16 of the Act.

When once the share of “C” was succeeded by her husband and children as per Section 15 and 16 of the Hindu Succession Act, 1956, then they will hold the said interest along with “A” and “B” as Tenants-in-common and not as Joint Tenants. The said right had already vested with her husband and children as on the date of her death and they can file a suit for partition to get the share of “C”.

Before filing of the suit for partition by the husband and children of “C”, the father and brother of “C” i.e., “A” and “B” sold their interest along with the interest of deceased “C” in the ancestral property to some third party in the year 2003. When the husband and children of “C” filed the suit for partition in the year 2006 by claiming the share of “C”, the defence put forth by the father and brother of “C” and also the purchaser is that the disposition has taken place before 20.12.2004 and therefore the said disposition is protected under proviso to Section 6(1) of Hindu Succession (Amendment) Act, 200 hence the suit be dismissed. Under these circumstances, whether the suit ought to be dismissed or decreed by holding that the said alienation of interest of “C” in the ancestral property is not binding on the interest of the legal heirs of “C”?

The important aspect to be noted is that as per proviso to Section 6B of Karnataka Amendment Act, 1990, the husband and children of “C” had succeeded to the interest of “C” in the coparcenery property immediately when she died in the year 1998 and they have exercised their right of partition in the year 2006 by filing suit. In such situation the vested right of the husband and children of “C” cannot be defeated by the alienation made in 2003, hence the alienation made by “A” and

"B" in favour of purchaser will bind only to the extent of their 1/3rd share and not upon the 1/3rd interest of the deceased daughter "C", through whom her husband and children claim right over the said share. Therefore, suit has to be decreed.

The statement of objects and reasons of the Hindu Succession (Amendment) Act, 2005 stated that in tune with the amendments already carried out by Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra to Section 6 of Hindu Succession Act, 1956 to give equal rights to daughters in Hindu Mitakshara coparcenery property, Hindu Succession (Amendment) Act, 2005 is enacted. The important aspect to be noted is that Hindu Succession (Amendment) Act, 2005 is the continuation of the purpose for which the State Amendments were carried out by the Southern States to Section 6 of Hindu Succession Act, 1956.

If the male coparceners of Joint Hindu Family, after commencement of Hindu Succession (Karnataka Amendment) Act, 1990 from 30.07.1994 till 20.12.2004 i.e., till the commencement of Hindu Succession (Amendment) Act, 2005, either sold, disposed, alienated or partitioned the ancestral property by way of registered deeds even including the undivided share of daughter coparcener without her consent and knowledge in contravention with Section 6A and 6B of Hindu Succession (Karnataka Amendment) Act, 1990 and when daughter was not a signatory to such deeds, then such acts of male coparceners and deeds of partition and alienation entered into by them are not protected under proviso to Section 6(1) of Hindu Succession (Amendment) Act, 2005. This is the object

and intention of proviso to Section 6(1) of the Hindu Succession (Amendment) Act, 2005.

Hence by relying upon the ratio laid down by Hon'ble Apex Court of India between **Prakash V/s Phulawathi (Supra)** and **Vineeta Sharma V/s Rakesh Sharma & Others** regarding ***"As per Law applicable prior to 20.12.2004", it can be concluded that disposition or alienation including partitions which may have taken place before 20.12.2004 in contravention with Section 6A and 6B of Hindu Succession (Karnataka Amendment) Act, 1990 will not affect the rights of daughter coparcener even after commencement of Hindu Succession (Amendment) Act, 2005.***

30. EFECT OF TESTAMENTARY DISPOSITION TAKEN PLACE PRIOR TO 20TH DECEMBER 2004 IN CONTRAVENTION WITH SECTION 6A AND 6B OF HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990

Proviso to Section 6(1) of the Hindu Succession (Amendment) Act, 2005 also protects the testamentary disposition which has taken place before the 20th day of December, 2004. Now a question arises that a daughter who became coparcener under the Hindu Succession (Karnataka Amendment) Act, 1990 married subsequently and settled in her matrimonial home and before coming to force of Hindu Succession (Amendment) Act, 2005, if testamentary disposition was made either by her father or brother including her share, then can such daughter ought to be deprived of her right in the Coparcenery property on the ground that the said testamentary disposition has already taken place before 20.12.2004?.

In order to answer the said question, let us take three different illustrations/situations.

30.1 ILLUSTRATION NO.1

"A" is the father and "B" is his son and there is an ancestral property for the Hindu undivided family. Both "A" and "B" are the coparceners in the Joint Hindu Undivided family and they have undivided share in the ancestral property. "B" appointed as Government Servant and started to work at Chennai. "A" executed a Will in the year 2000 in respect of his interest and also the interest of "B" in the ancestral property in favour of "C" who is his cousin in accordance with law and died in the year 2003. "C" started to claim absolute right over entire property and "B" filed a suit for declaration in the year 2007 that the said Will is not binding on his interest. "C" proved the execution of Will by "A" as per Law. In such a situation, would "B" lose his right over his undivided share in the ancestral property by virtue of Will executed by his father by including even his share i.e., share of B?. It is to be noted that both "A" and "B" being coparceners can dispose of their undivided interest by way of testamentary disposition as per Section 30 of Hindu Succession Act, 1956. But "A" had no right to dispose of the undivided share of "B" by way of executing the Will. Even if Will executed by "A" is proved, then "C" will get only the share of "A" in the property and "B" will be entitled get his share in the said property.

In the above illustration, there is no reference about the interest of a daughter coparcener. But this illustration is given to show that when one male coparcener executes a Will exceeding his share even including other male coparcener's

interest, then such testamentary disposition is not binding on the interest of other male coparcener. In the similar way if one of the male coparceners executes a Will by including even the interest of daughter coparcener, such testamentary disposition will not in anyway affect the interest of a daughter coparcener.

30.2 ILLUSTRATION NO.2

"A" is the father and "B" is his only unmarried daughter as on 30.07.1994 and there is an ancestral property for the Hindu undivided family. "B" by virtue of the Hindu Succession (Karnataka Amendment) Act, 1990 has become coparcener in the Joint Hindu Undivided family. Both "A" and "B" have undivided share in the ancestral property. "B" subsequently marries and resides in her matrimonial home. "A" executed a Will in the year 2000 in respect of the entire property by including the share of even "B", in favour of "C" who is his cousin in accordance with law and died in the year 2003. "C" started to claim absolute right over entire property and "B" filed a suit for declaration in the year 2007 that the said Will is not binding upon her. "C" proved the execution of Will by "A" as per Law and also put forth the defence that testamentary disposition had already taken place before 20.12.2004 as per Hindu Succession (Amendment) Act, 2005, hence the suit is not maintainable. In such a situation, would "B" lose her right over her undivided share in the property by virtue of Will executed by his father by including even her undivided interest/share in the ancestral property?

It is to be noted that both "A" and "B" being coparceners can dispose of their undivided interest by way of testamentary disposition as per Section 30 of Hindu Succession Act, 1956.

As per Hindu Succession (Karnataka Amendment) Act, 1990 a right was already vested with the daughter and the said right would not be divested by unilateral act of parties like in the given example by executing Will by "A" or bilateral act of parties like selling entire property including the share of "B" to third party. Therefore, "A" had no right to dispose of the undivided share of "B" by way of executing the Will.

In the given example, though testamentary disposition had already taken place before 20th day of December 2004 (prior to coming into force of Hindu Succession (Amendment) Act, 2005), the right of "B" in the ancestral property will not be lost as the said right had already vested with "B" by virtue of Hindu Succession (Karnataka Amendment) Act. 1990. Even if Will executed by "A" is proved, then "C" will get only the share of "A" in the ancestral property and "B" will be entitled to get her share in the said property even after Hindu Succession (Amendment) Act, 2005 came into force and the disposition such as above does not get protection under the proviso to Section 6(1) of the Act of 2005.

30.3 ILLUSTRATION NO.3

"A" is the father and "B" is his only unmarried daughter as on 30.07.1994 and there is an ancestral property for the Hindu undivided family. "B" by virtue of the Hindu Succession (Karnataka Amendment) Act, 1990 has become coparcener in the Joint Hindu Undivided family. Both "A" and "B" have undivided share in the ancestral property. "B" subsequently marries and resides in her matrimonial home. The husband of "B" was ill-treating her and later on deserted her. Even her father "A" had not extended helping hand to "B" and one of her

Aunt “C” gave shelter to her and started to look after her welfare. “B” on her own volition in accordance with law executed Will infavour of her Aunt “C” in the year 2002 and thereby bequeathed only her undivided interest in the ancestral property and died on 01.05.2003. “A” after the death of “B”, executed Will in the year 2004 in favour of his brother “D” and thereby bequeathed the entire ancestral property i.e., interest of both “A” and “B” and subsequently died on 10.10.2006. Meanwhile Hindu Succession (Amendment) Act, 2005 came into force.

“C” traced the Will executed by “B” in her favour and “D” also traced the Will executed by “A” in his favour. “D” started to claim the entire property as belongs to him and denied to give share to “C” as per the Will executed by “B”. “C” in the year 2007 filed a suit for partition of her half share in the property by virtue of the said Will executed by “B”. “D” while denying the execution of the said Will by “B” infavour of “C” also put forth the defence that the testamentary disposition made by “A” in his favour before 20.12.2004 is saved by the Hindu Succession (Amendment) Act, 2005, hence sought for dismissal of suit. Both the parties have adduced the evidence and the court comes to the conclusion that execution of Will by “A” infavour of “D” and “B” infavour of “C” is proved.

Now the question is, whether “C” will get the share of “B” or whether “D” will get the entire property including the share of “B” as per the Will executed by “A”? As per Section 6A(c) of Karnataka Amendment Act, 1990, testamentary right was conferred on daughter coparcener and during her life time, she could bequeath her undivided interest as per Section 30 of Hindu Succession Act, 1956. Accordingly in the given case, “B” during her life time in the year 2002 bequeathed her undivided

interest infavour of her Aunt “C” in accordance with law and died on 01.05.2003. When “B” died, succession had opened and her undivided half share devolved upon “C” by operation of Law. “A” had no right to bequeath the undivided share of “B” infavour of “D” and the right of “A” is only with respect to his undivided share. Though “A” without the knowledge of execution of Will by “B” infavour of “C” had bequeathed the entire ancestral property infavour of “D” and though “D” succeeds to prove the execution of Will by “A” in his favour with respect to entire property, but he will get only the undivided share of “A” and not the undivided share of “B”. The said undivided share of “B” will devolve upon “C” as per operation of Law and accordingly “C” is entitled for ½ share in the ancestral property by virtue of the Will executed by her niece “B’.

In the above given example, succession had opened when “B” died on 01.05.2003 and the rights of both “A’ and “B” in the ancestral property crystallised at that point in time itself, hence then prevailing Hindu Succession (Karnataka Amendment) Act, 1990 has to be applied to the said facts though suit is filed in the year 2007 after the commencement of Hindu Succession (Amendment) Act, 2005. **It can be concluded that even after coming into force of Hindu Succession (Amendment) Act, 2005, if succession had already opened while Hindu Succession (Karnataka Amendment) Act, 1990 was still in force i.e. till 08.09.2005, then we should follow the Karnataka Amendment Act of 1990 and not the Central Act of 2005 to the facts involved in such case**.

31. CAN A DAUGHTER MAINTAIN SUIT FOR PARTITION IN HER INDEPENDENT CAPACITY AS COPARCENER?

One of the incidents of coparceneary ownership is that a coparcener can work out his or her share by seeking for partition. **The Hon'ble Apex Court of India between Daramma V/s. Amar (Supra) has held that *a daughter coparcener can maintain a suit for partition in her independent capacity.*** The Division Bench of Hon'ble High Court of Karnataka between ***Nanjamma v. State of Karnataka, reported in ILR 1999 Kar 1094*** has held that ***a daughter who has become coparcener as per Hindu Succession (Karnataka Amendment) Act, 1990 can maintain a suit for partition in her independent capacity.*** It can be concluded that when a daughter has become the coparcener, then she can maintain a suit for partition in her independent capacity against other coparceners. In such a situation defences like till filing of a suit for partition by other male coparceners or till effecting partition by way of registered deed at the inception of male coparceners, a daughter coparcener cannot maintain a suit for partition are not sustainable in law. A daughter is not under the mercy of male coparceners to get her undivided share in the ancestral property and on the contrary the said right is her independent right and she can work out her remedy at any point of time to get her share in accordance with law.

32. CAN A DAUGHTER SELL HER UNDIVIDED INTEREST IN THE COPARCENERY PROPERTY WITHOUT THE CONCURRENCE OF OTHER COPARCENERS PRIOR TO EFFECTING PARTITION?

A question also arises whether a daughter can sell her undivided interest in the Coparcenery property to third parties prior to effecting partition among all the coparceners by meets and bounds?

An argument may be put forth that the undivided interest of a daughter in the ancestral property cannot be sold till effecting the partition among the other coparceners by meets and bounds and even if any such alienations are made, then such alienations are void and the purchaser will not get such undivided share of the daughter. The important aspect to be noted is that as per Section 6A(c) of the Karnataka Amendment Act, 1990 and as per Section 6(2) of Hindu Succession (Amendment) Act, 2005 absolute right is conferred on a daughter to bequeath her undivided share by way of executing Will. When such a right is conferred on a daughter, then she can sell her undivided interest in the Coparcenery property to third parties without the consent of other coparceners. The sale effected by her is not void and on the contrary, the same is valid in the eye of law. The said purchaser cannot get the possession of the said purchased portion and on the contrary he can sue the other coparceners for partition. ***The argument that till effecting the partition by metes and bounds among all the coparceners with respect to ancestral property, a daughter has no right to sell her undivided interest does not hold water.***

The Hon'ble Apex Court of India between ***Hardeo Rai v. Sakuntala Devi,*** **reported in (2008) 7 SCC 46 at page 52 para 26** held that ***even a Coparcenery interest can be transferred subject to the condition that the purchaser without the consent of other coparceners cannot get possession. Further held that the purchaser acquires a right to sue for partition.*** After considering the ratio laid down by Apex Court in the above said decision, it can be safely concluded that the daughter can alienate her undivided interest in the Coparcenery property in her independent capacity without seeking the concurrence of the other coparceners.

33. CAN A DAUGHTER BEQUEATH HER UNDIVIDED INTEREST IN THE COPARCENERY PROPERTY BY WAY OF EXECUTING THE WILL?

As per Sec.6A(c) of the Hindu Succession (Karnataka Amendment) Act 1990 and as per Sec.6(2) of the Hindu Succession (Amendment) Act 2005, a daughter can dispose of her undivided interest in the Coparcenery property by way of testamentary disposition. Sec.30 of the Hindu Succession Act 1956 also enables the coparceners to dispose of his/her undivided interest by way of executing the Will. Before discussing further, one thing to be remembered here is that in a Joint Hindu Family governed by Mitakshara law, which possess ancestral property, ***when a daughter has become a coparcener, she represents herself alone as one branch, which does not include her children. The children of a daughter coparcener are not coparceners in their mother's family and they have no birth right in the ancestral property in their mother's family.*** But when male coparceners represent their respective branches, it includes their children as well and the children also acquire birth right in the ancestral property. Hence a male coparcener when he represents a particular Branch, he can execute a Will infavour of anybody to whom he intends to give, but his testamentary disposition is limited to his undivided share in the said Branch and he cannot bequeath the undivided interest of his son or daughter in the same Branch.

The fundamental difference between the right of testamentary disposition of male coparcener and daughter coparcener is that, a daughter coparcener can bequeath her entire undivided interest in the Coparcenery property infavour of a person with whom she intends to give. Her children cannot question such testamentary disposition of their mother, because the said right of daughter coparcener is her absolute property right under Section 14 of Hindu Succession Act, 1956. ***But such***

absolute right of testamentary disposition is not available to a male coparcener as he is representing a branch. Hence he can execute Will only with respect to his undivided interest and not in respect of his son or daughter because his son and daughter are also coparceners and they have independent right in the said ancestral property by birth. It can be illustrated in the following manner.

33.1 <u>ILLUSTRATION</u>

"A" is the father, "B" is the son and "C" is the daughter of "A". "B" is married and has a son and daughter. "C" is also married and has a son and daughter. By virtue of the Hindu Succession (Karnataka Amendment) Act, 1990 and the Hindu Succession (Amendment) Act, 2005 the said "C" has become the coparcener. Now as per the said enactments "C" can bequeath her entire undivided interest in the coparcenery property by way of executing a Will either in favour of her husband, children, mother or even to a stranger. But the said "B" though being coparcener can execute the Will in respect of his undivided interest but he cannot bequeath the interest of his son and daughter as he is representing a Branch and in the said Branch his son and daughter have birth right over ancestral property.

34. CAN THE CHILDREN OF A DAUGHTER COPARCENER MAINTAIN A SUIT FOR PARTITION DURING THE LIFE TIME OF THIER MOTHER WITH RESPECT TO PROPERTIES FALLEN TO HER SHARE AS COPARCENAER ON THE GROUND THAT THE SAID PROPERTIES HAVE BECOME ANCESTRAL PROPERTIES TO THEM?

When a daughter being a coparcener acquires a property by way of partition, then a question arises, whether such property has become her absolute property under Section 14 of Hindu Succession Act, 1956 or whether the said property in the hands of daughter during her life time is also considered as ancestral property for her children and can her children maintain a suit for partition during the life time of their mother?

In order to answer this question, it is relevant to discuss Section 14 of Hindu Succession Act, 1956. As per Explanation to Section 14 of the Act, 1956, one of the modes of acquiring property by female is Partition. By way of partition if a daughter has acquired a share in the Coparcenery property from her paternal family, then such property is her absolute property under Section 14 of the Act, 1956. ***Someone may argue that when the said daughter has acquired Coparcenery property with all its incidents of Coparcenery ownership, then such property in the hands of such daughter is also Coparcenery property and her children can maintain a suit for partition during her life time. Whether such line of argument is tenable?***

The important aspect to be noted is that the Coparcenery status is given to a daughter only in order to give equal share in the ancestral property like that of a son and the children of such daughters cannot claim Coparcenery right over such property at any point of time on such undivided or divided share of their mother during her life time and even after her death. The children of such daughter can claim their right over the Coparcenery property of their mother if their mother died intestate as per Section 15 and 16 of Hindu Succession Act, 1956. Another important aspect to be remembered is that ***the children of such daughters are not coparceners in their maternal family and they can claim such right***

as coparceners only in their paternal family. The right of claiming Coparcenery right by children of a daughter coparcener both in maternal family as well as paternal family is unknown under Hindu Law. There is no such a single instance under Hindu Law claiming coparcenery right both in maternal family as well as paternal family.

When once a daughter coparcener has taken her undivided share in the ancestral property from her father's family and got separated, then for all practical purposes, her right of coparcenery comes to an end except under the circumstance covered under Section 6B of Hindu Succession (Karnataka Amendment) Act, 1990 regarding the right of survivorship. Further when a daughter coparcener after taking her undivided share got separated from her father's family, then that share of daughter will lose the character of ancestral property and the same becomes her absolute property under Section 14 of Hindu Succession Act, 1956. But when a son being a coparcener after taking his share in the ancestral property gets separated, the said share of a son continues to be ancestral property, the moment a son or daughter are born to him and they will have birth right in the said property.

Once a daughter acquires the ancestral property either by way of partition, inheritance or succession, then said property becomes her absolute property as per Sec. 14 of Hindu Succession Act, 1956. ***During her lifetime, the children of the said daughter coparcener cannot maintain a suit for partition on the ground that the said property is also ancestral property for them***. On the contrary the children of such daughter coparcener can maintain a suit for partition only after her death, if their mother had died intestate. After the mother's death, the rules contained under Section 15 and 16 of Hindu Succession Act, 1956 governs the children's right.

35. RIGHTS OF CHILDREN OF A DAUGHTER COPARCENER WHO HAVE SEPARATED DURING THE LIFE TIME OF THEIR MOTHER

This situation is covered under Explanation 2 to Section 6B of Hindu Succession (Karnataka Amendment) Act, 1990. ***A question arises that if some of the children of such daughters got separated during the life time of their mother, then after her death, can they claim right over the property of their deceased mother who died intestate?***. Explanation 2 to Section 6B of Hindu Succession (Karnataka Amendment) Act, 1990 expressly debars such children and their legal heirs to claim right over such property of the deceased. Though the separated children are also legal heirs as per Section 15(1)(a) of Hindu Succession Act, 1956, but as per Explanation 2 to Section 6B of Hindu Succession (Karnataka Amendment) Act, 1990, only such children who have not separated from their mother or the legal heirs of predeceased children can claim right over such property of their mother or grandmother as the case may be as per Section 15(1)(a) and 16 of Hindu Succession Act, 1956.

36. CAN ILLEGITIMATE DAUGHTER CLAIM ANCESTRAL PROPERTY AS A COPARCENER?

One of the conditions of a Hindu Marriage Act, 1955 as per Section 5 is that neither party has a spouse living at the time of the marriage. If any person contravenes such a condition and goes for second marriage, then such marriage is void under Section 11 of Hindu Marriage Act, 1956. The second wife of a male coparcener has no right over either Coparcenery property or separate or self-acquired property of her husband during his life time and even after his death. Only if husband bequeaths his undivided share in the Coparcenery property or his separate or self-acquired property to his second wife by way of executing Will as per Section 30 of Hindu Succession Act, 1956, then his undivided share in the Coparcenery property and his separate or self-acquired property will go to such second wife.

Except this situation, in normal circumstances such second wife will not get any right over either Coparcenery property or separate or self-acquired property of her husband.

Now the question is, can illegitimate daughter who satisfies the conditions of Section 6A(d) of Hindu Succession (Karnataka Amendment) Act, 1990 or under Section 6(1) of Hindu Succession (Amendment) Act, 2005 claim her right over ancestral property as a coparcener?. Section 16 of the Hindu Marriage Act, 1955 speaks of legitimacy of children of void and voidable marriages. As per Section 16(3) of Hindu Marriage Act, 1955, such children, though illegitimate are to be treated as legitimate, notwithstanding that marriage was void or voidable. ***But the said provision confined their right of succession or inheritance only to the properties of their parents and not the properties of any other persons. After considering all these aspects, it is very clear that the illegitimate children cannot claim the status of coparceners with respect to ancestral property and it is only legitimate children who can claim the status of coparceners with respect to ancestral property.***

Another question that arises for discussion is that after the death of their father, can such illegitimate children claim right over the share of their father in ancestral property as Class I legal heirs or their right is restricted only with respect to the self-acquired properties of their father?. The Hon'ble Apex court of India between **Jinia Keotin V/s Kumar Sitaram Manjhi, reported in (2003) 1 SCC 730,** between **Neelamma V/s Sarojamma, reported in (2006) 9 SCC 612** and between **Bharatha Matha V/s R. Vijaya Renganathan, reported in (2010) 11 SCC 483** while discussing the rights of illegitimate children rights has held that ***illegitimate children would only be entitled to a share of the***

self-acquired property of the parents and not to the ancestral property.

The Hon'ble Apex Court between ***Revanasiddappa v. Mallikarjun, (2011) 11 SCC 1 at page 9 para 27*** though referred the matter to larger Bench but not accepted the interpretation of Section 16(3) given in Jinia Keotin [(2003) 1 SCC 730], Neelamma [(2006) 9 SCC 612] and Bharatha Matha [(2010) 11 SCC 483 : (2010) 4 SCC (Civ) 498. At Para 28**, *it is held that the legislature has used the word "property" in Section 16(3) and is silent on whether such property is meant to be ancestral or self-acquired*.** Section 16 contains an express mandate that such children are only entitled to the property of their parents, and not of any other relation. At Para 29 it is ***held that when such illegitimate children are considered as legitimate as per Section 16(3) of Hindu Marriage Act, 1955, then they cannot be discriminated against and they will be on par with other legitimate children, and be entitled to all the rights in the property of their parents, both self-acquired and ancestral.***

The Hon'ble Apex court at para No. 38, has further held that in the case of joint family property such children will be entitled only to a share in their parents' property but they cannot claim it on their own right. ***Further held that logically, on the partition of an ancestral property, the property falling in the share of the parents of such children is regarded as their self-acquired and absolute property.*** Further held that in view of the amendment, we see no reason why such children will have no share in such property since such children are equated under the amended law with legitimate offspring of valid marriage. ***Further held that the only limitation even after the amendment seems to be that during the lifetime of their parents such children cannot ask for partition but they can exercise this right only after the death of their parents.***

The Hon'ble High Court of Karnataka between **Kenchegowda v. K.B. Krishnappa, ILR 2008 Kar 3453 page 3483,** while discussing the status of illegitimate children has clearly held that ***such illegitimate children are not coparceners and they have no right to maintain a suit for partition with respect to ancestral property during the life time of their father. Further it is held that such illegitimate children have to wait till the death of their father and only after his death, they can maintain a suit for partition.***

In a recent decision, the Division Bench of Honb'le High Court of Karnataka in R.F.A No.916/2014 C/w R.F.A. CROB. 8/2019 (PAR) between **Padmavathi and Another V/s Smt. Jayamma and Others, decided on 15th May, 2020** at Page 86 Para 19, framed 6 points for consideration, out of which, 5th point for consideration is as under:

> ***(v) Whether under Section 16 of Hindu Marriage Act, illegitimate children are entitled to a share in ancestral or Coparcenery property along with other legitimate heirs?***

The Hon'ble High Court at Page 221 Para 110.2 has answered the above said 5th point for consideration as under:

> ***Under Section 16 of the Hindu Marriage Act, illegitimate children are entitled to a share only in the separate property of their parents and not in the ancestral or Coparcenery property along with other legitimate heirs, so long as the properties are available for partition and not already partitioned or sold by registered instrument/s.***

After considering the ratio laid down by Hon'ble Apex Court of India and Hon'ble High Court of Karnataka, it is crystal clear that illegitimate children cannot claim the status of coparceners with respect to ancestral property and they have no independent right over the said property. Hence an illegitimate daughter though satisfies the conditions under Section 6A(d) of Hindu Succession (Karnataka Amendment) Act, 1990 or under Section 6(1) of Hindu Succession (Amendment) Act, 2005 cannot claim the status of coparcener and she cannot maintain suit for partition with respect to ancestral property. It can be concluded that the illegitimate children will not get share in the ancestral property in their independent right as coparceners, but they will get share in the property fallen to the share of their father as Class I legal heirs as per notional partition principle along with legitimate children subject to a condition that their father died intestate. If their father during his life time bequeathed his undivided share in the ancestral property to somebody else, then neither legitimate nor illegitimate children can claim such share of their father as per Section 8 to 10 of Hindu Succession Act, 1956. But in the self-acquired or separate property of a male Hindu, both legitimate and illegitimate children will get equal share as per the rules contained under Section 8 to 10 of Hindu Succession Act, 1956 provided the father died intestate.

37. RIGHTS OF A DAUGHTER IN COPARCENERY PROPERTY WHEN SHE HAS CONVERTED TO ANOTHER RELIGION

What if a daughter who has become coparcener either under Hindu Succession (Karnataka Amendment) Act, 1990 or under Hindu

Succession (Amendment) Act, 2005 gets converted to some other religion, then will she loses her right in the ancestral property?

Section 26 of Hindu Succession Act, 1956 covers this situation, which states that a Hindu before or after commencement of this Act, ceased or ceases to be a Hindu by conversion to another religion, children born to him or her after such conversion and their descendants shall be disqualified from inheriting the property of any of their Hindu relatives.

The said provision is very clear that a Hindu who converts to another religion will not lose his or her right in the undivided Coparcenery. ***Even after conversion also, such converted daughter can seek the partition of her undivided share in the ancestral property by maintaining suit in the court of law. The disqualification is only to the children of such converted daughter to inherit the property of their Hindu relatives.*** It can be illustrated as, after conversion, the said daughter got separated from the family by taking her share in the ancestral property. Her father and brother also got separated and are enjoying their respective shares. Meanwhile the said daughter after her marriage died leaving behind her husband, son and daughter. Later on her father also died intestate leaving behind his Class I legal heirs i.e., son and son and daughter of converted predeceased daughter. As per Section 26 of Hindu Succession Act, 1956, the children of converted daughter will not get any property though they are Class I legal heirs and on the contrary the son of deceased father will succeed the property of his father by excluding the children of converted sister.

The Division Bench of Hon'ble High Court of Madras between **E. Ramesh and Another V/s P. Rajini and Others, reported in (2002) 4 Law Weekly 192,** while interpreting Section 26 of Hindu Succession Act, 1956 has held that ***the bar of inheritance is only in respect of legal hires of convert. Further held that the individual, who converts himself to***

other religion from Hinduism, will not forego the right of any inheritance. By considering Section 26 of Hindu Succession Act, 1956 and the ratio laid down in the above said case, it can be concluded that a Hindu daughter being a coparcener will not lose her right in the ancestral property or her right of inheritance even after her conversion to some other religion.

38. RIGHTS OF A DAUGHTER IN COPARCENERY PROPERTY WHO MARRIED UNDER SPECIAL MARRIAGE ACT, 1954

As per Section 4 of Special Marriage Act, 1954, a marriage between any two persons may be solemnized. When, once a daughter who has acquired the status of coparcener gets married under the provisions of the said Act of 1954, then as per Section 19 of the said Act, she is deemed to sever from undivided family. As per Section 21 of the said Act, succession to the property of such daughter whose marriage is solemnised under the said Act is governed by the provisions of Indian Succession Act, 1925. But as per Section 21A of the said Act, if such daughter gets married to a person professing Hindu, Buddhist, Sikh or Jain religion, then such restrictions upon her children as contained under Section 19 and 21 will not apply. The restrictions contained under Section 19 and 21 will apply to such daughters who get married to a Non-Hindu. ***In whatever the circumstances i.e., whether she marries Hindu or Non-Hindu, she will not lose her right in the ancestral property being the coparcener.***

39. THE CONCEPT OF OUSTER AND THE SHARE OF A DAUGHTER COPARCENER IN THE ANCESTRAL PROPERTY

Sometimes, we may notice that when a daughter being a coparcener either under Hindu Succession (Karnataka Amendment) Act, 1990 or under Section 6 of Hindu Succession (Amendment) Act, 2005 files a suit for partition and separate possession with respect to her undivided share in the

ancestral property, one of the defences put forth by the male coparceners of her paternal family is Ouster. The male coparceners of her paternal family submit that the daughter coparcener was married off long back and she has not been in joint possession and enjoyment of the ancestral property, hence on the ground of ouster, she is not entitled for any share in the ancestral property and seek dismissal of the suit. ***Now the question before us is whether a daughter who has become a coparcener either under Hindu Succession (Karnataka Amendment) Act, 1990 or under Section 6 of Hindu Succession (Amendment) Act, 2005 gets married and resides in her matrimonial home, loses her right of share in the ancestral property on the ground of ouster?***

Before answering this question, let us discuss the meaning of "Oust" and "Ouster" and principles governing ouster. **"Oust" means 'to dispossess" and Ouster means 'Dispossession'.** The Hon'ble Apex Court of India between ***P. Lakshmi Reddy v. L. Lakshmi Reddy,*** **reported in AIR 1957 SC 314 Page 318, para 4** in the context of possession by a co-owner/co-heir has held as under:

> *"4. ... But it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties. Ouster of the non-possessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out.* ***The possession of one co-heir is considered, in law, as possession of all the co-heirs. When one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title. The co-heir in possession cannot render his possession adverse to the other co-heir not in possession merely by any secret hostile animus on his own part in derogation of the other co-heir's title.*** *It is a settled rule of*

law that as between co-heirs there must be evidence of open assertion of hostile title, coupled with exclusive possession and enjoyment by one of them to the knowledge of the other so as to constitute ouster."

The Hon'ble Apex Court of India between ***Vidya Devi v. Prem Prakash,*** **reported in (1995) 4 SCC 496 at page 505 Para 28,** while discussing the concept of Ouster and the necessary elements for establishing the plea of ouster has held as under:

"'Ouster' does not mean actual driving out of the co-sharer from the property. *It will, however, not be complete unless it is coupled with all other ingredients required to constitute adverse possession. Broadly* ***speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law".***

The Hon'ble Apex Court further held at page 504 Para 21 as under:

"Normally, where the property is joint, co-sharers are the representatives of each other. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such,

it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of other joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition.

The Hon'ble Apex Court of India between ***Darshan Singh v. Gujjar Singh,*** **reported in (2002) 2 SCC 62 at page 66 Para 9 has held as under:**

"In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied.

The Hon'ble Apex Court of India between ***N. Padmamma v. S. Ramakrishna Reddy,*** **reported in (2015) 1 SCC 417 at page 425 Para 10 has held as under:**

"It is fairly well-settled principle of law that the possession of a co-heir is in law treated as possession of all the co-heirs. If one co-heir has come in possession of

<u>the properties, it is presumed to be on the basis of a joint title. A co-heir in possession cannot render its possession adverse to other co-heirs not in possession, merely by any secret hostile animus on his own part, in derogation of the title of his other co-heirs.</u> *Ouster of the other co-heirs must be evidenced by hostile title coupled by exclusive possession and enjoyment of one of them to the knowledge of the other....."*

The Hon'ble Apex Court of India between ***Jai Singh v. Gurmej Singh,*** **reported in (2009) 15 SCC 747 at page 750 Para 9 has held as under:**

"....The principles relating to the inter se rights and liabilities of co-sharers are as follows:

(1) A co-owner has an interest in the whole property and also in every parcel of it.

(2) Possession of joint property by one co-owner is in the eye of the law, possession of all even if all but one are actually out of possession.

(3) A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

(4) The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on

behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of the other as, when a co-owner openly asserts his own title and denies, that of the other.

(5) Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

(6) Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

(7) Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to anybody to disturb the arrangement without the consent of others except by filing a suit for partition.

After considering the ratio laid down by Hon'ble Apex Court of India in the above said cases, it is very clear that the possession of one co-sharer/coparcener shall be deemed to mean that he possesses the property on behalf of the other co-sharers/coparceners also. A daughter after becoming a coparcener who subsequently gets married and resides in her matrimonial home, then when she has filed the suit for partition and separate possession of her undivided share in the ancestral property, the male coparceners cannot take the plea of Ouster. If the male coparceners succeed to get their names entered in the revenue records, they cannot take

shelter under the said revenue entries to deny the share of a daughter coparcener. The Hon'ble Apex Court of India between ***Jai Singh v. Gurmej Singh (Supra) has laid down 7*** principles regarding the inter se rights and liabilities of co-sharers and the courts while dealing with partition suits, have to follow the said principles. It can be concluded that a bare plea of Ouster cannot come to the aid of male coparceners to defeat the undivided share of a daughter coparcener in the ancestral property without passing the test as enumerated above with sufficient and acceptable evidence.

40. RELEVANT PROVISION OF LAW FOR COMPUTATION OF COURT FEE PERTAINING TO THE SHARE OF A DAUGHTER COPARCENER

A daughter coparcener normally files a suit for partition and separate possession of her share in the ancestral property by averring that the said property is joint family property and she being one of the coparceners is in joint possession and enjoyment over the same and accordingly values the suit as per Section 35(2) of Karnataka Court Fee and Suits Valuation Act, 1958 and pays the court fee of Rs.200/- as the property value is more than Rs.10,000/-. In such a situation, the male coparceners may contend that the Plaintiff was married long back and has been residing in her matrimonial home and has not been in possession of ancestral property, nor is she in constructive possession/control/ management of the said property, hence the suit ought to have been valued under Section 35(1) of the Act of 1958 and accordingly seek for a direction to her for payment of ad valorem court fee. Now the question before us is whether such a daughter coparcener who seeks her undivided share in the ancestral property must value the plaint under Section 35(1) of the Act of 1958?

We have already discussed that a bare plea of ouster is not available to the male coparceners against a married daughter coparcener. The Possession of joint family property by one co-owner/co-parcener is in the

eye of the law, possession of all even if all but one are actually out of possession. In case of a married daughter coparcener too, the laws presumes that she is in constructive (joint) possession over ancestral property along with other coparceners even though she is residing in her matrimonial home. Hence, valuing the suit under Section 35(2) of Karnataka Court Fees and Suits Valuation Act, 1958 is proper and she need not has to value the suit under Section 35(1) of Karnataka Court Fees and Suits Valuation Act, 1958

The Hon'ble Apex Court of India between ***Neelavathi v. N. Natarajan,*** **reported in (1980) 2 SCC 247 at page 252 para 8** while discussing the proper court fee payable by a co-owner/coparcener in a suit for partition and separate possession has held as under:

> ***"****Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act relates to partition suits. Section 37 provides as follows:*
> *"37. (1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.*
>
> *(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the rates prescribed."*
>
> *It will be seen that the court fee is payable under Section 37(1) if the plaintiff is "excluded" from possession of the property. The plaintiffs who are sisters of the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession. Under the proviso to Section 6*

of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the male Hindu who died after the commencement of the Act, having at the time of the death an interest in the Mitakshara Coparcenery property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided "joint family property" though not in the strict sense of the term. ***The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession.*** *Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been "excluded" from joint possession to which they are entitled in law. The averments in the plaint that the plaintiffs could not remain in joint possession as they were not given any income from the joint family property would not amount to their exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiffs had been excluded from possession".*

The Hon'ble Apex Court of India between *Jagannath Amin v. Seetharama*, reported in (2007) 1 SCC 694 at page 698 while interpreting Section 35(1) and Section 35(2) of Karnataka Court Fees and Suits Valuation Act, 1958 by relying upon the ratio laid down in ***Neelavathi v. N. Natarajan (Supra)*** has held that ***when a co-owner has filed a suit for partition and separate possession of his share, law presumes that he is in joint possession unless he is excluded from such possession, hence valuation of suit under Section 35(2) of Karnataka Court Fees and Suit Valuation Act, 1958 is proper and he need not to pay court fee under Section 35(1) of Karnataka Court Fees and Suit Valuation Act, 1958.***

The Hon'ble High Court of Karnataka between ***B.S. Malleshappa v. Koratagigere B. Shivalingappa*, reported in ILR 2001 Kar 3988 at page 4002 Page 10 has held as under:**

> ***"If the plaintiff claims to be in joint possession (either constructive or actual) and files a suit for partition and separate possession, he has to pay the Court fee only under Section 35(2) of the Act.*** In such a suit, the plaintiff will be entitled to relief, only if the Court accepts his contention that he is in joint possession (either constructive or actual). On the other hand, if the Court finds that he is not in possession or joint possession (either constructive or actual) or if the Court finds that he has been excluded or ousted from possession, the relief will be denied. But the plaintiff cannot be required to pay Court fee in such a situation. If the Court finds that some of the properties in the plaint schedule are in the possession or joint possession of the plaintiff, and others are not, the Court will give relief only in regard to those properties which are found to be in

possession or joint possession of the plaintiff and not in regard to those from which plaintiff had been excluded or ousted. ***The Court cannot, either at the instance of defendant, or Suo moto, convert the suit as one under Section 35(1) on the basis of defendant's pleadings or evidence.*** We may illustrate by an example. When a suit is filed by a plaintiff for a bare injunction alleging that he is in possession and pays Court fee under Section 26(c) of the Act, and if defendant denies such possession and established that he (the defendant) has always been in possession, the Court will dismiss the suit for injunction. It will not and cannot hold that it is a suit for possession and consequential injunction and call upon plaintiff to pay Court fee under Section 24(a) or 28 or 29 of the Act".

In the light of the ratio laid down by Hon'ble Apex Court of India and Hon'ble High Court of Karnataka, it can be concluded that when a daughter coparcener files a suit for partition and separate possession of her undivided share in the ancestral property and asserts that she is in joint possession of the ancestral property, then valuing the suit under Section 35(1) of Karnataka Court Fees and Suits Valuation Act, 1958 does not arise and the valuation under Section 35(2) of Karnataka Court Fees and Suits Valuation Act, 1958 would be proper.

41. MARKING OF UNREGISTERED PARTITION DEED AFTER PAYMENT OF DEFICIT STAMP DUTY AND PENALTY IN PARTITION SUITS AND ITS EFFECT ON THE RIGHTS OF A DAUGHTER COPARCENER

In certain situations, the male coparceners without the knowledge and consent of daughters enter into an unregistered partition deeds and divide

shares among themselves even including the undivided share of a daughter coparcener and assert possession and enjoyment of their respective shares/extent. When a daughter coparcener files a suit for partition and separate possession of her share in the ancestral property, the male coparceners who have entered into such unregistered partition deed may come up with the defence that already partition has been effected and produce the unregistered partition deed before the court to establish the factum of partition. The Court by noticing that the said unregistered partition deed is not duly stamped impounds the same and calculate the deficit stamp duty and penalty payable on the said document. The male coparceners as per the calculation made by the court pay the deficit stamp duty and penalty and get marked the said document as an exhibit during evidence.

After conclusion of evidence of both the sides, when the matter has reached the stage of arguments, during arguments, it is argued on behalf of male coparceners that deficit stamp duty and penalty has already been paid on the said unregistered partition deed and the same was marked as exhibit and the Court has admitted the document in evidence, therefore it is established that partition has already been effected among the male coparceners, hence the suit filed by the daughter coparcener deserves to be dismissed. Now the question before us is when deficit stamp duty and penalty is paid on such unregistered partition deed, will it deprive the right of a daughter coparcener in the ancestral property and whether the court can consider the said unregistered document as a deed of partition to prove partition among all the legitimate coparceners?

Before answering this question, it is just and necessary to discuss Section 17 and 49 of Registration Act, 1908. As per Section 17(1)(b) of the Act of 1908, a document which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property requires compulsory registration.

We have already discussed the ratio laid down by Hon'ble Apex Court of India and Hon'ble High Court of Karnataka that under a partition deed if the specific interest is created infavour of each coparcener, then the said document requires registration. Therefore, when the said partition deed is not a registered document, merely because it was marked during evidence, it will not come to the aid of male coparceners to establish the factum of partition and the same will not affect the interest of a daughter coparcener as marking of a document is different from appreciating the evidentiary value of such document.

Sometimes, the male coparceners may also take a plea that when they have paid deficit stamp duty and penalty on the said unregistered partition deed, then the said document may be looked into for collateral purpose as per Section 49 of Registration Act. Section 49 of the Act of 1908 deals with effect of non-registration of documents required to be registered. As per Section 49 of the Act of 1908, a document requires registration under Section 17 of the Act, if f it was not registered, then the said document will not affect (a) any immovable property comprised therein, or (b) confer any power to adopt, or (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. As per the proviso appended to Section 49 of the Act of 1908, the said document can be looked into as evidence of any collateral transaction not required to be effected by registered instrument.

The Hon'ble Apex Court of India **between Siromani and Another V/s. Hemkumar and Others, reported in AIR 1968 SC 1299 para No.4** has discussed about effect of unregistered partition deeds on the rights of coparceners. ***The Hon'ble Apex Court has held that, of course the document is admissible to prove an intention on the part of the coparceners to become divided in status.*** The collateral purpose as per Section 49 of Registration Act, 1908 with respect to unregistered partition deed can be implied only with respect to the intention of coparceners to sever from the joint family and not for any other purpose. The court can

consider such unregistered partition deeds only for the purpose of ascertaining the intention of coparceners to sever their status and not for any other purpose.

The Hon'ble High Court of Karnataka between ***K. Anjaneya Setty v. K.H. Rangiah Setty*, reported in ILR 2002 Kar 3613 at page 3632 Para 30 has held as under:**

> *"Though Section 49 of the Registration Act prohibits receiving as evidence the documents requiring registration under Section 17 which are compulsorily registrable the proviso to the said section provides for receiving such documents in the circumstances narrated therein. Therefore, it is clear there is no total prohibition for receiving unregistered documents in evidence and it is settled law that an unregistered partition deed could be received in evidence to prove any collateral transaction.* ***Therefore, even though an unregistered document is marked that in no way affects the interest of the parties. Mere marking of the document does not take away the right of the opposite party to contend that such a document cannot be relied upon as it is not registered.*** *Similarly, when the law declares for collateral purposes an unregistered document could be looked into, it makes clear that such a document could be marked. Under these circumstances, the proper course for the Courts would be to mark such documents, subject to objections, permit the parties to adduce evidence, instead of putting questions to the lawyers at the time of argument to state for what purpose they are relying on the said document. Thereafter consider the respective contentions at the time of final hearing and then decide whether the said document could be looked into for*

collateral purposes and whether non-registration of the said document has made it inadmissible in evidence.

In the light of the ratio laid down by the Hon'ble Courts as stated above, it can be said that mere marking of an unregistered partition deed after payment of deficit stamp duty and penalty does not take away the right of a daughter coparcener to seek her share in the ancestral property as such a document cannot be relied upon to prove partition but can be looked into only to consider if there is severance in the family. But as per the ratio laid down by the Apex Court of India in Vineeta Sharma's case (Supra) if such oral / unregistered partition deeds are followed by revenue entries at the undisputed point of time and the same are standing for number of years, then only such unregistered partition deed may be looked into.

42. POSITION OF DAUGHTERS AND WIDOWS UNDER BOMBAY SCHOOL OF MITAKSHARA LAW

The position of a daughter is same both in Madras School and Bombay School of Mitakshara Coparcenery. The rights and liabilities discussed herein above under Hindu Succession (Karnataka Amendment) Act, 1990 and under Hindu Succession (Amendment) Act, 2005 are equally applicable to a daughter governed under Bombay school of Mitakshara Law. ***With respect to the rights of widow under Bombay school of Mitakshara Law in respect of Coparcenery property, she has no independent right to claim right over such property as she is not a coparcener in her matrimonial home. Further wife has no right to maintain a suit for partition with respect to ancestral property or self-acquired property during the life time of husband. This position is same in all the schools of Mitakshara coparcenery.***

The Apex Court of India between ***Gurupad Khandappa Magdum V/s Hirabai Khandappa Magdum,*** **reported in 1978(3) SCC 383 at page 388** held that ***when the parties are governed under Bombay School of Mithakshara Law, widow not being a coparcener though was not entitled to demand partition yet if partition were to take place between her husband and sons, she would be entitled to receive a share equal to that of a son***. It is further held that in a partition between Khandappa and his two sons there would be four sharers in the Coparcenery property, the fourth being Kahndappa's wife, the Plaintiff. The Division Bench of Hon'ble High Court of Karnataka between **Irappa V/s Gurusiddappa and Another, reported in (2000) 8 Kar.L.J 431 (DB), between Smt. Ushatai and Others V/s Smt.Housabai and others, reported in (2015) 3 KCCR 2790 (DB) and between Balavant Rao V/s Smt. Geeta and Others, reported in ILR 2017 Kar 2882** followed the decision of Apex Court in **Gurupad Khandappa Magdum V/s Hirabai Khandappa Magdum (supra)** and comes to the conclusion that ***the widow would be entitled to receive a share equal to that of a son.***

43. SHARE OF A WIDOW UNDER MADRAS SCHOOL OF MITAKSHARA COPARCENERY IN ANCESTRAL PROPERTY

43.1 Share of a Widow in Madras School of Coparcenery under unamended Section 6 of Hindu Succession Act, 1956

In Madras School of Mitakshara Coparcenery, if a male Hindu having his undivided interest in a Coparcenery died intestate in the year 1989 leaving behind his mother, widow, unmarried daughter and son, then as per unamended Section 6 of Hindu Succession Act, 1956, succession opens in the year 1989 itself and by way of effecting notional partition held that, the said deceased male coparcener and his son being coparceners will

get ½ share each in the ancestral property. Out of the ½ share of the deceased male coparcener, his mother, widow, daughter and son will get 1/4th share each as Class I legal heirs as per Section 8 to 10 of Hindu Succession Act, 1956. The son will get ½ share as coparcener and 1/4th share each out of ½ share of the deceased male coparcener as Class I legal heir.

43.2 Share of a Widow in Madras School of Coparcenery under Hindu Succession (Karnataka Amendment) Act, 1990

If the said example is applied after coming into force of Hindu Succession (Karnataka Amendment) Act, 1990, by imagining that the said male coparcener died in the year 1996, then succession opens in the year 1996 and law applicable as on 1996 was Section 6A & 6B of Hindu Succession (Karnataka Amendment) Act, 1990 and not unamended Section 6 of Hindu Succession Act, 1956. By way of applying the notional partition principle, the said deceased male coparcener, his son and unmarried daughter being coparceners will get 1/3rd share each in the ancestral property. Out of the 1/3rd share of the deceased male coparcener, his mother, widow, daughter and son will get 1/4th share each as Class I legal heirs as per Section 8 to 10 of Hindu Succession Act, 1956. The son and daughter will get 1/3rd share each as coparceners and 1/4th share each out of 1/3rd share of the deceased male coparcener as Class I legal heirs.

43.3 Share of a Widow in Madras School of Coparcenery under Section 6(3) of Hindu Succession (Amendment) Act, 2005

If the said example is applied after coming into force of Hindu Succession (Amendment) Act, 2005, by imagining that the said male coparcener died in the year 2007, then succession opens in the year 2007 and law applicable in 2007 is amended Section 6(3) of Hindu Succession (Amendment) Act, 2005 and neither unamended Section 6 of Hindu Succession Act, 1956 nor Section 6A & 6B of Hindu Succession (Karnataka Amendment) Act, 1990 are applicable. By way of applying the notional partition principle, the said deceased male coparcener, his son and daughter (Both married and unmarried are covered under Hindu Succession (Amendment) Act, 2005) all being coparceners will get 1/3rd share each in the ancestral property. Out of the 1/3rd share of the deceased male coparcener, his mother, widow, daughter and son will get 1/4th share each as Class I legal heirs as per Section 8 to 10 of Hindu Succession Act, 1956. The son and daughter will get 1/3rd share each as coparceners and 1/4th share each out of 1/3rd share of their deceased father as Class I legal heirs.

This is the position of a Widow under Madras School of Mitakshara Coparcenery under unamended Section 6 of Hindu Succession Act, 1956, under Section 6A & 6B of Hindu Succession (Karnataka Amendment) Act, 1990 and under Section 6(3) of Hindu Succession (Amendment) Act, 2005.

44. SHARE OF A WIDOW UNDER BOMBAY SCHOOL OF MITAKSHARA COPARCENERY IN ANCESTRAL PROPERTY

44.1 Share of a Widow in Bombay School of Coparcenery under unamended Section 6 of Hindu Succession Act, 1956

The share of a Widow in Bombay School of Mitakshara Coparcenery changes and she would be entitled to receive a share equal to that of a son. If the same example given herein above for unamended Section 6 of Hindu Succession Act, 1956 is applied to the Bombay School of Mitakshara Coparcenery, then succession opens in the year 1989. By way of effecting notional partition, the said deceased male coparcener and his son being coparceners will get 1/3rd share each and the remaining 1/3rd share will devolve on widow of deceased as per the special rule of Bombay School of Mitakshara Coparcenery. Out of the 1/3rd share of deceased male coparcener, his mother, widow, daughter and son will get 1/4th share each as Class I legal heirs as per Section 8 to 10 of Hindu Succession Act, 1956.. The son being coparcener will get 1/3rd share each in his independent capacity and being class I legal heir of his deceased father will get 1/4th share each out of 1/3rd share of his father. The widow though not a coparcener, but as per the special rule of Bombay School of Mitakshara will get 1/3rd share each in her independent capacity and being class I legal heir of her deceased husband will get 1/4th share each out of 1/3rd share of his husband. The mother and daughter will get 1/4th share each out of 1/3rd share of deceased male coparcener i.e., son and father respectively.

44.2 Share of a Widow in Bombay School of Coparcenery under Hindu Succession (Karnataka Amendment) Act, 1990

If the said example is applied after coming into force of Hindu Succession (Karnataka Amendment) Act, 1990, by imagining

that the said male coparcener died in the year 1996, then succession opens in the year 1996 and law applicable in the 1996 was Section 6A & 6B of Hindu Succession (Karnataka Amendment) Act, 1990 and not unamended Section 6 of Hindu Succession Act, 1956. By way of effecting notional partition, the said deceased male coparcener, his son and unmarried daughter being coparceners will get 1/4th share each and the remaining 1/4th share will devolve on widow of deceased as per the special rule of Bombay School of Mitakshara Coparcenery. Out of the 1/4th share of deceased male coparcener, his mother, widow, daughter and son will get 1/4th share each as Class I legal heirs as per Section 8 to 10 of Hindu Succession Act, 1956. The son and unmarried daughter being coparceners will get 1/4th share each in their independent capacity and being class I legal of their deceased father will get 1/4th share each out of 1/4th share of his father. The widow though not a coparcener, but as per the special rule of Bombay School of Mitakshara will get 1/4th share each in her independent capacity and being class I legal heir of her deceased husband will get 1/4th share each out of 1/4th share of her husband. The mother of will get 1/4th share each out of 1/4th share of her deceased son.

44.3 Share of a Widow in Bombay School of Coparcenery under Section 6(3) of Hindu Succession (Amendment) Act, 2005

If the said example is applied after coming into force of Hindu Succession (Amendment) Act, 2005, by imagining that the said male coparcener died in the year 2007, then succession opens in the year 2007 and law applicable in the year 2007 is amended Section 6(3) of Hindu Succession (Amendment) Act, 2005 and neither unamended Section 6 of Hindu Succession

Act, 1956 nor Section 6A & 6B of Hindu Succession (Karnataka Amendment) Act, 1990 are applicable. By way of effecting notional partition, the said deceased male coparcener, his son and daughter (Both married and unmarried are covered under Hindu Succession (Amendment) Act, 2005) being coparceners will get 1/4th share each and the remaining 1/4th share will devolve on widow of deceased as per the special rule of Bombay School of Mitakshara Coparcenery. Out of the 1/4th share of deceased male coparcener, his mother, widow, daughter and son will get 1/4th share each as Class I legal heirs as per Section 8 to 10 of Hindu Succession Act, 1956. The son and unmarried/married daughter being coparceners will get 1/4th share each in their independent capacity and being class I legal heir of their deceased father will get 1/4th share each out of 1/4th share of their father. The widow though not a coparcener, but as per the special rule of Bombay School of Mitakshara will get 1/4th share each in her independent capacity and being class I legal heir of deceased husband will get 1/4th share each out of 1/4th share of her husband. The mother will get 1/4th share each out of 1/4th share of her deceased son.

This is the position of Widow under Bombay School of Mitakshara Coparcenery under unamennded Section 6 of Hindu Succession Act, 1956, under Section 6A & 6B of Hindu Succession (Karnataka Amendment) Act, 1990 and under Section 6(3) of Hindu Succession (Amendment) Act, 2005.

45. EFFECT OF THE HINDU SUCCESION (KARNATAKA AMENDMENT) ACT, 1990 AND THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

The Hindu Succession (Karnataka Amendment) Act, 1990 and other Southern State Amendments to Section 6 of Hindu Succession Act, 1956 and also the subsequent Amendment to the Hindu Succession (Amendment) Act 2005 have conferred Coparcenery status to a daughter and made a significant advancement towards achieving gender equality. The important change brought about by making all daughters as coparceners in the joint family property is of a great economic and symbolic importance for women. Giving Coparcenery rights to daughters would not only enhance their economic security by giving them birth-right in the property that cannot be taken away by men in a male-dominated society where women are often disinherited but also make her an equally important member of her natal family. After the amendment, a daughter would get an equal share as that of the son at the time of notional partition and also an equal share in the father's separate share. However, the position of the widow remains the same except under Bombay School of Mitakshara coparcenery, but she will get a share out of her deceased husband's share as a Class I legal heir.

46. PARTITION SUITS AND REJECTION OF PLAINT

When the application under Order 7 Rule 11 of C.P.C is filed for rejection of Plaint, then the first and foremost duty of the court is to ascertain, whether there is any cause of action for the Plaintiff to file the suit? While doing this exercise, the court has to consider only the plaint averments and not the defences of Defendants as pleaded in their written statement, affidavits, applications etc.,

Before discussing further let us discuss, what is the meaning of **"Cause of Action".** The Hon'ble Apex Court of India between ***Church of Christ Charitable Trust & Educational Charitable Society v. Ponniamman Educational Trust,*** **reported in (2012) 8 SCC 706 at page 715 at Para 13,** defined the term "Cause of action" as under:

> ***"While scrutinising the plaint averments, it is the bounden duty of the trial court to ascertain the materials for cause of action. The cause of action is a bundle of facts which taken with the law applicable to them gives the plaintiff the right to relief against the defendant. Every fact which is necessary for the plaintiff to prove to enable him to get a decree should be set out in clear terms. It is worthwhile to find out the meaning of the words "cause of action". A cause of action must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue.***

The Hon'ble Apex Court of India between ***A.B.C. Laminart (P) Ltd. v. A.P. Agencies,*** reported in **(1989) 2 SCC 163 at page 170** defined the term **"Cause of action"** as under:

> ***"A cause of action means every fact, which if traversed, it would be necessary for the plaintiff to prove in order to support his right to a judgment of the court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to***

the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove such facts, but every fact necessary for the plaintiff to prove to enable him to obtain a decree. Everything which if not proved would give the defendant a right to immediate judgment must be part of the cause of action. But it has no relation whatever to the defence which may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff".

The Hon'ble Apex Court of India between ***T. Arivandandam v. T.V. Satyapal,*** **reported in (1977) 4 SCC 467 at page 470 Para 5 held as under:**

.....The learned Munsif must remember that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them. In this case,

the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:

"It is dangerous to be too good."

After considering the ratio laid down by the Hon'ble Apex Court of India in the above said cases, it can be concluded that while scrutinising the plaint averments, it is the bounden duty of the trial courts to ascertain the materials for cause of action even by examining the parties under Order 10 of C.P.C. After considering the Plaint averments and examining the parties under Order 10, if the court comes to the conclusion that there is a cause of action, then the court by rejecting the application filed under Order 7 Rule 11 of CPC must proceed for trial to determine the rights and liabilities of parties to the suit. In this background let us discuss the kind of applications that would be filed under Order 7 Rule 11 of CPC in partition suits.

When a daughter files a suit for Partition and Separate possession of her undivided share in the ancestral property, in some cases it has come to our experience that either her father or brothers always try to avoid giving share to her by giving so may explanations like already oral partition was effected, at the time of marriage whatever to be given already given to her in the form of jewels and marriage expenses were taken care of and a grand wedding was conducted, "Kotta Hennu Kulakkke Horage, family is in financial crisis, hence not possible to give share to her etc etc. Frequent adjournments may also be the norm which in effect would result in long delays and the daughter may not survive to see the result of her efforts, during her lifetime. In some cases, it may also be noticed that Wills are created to show that already testamentary disposition has taken place hence daughter is not entitled for any share either as a coparcener or Class I Legal heir. Hence while deciding a suit for partition, one should be cautious about these aspects and to see that the true intention of the legislature is given effect to by upholding the law and giving the benefits of social beneficial

legislations to the daughters they are entitled to it. Only then the women folk will able to enjoy the fruits of legislations which conferred coparcenery status on them.

Now a trend has started to move an application under Order 7 Rule 11(a) and (d) of Code of Civil Procedure to reject the Plaint on the ground that there is no cause of action and the suit is barred under proviso to Section 6(1) of Hindu Succession (Amendment) Act, 2005. The common reasons in the said applications filed under Order 7 Rule 11 are that already partition, disposition, alienation and testamentary disposition taken place before 20.12.2004, hence as per proviso to Section 6(1) and 6(5) of Hindu Succession (Amendment) Act, 2005, daughter is not entitled for share and she is not a coparcener and therefore plaint has to be rejected. We have discussed minutely when unamended Section 6 of Hindu Succession Act, 1956 applies, when Hindu Succession (Karnataka Amendment) Act, 1990 applies and when Hindu Succession (Amendment) Act, 2005 applies. If the succession had already opened either under unamended Section 6 of Hindu Succession Amendment Act, 1956 or under Section 6A & 6B of Hindu Succession (Karnataka Amendment) Act, 1990, then the suit has to be decided as per the prevailing law applicable as on that date and not as per Hindu Succession (Amendment Act) 2005.

Even if partition, disposition, alienation and testamentary dispositions had taken place before 20.12.2004 in contravention with the provisions of either unamended Section 6 of Hindu Succession Act 1956 or Hindu Succession (Karnataka Amendment) Act, 1990, then such partition, disposition, alienation and testamentary dispositions will not be binding on the interest of a daughter. The benefit of the proviso of Section 6(1) of Hindu Succession (Amendment) Act, 2005 is available only if such partition, disposition, alienation were made in

accordance with law. Therefore when applications under Order 7 Rule 11 of CPC for rejection of Plaint are filed, the courts must be extra cautions to consider all the relevant legislations and decide the application on merit. By rejecting the plaint solely on the ground that partition, disposition, alienation and testamentary dispositions had taken place before 20.12.2004 will cause greater hardship to daughters and defeat the purpose of law.

The Hon'ble Apex Court of India between **John Kennedy v. Ranjana, reported in (2014) 15 SCC 785 at page 787 Para 10** has **held that *whether the suit scheduled property is ancestral property of the plaintiff's father or self-acquired property depends upon various factors. Further held that the law in this regard is well settled and whether the plaintiff is entitled for a right of partition in the suit scheduled property by virtue of the amendment carried to the Hindu Succession Act by the State of Tamil Nadu in 1989, or subsequently by Parliament, are matters to be decided after the pleadings are completed and evidence adduced. The Hon'ble Apex Court further held that without determining these aspects, rejection of Plaint is not proper procedure and accordingly directed the parties to prove their respective stands before the court.***

By applying the ratio laid down in the above said case, it can be concluded that when various questions of fact and law are involved as in Partition suits including the crucial question of when succession opened, the applicability of Hindu Succession Act, 1956, the Hindu Succession (Karnataka Amendment) Act, 1990 or the Hindu Succession (Amendment) Act, 2005 and the nature of property has to be determined and validity of alienations and/or dispositions have to be considered, it is just and necessary to adjudicate the rights and liabilities of parties by way of a full fledged trial instead of a

summary rejection of plaint. Hence, it is not advisable to reject the plaint at the threshold.

47. PRECAUTIONS TO BE TAKEN WHILE PASSING PRELIMINARY DECREE

47.1. APPLICATION OF RELEVANT LAW OF SUCCESSION WHICH STOOD AS ON THE DATE OF OPENING OF SUCCESSION

In a suit for partition, while determining the share to parties, the court has to see, when succession had opened and as on that day which law was in force. For example, if the suit schedule property is ancestral property and the coparcener died in the year 1990, then unamended Section 6 of Hindu Succession Act 1956 has to be applied and the share of the parties has to be determined as per the then prevailing law and not under Hindu Succession (Amendment) Act, 2005. If a coparcener died in the year 1996, the Karnataka Amendment Act, 1990 has to be applied. If the coparcener died in the year 2006, Hindu Succession (Amendment) Act 2005 has to be applied. Application of relevant enactment is one of the most important duties of the court while deciding the partition suit.

If the suit schedule property is ancestral immovable property, then the court has to discuss on what basis the court has declared the shares of parties to the suit. It is the duty of the Court to determine and specifically state who are entitled for a share in the ancestral property as coparceners, as per unamended Section 6 of Hindu Succession Act, 1956, under Karnataka Amendment Act of 1990 or under Hindu Succession (Amendment Act) 2005. If a deceased male coparcener had died intestate leaving behind his Class I female legal heirs, then the court has to effect notional partition and allot shares to Class I legal heirs, out of the share of the deceased male coparcener as per Section 8 to 10 of Hindu Succession Act, 1956.

If the suit schedule property is the self-acquired or separate property of the deceased male Hindu, then the court has to state that by applying Section 8 to 10 of the Hindu Succession Act, 1956, it has allotted shares to the parties. If the suit schedule property is the absolute property of the deceased female Hindu, then the court has to state that by applying Section 15 and 16 of the Hindu Succession Act, 1956, it has allotted the shares to the parties. The reader of the Judgment should know which provision of Hindu Succession Act, 1956, Karnataka Amendment Act 1990 or Amendment Act 2005 has been invoked by the Court while allotting the shares to the parties.

47.2. DECLARATION OF SHARES OF BOTH PLAINTIFFS AS WELL AS DEFENDANTS

Another important aspect to be noted here is that while passing the preliminary decree, the court has to declare the shares of both Plaintiffs as well as Defendants. Someone may argue that only the Plaintiffs have paid the Court Fee, hence it is enough to declare the share of the Plaintiffs alone and there is no necessity to declare the share of Defendants. ***What would be the consequence if the court passes a Preliminary Decree only with respect to the shares of the Plaintiffs and does not determine the shares of the Defendants?*** The consequence would be that based upon the Preliminary Decree, either of the parties will initiate the Final Decree Proceedings and in the said proceedings, the court will appoint Court Commissioner to submit the scheme of partition for passing the final decree by metes and bounds. The court commissioner would visit the spot and as per the preliminary decree would submit the scheme of partition as per the preliminary decree, only with respect to the share of the Plaintiffs. He will not submit the scheme of partition with respect to the shares of the Defendants and sometimes both sides may submit no objection to the court commissioner's report, then the Court at the time of passing the final Orders

on final decree proceedings to effect the partition by metes and bounds, may find it difficult to effect the partition by metes and bounds as there is no complete scheme of partition as per the court commissioner's report and the Preliminary Decree is silent about the share of the Defendants. In such an event, the court has to either amend the preliminary decree or has to pass one more preliminary decree to allot the shares of the Defendants and thereafter again court commissioner has to be appointed to revisit the spot and submit the report on the complete scheme of partition. In turn it will lead to delay, inconvenience and confusion. ***One of the reasons for the delay in disposal of Final Decree Proceedings is that in the preliminary decree the shares are not allotted to the Defendants.*** To avoid all that, the court while passing Preliminary Decree has to determine the shares of the defendants and direct them to pay the required court fee. Therefore it is just and necessary to declare the shares of all the parties entitled thereto, including the defendants at the time of passing the Preliminary Decree.

47.3 ILLUSTRATION

> "A" is the father and "B" is his son and "C", "D", "E" and "F" are four married daughters of "A". There is an ancestral property to the Hindu Undivided Joint Family and "A" died intestate in the year 1989 leaving behind "B" to "F" as his Class I legal heirs. "C" to "F" (Plaintiffs) filed suit for partition against "B" (Defendant) in the year 1990 by averring that they being coparceners are entitled for equal share in the ancestral property i.e., Item No.1 of Suit Schedule property and Tractor and golden ornaments i.e., Item No.2 of the Suit Schedule property and also sought for mesne profits. The nature of Item No.1 of the suit schedule property and relationship is proved. But the existence of Item No.2 of the Suit schedule property is

not proved and the court comes to the conclusion that for determination of mesne profits separate enquiry is required under Order 20 Rule 12.

In the year 1992, the court while partly decreeing the suit with respect to item No. 1 of the Suit Scheduled Property applied the unamended Section 6 of Hindu Succession Act, 1956 as the succession had opened in the year 1989 itself when "A" died. As per unamended Section 6 of Hindu Succession Act, 1956, "C" to "F" are not coparceners and they are only class I female legal heirs of "A". Hence in order to allot shares to "C" to "F", notional partition has to be effected as per Explanation I of unamended Section 6 of Hindu Succession Act, 1956. As per notional partition, deceased "A" and "B" being coparceners are entitled for ½ share each in the ancestral property i.e., Item No.1 of the suit schedule property. The ½ share of deceased "A" has to be further divided among his Class I legal heirs i.e., "B" to "F" as per Section 8 to 10 of Hindu Succession Act, 1956. Accordingly "B" to "F" are entitled for 1/5th share each in the 1/2 share allotted to their deceased father as a coparcener by way of notional partition, which would amount to 1/10th share each in the total property. However, "B" in his individual capacity as a coparcener would get 1/2 share in the total property in addition to 1/5th share in his father's share which would in total amount to 6/10th share. So four daughters "C to F" as Class I legal heirs under Section 6 to 8 of the Hindu Succession Act would get 1/10th Share each and one son "B" as a coparcener and as a Class I legal heir would get 6/10th share. So 1/10th X 4 plus 6/10th would total to 1.

The suit with respect to Item No.2 of the suit schedule property has to be dismissed and suit only with respect to Item No.1 of

the suit schedule property has to be decreed. Hence the court has to partly decree the suit.

The Calculation of shares of parties to the suit has to be made in the aforesaid manner. The reader of the Judgment has to get a clear idea about the court's final conclusion and application of relevant law for allotting the said shares.

48. MODEL OF OPERATIVE PORTION OF PRELIMINARY DECREE

By taking the above said scenario as an example, the court can pass the preliminary decree as under:

O R D E R

The suit of the Plaintiffs ("C" to F") is hereby partly decreed with cost on the following terms:

(i) It is hereby declared that the Plaintiffs ("C" to "F") are entitled for 1/10th share each in Item No.1 of the suit schedule properties.

(ii) It is hereby declared that the Defendant ("B") is entitled for 6/10th share in Item No.1 of the suit schedule properties.

(iii) The relief of partition with respect to Tractor and golden ornaments i.e., Item No.2 of the suit schedule properties is hereby rejected.

(iv) That there shall be a Final Decree Proceedings to carve out the share of each sharer in respect of Item

No.1 of the suit schedule properties as per Order XX Rule 18 R/w Sec.54 of CPC.

(v) The Plaintiffs ("C" to "F") are at liberty to proceed with enquiry as per Order XX Rule 12 of CPC with respect to mesne profits as sought for.

Draw decree preliminary accordingly.

49. CONCLUSION

Women folk were subjected to inequality under various personal laws. To achieve the gender equality, the Constitution of India under Article 15(3), empowered the State to pass special legislation to achieve the gender equality. To achieve this object, the Karnataka State Legislature and the Parliament of India by way of enacting Hindu Succession (Karnataka Amendment) Act, 1990 and Hindu Succession (Amendment) Act, 2005 respectively have conferred status of coparcener to daughters. **Both Bar and Bench should strive towards achieving gender equality by interpreting the said two enactments in proper perspective and by applying the appropriate legislation to a given case.** One should be objective while interpreting the legislations which conferred precious Coparcenery status on a daughter. **I would like to conclude with the following Sloka of Manusmruthi**

"Yatra naryastu pujyante ramante tatra Devata,

yatraitaastu na pujyante sarvaastatrafalaah kriyaah"

Meaning: Where Women are honoured, divinity blossoms there, and where ever women are dishonoured, all action no matter how noble it may be, remains unfruitful.

THE HINDU SUCCESSION ACT, 1956

(Came into force on 17th June, 1956)

Unamended Section 6 - ***Devolution of interest in coparcenary property***.—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 I.- 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 had separated himself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

THE HINDU SUCCESSION (AMENDMENT) ACT, 2005

(Came into force on 09th September, 2005)

Section 6: Devolution of interest in coparcenary property.— (1) On and from the commencement of the Hindu Succession (Amendment) Act, 2005, in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall—

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

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

(*c*) be subject to the same liabilities in respect of the said coparcenary property as that of a son,

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

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

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

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

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

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

(*c*) the share of the predeceased child of a predeceased son or of a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such predeceased child of the predeceased son or a predeceased 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, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt:

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub-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, 1908 (16 of 1908) or partition effected by a decree of a court.

THE HINDU SUCCESSION (KARNATAKA AMENDMENT) ACT, 1990

(Came in to force on 30th day of July 1994)

Section 6A - Equal rights to daughter in coparcenary property:

Notwithstanding anything contained in S. 6 of this Act.—

(a) in a Joint Hindu Family governed by *Mitakshara* Law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as a son and have the same rights in the coparcenary property as she would have had if she had been a son, inclusive of the right to claim by survivorship; and shall be subject to the same liabilities and disabilities in respect thereto as the son;

(b) at a partition in such a Joint Hindu Family the coparcenary property shall be so divided as to allot to a daughter the same share as is allotable to a son:

Provided that the share which a pre-deceased son or a pre-deceased daughter would have got at the partition if he or she had been alive at the time of the partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter:

Provided further that the share allotable to the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, if such child had 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 of the predeceased daughter, as the case may be;

(c) any property to which a female Hindu becomes entitled by virtue of the provisions of clause (a) 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 will or other testamentary disposition;

(d) nothing in clause (b) shall apply to a daughter married prior to or to a partition which had been effected before the commencement of the Hindu Succession (Karnataka Amendment) Act, 1990.

Section 6B - Interest to devolve by survivorship on death:

When a female Hindu dies after the commencement of the Hindu Succession (Karnataka Amendment) Act, 1990, having, at the time of her death an interest in a *Mitakshara* coparcenary property, her 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 any child or child of a pre-deceased child, 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 I.— For the purpose of this Section, the interest of a famale Hindu *Mitakshara* coparcenary shall be deemed to be the share in the property that would have been allotted to her if a partition of the property had taken place immediately before her death, irrespective of whether she was entitled to claim partition or not.

Explanation II.— Nothing contained in the Proviso to this section shall be construed as enabling a person who, before the death of the deceased, had separated himself or herself from the coparcenary, or any of his or her heirs to claim on intestacy a share in the interest referred to therein.

Section 6C - Preferential right to acquire property in certain cases:

(1) Where, after the commencement of the Hindu Succession (Karnataka Amendment) Act, 1990, an interest in any immovable property of an intestate or in any business carried on by him or her, whether solely or in conjunction with others, devolves under section 6-A or section 6-B upon two or more heirs, and any one of such heirs proposes to transfer his or her interest in the property or business, the other heirs shall have a preferential right to acquire the interest proposed to be transferred.

(2) The consideration for which any interest in the property of the deceased may be transferred under sub-section (1) shall, in the absence of any agreement between the parties, be determined by the court, on application, being made to it in this behalf, and if any person proposing to acquire the interest is not willing to acquire it for the consideration so determined, such person shall be liable to pay all costs of, or incidental to, the application.

(3) If there are two or more heirs proposing to acquire any interest under this section, that heir who offers the highest consideration for the transfer shall be preferred.

Explanation.— In this Section "court" means the court within the limits of whose jurisdiction the immovable property is situate or the business is carried on, and includes any other court which the State Government may by notification in the Official Gazette specify in this behalf.