DAUGHTERS AS COPARCENERS: UNRESOLVED QUESTIONS

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Property owned by Hindu females governed by the *Mitakshara* may be *stridhana*[1] and/or property acquired through inheritance/partition[2]. But *Mitakshara* does not recognize any female as coparcener. The 2005 Amendment to Section 6 of the Hindu Succession Act , 1956 ["*HSA*"] recognizes daughters of *Mitakshara* male as coparceners from birth in the same manner as sons. ["*2005 Amendment*"]. Contradictory judicial gloss on the interpretation of 2005 Amendment culminated in the decision, by way of a reference, rendered by 3 judges of the Supreme Court in *Vineeta Sharma v. Rakesh Sharma*[3]. The aim of this paper is to discuss the findings in *Vineeta* and highlight its departure not only from *Mitakshara* but also the HSA itself. In Section I of this paper the authors discuss the meaning and incidents of joint family and *Mitakshara* coparcenary as understood under classical Hindu law; Section II touches upon operation of 2005 Amendment per *Vineeta*; and Section III details devolution of coparcenary property per *Vineeta*.

I. The Joint Family and Coparcenary

Mitakshara, a commentary on the *Yajnavalkya Smriti* authored by Vijnaneshwara, emerged as the foremost authority on rules of inheritance by birth in Benaras, South and West of India.[4] Another commentary is Jimutvahana's *Dayabhaga* prevalent in the Bengal region. The *Mitakshara* and *Dayabhaga* as "*schools of Hindu law*" were recognized by H.T. Colebrooke[5] and (i) Mithila, (ii) Benaras, (iii) Maharashtra/Bombay; (iv) Dravida/Madras are sub-divisions of the *Mitakshara* School.[6] The sharers and their shares vary under each sub-school of *Mitakshara*.[7]

a. Joint Family

A joint family consists of male members who have descended from a common male ancestor and includes their wives/widows, mothers, and unmarried daughters.[8] The members of a joint family are brought together as *sapindas* which is its "*essence and distinguishing feature*"[9]. Thus, a joint family is a creature of law and not act of parties and does not come to an end upon death of last surviving male for it can always be resurrected through adoption by the surviving females.[10] A joint family is joint in estate, food, worship, religious duties and observances but it is not necessary for a joint family to possess property.[11] The joint family is

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1 *See* Satyajeet A. Desai ed., "*Mulla Hindu Law*", 23rd Edition, Chapter X at Pages 205-239 ["Mulla"].
2 Mulla at Page 241-310.
3 2020 SCC Online SC 641 ["Vineeta"] *(Arun Misra J, S. Abdul Nazeer J, M.R. Shah J).*
4 Justice Alladi Kuppuswami, "Mayne's Hindu law and Usage" 14th Edition at Page 32 ["Mayne"].
5 H.T. Colebrooke, "*Dayabhaga and Mitaksara Two Treatises on Hindu Law of Inheritance*"; Page iii. *See also Collector of Madras v. Mootoo Ramalinga Sethupathy* 1868 (12) MIA 397.
6 Mayne at Page 44.
7 *Id.*
8 N.R. Raghavachariar, "*Hindu Law Principles & Precedents*" 3rd Edition, at Page 252 ["Raghavachariar"].
9 *Id.*
10 *Id.*
11 *Id.*

headed by the *karta* who represents the joint family, enters into contracts on its behalf, manages joint family property including alienation and collection of income thus derived and contract debts.[12] All members of the joint family do not enjoy equal status or rights.[13]

b. Coparcenary

A coparcenary is a narrower body compared to the joint family since it commences with the common male ancestor who is the holder of property/propositus and includes only males who are not removed from such male ancestor by more than three degrees of relationship in the male line.[14] Thus, the father, his son, his son's son, and his son's son's son constitute a coparcenary. Coparceners get a right in coparcenary property by birth (*janma swatwavad*) under *Mitakshara*.[15] A coparcener is not only a member of his branch but also of every other branch of the coparcenary.[16] Under Section 6 HSA, after the 2005 Amendment, daughters of a *Mitakshara* male are also recognized as coparceners.

Coparcenary property means and includes (i) ancestral property; (ii) acquisitions by coparceners with the help of ancestral property; (iii) separate property of coparceners thrown into the common stock; (iv) joint acquisition by coparceners.[17] Ancestral property means property inherited by a male from his father, father' s father or father's father's father and the inheritor's son, son's son, and son's son's son get a right in such property by birth.[18]

The legal nature of coparcenary property is co-ownership characterized by "*community of interest*" and "*unity of possession*" by members of a coparcenary[19]. The interest in a coparcenary property is therefore always fluctuating, which is diminished by births and enlarged by deaths, until the same is partitioned amongst the members.[20]

Coparcenary property is necessarily *aprathibandha daya* or unobstructed heritage.[21] A corollary to this principle is the right to survivorship where death of a coparcener does not necessarily mean an occasion for partition and the deceased coparcener's share devolves upon the surviving coparceners through survivorship, and the coparcenary continues.[22]

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12 Raghavachariar at Pages 293 to 306.
13 Raghavachariar at Page 252.
14 Raghavachariar at Page 253.
15 *Id.*
16 *Id.*
17 *Id.*
18 *Id.*
19 Raghavachariar at Page 256.
20 Mulla at Page 322.
21 Unobstructed heritage means that devolution of such property does not depend on death of the last holder of property. The right having accrued in such property by birth. This is distinct from *sapratibandha daya* or obstructed heritage where devolution is possible on the death of the last holder of property and is obstructed by such an event.
22 For instance, A is the father's father's father, A1 is the father's father, A11 is the father and A111 is the son and A1111 is the son's son. So long as A is alive, A1111 will not be a coparcener. On the death of A, A1111 would become a coparcener. At the same time, if A were alive and A11 died, there would be no occasion for A1111 to become a coparcener. For detailed discussion, also refer *Vineeta*.

The Supreme Court in *State Bank of India v. Ghamandi Ram*[23] has identified the following incidents of coparcenary property: (i) coparceners may seek partition to obtain their share; (ii) alienation of coparcenary property can be only for necessity; (iii) alienation requires concurrence of other coparceners. In addition, an eminent commentator on the subject, lists the following rights of coparceners namely (i) right to restrain unauthorized acts by other coparceners which may injure the coparcenary property; (ii) right to impeach alienations by coparceners effected without consent of others; (iii) right to accounts; and (iv) right of a coparcener to acquire and possess property which is not coparcenary property.[24]

II. Females as Coparceners

a. Under HSA

The HSA which came into force on 18.6.1956 is applicable to, *inter alia*, *Mitakshara* and *Dayabhaga* schools and to all Hindus and overrides various texts of Hindu law, custom, usage and legislation enacted prior to the HSA which are inconsistent thereto. Rules contained in uncodified Hindu law operate to the extent that they are not covered by HSA.[25]

No female in any capacity was treated as coparcener under *Mitakshara*, although they were members of the joint family.[26] This remained so even under the HSA even though Section 6 read with Section 8 allowed several female relatives of a male coparcener to inherit coparcenary property.[27] Daughters as coparceners were recognized under the 2005 Amendment to HSA.

b. Under State Amendments

Kerala introduced a new legislation abolishing *Mitakshara* coparcenary[28] whilst Andhra Pradesh[29], Karnataka[30], Tamil Nadu[31], and Maharashtra[32] recognized daughters as coparceners instead of abolishing the *Mitakshara* coparcenary ["*State Amendments*"]. The approach of the State Amendments by retaining *Mitakshara* coparcenary in some respects but modifying it in others, was criticised as providing a "*joint family unknown to law and unworkable in practice*".[33]

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23 AIR 1969 SC 1330.
24 Raghavachariar at Page 285.
25 *Vineeta*
26 Raghavachariar at Page 255.
27 See *Thimmaiah and Others v. Ningamma and Others* (2000) 7 SCC 409 wherein the Supreme Court set aside a gift deed executed by the *karta* in 1971 on the ground that consent of the Class I female heirs of the *karta* was not obtained for the gift.
28 Kerala Joint Family System (Abolition) Act, 1975 came into effect from 17.8.1976.
29 Sections 29-A, 29-B and 29-C inserted in HSA by the Hindu Succession (Andhra Pradesh Amendment) Act 1986 which came into effect from 05.9.1985.
30 Section 6A, 6B and 6C inserted in HSA by the Hindu Succession (Karnataka Amendment) Act 1990 ("Karnataka Amendment Act") which came into effect from 30.7.1994.
31 Sections 29-A, 29-B and 29-C inserted in HSA by the Hindu Succession (Tamil Nadu Amendment) Act 1989 which came into effect from 25.3.1989.
32 Sections 29-A, 29-B and 29-C inserted in HSA by Hindu Succession (Maharashtra Amendment) Act 1994 which came into effect from 22.6.1994.
33 B Sivramayya, "Coparcenary Rights to Daughters: Constitutional and Interpretational Issues", (1997) 3 SCC (Jour) 25 ["B Sivramayya"]

The State Amendments (i) recognized the right of daughters in coparcenary property by birth by making them coparceners; (ii) such daughters were given same rights as sons and subject to same liabilities; (iii) if the daughter died intestate and issueless (*not even a child of a predeceased chid*), the doctrine of survivorship applied regarding devolution of her interest; (iv) daughters married prior to the enforcement of the State Amendments were not coparceners; (v) prior concluded transactions were not affected; (vi) it applied to partitions also.[34]

c. 2005 Amendment

Nearly fifty years after the enactment of HSA, the Parliament introduced an amendment to Section 6 effective from 9.9.2005. The 2005 Amendment, *inter alia*, recognizes daughters as coparceners by birth in the same manner as sons and subject to same rights and liabilities as sons with regard to coparcenary property. The distinction between married and unmarried daughters, introduced by State Amendments, is not present in the 2005 Amendment.

i. Operation of 2005 Amendment

Since daughters are recognized as coparceners "*by birth*" but the same is via an amendment effective from 9.9.2005, the following questions arose for consideration

(a) whether the 2005 Amendment applies to daughters born (i) before 17.6.1956 *(date of enforcement of HSA)*; (ii) after 17.6.1956 but before 9.9.2005; and (iii) daughters born after 9.9.2005;

(b) whether the daughter needs to be alive as on 9.9.2005 for the benefit of 2005 Amendment to be extended to her;

(c) whether the 2005 Amendment is prospective, retrospective, or retroactive;

(d) whether the father of a daughter has to be alive on 9.9.2005 for amendment to apply. These questions had been considered by various High Courts and the law has been since laid down by *Vineeta* and other decisions of the Supreme Court.

These questions arose for consideration before the Supreme Court for the first time in *Prakash and Others v. Phulvati and Others*[35] *and was answered by holding that "rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born" (emphasis supplied)* since the plain language of the text of the amendment itself states that daughters are coparceners "*on and from the commencement of Hindu Succession (Amendment) Act, 2005*" leaving no scope for a different interpretation.

In *Danamma v. Amar and Others*[36] a suit for partition and separate possession of one G was filed by his grandson (son's son) in 2002 after the death of G in 2001. G had two sons, and two daughters who were born prior to 1956 and were both married. G was survived by a widow W. The question before the Supreme Court was whether the daughters can be denied a share on the ground that they were born prior to the enactment of HSA. The Karnataka State Amendment is applicable. Although the father was not alive as on 9.9.2005 the

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34 For detailed analysis of issues raised by State Amendments *See* B. Sivaramayya,
35 (2016) 2 SCC 36 *(AK Goel and Anil R Dave, JJ.)* ["Phulvati"].
36 (2018) 3 SCC 343 (*AK Sikri and Ashok Bhushan, JJ.*) ["Danamma"].

Court gave relief to the daughters by holding that they are entitled to 1/5th share in the coparcenary property since G died leaving behind 2 sons, 2 daughters, and widow. The Court did not apply the State Amendment. Applying the dictum of *Phulvati* the daughters would not have been entitled as coparceners since their father had died prior to the 2005 Amendment. However, the Court did not follow the dictum of the co-ordinate bench in *Phulvati* and also did not apply the law applicable when succession opened, namely on the date of death of the propositus, to determine the interest of the co-parcener.

In *Mangammal v. TB Raju*[37] a suit for partition was filed by married daughters in 2003. Their father died in 1979 and mother in 1989. They had one brother. The State amendment in Tamil Nadu was applicable to the said facts which did not treat daughters married prior to commencement of amendment in 1989 as coparceners. The Court held that daughters were not entitled to seek a partition since they were excluded by the Tamil Nadu amendment.

Applying the dictum in *Danamma*, the daughters in *Mangammal* would have also been entitled to be treated coparceners under the 2005 Amendment irrespective of whether their father was alive and the State Amendment. But, the Court in *Mangammal* noted the departure by *Danamma* from *Phulvati* and reiterated that *Phulvati* would "*still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property.*" Thus, in *Mangammal*, even under the 2005 Amendment, the daughters were not coparceners since their father was not alive as on 9.9.2005 and were governed by the Tamil Nadu State Amendment which is the law applicable at the time when succession opened.

The conflict posed by the decision in *Danamma* on the one hand and *Mangammal* and *Phulvati* on the other, regarding application of 2005 Amendment, was noticed by the Supreme Court in *Vineeta* and referred to a larger bench . The Supreme Court in *Vineeta* has reasoned that *"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"* [38] and therefore holding *"it is not all necessary that the father of the daughter should be living as on date of amendment...."*[39] *and discarded the concept of "living coparcener"* as laid down in *Phulvati* and held that it is sufficient if the daughter is living as on 9.9.2005.[40]

To summarize, daughters are coparceners on and from 9.9.2005 irrespective of their date of birth or whether their father is alive so long as the daughters are alive on 9.9.2005. Thus, answering all the questions raised above.

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37 (2018) 15 SCC 662 (*RK Agarwal and Abhay Manohar Sapre, JJ.*) ["Mangammal"].
38 *Vineeta* at Para 55.
39 *Vineeta* at Para 63.
40 *Vineeta* at Para 75.

ii. Effect of 2005 Amendment to Prior Transactions

The declaration of daughters as coparceners by birth under the 2005 Amendment does not affect (i) any disposition, alienation including testamentary disposition which has taken place prior to 20.12.2004[41]; and (ii) duly registered partition or partition effected by a decree of the court prior to 20.11.2004.[42]

The question whether oral partitions fall within the purview of Section 6(5) has been decided in *Vineeta* by holding that a plea of oral partition ought not to be readily accepted so that the rights conferred upon daughters are not defeated by such false and frivolous defences. *Vineeta*, casts a heavy burden of proof upon the proponent of oral partition and cautions the courts to exercise safeguards before it is accepted. Oral partitions may be accepted in "*exceptionally good cases*" if "*proved conclusively*" and "*oral partition or memorandum of partition, unregistered one...without any contemporaneous public document needs rejection at all costs*". Therefore, *Vineeta* has expanded the meaning of "*partition*" in Explanation to Section 6(5) to include oral/unregistered partitions/memorandum of family settlements provided the same is proved to be *bona fide* and not a frivolous defence set up to deprive daughters of their legitimate share in coparcenary property.

iii. Application of 2005 Amendment to Pending Proceedings

The right to seek severance of status by partition is an inherent right of coparceners.[43] It is not necessary for division by metes and bounds for disruption of joint family.[44] Severance of status is effected by partition and a mere declaration as to indication of partition is sufficient.[45] Filing a suit for partition amounts to declaration of intention for severing joint status and date of severance is the date on which the suit is instituted.[46] After an unmistakable and clear indication by a member to separate, until the actual division of shares takes place, the position of coparceners is tenants in common and the interest does not survive upon the other coparceners by survivorship.[47] Thus, if the plaintiff dies after the institution of the suit but before final decree, his interest is deemed to be separate from date of plaint and heritable by his heirs as separate property.[48] Subsequent births and deaths in his own branch alone affect shares of such persons fixed on date of indication of intention to separate namely date of suit.[49] It does not affect the shares per stirpes i.e., allotted to each branch. However, the position has been altered by *Vineeta*.

The Supreme Court has held that in a partition suit there can be more than one preliminary decree and finality associated with the shares may vary after passing of the preliminary decree based on subsequent events.[50] This has been extended to hold that change in law after the passing of preliminary decree has to be taken note of while passing the final decree, as discussed below.

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41 Proviso to Section 6(1) HSA.
42 Section 6(5) HSA and Explanation.
43 Raghavachariar at Page 373.
44 *Id.*
45 Raghavachariar at Page 377.
46 Raghavachariar at Page 377.
47 Raghavachariar at Page 375.
48 Raghavachariar at Page 380.
49 Raghavahariar at Page 425.
50 *Phoolchand v. Gopal* AIR 1967 SC 1470.

In *S. Sai Reddy v. S. Narayana Reddy*[51] the Supreme Court held that Andhra Pradesh State Amendment which had come into force after the preliminary decree was passed in a suit for partition by a son against his father and siblings, but before the final decree could be passed, is applicable to the facts. On this basis the unmarried daughters were entitled to a share as per the amended law. This holding that partition is said to have occurred only when the final decree is passed and the members are put in possession of their shares, and any intervening change of law has to be taken note of while determining the shares was followed in *Prema v. Nanje Gowda and Others*[52], *Ganduri Koteshwaramma and Others v. Chakiri Yanadi and Others*[53] and *Danamma* to hold that the 2005 Amendment would apply to pending proceedings as well, where the preliminary decree has been passed and final decree is yet to be passed.

In *Phulvati*, the Supreme Court differentiated *Ganduri, Prema,* and *Sai Reddy* on facts since the male coparcener was alive at the time of the daughter claiming partition. In *Ganduri*, the male coparcener, though alive at the time of filing of the suit for partition, had died in 1993, much prior to the preliminary decree passed in 1999. The Supreme Court in *Ganduri* nonetheless held the 2005 Amendment to be applicable on the ground that it had commenced before the final decree was passed. The applicability of the Andhra Pradesh State Amendment would be questionable since the date of marriage of the daughters is not forthcoming. Moreover, the Supreme Court did not delve into its applicability, but instead allotted shares as per the amended Section 6. Therefore, the observations in *Sai Reddy* would be inapplicable to *Ganduri* or *Danamma*. In *Mangammal*, the Supreme Court did not apply the 2005 Amendment to a pending proceeding and went by the law applicable on the date of death which was the Tamil Nadu State Amendment in that case.

In *Vineeta*, the Supreme Court has affirmed that change in law shall be considered in pending proceedings of a partition suit. The preliminary decree having only the effect of determining shares and not severance by metes and bounds, any amendments that change the quantum of shares ought to be taken into consideration. Thus, the 2005 Amendment squarely applies to all pending proceedings where the preliminary decree has been passed prior to the 2005 Amendment and final decree is yet to be passed.

This observation in *Vineeta* in effect makes law applicable as on date of death irrelevant to determine sharers and shares, if the change in law even after the death and at the time of final decision in the suit is held to be applicable. The Supreme Court in *Vineeta* seems to favouring the proposition that date of final decree determines the law applicable and all changes in law till such time have to be accounted for. This begs the questions as to (i) whether date of death remains relevant to determine the shares and sharers; (ii) when do shares crystallize if date of death and date of suit are irrelevant; (iii) if shares are held to crystallize on the death of a coparcener, by holding the 2005 Amendment to be retroactive, can rights which vested as on date of death be disturbed on account of change in law at the time of passing the final decree?

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51 (1991) 3 SCC 647 ["Sai Reddy"].
52 (2011) 6 SCC 462 ["Prema"].
53 (2011) 9 SCC 788 ["Ganduri"].

iv. Fate of State Amendments after 2005 Amendment

The power of the Parliament and State Legislatures to enact the HSA is traceable to Entry 5 of Concurrent List in Seventh Schedule to the Constitution of India which deals with personal laws. The State Amendments were made applicable to States, although they were repugnant to Section 6 HSA as it stood prior to 2005 Amendment, in view of Presidential assent received for the same which cured such repugnancy.[54] However, Parliament retains the power to legislate on the same subject as the State amendment notwithstanding Presidential assent for the latter, and the law so enacted by the Parliament will prevail even if it is later.[55]

After the 2005 Amendment there are some features of the State Amendments which are repugnant. For instance, (i) the distinction between married and unmarried daughters is done away with by the 2005 Amendment and all daughters are recognized as coparceners; and (ii) partitions prior to the commencement of the amendment were not affected, irrespective of whether such partitions were registered. However, the 2005 Amendment excludes only registered partitions. It has been held that State Amendment is impliedly repealed to the extent of repugnancy with 2005 Amendment by the High Courts of Karnataka[56] and Andhra Pradesh.[57]

The Supreme Court in *Vineeta* has approved the observations in *Danamma* on the operation of 2005 Amendment and discarded the condition of living coparcener imposed by *Phulvati*. *Danamma* did not apply the State Amendments, although applicable to the facts therein, and yet the same has been approved by *Vineeta*. Whilst considering the findings in *Mangammal* wherein the Supreme Court approved the living coparcener theory propounded by *Phulvati*, the Supreme Court in *Vineeta* has rightly held that once the daughters were held not to be coparceners as per the Tamil Nadu State Amendment, it was unnecessary to go into the question of application of 2005 Amendment and opine on the finding in *Phulvati*. In effect, the Supreme Court has approved the application of State Amendment in *Mangammal*, even after the 2005 Amendment and also its non-application in *Danamma* after 2005 Amendment. In light of this contradiction, the fate of State Amendments is an unresolved question.

III. *Devolution* of Coparcenary Property

a. Pre-Hindu Succession Act

i. Classical Hindu Law

Coparcenary property devolves by survivorship.[58] The basis of the survivorship is explained by Professor B.N Sampath in the following manner[59]: (i) interest in a *Mitakshara* coparcenary is fluctuating until it is partitioned; (ii) coparcenary property is held through co-ownership; (iii) the undivided share is neither heritable nor transferable; and (iv) right to seek partition being a personal right comes to an end with the death of the

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54 Article 254(2) of Constitution of India.
55 (1983) 1 SCC 177.
56 ILR 2010 Kar 1484. This decision has been overruled by *Phulvati* on the aspect of retrospective application of 2005 Amendment.
57 *Damalanka Gangaraju and Others v. Nandipati Vijaya Lakshmi and Others* 2007 (2) ALT 447; *M Sujatha v. M Surender Reddy and Others* 2016 (1) ALD 1. See also *K.M Thangavel and Others v. K.T Udayakumar and Others* 2014(2) CTC 113.
58 Mulla at Page 102.
59 Justice B.N. Krishnan ed., "*Sampath's Hindu Law*", at Page 218.

coparcener resulting in the unascertained share of the deceased coparcener lapsing on his death. Consequently, coparcenary property enures to the benefit of the surviving coparceners who continue as co-owners and not as heirs of the deceased coparcener. Upon the death of a coparcener, the right to a share upon partition passes through survivorship and not a share.[60] Therefore, surviving coparceners cannot claim any share as representing the deceased coparcener's share.[61] For instance if A and B are brothers and C and D are their sons and they all form a coparcenary, upon the death of A, his son cannot claim his share as his heir. At the time of partition, A and B will get ½ share each and A will be represented by C (*per stirpes*). Between B and his son D they will get ½ share each (*per capita*). Since females are not coparceners under *Mitakshara*, no share was allotted to them in the coparcenary property under classical Hindu law.

ii. Legislative Enactments

Legislative intervention was with a view to ameliorate the lot of females as heirs and sharers in coparcenary property in view of the restricted class of females recognized as heirs under *Mitakshara* and the fact that no female could have any interest in coparcenary property. For instance, the Hindu Law of Inheritance (Amendment) Act, 1929 ["*1929 Act*"], since repealed by HSA, recognized son's daughter, daughter's daughter, and sister as heirs in all parts of India which followed *Mitakshara*. Prior to this Act they were heirs in Madras and Bombay only. However, this Act recognized these female heirs in self-acquired property only. The 1937 Act, since repealed by HSA, made a serious inroad to rule of survivorship by giving the widow of a deceased coparcener a share in the coparcenary property equal to the share of the deceased coparcener. Although the widow had a right to seek partition under the 1937 Act, her share was a limited estate and did not treat her as a coparcener.[62] A similar legislation was enacted in the state of Mysore in 1933 which is also repealed now.[63] Prior to the 1937 Act the widow had only a right to maintenance with regard to coparcenary property.[64]

b. Under Hindu Succession Act prior to 2005 Amendment

Under the HSA, as it stood prior to 2005 Amendment, two changes from classical Hindu law were introduced regarding devolution of interest in coparcenary property which have a bearing on females: *first*, if a male Hindu died leaving female heirs listed in Class I of Schedule, the device of notional partition would be used to calculate the interest of a Hindu *Mitakshara* coparcener thereby giving a share of the coparcenary property to certain females, and the principles of survivorship would not apply; *second,* restrictions on proprietary rights of females over property were removed and their absolute ownership was recognized.

i. Notional Partition

If a male coparcener died prior to HSA, his interest in the coparcenary devolves by the survivorship as explained earlier. This position continued under the HSA under Section 6. However, if a male Hindu died after

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60 Mulla at Page 340.
61 Mulla at Page 340.
62 *Controller of Estate Duty v. Alladi Kuppuswamy* (1977)3 SCC 385 wherein the Supreme Court held that if a widow does not exercise her right of partition, the coparcenary shall not cease, and upon her death, her interest in the coparcenary property would merge with the interest of other coparceners.
63 Hindu Law Women's Rights Act, 1933 (Mysore Act 10 of 1933).
64 Mulla at Page 117.

the commencement of HSA, leaving behind any female heirs or a male heir claiming under such female heirs mentioned in Class I of the Schedule, doctrine of survivorship does not apply and interest in coparcenary property would devolve by testamentary or intestate succession as per the Act.[65]

In the event a male Hindu dies leaving behind female heirs as stated above, the interest of such a male Hindu in coparcenary property is computed under the HSA by the concept of notional partition stated in Explanation I to Section 6. Applying the concept of notional partition, a male coparcener's '*interest in coparcenary property*' is the share that would be allotted to such coparcener upon a partition, if it had taken place immediately before his death, and the females are given a share in the property that falls to the share of the male Hindu under a notional partition. The above points are illustrated through the following:

i. if A (male Hindu) has two sons B and C, upon A's death after HSA and before HSA, his interest in the property would devolve upon B and C through survivorship and they would be entitled to ½ share each.

ii. if A's wife W were alive at the time of his death after the HSA, applying the concept of notional partition, A, B, and C would get 1/3rd each which is the share they would have gotten had a partition taken place immediately before the death of A and A's 1/3rd share would further be split equally between his widow W and two sons at 1/9th each. Thus, W would be entitled to 1/9th share and the sons would be entitled to 4/9th share each in the property of A. This is as per the Dravida school of *Mitakshara* which applies to a major part of Karnataka and Tamil Nadu.

iii. In the Bombay school, which applies to northern Karnataka which were part of old Bombay regions, W will be allotted a share equal to that of the son in the above illustration.

The Supreme Court, in *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum*[66] explained the concept of notional partition in consonance with the object of Section 6. The propositus K died in 1960 leaving behind his widow H, 2 sons and 3 daughters. They belonged to the Bombay school of *Mitakshara* wherein the widow gets a share equal to that of the son. The widow H filed a suit for partition and separate possession of 7/24th share – 1/4th share in the property upon the death of K and 1/24th share calculated in the 1/4th share allotted to K as per notional partition. The question arose as to whether the widow H would be entitled to 7/24th share or just 1/24th share. The Supreme Court observed that while Section 6 provides for calculation of the share of the claimants, Explanation I provides a formula to calculate the share of the deceased. Notional partition was deemed to be a legal fiction created to determine "*the share in the property that would have been allotted if a partition of the property had taken place immediately before his death*" and also that such fiction had to be given its "*due and full effect*". Therefore, it was held that H was entitled to 7/24th share, since notional partition could not be used solely to calculate the share of the deceased, and be ignored while dividing the share amongst the claimants. However, the dictum in *Gurupad* with regard to widow's share being equal to that of the son applies only to Bombay school and not to other schools of *Mitakshara*. Thus, under the Madras School followed in Karnataka the widow would be entitled only to a share

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65 *See* Eramma v. Verrupanna AIR 1996 SC 1879 *["Eramma"]*.

66 (1978)3 SCC 383 ["Gurupad"]. *Also see Shyama Devi and Others v. Manju Shukla and Others* (1994) 6 SCC 342; *Anar Devi and Others v. Parameshwari Devi and Others* (2006)8 SCC 656 ["Anar Devi"]; *Ram Nath Sao and Others v. Goberdhan Sao and Others* (2017)13 SCC 149.

in the property of the propositus allotted to him in the notional partition.[67] In essence, notional partition is a statutory fiction created to determine the shares of the eligible family members of the propositus as on the date of succession opening i.e., date of death of the propositus.

ii. Absolute Ownership

Section 14 declares properties '*possessed*'[68] by the female to be her absolute property, including property inherited, obtained at partition, gifts and *stridhana*, whether acquired before or after the commencement of HSA. Thus, females for the first time could inherit property as independent and absolute owners. This provision also did away with the classical notion and variances of *stridhana*.

c. 2005 Amendment

The 2005 Amendment introduced three changes to the manner in which coparcenary property devolves, *first*, it abrogates survivorship completely (Section 6(3)), *second*, allows daughters to inherit coparcenary property (Section 6(1)) which is interpreted by *Vineeta* to mean only daughters who are living as on date of the 2005 Amendment; *third*, nullifies the difference between succession under Section 6 and Section 8 HSA for the future generations (Section 6(3)). However, the interest in coparcenary property continues to be calculated as per the device of notional partition as was the case even prior to 2005 Amendment.

The interpretation of the operation of 2005 Amendment posited in *Vineeta* has a bearing on devolution of property although the judgment has not expressly gone into the aspect of devolution. In the opinion of the authors, after the decision in *Vineeta*, the following questions arise and require to be resolved with regard to devolution: (i) whether the concept of notional partition remains relevant after *Vineeta*; (ii) whether date of death or date of final decree determines shares and sharers; (iii) whether partition can be sought during the lifetime of the father.

i. Relevance of Date of Death

Law applicable to determine the interest of a deceased coparcener is that which is in operation as on the date on which succession opens i.e., the date of the death of the coparcener.[69] On this basis it has been held that determination of interest in coparcenary property is governed by (i) unamended HSA if the propositus dies between 1956 to 29.7.1994; (ii) the Karnataka State Amendment is applicable from 20.7.1994 to 8.9.2005 or any other State Amendment if applicable; and (iii) from 9.9.2005 the 2005 Amendment applies.[70]

In *Phulvati* by stating that father ought to be alive on 9.9.2005 for the 2005 Amendment to apply, the Supreme Court was in effect stating that law applicable in respect of coparcenary property of a father who dies after 9.9.2005 is 2005 Amendment (since father dies thereafter if he is alive on 9.9.2005), and reiterating the relevance of date of death to determine law applicable. In *Mangammal* too, the Supreme Court applied the

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67 *Pushpalatha v. Padma* 2019 (1) Kar LJ 127 ["Pushpalatha 2019"].
68 *Mangal Singh and Others v. Smt Rattno* AIR 1967 SC 1786; *V Thulsamma v. Shesha Reddy* (1977)3 SCC 99.
69 *Sheela Devi v. Lal Chand* (2006) 8 SCC 581 ["Sheela Devi"]; *Anar Devi*; Mulla at Page 1152; *Balvant Rao v. Geeta and Ors* ILR 2017 Kar 2882.
70 Padmavati v. Jayamma RFA 916/2014 decided on 15.5.2020 by High Court of Karnataka ["Padmavati"].

Tamil Nadu State Amendment since propositus died during the currency of the State Amendment and prior to 2005 Amendment, making date of death the focal point. This aspect of *Mangammal* has not been overruled by *Vineeta*, as explained above.

In *Vineeta*, by overruling *Phulvati*, the Supreme Court in effect has made date of death irrelevant to determine the law applicable to determine shares and sharers but continues to be relevant under *Mangammal*. In view of this contradiction, the question arises as to whether date of death still remains relevant to determine the law applicable and if not, when do shares crystallize.

ii. Relevance of Notional Partition

The 2005 Amendment recognizes the concept of notional partition under Explanation I to Section 6(3) to determine the share of the deceased coparcener. Section 6(3) governs two aspects: *firstly*, the interest of the dying Hindu in coparcenary property is divided by means of intestate or testamentary succession and not be survivorship; and *secondly*, share of a dying Hindu in coparcenary property is that which he would have received had a partition taken place just prior to his death thereby retaining the concept of notional partition in Explanation to Section 6(3).

In *Danamma*, a suit for partition and separate possession of one G was filed by his grandson (son's son) in 2002 after the death of G in 2001. G had two sons, and two daughters (born prior to 1956 and were both married). G was survived by a widow W. The Supreme Court held that upon the death of G in 2001 since he was survived by 2 daughters and 2 sons and a widow, each of them would be entitled to 1/5th share. Thus, the grandsons who had filed a suit for partition would be entitled to a share in the 1/5th allotted to their father who is one of the sons of G. In *Danamma*, the Supreme Court arrived at the said manner of sharing since it held that daughters are entitled to a share in the coparcenary property equal to that of the son irrespective of when they are born and the change in law applies to pending proceedings. In the humble opinion of the authors, *Danamma* did not note (i) date of death of propositus determines the applicable law irrespective of when partition is sought; (ii) Karnataka State Amendment applicable at the time of death of G under which married daughters would not be coparceners; and (iii) the concept of notional partition is retained even by the 2005 Amendment. The following would be the shares had the Court noted the same:

In *Mangammal,* a suit for partition was filed by married daughters in 2003. Their father died in 1979 and mother in 1989. They had one brother. The State amendment in Tamil Nadu was applicable to the said facts which did not treat daughters married prior to commencement of amendment in 1989 as coparceners. The Court held that daughters were not entitled to seek a partition since they were excluded by the Tamil Nadu amendment. Applying the concept of notional partition, at the time of death of the father B in 1979, his son and himself with be entitled to ½ share each as per pre-amendment Section 6 and the ½ share of the father would be divided equally between 2 daughters, 1 son, and his widow wherein the son would get 5/8th share and widow and daughters would get 1/8th share each. In the opinion of the authors, the calculation of shares in coparcenary property in *Mangammal* accords with 2005 Amendment. This aspect of devolution of shares in *Mangammal* has not been overruled in *Vineeta*. Therefore, the contrary dictum of *Danamma* and *Mangammal* regarding operation of State Amendments, relevance of date of death to determine the law applicable, and notional partition need to be reconciled.

Notional partition considers a situation that existed just prior to the death of the Propositus thus making date of death relevant. For instance, a *Mitakshara* male A in Karnataka has a wife W and two children-son S and daughter D, applying notional partition:

In *Vineeta,* the Supreme Court has curtailed the concept of notional partition by subjecting it to subsequent changes in law, thereby diluting the principle of succession opening on the date of death by holding that *"...in case of change of body of the coparceners by a legal provision or otherwise, unless and until actual partition is finally worked out, right gave to be recognized as they exist at the time of final decree. It is only the share of the deceased coparcener, and his heirs are ascertained under Explanation to Section 6 and not that of other coparceners, which keep on changing with birth and death."* Further it was held that *"in case coparcenary continues and later on between the surviving coparceners partition takes place, it would be necessary to find out extent of share of deceased coparcener. That has to be worked out with reference to the property which is available at the time of death of deceased coparcener whose share devolved as per proviso to Explanation 1 to Section 6 as in the case of intestate succession."*

Applying the dictum in *Vineeta*, the following situations arise: A is a *Mitakshara* male in Karnataka who has two Daughters D1 and D2 and one Son S1.

a. If daughters of G were married prior to the State Amendment, they would not be coparceners.

b. Assuming, State Amendment is not applied and Section 6 HSA prior to amendment is applied which is the law applicable as on 2001 which is the date of death of the propositus: upon the death of G, his 2 sons and G would get 1/3rd each and G's 1/3rd would be divided equally between two sons, two daughters, and widow each getting 1/15th

c. If daughters are coparceners even as of 2001 since it was held in *Danamma* that 2005 Amendment applies irrespective of when they are born and even to pending proceedings where final decree is not drawn: upon death of G, G and 2 daughters and 2 sons would get 1/5th each and 1/5th allotted to G would be divided between 2 daughters and 2 sons and widow. Thus 2 sons and 2 daughters would get 1/5 + 1/25 each and widow 1/25.

d. If they are from Bombay school, upon notional partition, G and 2 sons and 2 daughters and widow would get 1/6th each and G's 1/6th would be divided between 2 sons and 2 daughters and widow.

a. On the death of S in 1990, his widow files for partition in 1999, applying notional partition, A and S get ½ share each and the ½ share so allotted to S devolves upon his widow as she is a class I heir as per Section 8. Thus, S's branch is severed from A's family. Whilst determining S's share, daughters are not considered as coparceners since S died in 1990, prior to 2005 Amendment and Karnataka State Amendment. S' share crystallised in 1990.

b. If daughter D files for partition subsequently in 2000, A's ½ share as allotted in a. above shall stand divided between A and his daughter D since she is a coparcener under State Amendment each getting 1/4th share. S has been severed from the family and does not get further a share.

c. On A's subsequent death in 2006, his 1/4th share shall devolve upon his widow, daughter, and the widow of his pre-deceased son S as per Section 8.

a. *Pre-Vineeta*: On the death of S1 in 1990, his widow files for partition. Applying the law applicable as on date of death of S1: A and S1 get ½ share each since daughters were not coparceners in 1991, either under State Amendment or 2005 Amendment. The ½ share of S devolves upon his widow as she is a class I heir as per Section 8. With this S is severed from the family and he does not get a share in

successive partitions between A and Daughters D1 and D2. Date of death remains relevant and that is the date of crystallization of shares.

b. In *Vineeta*, the Supreme Court has held that severance of status does not take place with the filing of the suit and changes in law will have to be noted and 2005 Amendment applies to pending proceedings where final decree is yet to be drawn up. In such a situation, if the above suit in *a.* was pending when *Vineeta* was decided, D1 and D2 get a share as coparceners along with A and S and the share of S is as of that date and not on date of his death. Thus, each get 1/4th share. The coparcenary continues with A, D1, and D2. However, in *Vineeta*, the Supreme Court opines that notional partition is only to determine the share of the deceased coparcener but the same cannot be done in isolation without considering shares of other coparceners. This necessarily means change in law will have to be noted even for notional partition although notional partition takes place just before death and ought to be as per extant law at such time.

c. If D1 had died in 1995 and S and D2 file suit for partition in 2020, A's share shall stand divided between A and his daughter D2 and son S according to *Vineeta.* Since A is alive, it is not notional partition but actual partition. Pre-deceased daughters who died before 9.9.2005 are not coparceners as per *Vineeta*, hence D1 will not get a share. Widow will not get a share since A is alive and it is actual partition and not notional partition. However, the dictum in *Gurupad* which makes date of death relevant and gives full effect to notional partition, is not overruled in *Vineeta*. Therefore, *Vineeta* and *Gurupad* have to be reconciled.

d. On A's subsequent death, his share will devolve upon heirs as per Section 8 wherein widow gets a share along with others.

Another controversy with regard to notional partition is whether proviso to Section 6(1) and Explanation to Section 6(5) cover notional partitions also. *Phulvati* clarified that notional partition would remain unaffected by the proviso to Section 6(1) or the Explanation to Section 6(5). Therefore, if A died in 2009 leaving behind his widow W, daughter D1, son S1, daughter of a pre-deceased son GD1, and a son of a pre-deceased son of a pre-deceased daughter GGS1; coparcenary shares are divided between A, D1, S1, GGS1, GD1 who would get 1/5th share each as coparceners. Thereafter, the 1/5th share of A would be divided between W, D1, S1, GD1 and GGS1, with W getting 1/25th share and the rest getting 6/25th share each. Thus, the date of death of the propositus is the focal point to determine the laws applicable to determine shares on notional partition, irrespective of the date on which the partition is claimed.[71] In *Vineeta* it has been held that notional partition is not within the meaning of partition under Section 6(5).

iii. Partition during lifetime of father

Section 6 HSA prior to 2005 Amendment introduced the concept of succession as a mode of devolution of *Mitakshara* coparcenary in some instances. The 2005 Amendment has done away with survivorship and testamentary and intestate succession are the only modes. This is evident from the use of the word "*Hindu male having an interest in coparcenary property dies....*". From a plain reading it appears that Section 6 applies only upon the death of a *Mitakshara* male. If that is so, the questions which arise are (i) whether Section 6 applies to partitions during the lifetime of the *Mitakshara* male; (ii) whether a coparcener, under the HSA, can seek partition during the lifetime of a *Mitakshara* male. It is this background that Section 6A(b) of Karnataka State Amendment made it clear that State Amendment to Section 6 applies to partitions also. Right to

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71 *Anar Devi*

seek partition is an inherent right of coparceners even under classical Hindu law. However, 2005 Amendment is silent about this aspect and Courts have allowed such partitions. If the father is living and Section 6 is applied, it is an instance of action partition and not notional partition as discussed above, and shares vary accordingly.

iv. Devolution of Property of Females

Section 14 HSA characterizes property possessed by a Hindu female as her absolute property. However, Section 6(2) states that coparcenary property of a female Hindu is held with the incidents of coparcenary property. The question whether coparcenary property of a Hindu female is her absolute property and free from incidents of coparcenary property remains an unresolved question. Section 15 sets out the manner in which the property of Hindu females will devolve under the Act and Section 6(3) permits female Hindus to dispose coparcenary property by way of testamentary disposition.

v. Interplay between Section 6, Section 23, and Section 8

The Schedule to Section 8 was amended in consonance with Section 6 to include relations *inter-alia* claiming through females. Thus, a daughter of a predeceased daughter of a predeceased son would be entitled to a share in the property of her male ancestor, devolving through intestate succession if the propositus dies after the 2005 Amendment,[72]

In *G. Sekar v. Geetha and Others*[73], the prospective effect of deletion of Section 23[74] by the 2005 Amendment was discussed. The propositus G died leaving behind two daughters and a son. The daughters filed a suit for partition against the son in 1996 seeking their share in the self-acquired property of G, including his dwelling house. It was contended by the son that the omission of Section 23 by the 2005 Amendment would not apply since the suit was instituted prior to the amendment. The Supreme Court, while holding that succession would be governed by Section 8 and not Section 6, owing to the property being self-acquired, also discussed the prospective application of the 2005 Amendment. It was observed that the object of the amendment was to reduce disabilities on female heirs and that the provisions ought to be interpreted in this context. It was held that the omission of Section 23 though "*is not retrospective in nature, its application is prospective*", and "*that a right in terms of Section 23 to obtain a decree for partition of the dwelling house is one whereby the right to claim partition by the family is kept in abeyance. Once, the said right becomes enforceable, the restriction must be held to have been removed.*"

Section 24 which precluded widows of brothers, widows of predeceased sons and predeceases sons of predeceased sons in relation to the dying male, from inheriting their share if they were re-married on the date of opening of succession has also been omitted. This is in consonance with the amendment to Section 6 wherein the marital status of women is not a factor to determine their coparcenary rights. Widows of prede-

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72 By the 2005 amendment, sons and daughters of a predeceased daughter of a predeceased daughter, and daughter of a predeceased son of a predeceased daughter and daughter of a predeceased daughter of a predeceased son have been included as Class I heirs of a male Hindu.

73 (2009) 6 SCC 99 ["G. Sekhar"].

74 Section 23 provided a restricted right of partition and succession to female heirs over dwelling houses, and daughters were provided a right to reside in the dwelling house only if unmarried or separated from her husband.

ceased sons and predeceased sons of predeceased sons have however been Class I heirs since the commencement of the HSA. Applying the dicta in *Sekar*, these female relations would not be precluded from their share if final decree is pending post the 2005 Amendment.

Thus, there is a dichotomy between the prospective application of the amendment to Sections 6 and 8, and that of omission of Sections 23 and 24 as explained in *Vineeta* which has thrown light on the objective of the 2005 Amendment. The legislature, while aiming to reduce gender discrimination has brought about the 2005 Amendment, the preclusion of transactions that occurred prior to 20.12.2004 indicates the intention of not touching earlier modes of succession and partition.[75]

Conclusion

The 2005 Amendment has far reaching consequences for women of the future generation rather than the present because only daughters of coparceners are considered coparceners while other female relations including widows, mothers, and sisters of the propositus are not accorded this status. Thus, such other female relations or males inheriting through them shall be deemed to be coparceners *qua* daughters only from subsequent generations.

In the meanwhile, in the opinion of the authors, the following questions remain unresolved:

1. Whether by characterizing 2005 Amendment as retroactive, vested rights which crystallized on date of death of a coparcener can be abrogated?
2. Whether there is any justification in confining 2005 Amendment to living daughters as on 9.9.2005?
3. Whether date on which succession opened i.e., date of death is relevant to determine the applicable law or whether it is now date on which final decree is drawn up?
4. When are shares of a coparcener said to be crystallized, if date of death of the propositus is irrelevant?
5. Whether notional partition remains relevant after *Vineeta,* although *Gurupad* has not been overruled?
6. Whether coparcenary property allotted by a daughter is held as her absolute property or with all incidents of coparcenary property?
7. Whether Section 6 applies when a *Mitakshara* male is alive since it has moved towards succession as a model of devolution?
8. If Section 6 has moved towards succession, is there any difference between devolution of coparcenary and self-acquired property?
9. If date of death is not relevant to determine the law applicable to determine shares and sharers, whether State Amendments will continue to apply if succession opened during the currency of such amendments?

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75 See *G. Sekhar.*