

History of Female Coparcener and her rights to Coparcenary property towards Gender Justice: A Legal Study under Hindu Law

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“Once a daughter, always a daughter. A son is a son till he is married. The daughter shall remain a coparcener throughout life, irrespective of whether her father is alive or not”.

-Justice Arun Mishra

Abstract

In a country where parochial mind sets are deeply rotted, it is evident to find laws structured specially to cater to the benefits of men, who occupy a dominant pole in every spare. A relatable Instance was the devolution of property among the coparceners, where the only male coparcener of the Hindu joint family reckoned to be natural heirs to the ancestral property. It was the ipso facto gender-biased and unjust. The devolution of property under Hindus is governed by the Hindu Succession Act, 1956, which is with the due course of time change the status of a female coparcener and their right to coparcenary property. This is a journey where a female from nothing to getting equal status as to the male coparcener by reforming the patriarchal laws which were prevailing before the modern Hindu law. The Indian Constitution also enshrined the concept of equality and gender justice. By the virtue of Constitutional morality, the Indian judiciary preserved the right to equality and justice for all without any discrimination. The discriminatory practice of the female right to property is now changed and she also has the right to property absolutely like a son.

Keywords: Coparcener, Coparcenary property, Gender Equality, Hindu Succession Act, 1956.

Introduction:

Gender Equality is not only a legal right, human right but also a socio-legal right and the foundation of nation's development and

sustainable world. In order to achieve the sustainable development there is need to achieve gender quality and empowerment of all women. This sustainability realizes only when there is no discrimination with the women and protected their right social, economic and political. Women play a significant role in the formation of family; it is need of the day to change the patriarchal society where their rights were not protected due to the usages and custom. India is the country where the family law differs from community to community and family law is the subject matter of concurrent list of eight scheduled of the Indian Constitution. The Hindus has its own personal law. Hindu law is a Historic term which applied to Hindus, Buddhists, Jains and Sikhs. It is not the law of the land but personal law carrying with the person where he moves. It is one of the ancient known jurisprudence theories in the world history.¹ Before the independence Hindu law was govern by the customary laws but after the independence of India from the colonial rule of Britain in 1947, India adopted a new constitution in 1950 which reform the ancient Hindu law by the enactment of various legislation related with marriage, adoption, guardianship and succession of property among the Hindu. The term Hindu includes the Hindu by religion, by conversion also and various sub-sect of Hindus like *virashaives*, *lingayats*, *tantriks*, *raidashis*, *Brahama Samajists*, *Arya Amajists*, *Radhasoamis*, *Satsangis* or *Buddhist* by religion is a Hindu as defined by the Supreme Court in the landmark case of *Shastri*

¹ John Dawson Mayne (1910), A Treatise on Hindu Law and Usage, Stevens and Hynes, Harvard Law Library Series, see Preface

vs *Muldas*.² Under Hindu law there were various sui generis concepts like Kartaship, Coparcenary, Stridhan etc. In Hindu joint family the Karta or manger has pivotal position. According to the texture law of Hindus in the early ordinarily, the senior most male member is the Karta of joint Hindu family³ and female not be Karta because she was not a coparcener. She can be become Karta only in the absence of adult male members. With the due course of time this position change now the female can also be a Karta as confirmed by Judiciary in the case of *Sujata Sharma v. Mannu Gupta*.⁴ Coparcenary is one the important concept under Hindu law. The allocation of Hindu family property is based on the Coparcenary. The people who are the coparcenary have the property right by birth. Early only the male member of the family is only the coparcener but with the development of society and social transformation in order to achieve gender equality the legislators amended laws and now the female member is also treated as coparcener since the year 2005 when the landmark amendment took place in the Hindu Succession act, 1956. Therefore, female member is also entitled to family property but there was significant uncertainty on this issue which is clear by the Indian judiciary recently. Under the Indian Constitution gender equality is enshrined in its Preamble, Fundamental Rights, Fundamental Duties and Directive Principles and not only grants equality to women, but also empowers the State to adopt measures of positive discrimination in favor of women. The Indian judiciary has lay out the ambit of right to property time to time and Constitutional Amendment in the Indian Constitution provided the right to property as a legal right and not as a fundamental right. So, no person shall be depressed of his or right to property saves by the authority of law. This article studies the present situation of female coparcener and her right in the coparcenary property and the advancement of the property

right of daughter from texture law to modern Hindu law.

Meaning of Coparceners and Coparcenary Property

The conception of coparcenary is distinctive character of Hindu law and is the product of ancient Hindu jurisprudence which later on became the essential feature of Hindu law in general and Mitakshara school of Hindu law in particular. Mitakshara is one the school of Hindu law which contained the law of inheritance and property is inherited by the coparceners merely based on the fact that they were born in the family of the property holders. The concept of coparcenary is different from English law. Under the Hindu law Coparcenary is narrow body of persons within a joint family, and consist of father, son, son's son, son's son's son. In other words it consist s of father and his three male lineal descendants. A Coparcenary cannot be created by agreement. It is a creature of law.⁵ But this position change by the enactment of Hindu succession act, 1956⁶ and provided the gender equality as recognizing the female is also include in the definition of coparceners and has the interest by birth in the joint family property and there is nothing under Hindu law which shows that a right is irrevocably extinguished on a supervening insanity.⁷ Every coparcener has a right of maintenance out of the joint family property as per the Mitakshara school of law. Under the Hindu law, property is classified into coparcenary property and separate property. The property inherited from any ancestor or ancestress called coparcenary property or '*Apratibandha daya*' or unobstructed heritage because the interest in the property is created from the birth. In the case of *Bhanwar Singh vs. Puran*⁸ the Supreme Court delineate the term 'Coparcenary property' means the property which contain of ancestral property and a "Coparcener" is a person who shares equally with other in inheritance in the estate of common ancestor. Further, in the landmark case namely, *Uttam vs. Subagh Singh*⁹ the Supreme

² (1959) 61 BOMLR 1016

³ Shreeama v Krishavenanma, AIR 1957 AP 434

⁴ Mrs Sujata Sharma v Shri Manu Gupta & Ors [CS (OS) 2011/2006],

⁵ Bhagwan Dayal v.Reoti Devi, AIR 1962 SC 287

⁶ Section 6

⁷ Amirthamma v Vallimayil, AIR 1942

⁸ (2008) 3SCC 87

⁹ Civil Appeal no 2360(2016)

Court ruled that collective reading of the section 4,8 and 19 of the Hindu Succession Act, 1956 when the joint family property has intestate succession as per Section 8 the joint family property cease to be joint in nature .

Woman's Right to Property before Hindu Succession Act, 1956

Before 1956, the Property belonging to the woman was mainly in two categories. The Firstly Stridhan which means woman's property and secondary known as woman's estate. Stridhan contains such properties which a woman received by way of gift from her relations at the time of marriage such as ornaments, jewellery and dresses etc. and have the nature of the absolute ownership of property and female has full rights of its disposal or alienation. It means that she can sell, gift, mortgage, lease, exchange and if she wants to extinguish it by putting in on fire as her choice. In the case of *Pratibha vs. Suraj Kumar* held by the court that traditional presents made to wife at the time of the marriage constitute her Stridhan and if the husband or her in-laws refuse to give it back to her on demand they would be guilty of criminal breach of trust under section 405 of Indian Penal Code.¹⁰ The property which is obtains by inheritance and share obtained on partition have been considered as woman's estate. The female takes woman's estate as a limited owner and her power of disposal over the property are limited and it is those limitations which define the nature of her estate. The woman's estate is limited in nature so long as she is alive; no one has vested interested in succession. The right and interests in certain properties which a widow gets from her husband as limited estate shall cease upon her remarriage.¹¹ But after the 1956 any property which a Hindu female acquires will be her absolute property unless given to her with limitations. Therefore, the property acquired on succession or on partition is now her absolute property.¹²

Female Coparcener in the direction of Gender Equality

Mitakshara and Dayabhaga these are two main prominent schools of Hindu law. Mitakshara is an orthodox school which is based on Yagnavalkya Smriti and written by Vijaneshwara, a great thinker and law maker from Karnataka State whereas the Dayabhaga is reformist school and thoughts of this school is written by the Jimutavahana who predominantly emphases on law of inheritance. Their thoughts are differ to each other like as Mitakshara Coparcenary commences with the birth of a son whereas Dayabhaga Coparcenary commences on the death of father. The marginalization of women from an interest by birth in the coparcenary property and limiting male ownership to four degrees was due to the custom prevailing in ancient times. The attention of Mitakshara towards female is unjust and gender biased because it only recognized the male coparcener but after the independence the Constitutional law of the country consists of both legal as well as non-legal norms.¹³ It provides that the State shall not deny any person equality before the law or equal protection of the laws within the territory of India.¹⁴ Equality is the basic feature of the Indian Constitution.¹⁵ Further, it also embodied the particular application of equality as State is prohibited to discriminate between citizens on grounds only of religion, race, caste, sex, and place of birth or any of them.¹⁶ Right to equality is a fundamental right of every person. Therefore, legislature has enacted the Section 14 of Hindu Succession Act, 1956 in order to remove foregoing disabilities fastened on the Hindu female limiting her right to property without whole ownership. In order to understand the whole concept of daughter's right in coparcenary property we can study it into three different time period after the enactment of the Hindu Succession Act, 1956. The first phase is begin from the 1956 to September 8, 2005. It was the period where the

¹⁰ AIR 1985 SC 628

¹¹ Section 2 of Widow's Remarriage Act, 1956

¹² Panchi vs. Kumaran, AIR (1982)

¹³ M.P. Jain, Indian Constitutional Law 3(2016)

¹⁴ Article 14, Indian Constitution 1950

¹⁵ Indira Nehru Gandhi v Raj Narain, AIR 1975 SC 2299

¹⁶ Article 15

daughter has not been given any coparcenary right or right in the ancestral or coparcenary property at all. She can only be entitled the intestates succession as an heir of Class I heir of the Hindu Succession Act. They were not in equal status with the male coparcener. It was wholly centered on the Mitakshara school of Hindu law but in the second phase which is from the amendment date of the Hindu Succession act i.e. September 9, 2005 to August 10, 2020. Therefore, in order to eradicate the unequal treatment of daughter and gender biased in respect of inheritance of coparcenary property under the Hindu Succession (Amendment) Act, 2005 was passed, endowing the same coparcenary rights to daughters as the son and conferred upon Hindu women full and absolute ownership¹⁷ of property for the first time where the word 'property' includes both movable and immovable property.¹⁸ During this period there was conflict of judgments of the court as there was no consensus in the Supreme Courts' judgments itself. In some of the judgments coparcenary right is given to a daughter and in some others it is not provided. However the Hindu daughter are given equal rights in the coparcenary property as that of son but raised the controversy mainly regard to whether the amended provision have to be given retrospective operations and whether such coparcenary right will be given only to those daughter who born after September 9, 2005 or also will be given to all daughters irrespective of her birth date or even marital status. Since the Hindu Succession amendment act , 2005 daughters has equal right in the property as the son but there was uncertainty also exist as it however, established the right to inheritance of property to a daughter in a joint Hindu family during the lifetime of the father. Therefore, it created a situation that the rights under the amendment are valid only to living daughters of living coparceners as on September 9, 2005, the date of enforcement of the amendment. While since 2005, it has been the law that the women are also successor to their father's property but the position of a

woman to succeed to her father's property whose father was dead on the day of the enforcement of the law was not very clear and this uncertainty is removed by the judiciary in various cases. In the case of *Prakash V/S Phoolwati*¹⁹ a two-judge Bench headed by Justice A K Goel held that the benefit of the 2005 amendment could be granted only to "living daughters of living coparceners" as on September 9, 2005 regardless of when the daughters are born and amendment rules apply prospectively in operation. But in the case of *Danamma Suman Surpur v. Amar*²⁰ judiciary give the privileges of coparcenary to a daughter of coparcener and can claim a partition in the coparcenary property. In this case the male Coparcener died in the year 2001 leaving behind two daughters, two sons and his widow. They were entitled the 1/5th share in the property. Further the Supreme court held that section 6 of the act is retrospective in operation and it applies even if a male coparcener was not alive at the date of commencement Amendment Act, 2005. These two verdicts render by the Hon'ble Supreme Court creating the uncertainty and conflicting decision to each other but this contradiction again raised before the court which is answered in the another landmark case known as *Vineeta Sharma v. Rakesh Sharma*²¹ where the court decided to maintain the right of the daughters under the 2005 amendment to be retroactive instead of perspective. The significant point of this judgment is that now daughter has been given absolute right over the coparcenary property or ancestral property. This is the third phase of inheritance of coparcenary property by daughter and based on the gender justice or gender equality. In this case the judiciary determined that status of coparcener to a daughter is equal to the son coparcener with the same rights and obligations because the right of coparcenary accrues from birth. Now the daughter coparcener has right to claim partition in coparcenary property even though she born earlier with the effect from September 9, 2005. The decision of this case is a enlightened

¹⁷ Section 14

¹⁸ Punithavalli v. Ramanlingam AIR 1970 SC 1730.

¹⁹ AIR 2016,SCC 36

²⁰ AIR 2018, SCC 343

²¹ (2020) 9 SCC 1

step forward, however, it raises a lot of issues which are yet to be addressed. Further, the judgment quoted that “*Once a daughter, always a daughter ... son is a son till he is married*”. Therefore, now present situation is clear and resolved the confusion by giving the absolute coparcenary right to a daughter. So, in order to claim the coparcenary right by the daughter, there is no need to check whether father is alive on September 9, 2005 or not. At the present, any daughter irrespective of her date of birth, marital status, or even her father’s death can claim her coparcenary right.

Conclusion

After analysing the whole Journey of the daughter’s right in coparcenary property it is uncertain and unclear before the Hindu Succession Act, 1956 this legislation confirmed the position of daughter as coparcener by birth as of the son. The unfair distribution of intestate succession is resolved by the various case law in order to coparcenary right of daughter towards gender justice. Constitutional provisions also protect gender equality and ensure equality before the law and equaprotection of the law. The status quo before the modern Hindu law daughter had no right in coparcenary property. Only three females namely the father’s wife, mother, and grandmother entitled to share at the time of partition but had no right to call for the partition of joint Hindu family property. With the passages of time, this situation changed by the enactment of the Hindu Succession Act, 1956 which give a share to females as class I Heir. By the landmark Amendment act 2005 considering the daughter as a coparcener. Now she has the absolute right in her coparcenary property without any restrictions or conditions. In the respect of self-acquired property, daughters are class I heirs and eligible to have an equal share of any intestate succession as that of a son. Therefore, daughters have an equitable claim to ancestral properties as the result of the Supreme Court case and interpretation of section 6 of the Hindu Succession Act, 1956.