VINEETA SHARMA

v.

RAKESH SHARMA & ORS.

(Civil Appeal No. Diary No.32601 of 2018)

AUGUST 11, 2020

[ARUN MISHRA, S.ABDUL NAZEER AND M. R. SHAH, JJ.]

Hindu Succession Act, 1956 – s.6 as amended by Hindu Succession (Amendment) Act, 2005 – Interpretation of – Held: The provisions contained in substituted s.6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities – The effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment i.e. 09.09.2005 and she can claim partition also, which is a necessary concomitant of the coparcenary – s.6(1) recognises a Joint Hindu family governed by Mitakshara law – The coparcenary must exist on 09.09.2005 to enable the daughter of a coparcener to enjoy rights conferred on her – As the right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not – Conferral is not based on death of a father or other Coparcener – In case living coparcener dies after 09.09.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted s.6(3).

Hindu Succession Act, 1956 – s.6 as amended by Hindu Succession (Amendment) Act, 2005 and proviso to s.6 as originally enacted – Held: The statutory fiction of partition created by proviso to s.6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary – The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of class-I as specified in the Schedule to the Act of 1956 or male relative of such female – The provisions of the substituted s.6 are required to be given full effect – Notwithstanding, that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

A *Hindu Succession Act, 1956 – s.6 as amended by Hindu Succession (Amendment) Act, 2005 – Explanation to s.6(5) – Plea of oral partition – Held: In view of the rigor of provisions of Explanation to s.6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition fully registered under the provisions* B *of the Registration Act, 1908 or effected by a decree of a Court – However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a Court, it may be accepted – A plea of partition based on oral evidence* C *alone cannot be accepted and to be rejected outrightly.*

Hindu Succession Act, 1956 – s.6 as amended by Hindu Succession (Amendment) Act, 2005 – Enlargement of daughter's rights – Held: Under the proviso to s.6 before the amendment made in the year 2005 in case a coparcener died leaving behind female D *relative of class-I heir or a male descendant claiming through such class-I female heir, the daughter was one of them – s.6, as substituted, presupposes the existence of coparcenary – It is only the case of the enlargement of the rights of the daughters – The rights of other relatives remain unaffected as prevailed in the proviso to s.6 as it stood before amendment – The classic shastric Hindu Law excluded* E *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.*

Hindu Succession Act, 1956 – s.6 as amended by Hindu Succession (Amendment) Act, 2005 – Retroactive application – Held: F *Though the rights can be claimed, w.e.f. 09.09.2005, 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 – A retroactive statute is the one that does not operate retrospectively –* G *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 s.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.*

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Hindu Succession Act, 1956 – s.6 as amended by Hindu Succession (Amendment) Act, 2005 – Obstructed and unobstructed heritage – Unobstructed heritage takes place by birth, and the obstructed heritage takes place after the death of the owner – It is significant to note that u/s. 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 09.09.2005, date of substitution of provisions of s.6.

Answering the reference, the Court

HELD: 1. The amended provisions of section 6(1) provide that on and from the commencement of the Amendment Act, the daughter is conferred the right. Section 6(1)(a) makes daughter by birth a coparcener "in her own right" and "in the same manner as the son." Section 6(1)(a) contains the concept of the unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth. Section 6(1)(b) confers the same rights in the coparcenary property "as she would have had if she had been a son". The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcenary as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. Though the rights can be claimed, w.e.f. 09.09.2005, 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. [Para 55][190-H; 191-A-C]

2. 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. [Para 56] [191-D-E]

3. Section 6(2) provides when the female Hindu shall hold the property to which she becomes entitled under section 6(1), she will be bound to follow rigors of coparcenary ownership, and can dispose of the property by testamentary mode. [Para 60] [194-C-D]

4. 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 pre-deceased daughter or son are given a share in case child has also died then surviving child of such pre-deceased child of a pre-deceased son or pre-deceased 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. [Para 61][194-D-H]

5. The proviso to section 6(1) and section 6(5) saves any partition effected before 20.12.2004. However, Explanation to

section 6(5) recognises partition effected by execution of a deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. Other forms of partition have not been recognised under the definition of 'partition' in the Explanation. [Para 62][195-A-B]

6. 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., 09.09.2005 with saving of past transactions as provided in the proviso to section 6(1) read with section 6(5). [Para 63][195-B-E]

7. The effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. Section 6(1) recognises a joint Hindu family governed by Mitakshara law. The coparcenary must exist on 09.09.2005 to enable the daughter of a coparcener to enjoy rights conferred on her. As the right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not. Conferral is not based on the death of a father or other coparcener. In case living coparcener dies after 09.09.2005, inheritance is not by

survivorship but by intestate or testamentary succession as provided in substituted section 6(3). [Para 64][195-F-H]

8. Under the proviso to section 6 before the amendment made in the year 2005 in case a coparcener died leaving behind female relative of Class I heir or a male descendant claiming through such Class I female heir, the daughter was one of them. Section 6, as substituted, presupposes the existence of coparcenary. It is only the case of the enlargement of the rights of the daughters. The rights of other relatives remain unaffected as prevailed in the proviso to section 6 as it stood before amendment. [Para 65][196-A-B]

9. 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. [Para 66] [196-C-D]

10. A special definition of partition has been carved out in the explanation to section 6(5). 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. This Court reiterates 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. This Court says so for exceptionally good cases where partition is proved conclusively and the courts are cautioned 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 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. It is also taken note of the fact that even before 1956, partition in other modes than envisaged under Section 6(5) had taken place. [Para 127][234-D-H; 235-A-C]

11. 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. [Para 128] [235-D-G]

12. Resultantly, the reference is answered as under:

(i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with effect from 09.09.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 9.9.2005.

(iv) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining

share of deceased coparcener when he was survived by a female heir, of Class-I as specified in the Schedule to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

(v) In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly. [Para 129][235-H; 236-E-F]

Prakash & Ors. v. Phulavati & Ors. **(2016) 2 SCC 36: [2015] 12 SCR 579 – overruled.**

Danamma @ Suman Surpur & Anr. v. Amar & Ors., **(2018) 3 SCC 343 : [2018] 2 SCR 553 – partly overruled.**

Sunil Kumar & Anr. v. Ram Parkash & Ors., **(1988) 2 SCC 77 : [1988] 2 SCR 623;** *Sheela Devi v. Lal Chand*, **(2006) 8 SCC 581 : [2006] 6 Suppl. SCR 874;** *Smt. Sitabai & Anr. v. Ramchandra*, **AIR 1970 SC 343 : [1970] 2 SCR 1;** *State Bank of India v. Ghamandi Ram (dead) through Gurbax Rai*, **(1969) 2 SCC 33 : [1969] 3 SCR 681;** *Controller of Estate Duty, Madras v. Alladi Kuppuswamy*, **(1977) 3 SCC 385 : [1977] 3 SCR 721;** *Satrughan Isser v. Sabujpari & Ors.*, **AIR 1967 SC 272 : [1967] 1 SCR 7;** *Bhagwan Dayal (since deceased) & Anr. v. Mst. Reoti Devi* **AIR 1962 SC 287 : [1962] 3 SCR 440;** *Surjit Lal Chhabda v. Commissioner of Income Tax* **(1976) 3 SCC 142 : [1976] 2 SCR 164;** *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh &*

A *Ors.*, **(1985) 2 SCC 321 : [1985] 3 SCR 358;** *Commissioner of Income Tax, Poona v. H.H. Raja of Bhor* **(1967) (65) ITR 634;** *Vellikannu v. R. Singaperumal & Anr.*, **(2005) 6 SCC 622 : [2005] 1 Suppl. SCR 160;** *Rohit Chauhan v. Surinder Singh & Ors.*, **(2013) 9 SCC 419 : [2013] 7 SCR 897;** *Shankara Cooperative Housing Society Ltd. v. M. Prabhakar & Ors*., **(2011) 5 SCC 607 : [2011] 7 SCR 468;** *Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe*, **(1986) 1 SCC 366 : [1985] 3 Suppl. SCR 169;** *Darshan Singh etc. v. Ram Pal Singh & Anr.* **(1992) 1 Suppl. SCC 191 : [1990] 3 Suppl. SCR 212;** *S. Sai Reddy v. S. Narayana Reddy & Ors.* **(1991) 3 SCC 647;** *Prema v. Nanje Gowda* **AIR 2011 SC 2077 : [2011] 8 SCR 55;** *Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr.,* **(2011) 9 SCC 788 : [2011] 12 SCR 968;** *Shub Karan Bubna Alias Shub Karan Prasad Bubna v. Sita Saran Bubna and Ors.* **(2009) 9 SCC 689 : [2009] 14 SCR 40 – relied on.**

Kale v. Deputy Director of Consolidation **(1976) 3 SCC 119 : [1976] 3 SCR 202;** *G. Sekar v. Geetha & Ors.,* **(2009) 6 SCC 99 : [2009] 5 SCR 1005;** *Anthonyswamy v. Chhinnaswamy*, **(1969) 3 SCC 15 : [1970] 2 SCR 648;** *Shashikalabai (Smt) v. The State of Maharashtra & Anr.* **(1998) 5 SCC 332;** *Mangammal v. T.B. Raju*, **(2018) 15 SCC 662 : [2018] 6 SCR 776;** *Puttrangamma & Ors. v. M.S. Ranganna & Ors*., **AIR 1968 SC 1018 : [1968] 3 SCR 119;** *Mancheri Puthusseri Ahmed & Ors. v. Kuthiravattam Estate Receiver*, **(1996) 6 SCC 185 : [1996] 5 Suppl. SCR 813;** *Anar Devi & Ors. v. Parmeshwari Devi & Ors*., **(2006) 8 SCC 656 : [2006] 6 Suppl. SCR 370;** *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum & Ors.*, **(1978) 3 SCC 383 : [1978] 3 SCR 761;** *S. Sundaram Pillai & Ors. v. V. R. Pattabiraman & Ors.*, **(1985) 1 SCC 591 : [1985] 2 SCR 643;** *Sripad Gajanan Suthankar v. Dattaram Kashinath Suthankar & Ors.* **(1974) 2 SCC 156 : [1974] 3 SCR 474;** *Kanai Lal Sur v. Paramnidhi Sadhukhan*, **[1958] SCR 360;** *Lt. Amrendra Col. Prithi Pal Singh*

Bedi v. Union of India **(1982) 3 SCC 140 : [1983] 1 SCR 393;** *Sathyaprema Manjunatha Gowda (Smt) v. Controller of Estate Duty, Karnataka*, **(1997) 10 SCC 684 : [1997] 3 SCR 586;** *M. Yogendra & Ors. v. Leelamma N. & Ors.,* **(2009) 15 SCC 184 : [2009] 12 SCR 38;** *Dharma Shamrao Agalawe v. Pandurang Miragu Agalwe & Ors.* **(1988) 2 SCC 126 : [1988] 2 SCR 1077;** *Gowli Buddanna v. Commissioner of Income Tax, Mysore*, **AIR 1966 SC 1523 : [1966] 3 SCR 224;** *Thamma Venkata Subramma (dead) by LR v. Thamnma Ratamma & Ors*. **(1987) 3 SCC 294 : [1987] 3 SCR 236;** *Bhagwati Prasad Sah & Ors. v. Dulhin Rameshwari Kuer & Anr.* **AIR 1952 SC 72 : [1952] SCR 603;** *Savita Samvedi (Ms) & Anr. v. Union of India & Ors.*, **(1996) 2 SCC 380 : [1996] 1 SCR 1046;** *Hardeo Rai v. Sakuntala Devi & Ors.*, **(2008) 7 SCC 46 : [2008] 7 SCR 1;** *Man Singh (D) by LRs. v. Ram Kala (D) by LRs.*, **AIR 2011 SC 1542 : [2010] 14 SCR 577;** *I.T. Officer, Calicut v. N.K. Sarada Thampatty,* **AIR 1991 SC 2035 : [1990] 1 Suppl. SCR 473;** *Laxmi Narayan Guin & Ors. v. Niranjan Modak*, **(1985) 1 SCC 270 : [1985] 2 SCR 202;** *United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. & Ors.*, **AIR 2000 SC 2957 : [2000] 3 Suppl. SCR 153;** *Commissioner of Income Tax, Delhi v. S Teja Singh*, **AIR 1959 SC 352 : [1959] 1 Suppl. SCR 394;** *State of Travancore-Cochin & Ors. v. Shanmugha Vilas Cashew Nut Factory & Ors*., **[1954] SCR 53;** *Bengal Immunity Co. Ltd. v. State of Bihar & Ors.*, **AIR 1955 SC 661 : [1955] 2 SCR 603;** *Controller of Estate Duty v. Smt. S. Harish Chandra*, **(1987) 167 ITR 230;** *Gyarsi Bai v. Dhansukh Lal*, **AIR 1965 SC 1055 : [1965] 2 SCR 154;** *Hari Chand Roach v. Hem Chand & Ors.* **(2010) 14 SCC 294 : [2010] 12 SCR 1125;** *Shripad Gajanan Suthankar v. Dattaram Kashinath Suthankar,* **(1974) 2 SCC 156 : [1974] 3 SCR 474;** *Chinthamani Ammal v. Nandgopal Gounder,* **(2007) 4 SCC 163 : [2007] 2 SCR 903;** *Rukhmabai v. Laxminarayan,* **AIR 1960 SC 335 : [1960] 2 SCR 253;** *Mudigowda*

A *Gowdappa Sankh & Ors. v. Ramchandra Revgowda Sankh (dead) by his LRs. & Anr.*, **AIR 1969 SC 1076 : [1969] 3 SCR 245;** *Kalwa Devdattam v. Union of India,* **AIR 1964 SC 880 : [1964] 3 SCR 191;** *Digambar Patil v. Devram,* **AIR 1995 SC 1728 : [1995] 2 SCR 133;** *Girijanandini Devi & Ors. v. Bijendra Narain Choudhary,* **AIR 1967 SC 1124: [1967] 1 SCR 93 – referred to.**

C *Lokmani & Ors. v. Mahadevamma & Ors.* **[S.L.P.(C) No.6840 of 2016]** *Balchandra v. Smt. Poonam & Ors.* **[SLP (C) No.35994/2015];** *Sistia Sarada Devi v. Uppaluri Hari Narayana & Ors.* **[SLP (C) No.38542/ 2016];** *Girijavva v. Kumar Hanmantagouda & Ors.* **[SLP (C) No.6403/2019];** *Smt. V.L. Jayalakshmi v. V.L. Balakrishna & Ors.* **[SLP (C) No. 14353/2019];** *Indubai v. Yadavrao* **[SLP (C) No.24901/2019];** *B.K. Venkatesh* D *v. B.K. Padmavathi* **[SLP (C) Nos. 1766-67/2020]; – referred to.**

Nagindas Bhagwandas v. Bachoo Hurkissondas, **AIR 1915 PC 41;** *Nanak Chand & Ors. v. Chander Kishore & Ors.*, **AIR 1982 Del. 520;** *G. Narasimulu & Ors. v. P.* E *Basava Sankaram & Ors.*, **AIR 1925 Mad. 249;** *Haridas Narayandas Bhatia v. Devkuvarbai Mulji*, **AIR 1926 Bom. 408;** *Raghunadha v. Brozo Kishore*, **3 IA 154 (PC);** *Baijnath Prasad Singh & Ors. v. Tej Bali Singh*, **AIR 1921 PC 62;** *Diwan Singh v. Bhaiya Lal,* **(1997) 2 MP LJ-202;** *Sri Balusu Gurulingaswami v.* F *Sri Balusu Ramalakshmamma & Ors.*, **26 IA 113;** *Bireswar Mookerji & Ors. v. Shib Chunder Roy*, **19 IA 101;** *Amarendra Man Singh Bhramarbar & Anr. v. Sanatan Singh & Ors.*, **AIR 1933 PC 155;** ***Sri*** *Raghunadha v. Sri Brozo Kishore*, **1876 (1) Mad. 69 =** G **3 IA 154;** *Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari*, **AIR 2014 Bom. 151;** *Ramalinga v. Narayana,* **AIR 1922 PC 201;** *Kalyanji Vithaldas & Ors. v. Commissioner of Income Tax, Bengal,* **AIR 1937 PC 36;** *Palani Ammal v. Muthuvenkatachala,* **AIR 1925 PC 49;** *Joala Prasad*

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Singh v. Chanderjet Kuer **AIR 1938 Pat 278;** *Chokalingam v. Muthukaruppan* **AIR 1938 Mad 849;** *Ramabadra v. Gopalaswami*, **AIR 1931 Mad 404;** *Girja Bai v. Sadashiv,* **AIR 1916 PC 104,** *Kawal Nain v. Prabhulal,* **AIR 1917 PC 39;** *Gangabai v. Punau Rajwa,* **AIR 1956 Nag 261;** *Kedar Nath v. Ratan Singh* **(1910) 37 IA 161;** *Mukund Dharman Bhoir & Ors. v. Balkrishna Padmanji & Ors.* **AIR 1927 PC 224;** *Bhagwani v. Mohan Singh* **AIR 1925 PC 132;** *Poornandachi v. Gopalasami,* **AIR 1936 PC 281;** *Hari Baksh v. Babu Lal,* **AIR 1924 PC 126;** *Katama Natchiar v. Srimat Rajah Moottoo Vijaya Raganadha Bodha Gooroo Swamy Periya Odaya Taver*, **(1863) 9 MIA 543 – referred to.**

Case Law Reference

[2015] 12 SCR 579	**overruled**	**Para 1**
[2018] 2 SCR 553	**partly overruled**	**Para 1**
[1969] 3 SCR 681	**relied on**	**Para 11(c)**
[1977] 3 SCR 721	**relied on**	**Para 11 (d)**
[1970] 2 SCR 648	**referred to**	**Para 11(e)**
(1998) 5 SCC 332	**referred to**	**Para 11(m)**
[2018] 6 SCR 776	**referred to**	**Para 12(a)**
[1976] 2 SCR 164	**relied on**	**Para 13 (a)**
[1968] 3 SCR 119	**referred to**	**Para 13(d)**
[1996] 5 Suppl. SCR 813	**referred to**	**Para 13(f)**
[2006] 6 Suppl. SCR 370	**referred to**	**Para 13(g)**
[1978] 3 SCR 761	**referred to**	**Para 13 (h)**
[1985] 2 SCR 643	**referred to**	**Para 13(j)**
[1974] 3 SCR 474	**referred to**	**Para 13(m)**
[1958] SCR 360	**referred to**	**Para 14(a)**
[1983] 1 SCR 393	**referred to**	**Para 14 (a)**
[1997] 3 SCR 586	**referred to**	**Para 15(a)**

A	**[2011] 12 SCR 968**	**relied on**	**Para 16**
	[1988] 2 SCR 623	**relied on**	**Para 27**
	[2006] 6 Suppl. SCR 874	**relied on**	**Para 28**
	[2009] 12 SCR 38	**referred to**	**Para 28**
B	**[1970] 2 SCR 1**	**relied on**	**Para 28**
	[1988] 2 SCR 1077	**referred to**	**Para 29**
	[1967] 1 SCR 7	**relied on**	**Para 32**
	[1962] 3 SCR 440	**relied on**	**Para 33**
C	**[1966] 3 SCR 224**	**referred to**	**Para 34**
	[1985] 3 SCR 358	**relied on**	**Para 35**
	[2005] 1 Suppl. SCR 160	**relied on**	**Para 37**
	[2013] 7 SCR 897	**relied on**	**Para 38**
D	**[1987] 3 SCR 236**	**referred to**	**Para 39**
	[2011] 7 SCR 468	**relied on**	**Para 40**
	[1985] 3 Suppl. SCR 169	**relied on**	**Para 41**
	[1952] SCR 603	**referred to**	**Para 42**
E	**[1996] 1 SCR 1046**	**referred to**	**Para 50**
	[1990] 3 Suppl. SCR 212	**relied on**	**Para 57**
	[2009] 5 SCR 1005	**referred to**	**Para 58**
F	**[2008] 7 SCR 1**	**referred to**	**Para 80**
	[2010] 14 SCR 577	**referred to**	**Para 82**
	[1990] 1 Suppl. SCR 473	**referred to**	**Para 89**
	(1991) 3 SCC 647	**relied on**	**Para 90**
G	**[2011] 8 SCR 55**	**relied on**	**Para 91**
	[2009] 14 SCR 40	**relied on**	**Para 92**
	[1985] 2 SCR 202	**referred to**	**Para 94**
	[2000] 3 Suppl. SCR 153	**referred to**	**Para 95**

H

[1968] 3 SCR 119	**referred to**	**Para 98**
[1959] 1 Suppl. SCR 394	**referred to**	**Para 100**
[1954] SCR 53	**referred to**	**Para 101**
[1955] 2 SCR 603	**referred to**	**Para 101**
[1965] 2 SCR 154	**referred to**	**Para 103**
[2010] 12 SCR 1125	**referred to**	**Para 105**
[1976] 3 SCR 202	**referred to**	**Para 117**
[1974] 3 SCR 474	**referred to**	**Para 118**
[2007] 2 SCR 903	**referred to**	**Para 119**
[1960] 2 SCR 253	**referred to**	**Para 120**
[1969] 3 SCR 245	**referred to**	**Para 120**
[1964] 3 SCR 191	**referred to**	**Para 121**
[1995] 2 SCR 133	**referred to**	**Para 122**
[1967] 1 SCR 93	**referred to**	**Para 123**

CIVIL APPELLATE JURISDICTION: Civil Appeal Diary No. 32601 of 2018.

From the Judgment and Order dated 15.05.2018 of the High Court of Delhi at New Delhi in R.F.A. No. 301 of 2017.

With

Special Leave Petition (Civil) Nos. 684 of 2016, 35994 of 2015, 38542 of 2016, 6403, 14353. 24901 of 2019, 1766-1767 of 2020.

Tushar Mehta, SG, R. Venkatramani, V.V.S. Rao, Ranjit Kumar, Sr. Advs. (ACs), Biswajit Bhattacharya, Sr. Adv., Ms. Swati Ghildiyal, A.K. Sharma, Ms. Rashmi Nandakumar, Byrapaneni Suyodhan, Ms. Tatini Basu, Rupesh Kumar, Rajeev Sharma, Ms Neelam Sharma, Ms Pankhuri Shrivastava, Rohit Rathi, Sameer Shrivastava, I.V. Kasyap, Krishna Kumar, Dr (Mrs) Vipin Gupta, V.N. Raghupathy, Raghavendra S. Srivatsa, Pai Amit, Poonacha C.M., Rahat Bansal, Ms. Pankhuri Bhardwaj, Sridhar Potaraju, Ms. Shivani Tushir, Ms. G. Usha Sri, Vishnu Tulashi Menon, Rajesh Mahale, Ankolekar Gurudatta, Subhasish Mohanty, Ms. Anagha S. Desai, Irshad Ahmad, Shree Pal Singh, Manu

A Mridul, Surya Kant, Satya Kam Sharma, Ms. Apeksha D., Advs. for the appearing parties.

The Judgment of the Court was delivered by

ARUN MISHRA, J.

B 1. The question concerning the interpretation of section 6 of the Hindu Succession Act, 1956 (in short, 'the Act of 1956') as amended by Hindu Succession (Amendment) Act, 2005 (in short, 'the Act of 2005')has been referred to a larger Bench in view of the conflicting verdicts rendered in two Division Bench judgments of this Court in *Prakash & Ors. v. Phulavati & Ors.,* (2016) 2 SCC 36 and *Danamma @ Suman* C *Surpur&Anr. v. Amar & Ors.,* (2018) 3 SCC 343. In other connected matters, the question involved is similar; as such, they have also been referred for hearing along.

2. In the case of *Lokmani & Ors. v. Mahadevamma & Ors.*, [S.L.P.(C) No.6840 of 2016] the High Court held that section 6, as D amended by the Act of 2005, is deemed to be there since 17.6.1956 when the Act of 1956 came into force, the amended provisions are given retrospective effect, when the daughters were denied right in the coparcenary property, pending proceedings are to be decided in the light of the amended provisions. Inequality has been removed. The High Court E held that the oral partition and unregistered partition deeds are excluded from the definition of 'partition' used in the Explanation to amended Section 6(5).

3. In *Balchandra v. Smt. Poonam & Ors*. [SLP [C] No.35994/ 2015], the question raised is about the retrospectivity of section 6 as F substituted by Amendment Act, 2005 and in case the father who was a coparcener in the joint Hindu family, was not alive when the Act of 2005 came into force, whether daughter would become a coparcener of joint Hindu family property.

4. In the matter of *Sistia Sarada Devi v. Uppaluri Hari Narayana & Ors.* [SLP [C] No.38542/2016], the question raised is G where the final decree has not been passed in a suit for partition, whether the re-distribution of shares can be claimed by the daughters by amended section 6, as substituted.

5. In *Girijavva v. Kumar Hanmantagouda & Ors.* [SLP [C] No.6403/2019], the question raised is whether section 6, as substituted, H

is prospective as the father died in the year 1994 and, thus, no benefit could be drawn by the daughters.

6. In *Smt. V.L. Jayalakshmi v. V.L. Balakrishna &Ors.* [SLP [C] No. 14353/2019], the petitioner sought partition of his father's ancestral properties, and suit was filed in 2001. The trial court granted 1/7th share to all the parties. The same was modified. It was held petitioner, and daughters were entitled to only 1/35th share in the light of the decision of this Court in *Prakash v. Phulavati* (supra).

7. In *Indubai v. Yadavrao* [SLP [C] No.24901/2019], a similar question has been raised. In *B.K. Venkatesh v. B.K. Padmavathi* [SLP [C] Nos. 1766-67/2020], the daughters have been accorded equal shares in Item No. 1 of Schedule A property, that has been questioned.

8. A Division Bench of this Court in *Prakash v. Phulavati* (supra) held that section 6 is not retrospective in operation, and it applies when both coparceners and his daughter were alive on the date of commencement of Amendment Act, 9.9.2005. This Court further opined that the provision contained in the Explanation to section 6(5) provides for the requirement of partition for substituted section 6 is to be a registered one or by a decree of a court, can have no application to a statutory notional partition on the opening of succession as provided in the unamended Section 6. The notional statutory partition is deemed to have taken place to ascertain the share of the deceased coparcener which is not covered either under the proviso to section 6(1) or section 6(5), including its Explanation. The registration requirement is inapplicable to partition of property by operation of law, which has to be given full effect. The provisions of section 6 have been held to be prospective.

9. In *Danamma* (supra), this Court held that the amended provisions of section 6 confer full rights upon the daughter coparcener. Any coparcener, including a daughter, can claim a partition in the coparcenary property. Gurunalingappa died in the year 2001, leaving behind two daughters, two sons, and a widow. Coparcener's father was not alive when the substituted provision of section 6 came into force. The daughters, sons and the widow were given 1/5th share apiece.

Arguments:

10. Shri Tushar Mehta, learned Solicitor General of India, appearing on behalf of Union of India, raised the following arguments:

A (i) The daughters have been given the right of a coparcener, to bring equality with sons, and the exclusion of daughter from coparcenary was discriminatory and led to oppression and negation of fundamental rights. The Amendment Act, 2005, is not retrospective but retroactive in operation since it enables the daughters to exercise their coparcenary rights on the commencement of the Amendment Act. Even though the B right of a coparcener accrued to the daughter by birth, coparcenary is a birthright.

(ii) The conferment of coparcenary status on daughters would not affect any partition that may have occurred before 20.12.2004 when the Bill was tabled before Rajya Sabha as contained in the proviso to C section 6(1). Hence, the conferment of right on the daughter did not disturb the rights which got crystallised by partition before 20.12.2004.

(iii) Unamended Section 6 provided that if a male coparcener had left behind on death a female relative specified in Class I of the Schedule or male relative claiming through such female relative, the daughter was D entitled to limited share in the coparcenary interest of her father not share as a coparcener in her rights. They were unable to inherit the ancestral property like sons/male counterparts. The Mitakshara coparcenary law not only contributed to discrimination on the ground of gender but was oppressive and negated the fundamental right of equality E guaranteed by the Constitution of India.

(iv) With effect from 9.9.2005, the date of enforcement of Amendment Act, the daughters became coparceners by birth, in their own right with the same liability in the coparcenary property as if she had been a son.

F (v) The Explanation contained under Section 6(1) concerning conferral of rights as coparcener, daughter as coparcener, shall not affect or invalidate any disposition or alienation including any partition or testamentary disposition of the property which had taken place before 20.12.2004.

G (vi) After substitution of the provisions of section 6, the devolution of coparcenary by survivorship has been abrogated. Now in case of death of coparcener, male/female, the coparcenary interest would not devolve by survivorship but by intestate succession under the provisions of the Hindu Succession Act or based on testamentary succession.

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(vii) The decision in *Prakash v. Phulavati* to the effect that there should be a living daughter of a living coparcener on the date of commencement of the Act of 2005 fails to appreciate that coparcenary rights are by birth. The death of a Hindu coparcener father or any other coparcener is only relevant for the succession of his coparcenary interest under section 6(3) of the Act of 2005. The death of any coparcener does not bring to an end any coparcenary. An increase or decrease in the coparcenary interest independently held by each coparcener may occur by birth or death. On the coparcener's death, the notional partition is drawn only to determine his coparcenary's interest. It does not disturb the other incidents of the coparcenary, it can continue without disruption with other coparceners, and even new coparceners can be added on account of birth till the time an actual partition takes place. Coparcenary interest becomes definite only when a partition is effected.

(viii) The daughter of a coparcener in section 6 does not imply the daughter of a living coparcener or father, as the death of the coparcener/father does not automatically lead to the end of coparcenary, which may continue with other coparceners alive. Thus, the coparcener, from whom the daughter is inheriting by her being coparcener, needs not to be alive as on the commencement of the Amendment Act of 2005.

(ix) The Explanation to Section 6(5) was not provided in the original amendment Bill moved before the Rajya Sabha on 20.12.2004, which came to be added later.

(x) Often, coparceners enter into a family arrangement or oral partition, and it may not be necessary to register such a partition. Explanation to section 6(5) of the Amendment Act requires the partition to be registered, was inserted to avoid any bogus or sham transactions. Considering the entire scheme of the Amendment Act, the requirement of registered partition deed is directory and not mandatory. Any coparcener relying upon any family arrangement or oral partition must prove the same by leading proper documentary evidence.

11. Shri R. Venkataramani, learned senior counsel/amicus curiae, argued as under:

(a) There is no conflict between the decisions in *Prakash v. Phulavati* (supra) and *Danamma v. Suman* (supra). In both the decisions, the provisions of section 6 have been held to be of prospective application. The amendment is a prospective one. The declaration by

A the law that the daughter of a coparcener has certain entitlements and be subject to certain liabilities is prospective. The daughter is treated as a coparcener under the amendment Act and not because of the daughter's birth prior to the amendment.

(b) Unlike the joint tenancy principle in English law, a joint Hindu B family stands on a different footing. Every son by birth became a coparcener, and because of birth, the son became entitled to be a coparcener in the joint Hindu family property entitled to claim partition with or without reference to the death of the Karta of a joint Hindu family. Like a son born into the family, an adopted son is also entitled to C succeed to the joint family property. He becomes a coparcener with adoptive father, but his relationship with the natural family is severed, including his status as a coparcener in the family of birth as laid down in *Nagindas Bhagwandas v. Bachoo Hurkissondas*, AIR 1915 PC 41 and *Nanak Chand & Ors. v. Chander Kishore & Ors*., AIR 1982 Del. 520.

D (c) A Hindu joint family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows, and unmarried daughters bound together by the fundamental principle of a Sapindaship of family relationship is the essence and distinguishing feature of the institution of the coparcenary. A joint family E may consist of a single male member and widows of deceased male members. This body is purely a creature of law and cannot be created by an act of parties, as observed in *G. Narasimulu & Ors. v. P. Basava Sankaram & Ors*., AIR 1925 Mad. 249; and *State Bank of India v. Ghamandi Ram (dead) through Gurbax Rai*, (1969) 2 SCC 33. An undivided family which is the normal condition of Hindu society is F ordinarily joint not only in the estate but in food and worship, and, therefore, not only the concerns of the joint family but whatever relates to their commensality and their religious duties are regulated by the member or by the manager to whom they have expressly or by implication delegated the task of regulation as held in *Raghunadha v. Brozo Kishore*, 3 IA G 154 (PC). The coparcener status being the result of birth; possession of the joint property is only an adjunct of the joint family and is not necessary for its constitution, as discussed in *Haridas Narayandas Bhatia v. Devkuvarbai Mulji*, AIR 1926 Bom. 408.

(d) A Hindu coparcenary is said to have seven essential H characteristics, which include that the interest of a deceased member

survives on his death and merges in the coparcenary property as observed in *Controller of Estate Duty, Madras v. Alladi Kuppuswamy*, (1977) 3 SCC 385. As a result, if father or any other coparcener has died before the Amendment Act, 2005, the interest of father or another coparcener would have already merged in the surviving coparcenary. Consequently, there will be no coparcener alive, from whom the daughter will succeed. Thus, the daughter can succeed only in the interest of living coparcener as on the date of enforcement of the Amendment Act.

(e) In *Anthonyswamy v. Chhinnaswamy*, (1969) 3 SCC 15, it was observed that as a logical corollary and counter-balance to the principle before the amendment, that the son from the moment of his birth, acquires an interest in the coparcener, a pious obligation is imposed on him to pay his father's debts incurred for the purpose which is not illegal or immoral.

(f) In *Baijnath Prasad Singh & Ors. v. Tej Bali Singh*, AIR 1921 PC 62, it was observed that there is a difference between coparcenary in Hindu law, which is not identical with coparcenary as understood under the English law. In the case of death of a member of a coparcenary under the Mitakshara law, his right accretes to other members by survivorship while under the English law if one of the co-heirs jointly inheriting property dies, his or her right goes to his or her relations without accreting to surviving coparceners.

(g) By birth and adoption, a male becomes a coparcener. The custom of adoption is of ancient origin, as observed in *Amarendra Man Singh Bhramarbar & Anr. v. Sanatan Singh & Ors*., AIR 1933 PC 155, and *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma & Ors*., 26 IA 113. The adoption at the relevant time was only of male and not of a female as the custom related to succession to the property, as discussed in *Bireswar Mookerji & Ors. v. Shib Chunder Roy*, 19 IA 101.

(h) By the expression used in the amended section 6, the daughter becomes coparcener by birth. The retrospective effect is not intended to be given to the provisions of section 6. Though equality has been brought in, w.e.f. 2005, the incidence of birth of a daughter before 2005 is of no consequence and not to reopen the past transactions.

(i) The oral partition and family settlement are not intended to be reopened by section 6(1) and 6(5).

A (j) If the daughter is treated as coparcener at any point of time in the past before the amendment, the same will bring in enormous uncertainty in the working of the law. It can be stated that the Parliament has not intended to scramble the unscrambled egg or to resurrect the past.

B (k) Challenges to partition had always come when any member of a coparcenary, including an adopted son, stood deprived of the entitlement to succeed to the joint family property.

(l) The scheme of section 6 is future and forward-looking, and it has to be interpreted in such a manner that its relevance is not diluted. C Now the rights of a coparcener have been enlarged, and the provision has disabled it from defeating the right of a daughter from being treated equally.

(m) In the light of the decision in *Shashikalabai (Smt) v. the State of Maharashtra & Anr.*, (1998) 5 SCC 332, the past transactions D cannot be reopened. Thus, the daughter, whose coparcener father, was alive on the date of incorporation of provisions of section 6, will be treated as a coparcener. Any other interpretation would cause unjust consequences.

12. Shri V.V.S. Rao learned amicus curiae/senior counsel, argued E that:

(a) the logic of *Prakash v. Phulavati* has been upheld in *Mangammal v. T.B. Raju*, (2018) 15 SCC 662. It was held that there should be a living daughter of a living coparcener to inherit the property on the date of enforcement of the amended provisions of the 2005 Act.

F (b) Section 6(1)(a) declares a daughter to be a coparcener by birth. By the declaration, a daughter stands included in coparcenary. As the declaration is to the effect that the daughter is to become coparcener by birth, the question of prospectivity or retrospectivity will not arise — daughter, whether born before 2005 or after that, is considered a G coparcener.

(c) Section 6(1)(b) and (c) deal with the effects of inclusion of daughter as a coparcener. Having regard to the plain language and future perfect tense "shall have the same rights," the only conclusion is that the daughters who are included in the coparcenary will have the same rights after coming into force of the Amendment Act. The future perfect tense H

indicates that an action will have been completed (finished or perfected) at some point in the future. This tense is formed with "will" plus "have" plus the past participle of the verb. If the Parliament had intended to mean as conferring the same rights in the coparcenary, anterior to the amendment, the language would have been different. The future perfect tense indicates that action will have to be completed at some point in time in the future. The tense is formed with "will" plus "have" plus the past participle of the verb. If the Parliament intended to mean conferring the same rights in the coparcenary, anterior to the amendment, the language would have been different. If the daughter is now made a coparcener, she would now have the same rights as she is a son.

(d) The legislative history of section 6 throws light in understanding the provision before the Act of 1956 was enacted. Women were not having any interest in the coparcenary properties, and on the demise of a coparcener, the share of the deceased coparcener devolved on the surviving coparceners. Hindu Succession Act made inroads into the system. It provided that on the demise of a coparcener, his interest in the coparcenary properties would not devolve on other coparceners by survivorship, and the share of the deceased coparcener was to be ascertained by way of notional partition as on the date of death. To that limited extent, the women did not become a coparcener, but they could inherit the property.

(e) The 174th Report of Law Commission of India recommended the adoption of the Kerala Model, and the amendments were effected in Kerala, Andhra Pradesh, Karnataka, and in several States, giving coparcenary rights to the daughters.

(f) The Parliament Standing Committee report indicates that the Ministry proposed giving the benefit of the provision of this Bill to married daughters after the commencement of the proposed amending legislation.

(g) It was proposed in the report that nothing in the amended section 6 shall apply to a partition that has been effected before the commencement of the Amendment Act.

(h) Deliberations by the Committee also indicate that concerning the partition effected through oral means, it was opined that it would depend upon the facts of a particular case. As per the prevailing law, it was not necessary that a partition should be registered. There can be an oral partition also, as the law does not prohibit it. At the same time, the

A Committee observed that the term 'partition' should be defined appropriately, and for all practical purposes, should be registered or should have been effected by a decree of the Court. In case where oral partition is recognised, it should be backed by proper evidentiary support.

(i) The Parliament intended to confer the status of a coparcener
B from the birth of a daughter. However, it was never intended to confer her the rights in the coparcenary property retrospectively, for the following reasons:

a. Section 6(1)(a) deals with the inclusion of a daughter in the coparcenary "on and from the commencement of amendment
C Act 2005, w.e.f. 9.9.2005;

b. The operating part of section 6(1) controls not only clause (a) but also clauses (b) and (c);

c. Hence the daughter who is declared as coparcener from 9.9.205 would have the right in a coparcenary property only
D from 9.9.2005;

d. Equally, a daughter who is now coparcener will be subject to the same liabilities in respect of property only from 9.9.2005.

(j) Conferment of coparcenary status shall take effect on and
E from the commencement "of the Amendment Act." The use of the words "on and from" in section 6(1) indicates that the daughter becomes coparcener from the commencement of the Act. The daughter of a coparcener shall by birth become a coparcener, have the same rights and be subject to the same liabilities. The word "shall" indicates the due status of the daughter as coparcener is created only for the future and
F would not affect the existing rights of a male coparcener. The use of the words "become," "have," and "be" are all present tenses, and they reiterate to support the above-suggested interpretation.

(k) In the Bill recommended by the Law Commission and the Bill introduced, the Explanation to section 6(5) was not mentioned. It was
G introduced only on the recommendations of the Parliamentary Committee. Thus, the concept of partition by registered deed and decree of the Court were introduced. It follows that on a daughter becoming coparcener from a particular date, she cannot prospectively affect the share of a coparcener, which was already fixed as held *in Prakash v. Phulavati*.

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(l) The essential condition for conferring the status of coparcener on the daughter is that there should be a coparcenary on the date of coming into force of the Act in 2005. If the coparcenary was disrupted by the act of the parties or by the death of parties, in partition or sale, the daughter could not get the status of a coparcener in coparcenary. The status conferred cannot affect the past transactions of alienation, disposition, partition – oral or written.

(m) Partition could be in the form of a memorandum of partition, or it could also be made orally. In most of the families, there used to be an oral partition. Once parties settle their rights, the partition effected orally cannot be ignored to give shares to the daughters. Such legal transactions cannot be unsettled; the Explanation safeguards all genuine transactions of the past, including oral partition effected by the parties. The Explanation should not be understood as invalidating all other documents recording partition or oral partition in respect of coparcenary property before 20.12.2004.

(n) Daughters conferred with the status of coparcener under the Amendment Act cannot challenge past transactions that took place before 20.12.2004, and the daughter should be alive as on the date of amendment. There should be 'living coparcener' to whom the daughter can inherit to become a coparcener.

13. Shri Sridhar Potaraju, learned counsel, vociferously argued that:

(a) The decision in *Prakash v. Phulavati* adopted the correct interpretation of the provision. Married daughters are not considered as part of the father's joint family. They were recognised as Class I heirs that, by itself, did not make them part of their father's joint Hindu family. He has relied upon *Surjit Lal Chhabda v. Commissioner of Income Tax*, (1976) 3 SCC 142. A married daughter ceases to be a member of the father's family and becomes a member of her husband's family.

(b) As considered by P. Ramanatha Aiyar in Major Law Lexicon, the land is held in coparcenary when there is the unity of title, possession, and interest. A Hindu coparcenary is a narrower body than the joint family. A coparcener shares (equally) with others in inheritance in the estate of a common ancestor. Otherwise called parceners are such as have an equal portion in the inheritance of an ancestor. The share of a coparcener is undefined and keeps fluctuating with the birth and death

A of a coparcener. When a male is born, he becomes a coparcener, thereby decreasing the share of other coparceners. In the event of the death of a coparcener, the rule of survivorship comes into play, and the estate devolves on the surviving coparceners to the exclusion of heirs of the deceased coparcener. Status of a coparcener is a creation of law commencing with birth and ending with death or by severance of such
B status by way of partition or statutory fiction. The status of coparcenary ceases on death.

(c) "Daughter of a coparcener" means the daughter of an alive person and has the status of a coparcener on the date of commencement of the Amendment Act. In case a statutory partition has taken place, the
C same is required to be recognised. It would bring severance of jointness of status and settle the share.

(d) If a preliminary decree of partition has been passed and has attained finality, it must be given effect. The mere filing of a suit for partition is sufficient to effect a partition. On separation of status, the
D decree is passed by a court as held in *Puttrangamma & Ors. v. M.S. Ranganna & Ors*., AIR 1968 SC 1018.

(e) What rights have been conferred by way of survivorship are not intended to be taken away except as provided by the amended proviso in section 6(3) of the Amendment Act.

E

(f) A legal fiction created in law cannot be stretched beyond the purpose for which the fiction has been created, as held in *Mancheri Puthusseri Ahmed & Ors. v. Kuthiravattam Estate Receiver*, (1996) 6 SCC 185.

F (g) Statutory partition leads to disruption. A statutory partition, as provided in section 6(3), is to be given full effect. The same leads to severance of status of jointness of the deceased coparcener and his legal heirs, which shall include the right of maintenance from the joint family of the widow of the deceased coparcener and such other rights. Such partition brings an end to the joint family. In the case of death of
G the father of petitioner in 1963, notional partition would occur and the consequences laid down in *Anar Devi & Ors. v. Parmeshwari Devi & Ors*., (2006) 8 SCC 656 would follow.

(h) The married daughters on the death of father in 1963 were not entitled to a share in the coparcenary property. Only sons were
H entitled to equal shares, and sons obtained the property by way of

survivorship. The statutory partition under unamended Section 6 was considered in *Gurupad Khandappa Magdum v. Hirabai Khandappa Magdum & Ors.*, (1978) 3 SCC 383. Statutory partition has been in existence in section 6 since 1956 and is continued by the 2005 Amendment.

(i) Section 6, as amended, is not applicable in the case of a daughter whose father is not alive at the time of the introduction of provisions of section 6. Every member of a joint Hindu family is not entitled to be a coparcener either under the traditional Hindu law or under the Hindu Succession Act, 1956 or the Amendment Act, 2005. Under Section 29A introduced in the State of Andhra Pradesh, unmarried daughters were given the rights of a coparcener while excluding married daughters. The Central Amendment has not made a distinction based on the daughter's marital status expressly but has made it evident by the use of the expression 'joint Hindu family' and 'daughter of a coparcener.' The provisions should be read to exclude married daughters. The provisions of section 6, as amended, are prospective. It was not intended to unsettle the settled affairs.

(j) The Explanation to section 6(5) cannot be interpreted to take away the rights crystallised upon the surviving coparceners of the joint family under the statutory partition. The purpose of the Explanation was considered in *S. Sundaram Pillai & Ors. v. V. R. Pattabiraman & Ors.*, (1985) 1 SCC 591 thus:

> "**53.** Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—
>
> "(a) to explain the meaning and intendment of the Act itself,
>
> (b) where there is any obscurity or vagueness in the main enactment, to clarify the same to make it consistent with the dominant object it seems to subserve,
>
> (c) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,
>
> (d) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the Court in

A interpreting the true purport and intendment of the enactment, and

(e) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming an hindrance in the interpretation
B of the same."

(k) A preliminary decree determines the shares. Section 2(2) of the Code of Civil Procedure defines 'decree' to mean the formal expression, which clarifies that a decree is preliminary when further proceedings have to be taken before the suit can be decided entirely. In
C so far as the determination of individual shares to be allotted to parties to the suit is concerned, the preliminary decree is final. After the dismissal of Special Leave Petition (C) No.38542/2016 in *Sistla Sarada Devi v. Uppaluri Hari Narayana & Ors.*, the only step required to be taken is to apportion the shares by metes and bounds in terms of the preliminary decree which was passed. The daughters born after the commencement
D of the Amendment Act become coparceners, and daughters born before the commencement of the Amendment Act have been covered under section 6(1)(b) and granted the same rights in coparcenary as given to a son. The daughters born before and after the amendment covered under section 6 are given the status of a coparcener. The status of a coparcener
E to daughters cannot be given from the date of birth, and they cannot be made liable for all the liabilities of coparcenary property. The benefit cannot be conferred from the date of birth as it would relate in several cases to date of birth even in the year 1925. All liabilities are to be borne only from the amendment; as such, the provisions are not retrospective.

F (l) Even alternatively, if the status of coparcenary on the daughter is to be conferred retrospectively, the limitations governing such legal fiction will have to take into consideration the implications of (i) statutory partition; (ii) court's decree; and (iii) legitimate alienation of the property by Karta/coparceners, prior to commencement of the Amendment Act. All other dispositions or alienations, including any partition or testamentary
G disposition of property made before 20.12.2004, are required to be saved as earlier the daughters were not coparceners. On a statutory partition, the property becomes the self-acquired property and is no more a coparcenary property.

(m) Even in a case of adoption, the past transactions are saved
H while applying the theory of relation back as laid down in *Sripad Gajanan*

Suthankar v. Dattaram Kashinath Suthankar & Ors., (1974) 2 SCC 156. A

Thus, the provisions of section 6 are to be construed prospectively.

14. Shri Amit Pai, learned counsel, strenuously urged that:

(a) The golden rule of interpretation is required to be adopted as laid down in *Kanai Lal Sur v. Paramnidhi Sadhukhan*, (1958) SCR 360. The rule of literal construction is relied upon, as observed *in Lt. Amrendra Col. Prithi Pal Singh Bedi v. Union of India*, (1982) 3 SCC 140. B

(b) The substitution of the provision of section 6 dates back to the commencement of the Principal Act of 1956. A notional partition on the death of a coparcener to ascertain his share is not an actual partition. The same is not saved by the proviso contained in section 6. A daughter cannot be deprived of the right to equality as per the Statement of Objects and Reasons. The provision of section 6 is required to be given full effect. C D

(c) The decision in *Prakash v. Phulavati* cannot be said to be laying down the law correctly. The concept of living daughter of a living coparcener is adding to the text of provisions of section 6, whereas no word can be added or read into a statute by the Court. It can only repair errors or supply omissions. It is for the legislature to provide such a concept of a daughter of a living coparcener. Thus, it was argued that section 6 includes all living daughters of coparceners, irrespective of whether such coparceners are deceased or alive at the commencement of the 2005 Amendment. E

15. Shri Sameer Shrivastava, learned counsel, urged that: F

(a) The term 'coparcener' is not defined in the Succession Act. This Court considered it in *SathyapremaManjunatha Gowda (Smt) v. Controller of Estate Duty, Karnataka*, (1997) 10 SCC 684. It is a narrower body than a joint family and consists of only those persons who have taken by birth, an interest in the property, and can enforce a partition, whenever they like. The daughter is entitled to share in the property subject to the restrictions provided under sub-section (1) and sub-section (5) of amended section 6. G

(b) Section 6(3) provides a consequence of the death of a coparcener, devolution on the death of a coparcener after the H

A commencement of the Amendment Act. The concept of survivorship has been done away. Testamentary or intestate succession has been provided where a Hindu dies before the commencement of the Amendment Act. The relevant provisions are section 6(1)(2), where male Hindus are given the right by birth to become a coparcener, and they have the right to take a partition with coparcenary property.

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(c) The decision in *Prakash v. Phulavati*, laying down that section 6 as amended applies in case of living daughters of a living coparcener, is arbitrary and *non-est* in the eye of law. Both sons and daughters of coparceners are conferred the right of becoming coparcener by birth. Birth in coparcenary creates interest. The only other exception is by way of adoption. Coparcenary incident is the right to the severance of the status of partition.

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16. Ms. Anagha S. Desai, learned counsel, strenuously urged that section 6 provides parity of rights in coparcenary property among male and female members of a joint Hindu family on and from 9.9.2005. The declaration in section 6 that the daughter of a coparcener shall have the same rights and liabilities as she would have been a son is unambiguous and unequivocal. The daughter is entitled to a share in the ancestral property. She has relied upon *Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr.,* (2011) 9 SCC 788.

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17. When a daughter, who is claiming and demanding a share in the coparcenary, is alive, there is no difficulty of interpretation, irrespective of the fact whether a coparcener has died before the commencement of the Amendment Act. The coparcener and the daughter do not need to be alive as on the date of the amendment. If it is to be interpreted that coparcener and daughter both should be alive, it will defeat the very purpose and objective of the amended provisions. Earlier, the provisions of Hindu law treated a son as a coparcener by birth; now, daughters are given the same rights since birth. In case partition has been effected by metes and bounds and is adequately proved, then the daughter of coparcenary cannot seek partition of already divided property.

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In Ref. Historical Background

18. The Hindu branch of dharma is influenced by the theological tenets of the Vedic Aryans. What is not modified or abrogated by the legislation or constitutional provisions still prevails, the basic Hindu law emanates from Vedas and past shrutis/smritis. Various dharma shastras

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regard custom as the basis of Hindu law as administered from time to time. Law has advanced and made progress as per the requirements of the society and the prevailing ethos. The justice used to be administered by the emperors resolving the conflicts. The building of law has taken place over time. There are two main schools of Hindu law, i.e., Mitakshara and Dayabhaga. Mitakshara has further been sub-divided into four schools, i.e., Benares, Mithila, Maharashtra or Bombay, and Dravida or Madras school. Benares, Mithila, Dravida, and Maharashtra denote old names of the territories.

19. The application of schools of Mitakshara is region-wise. There has been re-organization of States in 1956, and after that, some confusion has arisen concerning the administration of Bombay school and Benares School. Benares school practically governs the whole of Northern India. The Bombay school covers Western India and various other territories. The certain States were re-organized by the State Reorganisation Act of 1956. In some regions of reorganised States, given the common name, different schools apply. Take, for example, Madhya Pradesh. It consists of territories to which both Bombay and Benares schools are applicable. However, various authors of Hindu law have failed to note the fact in which parts of the State of M.P. after reorganisation which school is applicable. A reference is found to tenets of Bombay school of Hindu law in the entire State of M.P., whereas Benares school is applicable in various parts of Madhya Pradesh. It was clarified by a Full Bench of Madhya Pradesh High Court in *Diwan Singh v. Bhaiya Lal, (1997) 2 MP LJ-202,* and a Division Bench decision was relied on in FA No.31/1968 decided on 14.12.1976. In integrating State of Madhya Bharat and some other parts of Madhya Pradesh, Benares school is applicable, not Bombay.

20. Mitakshara law applies to most parts of India except Bengal. Maharashtra school prevailed in North India, Bombay school, in Western India. However, certain areas in Southern India are governed by Marumakkatayam, Aliyasantana, and Nambudiri systems of law.

21. 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

A 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.

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In Ref.Coparcenary and Joint Hindu Family

22. A joint Hindu family is a larger body than a Hindu coparcenary. A joint Hindu family consists of all persons lineally descended from a C 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, as observed in *Sri Raghunadha v. Sri Brozo Kishore*, 1876 (1) Mad. 69 = 3 IA 154.

D 23. 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-E 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.

F 24. 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.

25. 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 G coparcener, but she could still be a joint family member. By substituted section 6 with effect from 09.09.2005 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

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a coparcener. In a case out of three maledescendants, one or other has died, the last holder, even a fifth descendant, can claim partition. In case they are alive, he is excluded.

In Ref. Formation of Coparcenary

26. 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.

27. In *Sunil Kumar & Anr. v. Ram Parkash & Ors.*, (1988) 2 SCC 77, the Court discussed essential features of coparcenary of birth and sapindaship thus:

> **"17.** Those who are of individualistic attitude and separate ownership may find it hard to understand the significance of a Hindu joint family and joint property. But it is there from the ancient time perhaps, as a social necessity. A Hindu joint family consists of male members descended lineally from a common male ancestor, together with their mothers, wives or widows and unmarried daughters. They are bound together by the fundamental principle of sapindaship or family relationship, which is the essential feature of the institution. The cord that knits the members of the family is not property but the relationship of one another.
>
> **18.**The coparcenary consists of only those persons who have taken by birth an interest in the property of the holder and who can enforce a partition whenever they like. It is a narrower body than a joint family. It commences with a common ancestor and includes a holder of joint property and only those males in his male line who are not removed from him by more than three degrees. The reason why coparcenership is so limited is to be found in the tenet of the Hindu religion that only male descendants up to three degrees can offer spiritual ministration to an ancestor. Only males can be coparceners. [See: Hindu Law by N.R. Raghavachariar, 8th Edn., p. 202]"
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> (emphasis supplied)

28. 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. In *Sheela Devi v. Lal Chand*, (2006) 8 SCC 581, it was observed:

> "12. The principle of law applicable in this case is that so long a property remains in the hands of a single person, the same was to be treated as separate property, and thus such a person would be entitled to dispose of the coparcenary property as the same were his separate property, but, if a son is subsequently born to him or adopted by him, the alienation whether it is by way of sale, mortgage or gift, will nevertheless stand, for a son cannot object to alienations so made by his father before he was born or begotten (See *C. Krishna Prasad v. CIT*, (1975) 1 SCC 160). But once a son is born, it becomes a coparcenary property, and he would acquire an interest therein."

In *M. Yogendra & Ors. v. Leelamma N. & Ors.,* (2009) 15 SCC 184, similar opinion was expressed thus:

> "**29.** It is now well settled in view of several decisions of this Court that the property in the hands of a sole coparcener allotted to him in partition shall be his separate property for the same shall revive only when a son is born to him. It is one thing to say that the property remains a coparcenary property but it is another thing to say that it revives. The distinction between the two is absolutely clear and unambiguous. In the case of former any sale or alienation which has been done by the sole survivor coparcener shall be valid whereas in the case of a coparcener any alienation made by the karta would be valid."
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> (emphasis supplied)

In *Smt. Sitabai & Anr. v. Ramchandra*, AIR 1970 SC 343, it was held:

> "3. x x x under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members and that the property of a joint family did not cease to belong to a joint family merely because the family is represented by a single coparcener who possesses rights which an absolute owner of property may possess….."

In *Dharma ShamraoAgalawe v. Pandurang Miragu Agalwe & Ors.*, (1988) 2 SCC 126, it was held that joint family property retains its character even after its passing on to the hands of a sole surviving coparcener. If a son is subsequently born or adopted, the coparcenary will survive, subject to saving the alienations made in the interregnum. A

29. In *Ghamandi Ram* (supra), the formation, concept and incidents of the coparcenary were discussed thus: B

> **"5.** According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (*see* Mitakshara, Ch. I, 1-27). The incidents of co-parcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly, that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property, conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly, that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenary under the Mitakshara School is a creature of law and cannot arise by Act of parties except in so far that on adoption the adopted son becomes a coparcener with his adoptive father as regards the ancestral properties of the latter. In *Sundaranam Maistri* v. *Harasimbhulu Maistri and Another, ILR 25 Mad 149 at 154.* C D E F
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> Mr Justice Bhashyam Ayyangar stated the legal position thus:
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> "The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family, as a corporate body (*Gan Savant Bal Savant* v. *Narayan Bhond Savant*) [ILR 7 Bom 467] and *Mayne's 'Hindu Law and Usage'*, (6th edition,Paragraph 270) and the possession of property by such corporate body. The first requisite therefore is the family unit; and the possession by it of property is the second requisite. For G H

A the present purpose, female members of the family may be left out of consideration and the conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition viz. the undivided state — it forms a corporate body. Such corporate body, with its heritage, is purely a creature of law and cannot be created by Act of parties, save in so far that, by adoption, a stranger may be affiliated as a member of that corporate family."

6. Adverting to the nature of the property owned by such a family the learned Judge proceeded to state:

C "As regards the property of such family, the 'unobstructed heritage' devolving on such family, with its accretions, is owned by the family, as a corporate body, and one or more branches of that family, each forming a corporate body within a larger corporate body, may possess separate 'unobstructed heritage' which, with its accretions, may be exclusively owned by such branch as a corporate body."

(emphasis supplied)

30. Essential characteristics of coparcenary, as discussed in the above-mentioned decision in *Ghamandi Ram* (supra), were analysed in E *Controller of Estate Duty v. Alladi Kuppuswamy*, (supra), thus:

"8. ….

"Thus analysing the ratio of the aforesaid case regarding the incidents of a Hindu coparcenary it would appear that a Hindu coparcenary has six essential characteristics, namely, (1) that F the lineal male descendants up to the third generation acquire an independent right of ownership by birth and not as representing their ancestors; (2) that the members of the coparcenary have the right to work out their rights by demanding partition; (3) that until partition, each member has got ownership G extending over the entire property conjointly with the rest and so long as no partition takes place, it is difficult for any coparcener to predicate the share which he might receive; (4) that as a result of such co-ownership the possession and enjoyment of the property is common; (5) that there can be no alienation of the property without the concurrence of the other H coparceners unless it be for legal necessity; and (6) that the

interest of a deceased member lapses on his death and merges in the coparcenary property. Applying these tests to the interest of a Hindu widow who has been introduced into a coparcenary by virtue of the Act of 1937, we find that, excepting Condition (1), all other conditions are fully satisfied in case of a Hindu widow succeeding to the interest of her husband in a Hindu coparcenary. In other words, after her husband's death the Hindu widow under the Act of 1937 has got the right to demand partition, she cannot predicate the exact share which she might receive until partition is made, her dominion extends to the entire property conjointly with the other members of the coparcenary, her possession and enjoyment is common, the property cannot be alienated without concurrence of all the members of the family, except for legal necessity, and like other coparceners she has a fluctuating interest in the property which may be increased or decreased by deaths or additions in the family. It is manifest that she cannot fulfil the first condition, because she enters the coparcenary long after she is born and after she is married to her husband and acquires his interest on his death. Thus, short of the first condition, she possesses all the necessary indicia of a coparcenary interest. The fact that before the Act of 1956, she had the characteristic of a widow-estate in her interest in the property does not detract any the less from this position. It must follow as a logical corollary that though a Hindu widow cannot be a coparcener, she has coparcenary interest and she is also a member of the coparcenary by virtue of the rights conferred on her under the Act of 1937."

31. In *Controller of Estate Duty* (supra), it has also been laid down that if a widow does not exercise her right of partition, there is no severance of the Hindu coparcenary and on her death, the interest of the widow merges in the coparcenary property or lapses to the other coparceners. It was observed that the male issue of coparcener acquires an interest in the coparcenary by birth, not as representing his father.

32. This Court in *Controller of Estate Duty* (supra), placed reliance on *Satrughan Isser v. Sabujpari, & Ors.*, AIR 1967 SC 272. In case the right to partition by a widow has not been exercised, there is no severance of Hindu coparcenary, and on death of coparcener, there is no dissolution of coparcenary. In *Satrughan* (supra), it was held:

A "7. By the Act certain antithetical concepts are sought to be reconciled. A widow of a coparcener is invested by the Act with the same interest which her husband had at the time of his death in the property of the coparcenary. She is thereby introduced into the coparcenary, and between the surviving coparceners of her husband and the widow so introduced, there arises community of interest and unity of possession. But the widow does not on that account become a coparcener: though invested with the same interest which her husband had in the property she does not acquire the right which her husband could have exercised over the interest of the other coparceners. Because of statutory substitution of her interest in the coparcenary property in place of her husband, the right which the other coparceners had under the Hindu law of the Mitakshara school of taking that interest by the rule of survivorship remains suspended so long as that estate enures. But on the death of a coparcener there is no dissolution of the coparcenary so as to carve out a defined interest in favour of the widow in the coparcenary property: Lakshmi Perumallu v. Krishnavanamma. The interest acquired by her under Section 3(2) is subject to the restrictions on alienation which are inherent in her estate. She has still power to make her interest definite by making a demand for partition, is a male owner may. If the widow after being introduced into family to which her husband belonged does not seek partition, on the termination of her estate her interest will merge into the coparcenary property. But if she claims partition, she is severed from the other members and her interest becomes a defined interest in the coparcenary property, and the right of the other coparceners to take that interest by survivorship will stand extinguished. If she dies after partition or her estate is otherwise determined, the interest in coparcenary property which has vested in her will devolve upon the heirs of her husband. It is true that a widow obtaining an interest in coparcenary property by Section 3(2) does not inherit that interest but once her interest has ceased to have the character of undivided interest in the property, it will upon termination of her estate devolve upon her husband's heirs. To assume as has been done in some decided cases that the right of the coparceners to take her interest on determination of the widow's interest survives even after the interest has become definite, because of a claim for partition, is to denude the right to claim partition of all reality."

33. In *Bhagwan Dayal (since deceased) & Anr. v. Mst. Reoti Devi*, AIR 1962 SC 287, it was held that coparcenary is a creature of law and branch of the family was a subordinate corporate body and discussed the proposition thus:

> "47. x xxCoparcenary is a creature of Hindu law and cannot be created by agreement of parties except in the case of reunion. It is a corporate body or a family unit. The law also recognizes a branch of the family as a subordinate corporate body. The said family unit, whether the larger one or the subordinate one, can acquire, hold and dispose of family property subject to the limitations laid down by law. Ordinarily, the manager, or by consent, express or implied, of the members of the family, any other member or members can carry on business or acquire property, subject to the limitations laid down by the said law, for or on behalf of the family. Such business or property would be the business or property of the family. The identity of the members of the family is not completely lost in the family. One or more members of that family can start a business or acquire property without the aid of the joint family property, but such business or acquisition would be his or their acquisition. The business so started or property so acquired can be thrown into the common stock or blended with the joint family property in which case the said property becomes the estate of the joint family. But he or they need not do so, in which case the said property would be his or their self-acquisition, and succession to such property would be governed not by the law of joint family but only by the law of inheritance. In such a case, if a property was jointly acquired by them, it would not be governed by the law of joint family; for Hindu law does not recognize some of the members of a joint family belonging to different branches, or even to a single branch, as a corporate unit. Therefore, the rights inter se between the members who have acquired the said property would be subject to the terms of the agreement whereunder it was acquired. The concept of joint tenancy known to English law with the right of survivorship is unknown to Hindu law except in regard to cases specially recognized by it. In the present case, the uncle and the two nephews did not belong to the same branch. The acquisitions made by them jointly could not be impressed with the incidents of joint family property. They can

A only be co-sharers or co-tenants, with the result that their properties passed by inheritance and not by survivorship."

(emphasis supplied)

34. In *Kalyanji Vithaldas & Ors. v. Commissioner of Income Tax, Bengal,* AIR 1937 PC 36, the concept of Hindu Undivided Family was considered thus:

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" …….. The phrase "Hindu undivided family" is used in the statute with reference, not to one school only of Hindu law, but to all schools; and their Lordships think it a mistake in method to begin by pasting over the wider phrase of the Act the words "Hindu coparcenary"-all the more that it is not possible to say on the face of the Act that no female can be a member. ….."

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(emphasis supplied)

In *Gowli Buddanna v. Commissioner of Income Tax, Mysore*, AIR 1966 SC 1523, it was held that coparcenary is narrower body than joint family thus:

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"6. x x x A Hindu joint family consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters. A Hindu coparcenary is a much narrower body than the joint family: it includes only those persons who acquire by birth an interest in the joint or coparcenary property, these being the sons, grandsons, and great-grandsons of the holder of the joint property for the time being. Therefore there may be a joint Hindu family consisting of a single male member and widows of deceased coparceners. x xx"

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(emphasis supplied)

The difference between joint Hindu family and coparcenary was considered in *Surjit Lal Chhabda v. The Commissioner of Income Tax, Bombay*, (supra) thus:

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"**13.** 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. A joint Hindu family consists of persons lineally descended from a common ancestor and includes

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their wives and unmarried daughters. 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, (1908) 32 Bom. 479.""

(emphasis supplied)

35. In *State of Maharashtra v. Narayan Rao Sham Rao Deshmukh & Ors.*, (1985) 2 SCC 321, characteristics of joint family and coparcenary were culled out. It was also held that interest of a female member of a joint Hindu family getting fixed, on her inheriting interest of a deceased male member of the family. She would not cease to be a member of family unless she chooses to become separate by partition, thus:

> "**8.** A Hindu coparcenary is, however, a narrower body than the joint family. Only males who acquire by birth an interest in the joint or coparcenary property can be members of the coparcenary or coparceners. A male member of a joint family and his sons, grandsons and great grandsons constitute a coparcenary, A coparcener acquires right in the coparcenary property by birth but his right can be definitely ascertained only when a partition takes place. When the family is joint, the extent of the share of a coparcener cannot be definitely predicated since it is always capable of fluctuating. It increases by the death of a coparcener and decreases on the birth of a coparcener. A joint family, however, may consist of female members. It may consist of a male member, his wife, his mother and his unmarried daughters. The property of a joint family does not cease to belong to the family merely because there is only a single male member in the family. (See *GowliBuddanna* v. *CIT*, AIR 1966 SC 1523 and *Sitabai* v. *Ram Chandra,* (1969) 2 SCC 544). A joint family may consist of a single male member and his wife and daughters. It is not necessary

A that there should be two male members to constitute a joint family. (See *N.V. Narendranath* v. *C.W.T.,* (1969) 1 SCC 748). While under the Mitakshara Hindu law there is community of ownership and unity of possession of joint family property with all the members of the coparcenary, in a coparcenary governed by the Dayabhaga law, there is no unity of ownership of coparcenary property with the members thereof. Every coparcener takes a defined share in the property and he is the owner of that share. But there is, however, unity of possession. The share does not fluctuate by births and deaths. Thus it is seen that the recognition of the right to a definite share does not militate against the owners of the property being treated as belonging to a family in the Dayabhaga law.

10. We have carefully considered the above decision and we feel that this case has to be treated as an authority for the position that when a female member who inherits an interest in the joint family property under Section 6 of the Act files a suit for partition expressing her willingness to go out of the family she would be entitled to get both the interest she has inherited and the share which would have been notionally allotted to her, as stated in Explanation I to Section 6 of the Act. But it cannot be an authority for the proposition that she ceases to be a member of the family on the death of a male member of the family whose interest in the family property devolves on her without her volition to separate herself from the family. A legal fiction should no doubt ordinarily be carried to its logical end to carry out the purposes for which it is enacted but it cannot be carried beyond that. It is no doubt true that the right of a female heir to the interest inherited by her in the family property gets fixed on the death of a male member under Section 6 of the Act but she cannot be treated as having ceased to be a member of the family without her volition as otherwise it will lead to strange results which could not have been in the contemplation of Parliament when it enacted that provision and which might also not be in the interest of such female heirs. To illustrate, if what is being asserted is accepted as correct it may result in the wife automatically being separated from her husband when one of her sons dies leaving her behind as his heir. Such a result does not follow from the language of the statute. In such an event she should have the option to separate herself or to continue

in the family as long as she wishes as its member though she has acquired an indefeasible interest in a specific share of the family property which would remain undiminished whatever may be the subsequent changes in the composition of the membership of the family. As already observed the ownership of a definite share in the family property by a person need not be treated as a factor which would militate against his being a member of a family. We have already noticed that in the case of a Dayabhaga family, which recognises unity of possession but not community of interest in the family properties amongst its members, the members thereof do constitute a family. That might also be the case of families of persons who are not Hindus. In the instant case the theory that there was a family settlement is not pressed before us. There was no action taken by either of the two females concerned in the case to become divided from the remaining members of the family. It should, therefore, be held that notwithstanding the death of Sham Rao the remaining members of the family continued to hold the family properties together though the individual interest of the female members thereof in the family properties had become fixed."

(emphasis supplied)

36. The essential feature is aggregate ownership, *i.e.*, 'Samudavika Swatwa' in coparcenary and the share keeps on fluctuating, was observed in *Commissioner of Income Tax, Poona v. H.H. Raja of Bhor*, (1967) (65) ITR 634 thus:

"…… no individual member of a Hindu coparcenary, while it remains undivided, can predicate of the joint and undivided property, that he, or any particular member, has a definite share, one-third or one-fourth – (Lord Westbury in *Approvier v. Rama Subha Aiyan*, (1866 11 MIA 75). His interest in the coparcenary property is a fluctuating interest which is capable of being enlarged by death in the family. It is only on partition that the coparcener is entitled to a definite share. But the important thing to notice is that the theory of ownership being acquired by birth has given rise to the doctrine of *Samudavika swatwa*or aggregate ownership in the Mitakshara school. Till partition therefore all the coparceners have got rights extending over the entirety of the coparcenary property……"

(emphasis supplied)

37. In *Vellikannu v. R. Singaperumal & Anr.*, (2005) 6 SCC 622, this Court restated that the share of a member of a coparcenary fluctuates from time to time is a settled proposition of law. It was held:

"**11.** So far as the property in question is concerned, there is a finding of the courts below that the property is a coparcenary property and if that being so, if Defendant 1 had not murdered his father then perhaps things would have taken a different shape. But what is the effect on the succession of the property of the deceased father when the son has murdered him? If he had not murdered his father he would have along with his wife succeeded in the matter. So far as the rights of coparceners in the Mitakshara law are concerned, the son acquires by birth or adoption a vested interest in all coparcenary property whether ancestral or not and whether acquired before or after his birth or adoption, as the case may be, as a member of a joint family. This is the view which has been accepted by all the authors of the Hindu law. In the famous principles of *Mulla*, 15th Edn. (1982) at pp. 284 and 285, the learned author has stated thus:

> "The essence of a coparcenary under the Mitakshara law is unity of ownership. The ownership of the coparcenary property is in the whole body of coparceners. <u>According to the true notion of an undivided family governed by the Mitakshara law, no individual member of that family, whilst it remains undivided, can predicate, of the joint and undivided property, that he, that particular member, has a definite share, one-third or one-fourth. His interest is a fluctuating interest, capable of being enlarged by deaths in the family, and liable to be diminished by births in the family. It is only on a partition that he becomes entitled to a definite share. The most appropriate term to describe the interest of a coparcener in coparcenary property is 'undivided coparcenary interest'</u>. The nature and extent of that interest is defined in Section 235. The rights of each coparcener until a partition takes place consist in a common possession and common enjoyment of the coparcenary property. As observed by the Privy Council in *Katama Natchiar* v. *Rajah of Shivagunga*, (1863) 9 MIA 543, 'there is community of interest and unity of possession between all the members of the family, and upon the death of any one of them the others

may well take by survivorship that in which they had during the deceased's lifetime a common interest and a common possession'."

13. In *N.R. Raghavachariar's Hindu Law — Principles and Precedents*, 8th Edn. (1987) at p. 230 under the heading "Rights of Coparceners" it is said thus:

"*The following are the rights of a coparcener*.—(*1*) Right by birth, (*2*) Right of survivorship, (*3*) Right to partition, (*4*) Right to joint possession and enjoyment, (*5*) Right to restrain unauthorised acts, (*6*) Right of alienation, (*7*) Right to accounts, and (*8*) Right to make self-acquisition."

While dealing with "Right by Birth" learned author says thus:

"Every coparcener gets an interest by birth in the coparcenary property. This right by birth relates back to the date of conception. This, however, must not be held to negative the position that coparcenary property may itself come into existence after the birth of the coparcener concerned."

While dealing with right of survivorship, it is said thus:

"The system of a joint family with its incident of succession by survivorship is a peculiarity of the Hindu law. In such a family no member has any definite share and his death or somehow ceasing to be a member of the family causes no change in the joint status of the family. Where a coparcener dies without male issue his interest in the joint family property passes to the other coparceners by survivorship and not by succession to his own heir. Even where a coparcener becomes afflicted with lunacy subsequent to his birth, he does not lose his status as a coparcener which he has acquired by his birth, and although his lunacy may under the Hindu law disqualify him from demanding a share in a partition in his family, yet where all the other coparceners die and he becomes the sole surviving member of the coparcenary, he takes the whole joint family property by survivorship, and becomes a fresh stock of descent to the exclusion of the daughter of the last predeceased coparcener, a case of leprosy of the last surviving coparcener. The beneficial interest of each coparcener is liable to fluctuation, increasing by the death of another coparcener and decreasing by the birth of a new coparcener."

A Therefore, it is now settled that a member of a coparcenary acquires a right in the property by birth. His share may fluctuate from time to time but his right by way of survivorship in coparcenary property in Mitakshara law is a settled proposition.

(emphasis supplied)"

B 38. In *Rohit Chauhan v. Surinder Singh & Ors.*, (2013) 9 SCC 419, the concept of coparcenary of sharing equally with others and no definite share, was discussed thus:

"**11.** We have bestowed our consideration to the rival submissions and we find substance in the submission of Mr Rao. In our opinion C coparcenary 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. Coparcenary is a narrower body than the joint Hindu family and before the commencement of the Hindu Succession (Amendment) Act, 2005, only male members of the family used D to acquire by birth an interest in the coparcenary property. A coparcener has no definite share in the coparcenary property but he has an undivided interest in it and one has to bear in mind that it enlarges by deaths and diminishes by births in the family. It is not static. We are further of the opinion that so long, on partition E an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary 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 F son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener."

(emphasis supplied)"

39. A similar view was taken in *Thamma Venkata Subramma (dead) by LR v. Thamnma Ratamma & Ors*., (1987) 3 SCC 294, that G the share is not defined in coparcenary. It keeps on fluctuating on death and birth in the family.

40. It is only on actual partition a coparcener becomes entitled to a definite share. The interest of a coparcener is called "undivided coparcenary interest," which remains undivided as held by the Privy H Council in *Katama Natchiar v. Srimat Rajah Moottoo Vijaya*

Raganadha Bodha Gooroo Swamy Periya Odaya Taver, (1863) 9 MIA 543.

In *Shankara Cooperative Housing Society Ltd. v. M. Prabhakar &Ors*., (2011) 5 SCC 607, it was observed that coparcenary be collective ownership. If a suit for recovery of property is filed, it is for the benefit of all co-owners. The position of ownership of co-ownership property indicates a change when actual division takes place, and co-owner's share becomes identifiable. In *Shankara Cooperative*, it was observed:

> "**85.** Shri Ranjit Kumar, learned Senior Counsel, contends that the writ petition was filed by one of the co-owners of late Mandal Buchaiah and judgment and order passed would not bind the other parties. We cannot agree. It is a settled law that no co-owner has a definite right, title and interest in any particular item or portion thereof. On the other hand, he has right, title and interest in every part and parcel of the joint property or coparcenary under Hindu law by all the coparceners. Our conclusion is fortified by the view expressed by this Court in *A. Viswanatha Pillai* v. *Tahsildar (LA)*, (1991) 4 SCC 17 in which this Court observed: (SCC p. 21, para 2)
>
> "*2*. … It is settled law that one of the co-owners can file a suit and recover the property against strangers and the decree would enure to all the co-owners. It is equally settled law that no co-owner has a definite right, title and interest in any particular item or a portion thereof. On the other hand he has right, title and interest in every part and parcel of the joint property or coparcenary under Hindu law by all the coparceners. In *KantaGoel* v. *B.P. Pathak*, (1977) 2 SCC 814, this Court upheld an application by one of the co-owners for eviction of a tenant for personal occupation of the co-owners as being maintainable. The same view was reiterated in *Sri Ram Pasricha* v. *Jagannath*, (1976) 4 SCC 184, and *Pal Singh* v. *Sunder Singh*, (1989) 1 SCC 444. A co-owner is as much an owner of the entire property as a sole owner of the property. It is not correct to say that a co-owner's property was not its own. He owns several parts of the composite property along with others and it cannot be said that he is only a part owner or a fractional owner in the property. That position will undergo a change only when partition takes place and division was effected

A by metes and bounds. Therefore, a co-owner of the property is an owner of the property acquired but entitled to receive compensation pro rata.""

(emphasis supplied)

B 41. In *Bhagwant P. Sulakhe v. Digambar Gopal Sulakhe*, (1986) 1 SCC 366, a 3-Judge Bench of this Court held that character of a joint family property does not change with the severance in the status of the joint family before an actual partition takes place. It was observed thus:

C "**14.** …The character of any joint family property does not change with the severance of the status of the joint family and a joint family property continues to retain its joint family character so long as the joint family property is in existence and is not partitioned amongst the co-sharers. By a unilateral act it is not open to any member of the joint family to convert any joint family property into his personal property."

D 42. In *Bhagwati Prasad Sah & Ors. v. Dulhin Rameshwari Kuer & Anr.*, AIR 1952 SC 72, it was held that once a coparcener separates himself from other members of the joint family, there is no presumption that rest of the coparceners continued to be joint, it would be a question of fact in each case. Following discussion was made:

E **"7.** x xx The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved, but ……where it is admitted that one of the coparceners did separate himself from the other members of the joint family and had his share in the joint property partitioned off for him, there is no presumption

F that the rest of the coparceners continued to be joint. There is no presumption on the plaintiff's side too that because one member of the family separated himself, there has been separation with regard to all. It would be a question of fact to be determined in each case upon the evidence relating to the intention of the parties whether there was a separation amongst the other coparceners

G or that they remained united. The burden would undoubtedly lie on the party who asserts the existence of a particular state of things on the basis of which he claims relief…."

In Ref. Unobstructed and obstructed heritage

H

43. In Mitakshara coparcenary, there is unobstructed heritage, i.e., apratibandhadaya and obstructed heritage i.e., sapratibandhadaya. 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. Mulla on Hindu Law has discussed the concept thus:

> **"216. Obstructed and unobstructed heritage.** – *Mitakshara* divides property into two classes, namely, *apratibandha daya* or unobstructed heritage, and *sapratibandha daya* or obstructed heritage.
>
> (1) 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,[1] is unobstructed heritage as regards his own male issue, i.e., his son, grandson, and great-grandson.[2] 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.
>
> 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 the owner.
>
> Thus, property which devolves on parents, brothers, nephews, uncles, etc. upon the death of the last owner, is obstructed

[1]*Muhamad Hussain v. Babu Kishava Nandan Sahai*, (1937) 64 IA 250 : (1937) All 655: 39 Bom LR 979: 169 IC 1: AIR 1937 PC 223; *Om Prakash v. Sarvjit Singh,* AIR 1995 MP 92 (property inherited from person other than father, father's father, or father's father's father is obstructed heritage).
[2]*Sirtaji v. Algu Upadhiya,* (1937) 12 Luck 237: 163 IC 935: AIR 1936 Ori 331.

A 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 the owner.[3]

B (2) Unobstructed heritage devolves by survivorship; obstructed heritage, by succession. There are, however, some cases in which obstructed heritage is also passed by survivorship."

44. It is apparent that unobstructed heritage takes place by birth, and the obstructed heritage takes place after the death of the owner. It C 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.

In Ref. Section 6 of the Act of 1956

D 45. Section 6 of the Act of 1956 before the substitution by Amendment Act, 2005 is reproduced hereunder :

> ***"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* E *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 relativespecified in Class I of the Schedule or a male relative* F *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.*
>
> G *Explanation I.—For the purposes of this section, the interest of a HinduMitakshara 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*

H [3]*Mitakshara,* Ch.I, S 1, v 3.

his death, irrespective of whether he was entitled to claim partition or not."

46. The substituted provision of section 6 by the Amendment Act, 2005 is extracted hereunder:

"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, 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;

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

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

Explanation.- For the purposes of this sub- section, the interest of
C 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
D (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
E 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

F (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.

G 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.

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(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.'."

47. Statement of Objects and Reasons behind the introduction of Bill is reproduced as under:

"STATEMENT OF OBJECTS AND REASONS

The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession among Hindus. The Act brought about changes in the law of succession among Hindus and gave rights which were till then unknown in relation to women's property. However, it does not interfere with the special rights of those who are members of Hindu Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by the Mitakshara and Dayabhaga schools and also to those governed previously by the Murumakkattayam, Aliyasantana and Nambudri laws. The Act applies to every person who is a Hindu by religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Pararthana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; or to any other person who is not a Muslim, Christian, Parsi or Jew by religion. In the case of a testamentary disposition, this Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925.

2. Section 6 of the Act deals with devolution of interest of a male hindu in coparcenary property and recognises the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakashara coparcenary 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 coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her

A 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 Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975.

B

3. 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 coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the said section so as to remove the disability on female heirs contained in that section.

C

4. The above proposals are based on the recommendations of the Law Commission of India as contained in its 174th Report on "Property Rights of Women: Proposed Reform under the Hindu Law".

D

5. The Bill seeks to achieve the above objects.

NEW DELHI;

E

The 16th December, 2004."

48. Section 6 deals with devolution of interest in coparcenary property of a joint Hindu family governed by the Mitakshara law. The originally enacted provision of section 6 excluded the rule of succession concerning Mitakshara coparcenary property. It provided the interest of a coparcener male Hindu who died after the commencement of Act of 1956, shall be governed by survivorship upon the surviving members of the coparcenary. The exception was provided that if the deceased had left 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 such coparcener shall devolve by testamentary or intestate succession, as the case may be, in order to ascertain the share of deceased coparcener, the partition has to be deemed before his death. Explanation 2 disentitled the separated person to make any claim in case of intestate succession.

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G

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49. Though the widow or daughter could claim a share, being a Class I heir in the property left by the deceased coparcener, and a widow was entitled, having a right to claim a share in the event of partition daughter was not treated as a coparcener. The goal of gender justice as constitutionally envisaged is achieved though belatedly, and the discrimination made is taken care of by substituting the provisions of section 6 by Amendment Act, 2005.

50. Concerning gender discrimination to a daughter who always remains a loving daughter, we quote*Savita Samvedi (Ms) & Anr. v. Union of India & Ors.*, 1996 (2) SCC 380, thus:

> "6. A common saying is worth pressing into service….
>
> "A son is a son until he gets a wife. A daughter is a daughter throughout her life."
>
> 7. …The eligibility of a married daughter must be placed on a par with an unmarried daughter (for she must have been once in that state), …..to claim the benefit…..
>
> …(Otherwise, it would be) unfair, gender-biased and unreasonable, liable to be struck down under Article 14 of the Constitution. … It suffers from twin vices of gender discrimination inter se among women on account of marriage."

51. The daughter is treated as a coparcener in the same manner as a son by birth with the same rights in coparcenary property and liabilities. However, the proviso of sub-section (1) contains a non-obstante clause providing that nothing contained in the sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of the property which had taken place before 20.12.2004.

52. 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,

A 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.

53. Before the amendment, section 6 provided that on the death of a male Hindu, a coparcener's interest in Mitakshara coparcenary B 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. The Schedule C containing categories of Class I heirs is extracted hereunder:

"THE SCHEDULE

(See section 8)

HEIRS IN CLASS I AND CLASS II

D

Class I

Son, daughter, widow; mother; son of a pre-deceased son; daughter of a pre-deceased son, son of a pre-deceased daughter, daughter of a pre-deceased daughter; widow of a pre-deceased son, son of a pre-deceased son of a pre-deceased son; daughter of a pre- E deceased son of a pre-deceased son; widow of a pre-deceased son of a pre-deceased son; [son of a pre-deceased daughter of a pre-deceased daughter, daughter of a pre-deceased daughter of a pre-deceased daughter, daughter of a pre-deceased son of a pre-deceased daughter, daughter of a pre-deceased daughter of F a pre-deceased so."

54. 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 G 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.

55. The amended provisions of section 6(1) provide that on and H from the commencement of the Amendment Act, the daughter is conferred

the right. Section 6(1)(a) makes daughter by birth a coparcener "in her own right" and "in the same manner as the son." Section 6(1)(a) contains the concept of the unobstructed heritage of Mitakshara coparcenary, which is by virtue of birth. Section 6(1)(b) confers the same rights in the coparcenary property "as she would have had if she had been a son". The conferral of right is by birth, and the rights are given in the same manner with incidents of coparcenary as that of a son and she is treated as a coparcener in the same manner with the same rights as if she had been a son at the time of birth. 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.

56. 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.

57. The concept of retrospective and retroactive statute was stated by this Court in *Darshan Singh etc. v. Ram Pal Singh &Anr.*, (1992 Supp. (1) SCC 191, thus:

> **"35.** Mr Sachar relies on *Thakur Gokulchand* v. *Parvin Kumari*, AIR 1952 SC 231, *Garikapatti Veeraya* v. *N. Subbiah Choudhury*, AIR 1957 SC 540, *Jose Da Costa* v. *Bascora Sadasiva Sinai Narcornim*, (1976) 2 SCC 917, *Govind Das* v. *ITO*, (1976) 1 SCC 906, *Henshall* v. *Porter*, (1923) 2 KBD 193, *United Provinces* v. *Mst. Atiga Begum*, AIR 1941 FC 16, in support of his submission that the Amendment Act was not made retrospective by the legislature either expressly or by necessary

implication as the Act itself expressly provided that it shall be deemed to have come into force on January 23, 1973; and therefore there would be no justification to giving it retrospective operation. The vested right to contest which was created on the alienation having taken place and which had been litigated in the court, argues Mr Sachar, could not be taken away. In other words, the vested right to contest in appeal was not affected by the Amendment Act. However, to appreciate this argument we have to analyse and distinguish between the two rights involved, namely, the right to contest and the right to appeal against lower court's decision. Of these two rights, while the right to contest is a customary right, the right to appeal is always a creature of statute. The change of the forum for appeal by enactment may not affect the right of appeal itself. In the instant case we are concerned with the right to contest and not with the right to appeal as such. There is also no dispute as to the propositions of law regarding vested rights being not taken away by an enactment which is ex facie or by implication not retrospective. But merely because an Act envisages a past act or event in the sweep of its operation, it may not necessarily be said to be retrospective. Retrospective, according to Black's *Law Dictionary*, means looking backward; contemplating what is past; having reference to a statute or things existing before the Act in question. Retrospective law, according to the same dictionary, means a law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights occurring, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. Retroactive statute means a statute which creates a new obligation on transactions or considerations already past or destroys or impairs vested rights.

36. In *Halsbury's Laws of England* (4th edn., Vol. 44, at paragraph 921) we find:

> "921. *Meaning of 'retrospective'*.— It has been said that 'retrospective' is somewhat ambiguous and that a good deal of confusion has been caused by the fact that it is used in more senses than one. In general, however, the courts regard as

retrospective any statute which operates on cases or facts coming into existence before its commencement in the sense that it affects, even if for the future only, the character or consequences of transactions previously entered into or of other past conduct. Thus a statute is not retrospective merely because it affects existing rights; or is it retrospective merely because a part of the requisites for its action is drawn from a time antecedent to its passing."

37. We are inclined to take the view that in the instant case legislature looked back to January 23, 1973 and not beyond to put an end to the custom and merely because on that cut off date some contests were brought to abrupt end would not make the Amendment Act retrospective. In other words, it would not be retrospective merely because a part of the requisites for its action was drawn from a time antecedent to the Amendment Act coming into force. We are also of the view that while providing that "no person shall contest any alienation of immovable property whether ancestral or non-ancestral or any appointment of an heir to such property", without preserving any right to contest such alienations or appointments as were made after the coming into force of the Principal Act and before the coming into force of the Amendment Act, the intention of the legislature was to cut off even the vested right; and that it was so by implication as well. There is no dispute as to the proposition that retrospective effect is not to be given to an Act unless, the legislature made it so by express words or necessary implication. But in the instant case it appears that this was the intention of the legislature. Similarly courts will construe a provision as conferring power to act retroactively when clear words are used. We find both the intention and language of the Amendment Act clear in these respects."

58. In *G. Sekar v. Geetha &Ors.*, (2009) 6 SCC 99 with respect to the operation of Amendment Act, 2005, it was observed that the same is prospective in nature and not retrospective thus:

"30. Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature. The High Court might have committed a mistake in opining that the operation of Section 3 of the 2005 Act is retrospective in

A character, but, for the reasons aforementioned, it does not make any difference. What should have been held was that although it is not retrospective in nature, its application is prospective."

59. The decision in *G. Sekar* (supra) concerned with the provisions of section 23 of the Hindu Succession Act prior to its deletion, w.e.f. B 9.9.2005. The question involved therein was the effect of the deletion by Amendment Act of 2005. The suit for partition of the residential dwelling house was not maintainable under section 23. In that context, the observations were made by this Court. In *Sheela Devi* (supra), the question was whether Section 8 of the Act of 1956 would apply or the law applicable prior to the Act of 1956.

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60. Section 6(2) provides when the female Hindu shall hold the property to which she becomes entitled under section 6(1), she will be bound to follow rigors of coparcenary ownership, and can dispose of the property by testamentary mode.

D 61. 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 E son; even surviving child of pre-deceased daughter or son are given a share in case child has also died then surviving child of such pre-deceased child of a pre-deceased son or pre-deceased 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 F 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 G 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.

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62. The proviso to section 6(1) and section 6(5) saves any partition effected before 20.12.2004. However, Explanation to section 6(5) recognises partition effected by execution of a deed of partition duly registered under the Registration Act, 1908 or by a decree of a court. Other forms of partition have not been recognised under the definition of 'partition' in the Explanation.

63. 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 coparcenerby 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).

64. The effect of the amendment is that a daughter is made coparcener, with effect from the date of amendment and she can claim partition also, which is a necessary concomitant of the coparcenary. Section 6(1) recognises a joint Hindu family governed by Mitakshara law. The coparcenary must exist on 9.9.2005 to enable the daughter of a coparcener to enjoy rights conferred on her. As the right is by birth and not by dint of inheritance, it is irrelevant that a coparcener whose daughter is conferred with the rights is alive or not. Conferral is not based on the death of a father or other coparcener. In case living coparcener dies after 9.9.2005, inheritance is not by survivorship but by intestate or testamentary succession as provided in substituted section 6(3).

A **In ref: Effect of enlargement of daughter's rights**

65. Under the proviso to section 6 before the amendment made in the year 2005 in case a coparcener died leaving behind female relative of Class I heir or a male descendant claiming through such Class I female heir, the daughter was one of them. Section 6, as substituted, presupposes
B the existence of coparcenary. It is only the case of the enlargement of the rights of the daughters. The rights of other relatives remain unaffected as prevailed in the proviso to section 6 as it stood before amendment.

66. 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
C 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
D 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.

67. There can be a sole surviving coparcener in a given case the
E property held by him is treated individual property till a son is born. In case there is a widow or daughter also, it would be treated as joint family property. If the son is adopted, he will become a coparcener. An adoption by a widow of a deceased coparcener related to the date of her husband's death, subject to saving the alienations made in the
F intermittent period.

In Ref.Acquisition of Rights in Coparcenary Property

68. It is by birth that interest in the property is acquired. Devolution on the death of a coparcener before 1956 used to be only by survivorship. After 1956, women could also inherit in exigencies, mentioned in the
G proviso to unamended section 6. Now by legal fiction, daughters are treated as coparceners. No one is made a coparcener by devolution of interest. It is by virtue of birth or by way of adoption obviously within the permissible degrees; a person is to be treated as coparcener and not otherwise.

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69. The argument raised that if the father or any other coparcener died before the Amendment Act, 2005, the interest of the father or other coparcener would have already merged in the surviving coparcenary, and there was no coparcener alive from whom the daughter would succeed. We are unable to accept the submission because it is not by the death of the father or other coparcener that rights accrue. It is by the factum of birth. 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 offormation 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.Survivorship as a mode of succession of property of a Mitakshara coparcener, has been abrogated with effect from 9.9.2005 by section 6(3).

70. The decision in *Bireswar Mookerji & Ors. v. Shib Chunder Roy* (supra), was relied upon to contend that adoption is only of a male and not a female as held in *Amarendra Man Singh Bhramarbar & Anr. v. Sanatan Singh & Ors.,* (supra), a male becomes a coparcener by birth or adoption. There is no dispute with the custom, which was prevalent earlier that there could be the adoption of a male child and not that of females. There is no dispute with the proposition that a coparcenary right accrued to males under the prevalent law by birth or adoption. In the same manner, right is accrued by birth to the daughter under the provisions of section 6. The legislature in section 6 used the term that a daughter becomes coparcener by birth. The claim based on birth is distinguishable and is different from modes of succession.

A 71. It was argued that in case Parliament intended that the incident of birth prior to 2005 would be sufficient to confer the status of a coparcener, Parliament would need not have enacted the proviso to section 6(1). When we read the provisions conjointly, when right is given to the daughter of a coparcener in the same manner as a son by birth, it
B became necessary to save the dispositions or alienations, including any partition or testamentary succession, which had taken place before 20.12.2004. A daughter can assert the right on and from 9.9.2005, and the proviso saves from invalidation above transactions.

72. It was argued that in the eventuality of the death of a father or
C other coparcener, the parties would have not only partitioned their assets but also acted in pursuance of such partition. However, partitions have been taken care of by the proviso to section 6(1) and 6(5). Parliament has not intended to upset all such transactions as specified in the proviso to section 6(1).

D 73. It was vehemently argued that if the daughter is given the right to be a coparcener by birth and deemed to become a coparcener at any point in the past, in the normal working of the law, uncertainty would be caused. In our opinion, no uncertainty is brought about by the provisions of section 6 as the law of Mitakshara coparcenary makes the share of surviving coparceners uncertain till actual partition takes place.
E Uncertainty in the right of share in a Mitakshara coparcenary is inhered in its underlying principles, and there is no question of upturning it when the daughter is treated like a son and is given the right by birth; to be exercised from a particular date, i.e., 9.9.2005. It is not to resurrect the past but recognising an antecedent event for conferral of rights, prospectively. There is no doubt about it that advancement brings about
F the enlargement of the size of the coparcenary and disabling it from treating the daughter unequally. Even otherwise, its size could be enlarged by the birth of a son also. By applying section 8, the joint possession was not repudiated by the fact that a female, whether a wife or daughter, inherited the share of coparcener under the proviso to original section 6.
G She was an equal member of the joint Hindu family and deemed statutory partition did not bring disruption of the coparcenary.

74. In *Prakash v. Phulavati*, father died in the year 1988, daughters filed a suit for partition in 1992, same was dismissed in 2007, entitlement was given to the daughters to a share on a notional partition
H under the proviso to section 6 in the share of the coparcener father.

However, the High Court applied the amended provisions of section 6 to the pending proceedings and treated daughters equally with sons. As such, the matter travelled to this Court. It was held that the proviso is not retrospective. The requirement of partition being registered can have no application to statutory notional partition, on the opening of succession as per the unamended proviso to section 6, having regard to the nature of such partition, which is by operation of law. It was opined:

> **"17.** The text of the amendment itself clearly provides that the right conferred on a "daughter of a coparcener" is "on and from the commencement of the Hindu Succession (Amendment) Act, 2005". Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective.[Shyam Kumar v. Ram Kumar, (2001) 8 SCC 24, paras 22 to 27] In the present case, there is neither any express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.
>
> **18.** The contention of the respondents that the amendment should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment. Thus, no other interpretation is possible in view of the express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20-12-2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent

A of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20-12-2004. Notional partition, by its very nature, is not covered either under the proviso or under sub-section (5) or under the Explanation.

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

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27.2. In *Gurupad Khandappa Magdum* v. *Hirabai Khandappa Magdum(1978) 3 SCC 383*, *Shyama Devi* v. *Manju Shukla* (1994) 6 SCC 342 and *Anar Devi* v. *Parmeshwari Devi* (2006) 8 SCC 656 cases this Court interpreted Explanation 1 to Section 6 (prior to the 2005 Amendment) of the Hindu Succession Act. It was held that the deeming provision referring to partition of the property immediately before the death of the coparcener was to be given due and full effect in view of settled principle of interpretation of a provision incorporating a deeming fiction. In *Shyama Devi* (supra) and *Anar Devi* (supra) cases, same view was followed.

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27.3. In *Vaishali Satish Ganorkar* v. *Satish Keshaorao Ganorkar*, AIR 2012 Bom. 101, the Bombay High Court held that the amendment will not apply unless the daughter is born after the 2005 Amendment, but on this aspect a different view has been taken in the later larger Bench judgment [AIR 214 Bom 151]. We are unable to find any reason to hold that birth of the daughter after the amendment was a necessary condition for its applicability. All that is required is that daughter should be alive and her father should also be alive on the date of the amendment."

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75. A finding has been recorded in *Prakash v. Phulavati* that the rights under the substituted section 6 accrue to living daughters of living coparceners as on 9.9.2005 irrespective of when such daughters are born. We find that the attention of this Court was not drawn to the aspect as to how a coparcenary is created. It is not necessary to form a coparcenary or to become a coparcener that a predecessor coparcener should be alive; relevant is birth within degrees of coparcenary to which it extends. Survivorship is the mode of succession, not that of the formation of a coparcenary. Hence, we respectfully find ourselves unable to agree with the concept of "living coparcener", as laid down in *Prakash v. Phulavati*. In our opinion, the daughters should be living on 9.9.2005. In substituted section 6, the expression 'daughter of a living coparcener' has not been used. Right is given under section 6(1)(a) to the daughter by birth. Declaration of right based on the past event was made on 9.9.2005 and as provided in section 6(1(b), daughters by their birth, have the same rights in the coparcenary, and they are subject to the same liabilities as provided in section 6(1)(c). Any reference to the coparcener shall include a reference to the daughter of a coparcener. The provisions of section 6(1) leave no room to entertain the proposition that coparcener should be living on 9.9.2005 through whom the daughter is claiming. We are unable to be in unison with the effect of deemed partition for the reasons mentioned in the latter part.

76. In *Mangammal v. T.B. Raju & Ors.* (supra), the Court considered the provisions made in the State of Tamil Nadu, the State Government enacted the Hindu Succession (Tamil Nadu Amendment) Act, 1989, made effective from 25.3.1989, adding section 29-A in the Hindu Succession Act, 1956. Section 29A was held to be valid regarding succession by survivorship. Section 29A provided equal rights to daughters in coparcenary property. The provisions were more or less similar, except section 29A(iv) treated a married daughter differently. The provisions were not applicable to the daughters married before the date of commencement of Amendment Act, 1989. Thus, married daughters were not entitled to equal rights. That too, has been taken care of in section 6, as substituted by Act of 2005, and no discrimination is made against married daughters. In the said case, Mangammal got married in 1981, and Indira got married in or about 1984, i.e., before the 1989 Amendment. Therefore, it was held that because of section 29-A(iv) of the Amendment Act, the appellant could not institute a suit for partition and separate possession as they were not coparceners. The decisions in *Prakash v.*

A *Phulavati* and *Danamma* were referred, and it was opined that *Prakash v. Phulavati* would still hold the value of precedent for right of a daughter in ancestral property and only "living daughters of living coparceners" as on 9.9.2005 would be entitled to claim a share in the coparcenary property. In *Mangammal*, the Court opined thus:

B **"15.** Moreover, under Section 29-A of the Act, the legislature has used the word "the daughter of a coparcener." Here, the implication of such wordings mean both the coparcener as well as daughter should be alive to reap the benefits of this provision at the time of commencement of the amendment of 1989. The similar issue came up for the consideration before this C Court in *Prakash* v. *Phulavati*, (2016) 2 SCC 36, wherein this Court while dealing with the identical matter held at para 23 as under (SCC p. 49)

"*23*. Accordingly, we hold that the rights under the amendment are applicable to *living daughters of living* D *coparceners* as on 9-9-2005 irrespective of when such daughters are born."

(emphasis supplied)

16. It is pertinent to note here that recently, this Court in E *Danamma* v. *Amar*, (2018) 3 SCC 343, dealt, inter alia, with the dispute of daughter's right in the ancestral property. In the above case, father of the daughter died in 2001, yet court permitted the daughter to claim the right in ancestral property in view of the amendment in 2005. On a perusal of the judgment and after having regard to the peculiar facts of the *Danamma*(supra), it is evident F that the Division Bench of this Court primarily did not deal with the issue of death of the father rather it was mainly related to the question of law *whether daughter who was born prior to 2005 amendment would be entitled to claim a share in ancestral property or not?* In such circumstances, in our view, *Prakash*, G (2016) 2 SCC 36, would still hold precedent on the issue of death of coparcener for the purpose of right of daughter in ancestral property. Shortly put, only living daughters of living coparceners would be entitled to claim a share in the ancestral property.

17. Hence, without touching any other aspect in the present H case, we are of the view that the appellants were not the

coparceners in the Hindu joint family property in view of the 1989 amendment, hence, they had not been entitled to claim partition and separate possession at the very first instance. At the most, they could claim maintenance and marriage expenses if situation warranted."

It is apparent that the question of living daughter of a living coparcener was not involved in the matter, once this Court held that the married daughters were not entitled to claim partition and separate possession as marriage had taken place prior to the enforcement of the 1989 amendment, as observed in para 17 quoted above. However, this Court opined that the decision in *Prakash v. Phulavati,* laying down that only living daughters of living coparceners would be entitled to claim a share in the ancestral property under section 6 of the Act of 1956. The opinion expressed cannot be accepted for the reasons mentioned above. Moreover, it was not necessary to go into the aforesaid question.

77. In *Danamma*, a Division Bench of this Court dealt with the interpretation of amended provisions of section 6. The decision in *Anar Devi v. Parmeshwari Devi* (supra) was relied upon. It was observed that the controversy concerning the interpretation of section 6 now stands settled with authoritative pronouncement in *Prakash v. Phulavati* which affirmed the view taken by the High Court as well as a Full Bench in *Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari*, AIR 2014 Bom. 151. In *Danamma*, the Court further opined:

> **"23.** Section 6, as amended, stipulates that *on and from* the commencement of the amended Act, 2005, the daughter of a coparcener shall *by birth* become a coparcener in her own right in *the same manner as the son*. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners *since birth*. The amended provision now statutorily recognises the rights of coparceners of daughters as well *since birth*. The section uses the words *in the same manner as the son*. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners *by birth*. It is the very *factum of birth* in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by *virtue of birth*. Devolution of coparcenary property is the later stage of and a consequence of

A death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and is well recognised. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-sections (1)(*a*) and (*b*).

B

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

26. In the present case, no doubt, suit for partition was C filed in the year 2002. However, during the pendency of this suit, Section 6 of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court. This Court in *Ganduri Koteshwaramma* v. *Chakiri Yanadi* (2011) 9 D SCC 788, held that the rights of daughters in coparcenary property as per the amended Section 6 are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the E preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005.

27. On facts, there is no dispute that the property which was the subject-matter of partition suit belongs to joint family and Gurulingappa Savadi was propositus of the said joint family F property. In view of our aforesaid discussion, in the said partition suit, share will devolve upon the appellants as well. Since, Savadi died leaving behind two sons, two daughters and a widow, both the appellants would be entitled to 1/5th share each in the said property. The plaintiff (Respondent 1) is son of Arun Kumar (Defendant 1). Since, Arun Kumar will have 1/5th share, it would G be divided into five shares on partition i.e. between Defendant 1 Arun Kumar, his wife Defendant 2, his two daughters Defendants 3 and 4 and son/plaintiff (Respondent 1). In this manner, Respondent 1-plaintiff would be entitled to 1/25th share in the property."

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78. In *Danamma*, it is pertinent to mention that Gurulingappa, propositus of a Hindu joint family and the father of living daughter coparcener died in 2001, before the Amendment Act, 2005 came into force, leaving behind two daughters, son and a widow. Daughters were given equal rights by this Court. We agree with certain observations made in paras 23 and 25 to 27 (supra) but find ourselves unable to agree with the earlier part approving the decision in *Prakash v. Phulavati* and the discussion with respect to the effect of the statutory partition. As a matter of fact, in substance, there is a divergence of opinion in *Prakash v. Phulavati* and *Danamma* with respect to the aspect of living daughter of a living coparcener. In the latter case, the proposition of the living daughter of a living coparcener was not dealt with specifically. However, the effect of reasons given in para 23 had been carried out to logical end by giving an equal share to the daughter.

In Ref. Partition and Effect of Statutory Fiction

79. The right to claim partition is a significant basic feature of the coparcenary, and a coparcener is one who can claim partition. The daughter has now become entitled to claim partition of coparcenary w.e.f. 9.9.2005, which is a vital change brought about by the statute. A coparcener enjoys the right to seek severance of status. Under section 6(1) and 6(2), the rights of a daughter are *paripassu* with a son. In the eventuality of a partition, apart from sons and daughters, the wife of the coparcener is also entitled to an equal share. The right of the wife of a coparcener to claim her right in property is in no way taken away.

80. We deem it appropriate to refer to the decision in *Hardeo Rai v. Sakuntala Devi & Ors.*, (2008) 7 SCC 46 laying down that when an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of a coparcener is determined, it ceases to be a coparcenary property. After taking a definite share in the property, a coparcener becomes the owner of that share, and, as such, he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property. It was observed:

> "**22.** For the purpose of assigning one's interest in the property, it was not necessary that partition by metes and bounds amongst the coparceners must take place. When an intention is expressed to partition the coparcenary property, the share of each of the coparceners becomes clear and ascertainable. Once the share of

A a coparcener is determined, it ceases to be a coparcenary property. The parties in such an event would not possess the property as "joint tenants" but as "tenants-in-common". The decision of this Court in *SBI*, (1969) 2 SCC 33, therefore, is not applicable to the present case.

B **23.** Where a coparcener takes definite share in the property, he is owner of that share and as such he can alienate the same by sale or mortgage in the same manner as he can dispose of his separate property."

81. It is settled proposition of law that without partition, only C undivided share can be sold but not specific property, nor joint possession can be disrupted by such alienation. Whether the consent of other coparcener is required for sale or not, depends upon by which School of Mitakshara law, parties are governed, to say, in Benares School, there is a prohibition on the sale of property without the consent of other coparceners. The Court in the abovesaid decision made general D observation but was not concerned with the aspect when the partition was completed, the effect of intervening events and effect of statutory provisions as to partition, as such, it cannot be said to be an authority as to provisions of section 6 as substituted and as to enlargement of the right by operation of law achieved thereunder. Shares of coparceners E can undergo a change in coparcenary by birth and death unless and until the final division is made. The body of coparcenary is increased by the operation of law as daughters have been declared as a coparcener, full effect is required to be given to the same. The above decision cannot be said to be an authority for the question involved in the present matters.

F 82. In *Man Singh (D) by LRs. v. Ram Kala (D) by LRs.*, AIR 2011 SC 1542, the question of devolution of interest in coparcenary property arose on the death of male Hindu leaving behind wife, son and three daughters, and determination of their shares. It was observed that until the disruption of joint family status occurs, the definite share cannot be claimed with certainty, and share cannot be predicated in joint and G undivided property. The question of disruption of joint family status by a definite and unequivocal declaration of intention to separate himself from the family was also considered. The question in the present case is when the partition has not taken place whether the statutory fiction contained in the proviso to section 6 with respect to the determination of shares of H a deceased coparcener and its devolution thereunder would disrupt

coparcenary. The answer is in the negative. In *Man Singh* (supra), it was observed that the wife has a right to claim an equal share in the husband's property as that of a son, and she can enjoy the share separately even from her husband thus:

> "**12.** …Till disruption of joint family status takes place, neither coparcener nor the other heirs entitled to share in the joint family property can claim with certainty the exact share in that property. In the case of *Appovier Alias Seetaramier* v. *Rama Subba Aiyan & Ors.,* (1866) 11 MIA 75, Lord Westbury speaking for the Judicial Committee (Privy Council) observed, 'According to the true notion of an undivided family in Hindoo law, no individual member of that family, whilst it remains undivided, can predicate of the joint and undivided property, that he, that particular member, has a certain definite share.'
>
> **15.** In Principles of Hindu Law by Mulla, Vol. I (17th Edition) as regards the right of wife, it is stated that a wife cannot herself demand a partition, but if a partition does take place between her husband and his sons, she is entitled (except in Southern India) to receive a share equal to that of a son and to hold and enjoy that share separately even from her husband (Article 315 at Page 506)."

83. In *Girja Bai v. Sadashiv,* AIR 1916 PC 104, *Kawal Nain v. Prabhulal,* AIR 1917 PC 39 and *Ramalinga v. Narayana,* AIR 1922 PC 201, it was laid that the institution of a suit for partition by a member of a joint family is a clear intimation of his intention to separate and the decisions indicate that there was consequential severance of joint status from the date when the suit was filed though there was an assertion of his right to separate by filing of the suit whether the consequential judgment is passed or not. However, we add a rider that if subsequently, the law confers a right, or such other event takes place, its effect has to be worked out even after passing of the preliminary decree.

84. In *Kedar Nath v. Ratan Singh,* (1910) 37 IA 161 and *Palani Ammal v. Muthuvenkatachala,* AIR 1925 PC 49, it was observed that if the suit is withdrawn before trial and passing of the decree, the plaintiff ultimately has not chosen to go for separation. It was laid down that there was no severance of the joint status of the family by filing of the suit.

A 85. In *Joala Prasad Singh v. Chanderjet Kuer,* AIR 1938 Pat 278, it was held that the filing of a suit is a shred of strong evidence, but not conclusive evidence of an intention to separate. However, in our opinion, the intention to separate need not be confused with the change of rights during the pendency of the suit, which has to be given full effect, to do complete justice.

B 86. In *Chokalingam v. Muthukaruppan,* AIR 1938 Mad 849, it was laid down that even a decree passed by consent does not affect a severance; it had no validity if its terms were not executed and the members continue to live together having abandoned their decision to separate.

C 87. In *Mukund Dharman Bhoir & Ors. v. Balkrishna Padmanji & Ors.*, AIR 1927 PC 224, a distinction was made between severance of the joint status, which is a matter of individual decision and the division of the property where the allotment of shares may be effected by private arrangements, by arbitrators or as a last resort, by the Court. It was observed:

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> "In the first place, there is separation, which means the severance of the status of jointness. That is matter of individual volition; and it must be shown that an intention to become divided has been clearly and unequivocally expressed, it may be by explicit declaration or by conduct.
>
> Secondly, there is the partition or division of the joint estate, comprising the allotment of shares, which may be effected by different methods."

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F 88. In *Palani Ammal* (supra), *Ramabadra v. Gopalaswami*, AIR 1931 Mad 404 and *Gangabai v. Punau Rajwa,* AIR 1956 Nag 261, it was laid down that joint family does not get disrupted merely by ascertainment of the shares of the coparcener. In order to constitute a partition, the shares should be defined with the intention of an immediate separation.

G 89. In *Poornandachi v. Gopalasami,* AIR 1936 PC 281, only one of the members was given the share by way of instrument of partition. It was also provided that the rest of the property was to remain joint. It was held that there was no partition between the other members.In *I.T. Officer, Calicut v. N.K. Sarada Thampatty,* AIR 1991 SC 2035, it was

H held that if a preliminary decree for partition is passed, it will not amount

to a partition unless an actual physical partition is carried out pursuant to a final decree.

90. In *S. Sai Reddy v. S. Narayana Reddy &Ors*. (1991) 3 SCC 647, a suit for partition, was filed. A preliminary decree determining the shares was passed. The final decree was yet to be passed. It was observed that 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. A preliminary decree 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, and the preliminary decree does not bring about any irreversible situation. The concept of partition that the legislature had in mind could not be equated with a mere severance of the status of the joint family, which could be effected by an expression of a mere desire by a family member to do so. The benefit of the provision of section 29A could not have been denied to women whose daughters were entitled to seek shares equally with sons in the family. In *S. Sai Reddy* (supra), it was held:

> "**7.** The question that falls for our consideration is whether the preliminary decree has the effect of depriving respondents 2 to 5 of the benefits of the amendment. The learned counsel placed reliance on clause (*iv*) of Section 29-A to support his contention that it does. Clause (*ii*) of the section provides that a daughter shall be allotted share like a son in the same manner treating her to be a son at the partition of the joint family property. However, the legislature was conscious that prior to the enforcement of the amending Act, partitions will already have taken place in some families and arrangements with regard to the disposition of the properties would have been made and marriage expenses would have been incurred etc. The legislature, therefore, did not want to unsettle the settled positions. Hence, it enacted clause (*iv*) providing that clause (*ii*) would not apply to a daughter married prior to the partition or to a partition which had already been effected before the commencement of the amending Act. Thus if prior to the partition of family property a daughter had been married, she was disentitled to any share in the property. Similarly, if the partition had been effected before September 5, 1985 the date on which the amending Act came into force, the daughter even though unmarried was not given a share in the family property. The crucial

A question, however, is as to when a partition can be said to have been effected for the purposes of the amended provision. 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. For this reason also, we cannot equate the concept of partition that the legislature has in mind in the present case with a mere severance of the status of the joint family which can be effected by an expression of a mere desire by a family member to do so. The partition that the legislature has in mind in the present case is undoubtedly a partition completed in all respects and which has brought about an irreversible situation. A preliminary decree which merely declares shares which are themselves liable to change does not bring about any irreversible situation. Hence, we are of the view 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. Any other view is likely to deprive a vast section of the fair sex of the benefits conferred by the amendment. 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.

8. Hence, in our opinion, the High Court has rightly held that since the final decree had not been passed and the property had not been divided by metes and bounds, clause (*iv*) to Section 29-A was not attracted in the present case and the respondent-daughters were entitled to their share in the family property."

(emphasis supplied)

91. In *Prema v. Nanje Gowda*, AIR 2011 SC 2077, insertion of section 6A by the amendment made by the State of Karnataka in the Hindu Succession Act, 1956, was considered. Equal rights were given to the daughter in coparcenary property in a suit for partition. A preliminary decree was passed. Amendment in the Act was made during the final decree proceedings. It was held that the discrimination practiced against the unmarried daughter was removed. Unmarried daughters had equal rights in the coparcenary property. The amendment's effect was that the unmarried daughter could claim an equal share in the property in terms of section 6A inserted in Karnataka. In *Prema* (supra), the Court opined:

"**11.** … in *R. Gurubasaviah* v. *Rumale Karibasappa and others*, AIR 1955 Mysore 6, *Parshuram Rajaram Tiwari* v. *Hirabai Rajaram Tiwari*, AIR 1957 Bombay 59 and *Jadunath Roy*and others v. *Parameswar Mullick and others,* AIR 1940 PC 11, and held that if after passing of preliminary decree in a partition suit but before passing of final decree, there has been enlargement or diminution of the shares of the parties or their rights have been altered by statutory amendment, the Court is duty-bound to decide the matter and pass final decree keeping in view of the changed scenario."

"**14.** 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

A 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…"

B (emphasis supplied)

It was held that if after passing of a preliminary decree in a partition suit but before passing of the final decree, there has been enlargement or diminution of the shares of the parties or their rights have been altered C by statutory amendment; the Court is duty-bound to decide the matter and pass final decree keeping in view the changed scenario. In *Prema* (supra), the Court further opined:

"20. In our view, neither of the aforesaid three judgments can be read as laying down a proposition of law that in a partition suit, D preliminary decree cannot be varied in the final decree proceedings despite amendment of the law governing the parties by which the discrimination practiced against unmarried daughter was removed and the statute was brought in conformity with Articles 14 and 15 of the Constitution. We are further of the view that the ratio of Phoolchand v. Gopal Lal, (AIR 1967 SC 1470) (supra) and S. Sai E Reddy v. S. Narayana Reddy, (1991 AIR SCW 488) (supra) has direct bearing on this case and the trial court and the High Court committed serious error by dismissing the application filed by the appellant for grant of equal share in the suit property in terms of Section 6A of the Karnataka Act No.23 of 1994."

F It was laid down that by the change of law, the share of daughter can be enlarged even after passing a preliminary decree, the effect can be given to in final decree proceedings.

92. In *Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr*., (supra), this Court considered the amendment made in section 6 of G the Hindu Succession Act in 2005 and held that the right of a daughter in coparcenary property is not lost bypassing of a preliminary decree for partition before stipulated date i.e., 20th December, 2004. A partition suit does not stand disposed of bypassing a preliminary decree. Relying inter alia, on *S. Sai Reddy* (supra), it was held that the preliminary decree can be amended in order to fully recognise the rights of a daughter: H

"16. 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 determination of shares vide preliminary decree dated 19-3-1999, which came to be amended on 27-9-2003 and the receipt of the report of the Commissioner.

17. 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 redetermining the rights and interests of the parties having regard to the changed situation. We are fortified in our view by a three-Judge Bench decision of this Court in Phoolchand & Anr. v. Gopal Lal, AIR 1967 SC 1470, wherein this Court stated as follows:

> "We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. … So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so; … there is no prohibition in the Code of Civil Procedure against passing a second preliminary decree in such circumstances and we do not see why we should rule out a second preliminary decree in such circumstances only on the ground that the Code of Civil Procedure does not contemplate such a possibility. … for it

A must not be forgotten that the suit is not over till the final decree is passed and the Court has jurisdiction to decide all disputes that may arise after the preliminary decree, particularly in a partition suit due to deaths of some of the parties. … a second preliminary decree can be passed in partition suits by which the shares allotted in the preliminary decree already passed can be amended and if there is dispute between surviving parties in that behalf and that dispute is decided the decision amounts to a decree….."

19. The above legal position is wholly and squarely applicable to the present case. It surprises us that the High Court was not apprised of the decisions of this Court in Phoolchand, (AIR 1967 SC 1470) and S. Sai Reddy, (1991 AIR SCW 488). High Court considered the matter as follows:

" xxx."

20. The High Court was clearly in error in not properly appreciating the scope of Order XX Rule 18 of CPC. In a suit for partition of immovable property, if such property is not assessed to the payment of revenue to the Government, ordinarily passing of a preliminary decree declaring the share of the parties may be required. The Court would thereafter proceed for preparation of final decree. In Phoolchand, this Court has stated the legal position that CPC creates no impediment for even more than one preliminary decree if after passing of the preliminary decree events have taken place necessitating the readjustment of shares as declared in the preliminary decree. The Court has always power to revise the preliminary decree or pass another preliminary decree if the situation in the changed circumstances so demand. A suit for partition continues after the passing of the preliminary decree and the proceedings in the suit get extinguished only on passing of the final decree. It is not correct statement of law that once a preliminary decree has been passed, it is not capable of modification. It needs no emphasis that the rights of the parties in a partition suit should be settled once for all in that suit alone and no other proceedings.

21. Section 97 of C.P.C. that provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree, he shall be

precluded from disputing its correctness in any appeal which may be preferred from the final decree does not create any hindrance or obstruction in the power of the Court to modify, amend or alter the preliminary decree or pass another preliminary decree if the changed circumstances so require.

22. It is true that final decree is always required to be in conformity with the preliminary decree but that does not mean that a preliminary decree, before the final decree is passed, cannot be altered or amended or modified by the trial court in the event of changed or supervening circumstances even if no appeal has been preferred from such preliminary decree."

(emphasis supplied)

The effect of the legislative provision concerning partition was considered, and it was held that a preliminary decree merely declares the shares and on which law confers equal rights upon the daughter that is required to be recognised.

93. The concept of partition and its effect was considered by this Court in *Shub Karan Bubna Alias Shub Karan Prasad Bubna v. Sita Saran Bubna and Ors.*, (2009) 9 SCC 689 thus:

*"**The issue***

5. "Partition" is a redistribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the joint ownership is terminated and the respective shares vest in them in severalty.

6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. "Separation of share" is a species of "partition". When all co-owners get separated, it is a partition. Separation of share(s) refers to a division where only one or only a few among several co-owners/ coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a

A partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

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B **18.** The following principles emerge from the above discussion regarding partition suits:

18.3. As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until *partition*, that is, division by metes and bounds takes place by passing a final decree. An application requesting the Court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under Article 136 of the Limitation Act) nor an application seeking a fresh relief (falling under Article 137 of the Limitation Act). It is only a reminder to the Court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

20. On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or there can be merely a single decree with certain further steps to be taken by the Court. In fact, several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree."

(emphasis supplied)

G 94. In *Laxmi Narayan Guin&Ors. v. Niranjan Modak*, (1985) 1 SCC 270, it was laid down that change in law during the pendency of the appeal has to be taken into consideration thus:

"9. That a change in the law during the pendency of an appeal has to be taken into account and will govern the rights of the

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parties was laid down by this Court in *Ram Sarup* v. *Munshi,* AIR 1963 SC 553 which was followed by this Court in *Mula* v. *Godhu, (1969) 2 SCC 653*. We may point out that in *Dayawati* v. *Inderjit,* AIR 1966 SC 1423 this Court observed:

> "If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the Court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance."

Reference may also be made to the decision of this Court in *Amarjit Kaur* v. *Pritam Singh,* (1974) 2 SCC 363 where effect was given to a change in the law during the pendency of an appeal, relying on the proposition formulated as long ago as *Kristnama Chariar* v. *Mangammal*, ILR (1902) 26 Mad 91 (FB) by BhashyamAyyangar, J., that the hearing of an appeal was, under the processual law of this country, in the nature of a re-hearing of the suit. In *Amarjit Kaur*, (1974) 2 SCC 363 this Court referred also to *Lachmeshwar Prasad Shukul* v. *Keshwar Lal Chaudhuri,* AIR 1941 FC 5 in which the Federal Court had laid down that once a decree passed by a court had been appealed against the matter became sub judice again and thereafter the appellate court acquired seisin of the whole case, except that for certain purposes, for example, execution, the decree was regarded as final and the Court below retained jurisdiction."

95. In *United Bank of India, Calcutta v. Abhijit Tea Co. Pvt. Ltd. & Ors.*, AIR 2000 SC 2957, with respect to change in law during the pendency of proceedings, it was observed:

> **"20.** Now, it is well settled that it is the duty of a court, whether it is trying original proceedings or hearing an appeal, to take notice of the change in law affecting pending actions and to give effect to the same. (See G.P. Singh: *Interpretation of Statutes*, 7th Edn., p. 406). If, while a suit is pending, a law like the 1993 Act that the Civil Court shall not decide the suit, is passed, the Civil Court is bound to take judicial notice of the statute and hold that the suit — even after its remand — cannot be disposed of by it."

96. In *Gurupad Khandappa Magdum* (supra), the question of Explanation I to section 6 of the Hindu Succession Act, 1956 came up

A for consideration with respect to the determination of widow's interest in the coparcenary property. Court held that a widow's share in the coparcenary property must be ascertained by adding the share to which she is entitled at a notional partition during her husband's lifetime and the share she would have obtained in her husband's interest upon his death. The first step is to ascertain the share of the deceased in the coparcenary property that would be worked out ultimately, and that shall be deemed to be the share in the property that should have been allotted to the deceased. What is therefore required to be assumed is that a partition had, in fact, taken place between the deceased and his coparceners immediately before his death. The assumption must permeate the entire process of ascertainment of the ultimate share of the heirs. All the consequences must be taken to a logical end. It was opined:

> "13. In order to ascertain the share of heirs in the property of a deceased coparcener it is necessary in the very nature of things, and as the very first step, to ascertain the share of the deceased in the coparcenary property. For, by doing that alone can one determine the extent of the claimant's share. Explanation 1 to Section 6 resorts to the simple expedient, undoubtedly fictional, that the interest of a Hindu Mitakshara coparcener "shall be deemed to be" the share in the property that would have been allotted to him if a partition of that property had taken place immediately before his death. What is therefore required to be assumed is that a partition had in fact taken place between the deceased and his coparceners immediately before his death. That assumption, once made, is irrevocable. In other words, the assumption having been made once for the purpose of ascertaining the share of the deceased in the coparcenary property, one cannot go back on that assumption and ascertain the share of the heirs without reference to it. The assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate share of the heirs, through all its stages. To make the assumption at the initial stage for the limited purpose of ascertaining the share of the deceased and then to ignore it for calculating the quantum of the share of the heirs is truly to permit one's imagination to boggle. All the consequences which flow from a real partition have to be logically worked out, which means that the share of the heirs must be ascertained on the basis that they had separated from

one another and had received a share in the partition which had taken place during the lifetime of the deceased. The allotment of this share is not a processual step devised merely for the purpose of working out some other conclusion. It has to be treated and accepted as a concrete reality, something that cannot be recalled just as a share allotted to a coparcener in an actual partition cannot generally be recalled. The inevitable corollary of this position is that the heir will get his or her share in the interest which the deceased had in the coparcenary property at the time of his death, in addition to the share which he or she received or must be deemed to have received in the notional partition."

The only question involved in the aforesaid matter was with respect to the Explanation of section 6 and the determination of the widow's share. In that case, the question was not of fluctuation in the coparcenary body by a legal provision or otherwise. Everything remained static. No doubt about it, the share of the deceased has to be worked out as per the statutory fiction of partition created. However, in case of change of body of the coparceners by a legal provision or otherwise, unless and until the actual partition is finally worked out, rights have to be recognised as they exist at the time of the final decree. It is only the share of the deceased coparcener, and his heirs are ascertained under the Explanation to section 6 and not that of other coparceners, which keep on changing with birth and death.

97. In *Anar Devi & Ors. v. Parmeshwari Devi & Ors* (supra), the decision in *Gurupad* (supra) was considered, and it was held that when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative claiming through such female relative, his undivided interest is not devolved by survivorship but upon his heir by intestate succession thus:

"8. According to the learned author, at page 253, the undivided interest"of the deceased coparcener for the purpose of giving effect to the rule laid down in the proviso, as already pointed out, is to be ascertained on the footing of a notional partition as of the date of his death. The determination of that share must depend on the number of persons who would have been entitled to a share in the coparcenary property if a partition had in fact taken place immediately before his death and such person would have to be ascertained according to the law of joint family and

A partition. The rules of Hindu law on the subject in force at the time of the death of the coparcener must, therefore, govern the question of ascertainment of the persons who would have been entitled to a share on the notional partition".

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

In *Anar Devi* (supra), the question of enlargement of right by a legal provision or otherwise change in the coparcener's share was not F involved. The decision cannot help the cause set up of partition created by statutory fiction. Statutory fiction is with respect to the extent of the share of deceased coparcener in exigency provided in the proviso to section 6. Co-parcenary or HUF, as the case may be, does not come to an end by statutory fiction. Disruption of coparcenary by statutory fiction G takes place, is not the proposition laid down in the aforesaid decision.

98. In *Puttrangamma & Ors. v. M.S. Rangamma & Ors.*, AIR 1968 SC 1018, this Court considered the doctrine of Hindu law, separation in status by a definite, unequivocal and unilateral declaration thus:

"(4) It is now a settled doctrine of Hindu Law that a member of a H joint Hindu family can bring about his separation in status by a

definite, unequivocal and unilateral declaration of his intention to separate himself from the family and enjoy his share in severalty. There does not need to be an agreement between all the coparceners for the disruption of the joint status. It is immaterial in such a case whether the other coparceners give their assent to the separation or not. The jural basis of this doctrine has been expounded by the early writers of Hindu Law. The relevant portion of the commentary of Vijnaneswara states as follows:

"x x x xx "

[And thus though the mother is having her menstrual courses (has not lost the capacity to bear children) and the father has attachment and does not desire a partition, yet by the will (or desire) of the son a partition of the grandfather's wealth does take place]"

Saraswathi Vilasa, placitum 28 states:

–सकुनवयअनेन ज्ञायते परिभावां विना संकल्पमात्रेणापि विभाग सिद्धि ।
यथा पुत्रिकाकरणमेपउय परिभा–ब्बपतबयां विना संकल्पमात्रात्सिध्यति इति।।

[From this it is known that without any speech (or Explanation) even by means of a determination (or resolution) only, partition is effected, just an appointed daughter is constituted by mere intention without speech.]

Viramitrodaya of Mitra Misra (Ch. 11. pl. 23) is to the following effect:

–सकुनवयअत्रचपुत्रेच्छयायो जीवद्विभाग:1एकेच्छयापि
भवत्यवि–चवेयो–ब्बपतबयात–ेपउय ।–तकुनवय

[Here too there is no distinction between a partition during the lifetime of the father or after his death and partition at the desire of the sons may take place or even by the desire (or at the will) of a single (coparcener)].

VyavaharaMayukha of Nilakantabhatta also states:

–सकुनवयद्रव्यसामान्याधावेपि त्व–न्हतंअमयोहं विभक्त इति व्यवस्यामात्रेणापि भवत्येव विभाग
बुद्विवि–चवेयो–ब्बपतबयामात्रमेव हि विभाग:।। तस्यैवामिव्यजिकेयं व्यवस्था।।–तकुनवय

[Even in the absence of any common (joint family) property, severance does indeed result by the mere declaration 'I am

A separate from thee' because severance is a particular state (or condition) of the mind and the declaration is merely a manifestation of this mental state (or condition).]" (Ch. IV, S. III-I).

Emphasis is laid on the "budhivisesha" (particular state or condition of the mind) as the decisive factor in producing a severance in
B status and the declaration is stated to be merely "abhivyanjika" or manifestation which might vary according to circumstances. In *Suraj Narain* v. *Iqbal Narain*, (1913) ILR 35 All 80 the Judicial Committee made the following categorical statement of the legal position:

C "A definite and unambiguous indication by one member of intention to separate himself and to enjoy his share in severalty may amount to separation. But to have that effect the intention must be unequivocal and clearly expressed … Suraj Narain alleged that he separated a few months later; there is, however, no writing in support of his allegation, nothing to show that at that time he gave
D expression to an unambiguous intention on his part to cut himself off from the joint undivided family."

In a later case — *Girja Bai* v. *Sadashiv Dhundiraj*, ILR 42 Cal 1031, the Judicial Committee examined the relevant texts of Hindu Law and referred to the well-marked distinction that
E exists in Hindu law between a severance in status so far as the separating member is concerned and a de facto division into specific shares of the property held until then jointly, and laid down the law as follows:

"One is a matter of individual decision, the desire on the
F part of any one member to sever himself from the joint family and to enjoy his hitherto undefined or unspecified share separately from the others without being subject to the obligations which arise from the joint status; whilst the other is the natural resultant from his decision, the division and separation of his share which
G may be arrived at either by private agreement among the parties, or on failure of that, by the intervention of the Court. Once the decision has been unequivocally expressed and clearly intimated to his co-sharers, his right to obtain and possess the share to which he admittedly has a title is unimpeachable; neither the co-sharers can question it nor can the Court examine his conscience to find
H out whether his reasons for separation were well-founded or

sufficient; the Court has simply to give effect to his right to have his share allocated separately from the others."

In *Syed Kasam* v. *Jorawar Singh,* ILR 50 Cal 84, Viscount Cave, in delivering the judgment of the Judicial Committee, observed:

"It is settled law that in the case of a joint Hindu family subject to the law of the Mitakshara, a severance of estate is effected by an unequivocal declaration on the part of one of the joint holders of his intention to hold his share separately, even though no actual division takes place; and the commencement of a suit for partition has been held to be sufficient to effect a severance in interest even before decree."

(emphasis supplied)

99. 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.

100. As to the effect of legal fiction, reliance was placed on *Commissioner of Income Tax, Delhi v. S Teja Singh*, AIR 1959 SC 352, in which it was laid down that in construing the scope of legal fiction, it would be proper and even necessary to assume all those facts on which alone the fiction can operate. There is no dispute with the aforesaid proposition, but the purpose of fiction is limited so as to work out the extent of the share of the deceased at the time of his death, and not to affect the actual partition in case it has not been done by metes and bounds.

101. 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.

A 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. Legal fiction is only for a purpose it serves, and it cannot be extended beyond was held in *State of Travancore-Cochin &Ors. v. Shanmugha Vilas Cashew Nut Factory &Ors*., (1954) SCR 53; *Bengal Immunity Co. Ltd. v. State of Bihar&Ors.*, AIR 1955 SC661; and *Controller of Estate Duty v. Smt. S. Harish Chandra*, (1987) 167 ITR 230. A legal fiction created in law cannot be stretched beyond the purpose for which it has been created, was held in *MancheriPuthusseri Ahmed* (supra) thus:

> "8. xxx In the first place the section creates a legal fiction. Therefore, the express words of the section have to be given their full meaning and play in order to find out whether the legal fiction contemplated by this express provision of the statute has arisen or not in the facts of the case. Rule of construction of provisions creating legal fictions is well settled. In interpreting a provision creating a legal fiction the Court is to ascertain for what purpose the fiction is created, and after ascertaining this, the Court is to assume all those facts and consequences which are incidental or inevitable corollaries to the giving effect to the fiction. But in so construing the fiction it is not to be extended beyond the purpose for which it is created, or beyond the language of the section by which it is created. It cannot also be extended by importing another fiction. x xx"

102. It is apparent that the right of a widow to obtain an equal share in the event of partition with the son was not deprived under old section 6. Unamended Section 6 provided that the interest of a coparcener could be disposed of by testamentary or intestate succession on happening of exigency under the proviso. Under the old law before 1956 devise by a coparcener of Hindu Mitakshara family property was wholly invalid. Section 30 of the Act of 1956 provided competence for a male Hindu in Mitakshara coparcenary to dispose of his interest in the coparcenary property by a testament.

103. In *Gyarsi Bai v. Dhansukh Lal*, AIR 1965 SC 1055, it was held that the shares of all coparceners should be ascertained in order to work out the share of the deceased coparcener, partition to be assumed and given effect to when the question of allotment comes, but this Court did not lay down in the said decision that the deeming fiction and notional partition brought an end to the joint family or coparcenary.

104. 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.

105. In *Hari Chand Roach v. Hem Chand & Ors.*, (2010) 14 SCC 294, a widow inherited the estate of her husband and had an undivided interest in the property. The subsequent family arrangement was entered into whereby she exchanged her share for another property. This Court held that though her share was definite, the interest continued undivided, and there was a further family arrangement that will have the effect of giving her disposition over the property in question, which was given to her in the subsequent family arrangement. It is apparent that under an undivided interest, as provided under section 6, the shares are definite, but the interest in the property can continue undivided.

106. In the instant case, the question is different. What has been recognised as partition by the legislation under section 6, accordingly, rights are to be worked out. This Court consistently held in various decisions mentioned above that when the rights are subsequently conferred, the preliminary decree can be amended, and the benefit of law has to be conferred. Hence, we have no hesitation to reject the effect of statutory fiction of proviso to section 6 as discussed in *Prakash v. Phulavati* (supra) and *Danamma* (supra). If a daughter is alive on the date of enforcement of the Amendment Act, she becomes a coparcener with effect from the date of the Amendment Act, irrespective of the date of birth earlier in point of time.

In Ref. Section 6(5)

107. The Explanation to Section 6(5) provides that for the purposes of Section 6, 'partition' means effected by any registered partition deed or effected by a decree of a court. It is pertinent to mention that

A Explanation did not find place in the original Amendment Bill moved before the Rajya Sabha on 20.12.2004. The same was added subsequently. In the initial Note, it was mentioned that partition should be properly defined, leaving any arbitrary interpretation, and for all practical purposes, the partition should be evinced by a registered public document or have been affected by a decree of a court. In a case B partition is oral, it should be supported by documentary evidence. Initially, it was proposed to recognise the oral partition also, in case the same is supported by contemporaneous documentary evidence. The intention was to avoid any sham or bogus transactions in order to defeat the rights of coparcener conferred upon daughters by the Amendment Act, 2005. C In this regard, Note for Cabinet issued by the Legislative Department, Ministry of Law & Justice, Government of India, suggested as under:

> "As regards subsection 5 of the proposed new section 6, the committee vide paragraph has recommended that the term "partition" should be properly defined, leaving any arbitrary D interpretation. Partition for all practical purposes should be registered have been effected by a decree of the Court. In case where oral partition is recognised, be backed by proper documentary evidence. It is proposed to accept this recommendation and make suitable changes in the Bill."

E 108. Learned Solicitor General argued that the requirement of a registered partition deed may be interpreted as the only directory and not mandatory in nature considering its purposes. However, any coparcener relying upon any such family arrangements or oral partition so arrived must prove the same by leading proper documentary evidence.

F 109. The Cabinet note made on 29.7.2005 with respect to 'partition' is quoted hereunder:

> "5.2 In this connection it may be noted that the amendments made in the Hindu Succession Act, 1956 by the States of Andhra Pradesh, Karnataka, Maharashtra and Tamil Nadu and the Kerala G Joint Hindu Family System (Abolition) Act, 1975 will be superseded by any subsequent Central enactment containing provisions to the contrary as the Central legislation will prevail over the State enactments by virtue of operation of doctrine of repugnancy enunciated in article 254 of the Constitution. Innumerable settled transactions and partitions which have taken

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place hitherto will also become disturbed by the proposed course of action. Further, there could be heartburning from the majority of the Hindu population. In the circumstances, it is proposed that we may remove the distinction between married and unmarried daughters and at the same time clearly lay down that alienation or disposition of property made at any time before the 20th day of December, 2004, that is, the date on which the Hindu Succession (Amendment) Bill, 2004 was introduced in the Rajya Sabha will not be affected or invalidated. Consequential changes are also suggested in sub-section (5) of proposed section 6."

110. Section 6(5) as proposed in the original Bill of 2004 read thus:

"(5) Nothing contained in this section shall apply to a partition, which has been effected before the commencement of the Hindu Succession (Amendment) Act, 2004."

111. Shri R. Venkataramani, *Amicus Curiae*, argued that proviso to Section 6 is plain and clear. All dispositions, alienations, testamentary depositions, including partition effected prior to 20.12.2004, shall not be reopened. There may be a partition of coparcenary property, and they would have also acted in pursuance of such partition. There could be any number of instances where parties would have entered into family settlements or division of properties on the basis of respective shares or entitlement to succeed on a partition. In many of those cases, a simple mutation in revenue entries would have been considered as sufficient for severance of status. The Parliament did not intend to upset all such cases, complete transactions, and open them for a new order of succession. The partition effected merely to avoid any obligation under any law, for example, the law relating to taxation or land ceiling legislation, are not examples relevant for understanding the objects and scheme of Section 6. Therefore, the proviso to sub-Section (1) of Section 6 and sub-Section 5 of Section 6 is required to be given such meaning and extent to not dilute the relevance in the forward and future-looking scheme of Section 6. The past cases shall not be reopened for this purpose. He has relied upon *Shashika Bai* (supra).

112. Shri V.V.S. Rao, learned senior counsel appearing as *Amicus Curiae*, pointed out that under Section 6(5), as proposed in the Bill mentioned that nothing contained in the amended Section 6 should apply

A to a partition, which has been effected before the commencement of the Amendment Act. Following deliberation was made by the Committee:

"**Deliberation by the Committee**

35. During its deliberation on the Bill, the Committee pondered on the concept of 'partition' as referred to in the aforesaid sub section. When the Secretary (Legislative Department) was asked as to the validity of partition effected through oral means, he replied that it depends upon the facts of the particular case.The Secretary stated as below:

"Sub clause (5) (of the Bill) says that nothing contained in this section shall apply to a partition, which has been effected before the commencement of the Act. So, people may not have a chance of effecting registered partition or going to the court and getting it registered."

36. Further, the Legal Secretary stated as below:

"…. under the present legal position, it is not necessary that a partition should be registered. There is no legal requirement. There can be oral partition also."

General observation by the Committee

37. The Committee recommends that the term 'partition' should be properly defined leaving no scope for any arbitrary interpretation. Partition, for all practical purposes should be registered or should have been effected by a decree of the court. In cases, where oral partition is recognised, it should be backed by proper evidentiary support.

Subject to above, clause 2 of the Bill is adopted."

113. Shri V.V.S. Rao argued that the status of coparcener conferred on daughters cannot affect the partition made orally, and the explanation at the end of Section 6 was added after receiving report of the Parliamentary Committee. The partition may be effected orally and later on memorandum can be created for memory purposes. Such a document containing memorandum of partition is not required to be registered. The parties may settle their rights and enter into subsequent transactions based upon such a partition.It is not to unsettle the completed property transactions that had already taken place. The explanation should

not be understood as invalidating all the documents or oral partition in respect of the coparcenary property. In case genuineness of such document is questioned, it has to be proved to the satisfaction of the Court. The saving of transactions would safeguard the genuine past transaction and prevent unrest in the family system. Similar proposal was made by the Law Commission of India.

114. The learned counsel, Shri Sridhar Potaraju, argued that ignoring statutory fiction of partition under proviso to section 6, which provision had been incorporated in 1956 and continued till 2005, is not warranted.

115. Ms. Anagha S. Desai, learned counsel,argued that in the absence of partition deed also, partition could be effected by metes and bounds, and if it is proved properly, the daughters will not open these concluded transactions of coparcenary property.

116. The intendment of amended Section 6 is to ensure that daughters are not deprived of their rights of obtaining share on becoming coparcener and claiming a partition of the coparcenary property by setting up the frivolous defence of oral partition and/or recorded in the unregistered memorandum of partition. The Court has to keep in mind the possibility that a plea of oral partition maybe set up, fraudulently or in collusion, or based on unregistered memorandum of partition which may also be created at any point of time. Such a partition is not recognized under Section 6(5).

117. How family settlement is effected was considered in *Kale v. Deputy Director of Consolidation*, (1976) 3 SCC 119, thus:

> "**10.** In other words to put the binding effect and the essentials of a family settlement in a concretised form, the matter may be reduced into the form of the following propositions:
>
> "(*1*) The family settlement must be a bona fide one so as to resolve family disputes and rival claims by a fair and equitable division or allotment of properties between the various members of the family;
>
> (*2*) The said settlement must be voluntary and should not be induced by fraud, coercion or undue influence;
>
> (*3*) The family arrangement may be even oral in which case no registration is necessary;

A (*4*) It is well settled that registration would be necessary only if the terms of the family arrangement are reduced into writing. Here also, a distinction should be made between a document containing the terms and recitals of a family arrangement made *under the document* and a mere memorandum prepared after the family arrangement had already been made either for the purpose of the record or for information of the Court for making necessary mutation. In such a case the memorandum itself does not create or extinguish any rights in immovable properties and therefore does not fall within the mischief of Section 17(2) of the Registration Act and is, therefore, not compulsorily registrable;

C (*5*) The members who may be parties to the family arrangement must have some antecedent title, claim or interest even a possible claim in the property which is acknowledged by the parties to the settlement. Even if one of the parties to the settlement has no title but under the arrangement the other party D relinquishes all its claims or titles in favour of such a person and acknowledges him to be the sole owner, then the antecedent title must be assumed and the family arrangement will be upheld and the courts will find no difficulty in giving assent to the same;

(*6*) Even if bona fide disputes, present or possible, which E may not involve legal claims are settled by a bona fide family arrangement which is fair and equitable the family arrangement is final and binding on the parties to the settlement."

15. In *Tek Bahadur Bhujil* v. *Debi Singh Bhujil*, AIR 1966 SC 292, 295, it was pointed out by this Court that a family F arrangement could be arrived at even orally and registration would be required only if it was reduced into writing. It was also held that a document which was no more than a memorandum of what had been agreed to did not require registration. This Court had observed thus:

G "Family arrangement as such can be arrived at orally. Its terms may be recorded in writing as a memorandum of what had been agreed upon between the parties. The memorandum need not be prepared for the purpose of being used as a document on which future title of the parties be founded. It is usually prepared as a record of what had been agreed upon so that there be no

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hazy notions about it in future. It is only when the parties reduce the family arrangement in writing with the purpose of using that writing as proof of what they had arranged and, where the arrangement is brought about by the document as such, that the document would require registration as it is then that it would be a document of title declaring for future what rights in what properties the parties possess.""

(emphasis supplied)

It is settled law that family arrangements can be entered into to keep harmony in the family.

118. Reliance has been placed on *Shripad Gajanan Suthankar v. Dattaram Kashinath Suthankar,* (1974) 2 SCC 156, in which effect of adoption by a widow and its effect on partition and other alienation made before adoption was considered. , the following observations were made:

"**11.** Two crucial questions then arise. One-third share out of what? Should the gift by Mahadev of what was under the then circumstances his exclusive property be ignored in working out the one-third share? Two principles compete in this jurisdiction and judges have struck a fair balance between the two, animated by a sense of realism, impelled by desire to do equity and to avoid unsettling vested rights and concluded transactions, lest a legal fiction should by invading actual facts of life become an instrumentality of instability. Law and order are jurisprudential twins and this perspective has inarticulately informed judicial pronouncements in this branch of Hindu law.

18. We reach the end of the journey of precedents, ignoring as inessential other citations. The balance sheet is clear. The propositions that emerge are that: (*i*) A widow's adoption cannot be stultified by an anterior partition of the joint family and the adopted son can claim a share as if he were begotten and alive when the adoptive father breathed his last; (*ii*) Nevertheless, the factum of partition is not wiped out by the later adoption; (*iii*) Any disposition testamentary or inter vivos lawfully made antecedent to the adoption is immune to challenge by the adopted son; (*iv*) Lawful alienation in this context means not necessarily for a family necessity but alienation made competently in accordance with

A law; (*v*) A widow's power of alienation is limited and if — and only if — the conditions set by the Hindu Law are fulfilled will the alienation bind a subsequently adopted son. So also alienation by the Karta of an undivided Hindu family or transfer by a coparcener governed by the Benares school; (*vi*) Once partitioned validly, the share of a member of a Mitakshara Hindu family in which his own issue have no right by birth can be transferred by him at his will and such transfers, be they by will, gift or sale, bind the adopted son who comes later on the scene. Of course, the position of a void or voidable transfer by such a sharer may stand on a separate footing but we need not investigate it here."

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(emphasis supplied)

119. In *ChinthamaniAmmal v. NandgopalGounder,* (2007) 4 SCC 163, it was observed that a plea of partition was required to be substantiated as under law, there is a presumption as to jointness. Even separate possession by co-sharers may not, by itself, lead to a presumption of partition.

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120. In *Rukhmabai v. Laxminarayan,* AIR 1960 SC 335 and *Mudigowda Gowdappa Sankh & Ors. v. Ramchandra Revgowda Sankh (dead) by his LRs. &Anr.*, AIR 1969 SC 1076, it was observed that *prima facie* a document expressing the intention to divide brings about a division in status, however, it is open to prove that the document was a sham or a nominal one and was not intended to be acted upon and executed for some ulterior purpose. The relations with the estate is the determining factor in the statement made in the document. The statutory requirement of substituted Section 6(5) is stricter to rule out unjust deprivation to the daughter of the coparcener's right.

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121. In *Kalwa Devdattam v. Union of India,* AIR 1964 SC 880, it was laid down that when a purported petition is proved to be a sham, the effect would be that the family is considered joint.

122. Earlier, an oral partition was permissible, and at the same time, the burden of proof remained on the person who asserted that there was a partition. It is also settled law that Cesser of Commonality is not conclusive proof of partition, merely by the reason that the members are separated in food and residence for the convenience, and separate residence at different places due to service or otherwise does not show separation. Several acts, though not conclusive proof of partition, may

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lead to that conclusion in conjunction with various other facts. Such as separate occupation of portions, division of the income of the joint property, definement of shares in the joint property in the revenue of land registration records, mutual transactions, as observed in *Bhagwani v. Mohan Singh,* AIR 1925 PC 132, and *Digambar Patil v. Devram,* AIR 1995 SC 1728.

123. There is a general presumption that every Hindu family is presumed to be joint unless the contrary is proved. It is open even if one coparcener has separated, to the non-separating members to remain joint and to enjoy as members of a joint family. No express agreement is required to remain joint. It may be inferred from how their family business was carried on after one coparcener was separated from them. Whether there was a separation of one coparcener fromall other members of a joint family by a decree of partition, the decree alone should be looked at to determine the question was laid down in *Palani Ammal* (supra) and *Girijanandini Devi & Ors. v. Bijendra Narain Choudhary,* AIR 1967 SC 1124. In *Palani Ammal* (supra), it was held:

> "…… It is also now beyond doubt that a member of such a joint family can separate himself from the other members of the joint family and is on separation entitled to have his share in the property of the joint family ascertained and partitioned off for him, and that the remaining coparceners, without any special agreement amongst themselves, may continue to be coparceners and to enjoy as members of a joint family what remained after such a partition of the family property. That the remaining members continued to be joint may, if disputed, be inferred from the way in which their family business was carried on after their previous coparcener had separated from them. It is also quite clear that if a joint Hindu family separates, the family or any members of it may agree to reunite as a joint Hindu family, but such a reuniting is for obvious reasons, which would apply in many cases under the law of the Mitakshara, of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved…."

124. In *Hari Baksh v. Babu Lal,* AIR 1924 PC 126, it was laid down that in case there are two coparcener brothers, it is not necessary that there would be a separation *inter se* family of the two brothers. The family of both the brothers may continue to be joint.

A 125. The severance of status may take place from the date of filing of a suit; however, a decree is necessary for working out the results of the same, and there may be a change of rights during the pendency of the suit for allotting definite shares till final decree is passed. There are cases in which partition can be reopened on the ground of fraud or mistake, etc. or on certain other permissible grounds. In appropriate B cases, it can be reopened at the instance of minor also.

126. 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. C

127. 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 daughterand 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 D as substituted. Thestatutory 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 E 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 F to accept the genuine partitions that might have taken place under the prevailing law, and are not set up as a false defenceand 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 G become very easy to deprive the daughter of her rightsas 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, H

unregisteredone 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 preponderanceof 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 exceptioniscarved 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.

128. 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 consonancewith the spirit of the provisions of Section 6(5) and its Explanation.

129. Resultantly, we answer the reference as under:

A (i) The provisions contained in substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after amendment in the same manner as son with same rights and liabilities.

(ii) The rights can be claimed by the daughter born earlier with B effect from 09.09.2005 with savings as provided in Section 6(1) as to the disposition or alienation, partition or testamentary disposition which had taken place before 20th day of December, 2004.

(iii) Since the right in coparcenary is by birth, it is not necessary that father coparcener should be living as on 09.09.2005.

C (iv) The statutory fiction of partition created by proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class-I as specified in the Schedule D to the Act of 1956 or male relative of such female. The provisions of the substituted Section 6 are required to be given full effect. Notwithstanding that a preliminary decree has been passed the daughters are to be givenshare in coparcenary equal to that of a sonin pending proceedings forfinal decree or in an appeal.

E (v) In view of the rigor of provisions of Explanation to Section 6(5) of the Act of 1956, a plea of oral partition cannot be accepted as the statutory recognised mode of partition effected by a deed of partition duly registered under the provisions of the Registration Act, 1908 or effected by a decree of a court. However, in exceptional cases where plea of oral partition is supported by public documents and partition is F finally evinced in the same manner as if it had been affected by a decree of a court, it may be accepted. A plea of partition based on oral evidence alone cannot be accepted and to be rejected outrightly.

130. We understand that on this question, suits/appeals are pending before different High Courts and subordinate courts. The matters have G already been delayed due to legal imbroglio caused by conflicting decisions.The daughters cannot be deprived of their right of equality conferred upon them by Section 6. Hence, we request that the pending matters be decided, as far as possible, within six months.

In view of the aforesaid discussion and answer, we overrule the H views to the contrary expressed in *Prakash v. Phulavati* and

Mangammal v. T.B. Raju & Ors. The opinion expressed in *Danamma @ Suman Surpur & Anr. v. Amar* is partly overruled to the extent it is contrary to this decision.Let the matters be placed before appropriate Bench for decision on merits. A

Ankit Gyan Reference answered.