



Inclusion of daughter in Mitakshara coparcenary : a radical change

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Abstract

A Hindu coparcenary means only those persons who acquire by birth an interest in the joint family property or coparcenary property. Prior to 2005 a Hindu Mitakshara coparcenary consisted of the common male ancestor and three male lineal descendants. Now according to Section 6 of the Hindu Succession (Amendment) Act, 2005, a daughter of a coparcener has been included in Mitakshara coparcenary along with the sons of the coparcener. Proviso to substituted Section 6 (1) is violative of Article 14 of the Constitution of India. It discriminates against the daughter since the son is not debarred from challenging disposition of coparcenary property made before 20.12.2004, whereas the daughter is debarred. The Kerala Joint Hindu Family System (Abolition) Act, 1975 abolished the joint family system in the Kerala State with effect from 1.12.1976. Parliament may consider the desirability to strike down the entire coparcenary system as has been done by the Kerala State Legislature.

Keywords: Mitakshara, Dayabhaga, Coparcenary, Devolution of interest, Survivorship, Unobstructed Heritage

1. Introduction

A joint Hindu family consists of all persons lineally descended from a common ancestor, and includes their wives and unmarried daughters. The membership of a joint family can be divided into two classes viz. coparceners and ordinary members. Coparcenary is a narrower body than the joint family. Coparcenary consists of those members of the joint family whose interest in the joint family property is in the nature of ownership.¹ Coparceners can divide the property and can alienate it. The other members are the ordinary ones. They have the right to obtain maintenance from the joint family property but they have no ownership over it. Some of the members entitled to maintenance have the right to get a share when the partition of the joint family property takes place but they have no right to demand partition. Even after the Hindu Succession Act, 1956 coming into force, in Mitakshara coparcenary no females could be its members, though they were members of the joint family. A growing need was perceived to merit equal treatment to the nearest female relative, viz., daughter of a coparcener. The law relating to a joint Hindu family governed by

Mitakshara law underwent a radical change in 2005.

2. Objective

The objective of the present paper is to examine the law of coparcenary as amended by the Hindu Succession (Amendment) Act, 2005.

3. Methodology

The methodology adopted in the present paper is doctrinal legal research, study of case law and analysis of text law.

4. Daughter as a coparcener under the Hindu succession (Amendment) Act, 2005

On the recommendations of the Law Commission of India in its 174th report, Parliament passed the Hindu Succession (Amendment) Act, 2005 and amended the law of Mitakshara coparcenary making a daughter of a coparcener a member of Mitakshara coparcenary. The Hindu Succession (Amendment) Act, 2005 through substituted Section 6 has brought about fundamental changes, inter alia, in the composition of the Mitakshara coparcenary. In this connection the

relevant portion of Section 6 (1) and (2) is reproduced below:

“6.2 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.”

A perusal of the above provision reveals the following salient features:

1. The *Shastric* composition of the coparcenary has undergone a change. On and from 9.9.2005, the daughter of a coparcener becomes by birth a coparcener in her own right;
2. This provision applies irrespective of whether the daughter was born before or after the Hindu Succession Act, 1956, or before or after the Hindu Succession (Amendment) Act, 2005.³ This provision applies irrespective of whether she was married⁴ or unmarried;
3. The rights under Amendment of 2005 are applicable to living daughters of living coparceners as on 9.9.2005.⁵
4. There is a change in the law of partition. The daughter shall have the same rights on the coparcenary property as she would have had if she had been a son. She would have the right not only to seek partition of her interest as a coparcener but also to head the joint family as its *karta*.
5. The property to which the daughter of a

coparcener becomes entitled as a coparcener shall be held by her with all incidents of coparcenary;

6. The property held by her shall be capable of being disposed of by her testamentary disposition;
7. She shall be subject to the same liabilities in respect of the 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;
8. Nothing contained in sub-section (1) of Section 6 of the Amendment Act shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before 20.12.2004 when the Amendment Bill was introduced in the Rajya Sabha. The Explanation to Section 6 (5) lays down that partition means any partition made by execution of registered deed or a partition effected by the decree of a Court.

5. Coparcenary under Mitakshara

A Hindu coparcenary includes only those persons who acquire by birth an interest in the joint family property or coparcenary property. These are the sons (S), grandsons (SS) and great-grandsons (SSS) of the holder of the joint property for the time being. Thus, three generations next to the holder in unbroken male descent constitute coparcenary under Mitakshara law. A coparcenary cannot be created by agreement. It is creature of law as held by the Supreme Court in *Bhagwan Dayal v. Reoti Devi*.⁶ The adopted child also gets a right equal to the right of his adoptive father in the joint family property from the date of the adoption in view of the law laid down in Section 12 of the Hindu Adoptions and Maintenance Act, 1956. The daughter is not given a right by birth in the joint family property. Now according to the Hindu Succession (Amendment) Act, 2005, a daughter of a coparcener has been included in coparcenary along with the sons of the coparcener. Thus, Mitakshara coparcenary may be defined to consist of a male Hindu and all his male or female descendants by birth or by adoption up to the 4th degree of generation in the male line. The common male ancestor may or may not be the founder of the joint family property. The disappearance of any of the intermediary generation or generations during the life of the common male ancestor does not extend the coparcenary beyond the 4th degree of generation from him. On his death, the coparcenary extends up to the 4th degree of generations from the last holder or senior-

most surviving coparcener. Thus, with the removal of upper generations, the lower generations enter into the coparcenary. Where the father is living, there cannot be a coparcenary between his sons and daughters (i.e. brothers and sisters) excluding him.⁷ However, the coparcenary would continue between the brothers and sisters even after the death of their father. So long as one is not removed by more than 4 degrees from the last holder of the property, howsoever removed one may be, from the original holder, one will be a coparcener. But if one is removed by more than 4

degrees, one will not be a coparcener. The term ‘last holder’ means the senior-most living lineal male ancestor.

5.1 Diagrams illustrating composition of coparcenary

A few diagrams are given to illustrate the composition of the coparcenary. In the diagrams degree of generations from the common ancestor and serial number of generation have been shown against the member(s) of family.

<p>A---1 B---2 C---3 D---4 E---5 F---6 G---7</p>	<p>In diagram I there are 7 degrees of generation from A to G. Serial number of generation from 1-7 has been shown against the member of the family from A-G. A is the father and B to G are his 6 lineal male descendants.</p> <p>(i) The coparcenary consists of A,B,C and D. E, F and G are not coparceners. A is the last holder.</p> <p>(ii) If B dies before A, the coparcenary will now consist of A, C and D as A continues to be the last holder and E continues to be removed from the last holder by 5 degrees.</p> <p>(iii) Now, if C dies then also E will not become a coparcener and his position will remain unchanged. The coparcenary will consist of A and D.</p> <p>(iv) If A dies before D, then D becomes the last holder with the result that E, F and G at once will become coparceners.</p> <p>(v) If D dies before A, A will continue to be the last holder and E, F and G will continue to be removed by more than 4 degrees. At this stage A alone is the coparcener who is called sole surviving coparcener and coparcenary comes to an end. E, F, G can never become coparceners of this coparcenary.</p>
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Fig : 1

Fig : 2

In diagram II there are 5 degrees of generation. If B dies first and then C dies. At this stage coparcenary consists of A, and his 2 great-grandsons, D and E. Now if at this stage E dies, coparcenary will consist of A and D. At this stage ES and ES₁ get removed by more than 4 degrees from A, the last holder of the property and their chance of ever becoming coparceners comes to an end. If at this stage A dies, coparcenary will consist D and his two sons DS and DS₁.

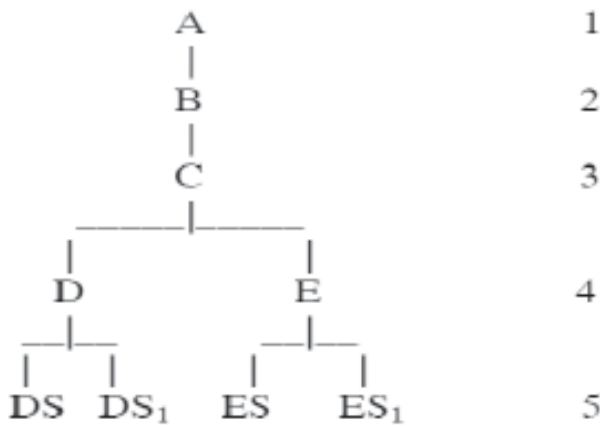


Fig. 2

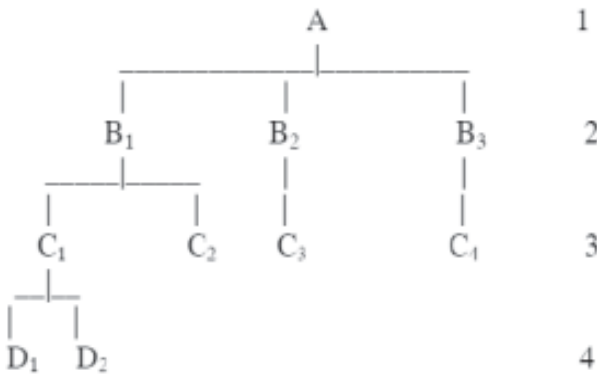


Fig. 3

In Figure 3-

- (i) A constitutes the coparcenary with all other persons because they are A's lineal descendants in the male line up to 4th degree.
- (ii) On the death of A, the coparcenary will consist of remaining other persons i.e. B₁, B₂ and B₃ (brothers) and their descendants. C₁, C₂, C₃ and C₄, and D₁ and D₂.
- (iii) On the death of A and B₁, the coparcenary will

consist of B₂, B₃ and their nephews C₁ and C₂, their sons C₃ and C₄ and the sons of C₁, namely D₁ and D₂.

- (iv) On the death of A, B₁, B₂ and B₃, the coparcenary will consist of C₁, C₂ and their cousin brothers C₃, C₄ and the sons of C₁, namely D₁, D₂.
- (v) On the death of A, B₁, B₂, B₃, C₁ and C₂, the coparcenary will consist of cousin brothers C₃, C₄ and their cousin nephews D₁, D₂.

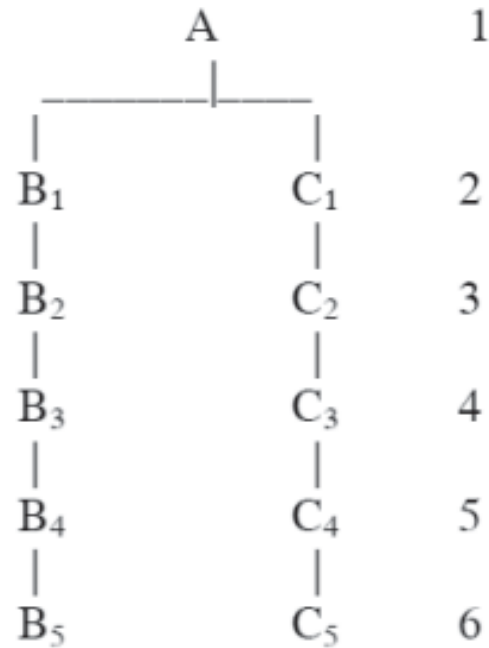


Fig : 4

In figure 4-

- (i) The coparcenary consists of A and his male descendants B₁, B₂, B₃, C₁, C₂ and C₃
- (ii) On the death of A, the coparcenary will consist of B₁, B₂, B₃ and B₄, C₁, C₂, C₃ and C₄. On A's death, B₄ and C₄ will enter into the coparcenary as they are at the 4th degree from their lineal ancestors B₁ and C₁
- (iii) On the death of A and B₁, coparcenary will not include B₅. The reason is that B₅ and C₅ are at equal distance from their common ancestor A. C₅ and B₅ cannot become members of the coparcenary during the life time of C₁
- (iv) On the death of A, B₁ and C₁, the coparcenary will extend to B₅ and C₅

The composition of a Mitakshara coparcenary after the inclusion of a daughter as a coparcener under Hindu Succession Amendment Act, 2005 is shown below.

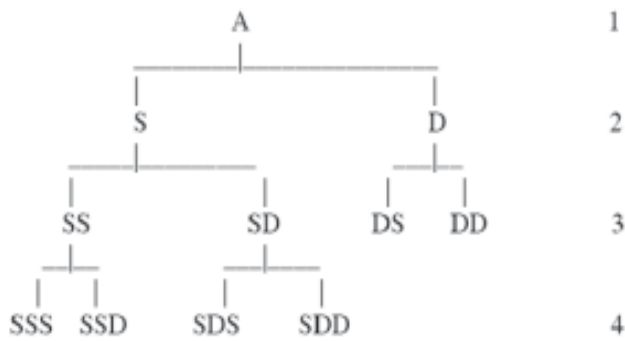


Fig : 5

In diagram 5-

- (i) Coparcenary consists of A, his son (S) and his daughter (D); his son’s son (SS) and son’s daughter (SD); his son’s son’s son (SSS); and son’s son’s daughter (SSD);
- (ii) A’s daughter’s son (DS) and daughter’s daughter (DD) are not included in the coparcenary;
- (iii) A’s son’s daughter’s son (SDS) and son’s daughter’s daughter (SDD) are not included in the coparcenary.

The persons under the categories (ii) and (iii) above are excluded from the coparcenary because a son or a daughter gets interest by birth in the coparcenary property equal to his or her father’s interest. They do not get interest in the coparcenary property of their mother. Thus, even after a daughter is made a coparcener under Act of 2005, her children are not the coparceners.

5.2 Coparcenary within the coparcenary

Separate coparcenaries may exist within a coparcenary. Let us depict it with the help of the following figure:

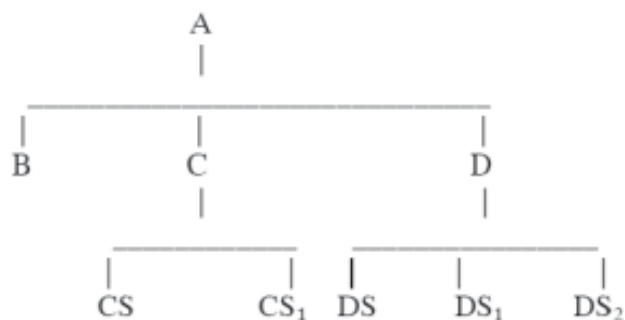


Fig : 6

A coparcenary consists of his 3 sons B, C, D, and 2 sons of C, CS and CS₁ and 3 sons of D, DS, DS₁, DS₂. C and D acquire separate property and die. CS and CS₁ inherit the separate property of C and between themselves, they constitute a coparcenary.

DS, DS₁ and DS₂ inherit separate properties of D and constitute a coparcenary. Two sub-coparcenaries come into existence. If sons are born to CS, CS₁; or DS, DS₁ or DS₂, they will get a birth right not only in the coparcenary headed by A but also in their respective sub-coparcenaries⁸.

6. Section 6 (1): Daughter of coparcener, a coparcener

Section 6 (1) accords to the daughter of a coparcener membership of the coparcenary in a Mitakshara governed joint Hindu family. Parliament has raised the position of a daughter and brought it equal to that of a son.

Actually the reform to make a daughter coparcener has already been made in 4 States by enacting law as under:

1. The Hindu Succession (Andhra Pradesh Amendment) Act, 1986
2. The Hindu Succession (Tamil Nadu Amendment) Act, 1989
3. The Hindu Succession (Maharashtra Amendment) Act, 1994, and
4. The Hindu Succession (Karnataka Amendment) Act, 1990

Parliament thought this measure good for all the States and enacted the Hindu Succession (Amendment) Act, 2005. Substituted Section 6 (1), Hindu Succession (Amendment) Act, 2005 confers on the daughter of a coparcener in the Mitakshara Joint Hindu family:(i) coparcenership by birth in her own right; (ii) the same rights; and (iii) the same liabilities in the coparcenary property as a son. However, Section 6 (1) lays down a proviso that this will not affect any disposition, alienation, partition or Will in respect of the properties which had taken place before 20.12.2004. The Hindu Succession (Karnataka Amendment) Act, 1990 also earlier made a daughter, a coparcener in the Mitakshara coparcenary but it imposed no such restriction on her right as laid down in Proviso to Section 6 of the Union Act, 2005.

6.1 Conflict between state and central laws

The Hindu Succession (Karnataka Amendment) Act, 1990 provides that it would not apply to a daughter married before the Amendment made in 1990. On the other hand, substituted Section 6, Hindu Succession Amendment Act, 2005, made no discrimination between a married and unmarried daughter. The question arose before the Karnataka High Court as to which provision Union law or State law would apply in Karnataka. It

was held by the Karnataka High Court that Article 254 (1) of the Constitution of India lays down that in case of a conflict between a State law and the Union law, the latter prevails and the State law is, to the extent of repugnancy, void. Proviso to Article 254 (2) lays down that nothing in Article 254 (2) shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the legislature of the State. The Court held that the provision of the Karnataka Amendment Act, 1990 refusing a married daughter a share on the partition of the joint family property is repugnant to the Central Amendment; hence, the former is void.⁹ The daughter cannot ask for partition of her coparcenary interest during the life time of her father. The reason is that the HSA related to intestate succession excepting Section 30 which relates to testamentary succession. The heading of Section 6 indicates that the provisions of the Act can be enforced when the right to succession opens on the death of the property holder and not during his life. It uses the word “devolve” which means to pass from a dead person to a living one. In *Miss R. Kantha v. Union of India*,¹⁰ it has been held that the Central Amendment Act of 2005 prevailed over the Karnataka Amendment Act, 1990.

6.2 Proviso to Section 6 (1): No effect on Disposition, Alienation or Testamentary Disposition before 20.12.2004

The legislature added a proviso to sub-section (1) of Section 6 providing that any dispositions or alienations, including a partition or testamentary disposition, entered into before 20.12.2004, when the Amendment Bill was introduced in the Rajya Sabha, are not affected. The operation of sub-section (1) of Section 6 is not intended to enlarge the scope of sub-section (1) but only to save those categories from being challenged by the new recognised daughter coparcener. The object of the proviso is to ensure that the partitions, alienations or testamentary disposition which had taken place before 20.12.2004 are not reopened. Whenever the legislature introduces a date for operation or exclusion, the avowed object is to see that certain position prevailing before that date is not disturbed. The legislature was apparently aware of the consequences that could ensue, if such restrictions were not placed on certain prevailing state of affairs.

7. Sub-section (2) of Section 6: Female coparcener to hold property with all

incidents of coparcenary benefits

Section 6 (2) stipulates that any property to which a female Hindu becomes entitled, under sub-clause (1), would be held by her with all the incidents of coparcenary ownership. Notwithstanding anything contained in the HSA or any other law, such property could be disposed of by such female by testamentary disposition. This section is limited only to coparcenary property and not to ‘any property’. Section 30 of the HSA as amended by the Hindu Succession (Amendment) Act, 2005 stipulates that any Hindu may dispose of by will or other testamentary disposition ‘any property’ which is capable of being so disposed of by him or by her. Section 30 has now been amended so as to include a female Hindu. Sub-section (2) of Section 6 stipulates the right of any female over coparcenary property. Therefore, daughters are entitled to a share in the ancestral property.¹¹ After the Amendment Act, 2005 came into force, the right of partition of the daughter would operate if no partition by execution by registered deed or decree of court was effected prior to 20.12.2004.¹² There is a restriction against reopening of partition which had taken place prior to the amendment of 2005. If the succession had opened prior to the amendment, the amended section would be inapplicable as held by the Supreme Court in *Sheela Devi v. Lalchand*.¹³

7.1 Incidents of coparcenary

In *State bank of India v. Ghamandi Ram*,¹⁴ the Supreme Court culled all the incidents of a Mitakshara coparcenary explained in numerous cases. The following are the incidents of a coparcenary:

(1) **Unobstructed heritage:** The lineal male descendants of a person up to the 4th generation acquire a right by birth in the ancestral properties of the father¹⁵. The doctrine of right by birth is a unique feature of the Mitakshara. The existence of the owner does not obstruct the accrual of the right in the property to another. Therefore, the Mitakshara coparcenary property is known as unobstructed heritage (*apratibandha daya*). The Mitakshara coparcenary takes birth with the birth of a son who becomes a coparcener of the coparcenary property along with his father.

(2) **Unity of possession and enjoyment:** There is a unity of possession and enjoyment of the properties. Hence, no coparcener can lay any claim to any specific item of property even on the ground of his personal possession of that property. The possession

of the property by a coparcener is on behalf of the whole family. Each member of the joint family is a co-sharer and possession of one is the possession of all¹⁶.

(3) Right to partition: The descendants can at any time work out their rights by asking for partition. The right to demand partition is almost absolute.

(4) No consent of other coparceners for partition: Coparceners have a right to demand partition but it is not subject to consent of other coparceners. There are only a few exceptions to this rule.

(5) Burden of proof of partition on member pleading partition: Each member of the coparcenary has ownership extending over the entire property conjointly with the rest of the coparceners till partition. This is the community of interest. All the property of the coparcenary constitutes one unit. All the coparceners jointly own the whole property and every coparcener singly also owns the whole property. In *Jagdish Dutt v. Dharam Pal*¹⁷, the Supreme Court held that when a decree is passed in favour of a joint family, the same has to be treated in favour of all the members of the joint family. It is only on partition that the shares of coparceners become separate or defined. If a member pleads that partition has taken place, he has to prove it by a reliable evidence.¹⁸

(6) No right of alienation: No alienation of the property can be made without the concurrence of the coparceners. An individual member cannot deal with the property according to his intents and purposes.

(7) Rule of survivorship pruned in 1956 and abolished in 2005: Under the *Shastric law*, the interest of a coparcener in Mitakshara coparcenary devolved by survivorship on the surviving coparceners. The HSA, 1956 retained the rule of survivorship under Section 6 subject to a proviso which laid down that if the deceased coparcener was survived by any of 9 heirs, his interest was to devolve by succession and not by survivorship. The 9 heirs were – his widow (W), mother (M), daughter (D), widow of the predeceased son (SW), daughter of a predeceased son (SD), son of a predeceased daughter (DS), daughter of a predeceased daughter (DD), widow of a predeceased son of a predeceased son (SSW), and daughter of a predeceased son of a predeceased son (SSD). It is clear from the long list that it rendered the application of the rule of survivorship in exceptional cases¹⁹. Sub-section (3) of Section 6 substituted by Amendment of 2005 HSA provides that the interest of a coparcener in the joint family property devolves on his death by testamentary or intestate succession under

the HSA and not by survivorship. Thus, the rule of survivorship has been abolished.

8. Coparcenary under dayabhaga law

Sons have no right by birth. There is no joint family between father and son. Therefore, sons have no right of survivorship. Under Dayabhaga school, all properties self-acquired as well as coparcenary properties devolve by succession. There is no coparcenary consisting of father (F), son (S), son's son (SS), son's son's son (SSS). A Dayabhaga coparcenary comes into existence for the first time on the death of the father. When sons inherit their father's property, they constitute a coparcenary.

9. Conclusion

A Hindu coparcenary means only those persons who acquire by birth an interest in the joint family property or coparcenary property. A Hindu coparcenary comprises the common male ancestor and three male lineal descendants. The law relating to a joint Hindu family governed by Mitakshara law underwent a radical change in 2005. Now according to the Hindu Succession (Amendment) Act, 2005, a daughter of a coparcener has been included in coparcenary along with the sons of the coparcener. Thus, Mitakshara coparcenary may be defined to consist of a male Hindu and all his male or female descendants by birth or by adoption up to the 4th degree of generation in the male line.

It is submitted that the Proviso to substituted Section 6 (1) is violative of Article 14 of the Constitution of India. It discriminates against the daughter since the son is not debarred from challenging disposition of coparcenary property made before 20.12.2004, whereas the daughter is debarred. If the object of the restriction was to prevent litigation and disturbance of the settled positions, it would equally apply to the son. Therefore, the Proviso has no nexus with the object.

The Kerala Joint Hindu Family System (Abolition) Act, 1975 abolished the joint family system in the Kerala State with effect from 1.12.1976. The Act received the assent of the President of India. Therefore, the laws made by the Indian Parliament do not prevail over the law of the State in case of repugnancy by virtue of Article 254(2) of the Constitution of India. Parliament may consider the desirability to strike down the entire coparcenary system as has been done by the State Legislature by the Kerala Joint Hindu Family System (Abolition) Act, 1975.

Footnotes

1. Shiv Ratan v. Kanhaiyalal, 1992: 1 HLR 80 (MP)
2. Substituted by Act 39 of 2005 Section 3 (w.e.f. 9.9.2005)
3. Sugalabai v. Gundappa A. Maradi, ILR 2007 Kar 479; Pravat Chandra Pattnaik. v. Sarat Chandra Pattnaik, AIR 2008 Orissa 133; Badrinaryan Shankar Bhandari v. Omprakash Shankar Bhandari, AIR 2014 Bom 151; Babu Dagadu Awari v. Baby, AIR 2015 (NOC) 446 (Bom)
4. Maritamgeevva v. Anusuya, AIR 2012 Kant 320; Leelabai Dagduba Hingne v. Bhikabai Shriram Pakhare, AIR 2015 (NOC) 161 (Bom)
5. Prakash & others v. Phulavati & others, 2015: 11 SCALE 643
6. AIR 1962 SC 287
7. Ashwani Kumar Dhingra v. State of Punjab, (1992) 2 SCC 592
8. Sundarsanam v. Naraismbulu, (1902) 25 Mad 149
9. Sugalabai v. Gundappa A. Maradi, (2008) 1 HLR 359 (Kant)
10. AIR 2010 Kant 27
11. Shantilata Sahu v. Sabitri Sahu, AIR 2008 Ori 86
12. Jamanbhai Maganbhai Mavani v. Bhanuben Maganbhai Mavani, AIR 2014 Guj 185; Pratibha Rani Tripathy v. Binod Bihari Tripathy, AIR 2014 Orissa 74
13. (2006) 8 SCC 581
14. AIR 1969 SC 1330
15. Sheela Devi v. Lal Chand, (2006) 8 SCC 581
16. Sakhahari Parwatrao Karahale v. Bhimashanka Parwatrao Karahale, (2002) 9 SCC 608
17. (1999) 3 SCC 644
18. Raj Kumar v. Hardit Singh, (1993) 2 HLR 656 (P&H)
19. K.M. Raghothaman v. M.P. Kannappan, AIR 1982 Mad 235

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