

4  
2

1

**IN THE HIGH COURT OF KARNATAKA AT BANGALORE**

Dated this the 19<sup>th</sup> day of March, 2010

PRESENT

**THE HON'BLE MR. JUSTICE N KUMAR**

AND

**THE HON'BLE MR. JUSTICE A N VENUGOPALA GOWDA**

REGULAR FIRST APPEAL No. 326 of 2004

BETWEEN:

Pushpalatha N.V.,  
W/o Nemraj  
Aged about 42 years  
R/at U-75, 5<sup>th</sup> Main  
Jabbar Block, Vyalikaval  
Bangalore - 560003

...Appellant

(By Sri L. Govindraj, Advocate)

AND:

1 V. Padma  
Widow of Vasantha Kumar D.N.  
Aged about 65 years  
Now r/at c/o N.V. Bahubali (Appi)  
Tej Stores, No.52  
II Main Road, Palace Guttahalli  
Bangalore - 560 003

✓

2 Asha N.V.  
W/o Shantharaj  
Aged about 40 years  
R/at No.52, II Main Road  
Palace Guttahalli  
Bangalore - 560 003

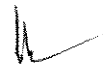
3 N V Tejkumar  
Aged about 40 years  
Door No. 646, 12<sup>th</sup> Main Road  
1<sup>st</sup> Block, 3<sup>rd</sup> Stage  
Basaveshwar Nagar  
Bangalore - 560 079

4 N V Bahubali (Appi)  
Aged about 36 years  
No.52/4, 4<sup>th</sup> Cross  
Nanjundeswara Nilaya  
Lakshminagar  
Kamal Nagar  
Bangalore

...Respondents

(By Sri R B Sadashivappa &  
Sri K G Naik Advocate for R1 to R4)

This RFA filed under section 96 of CPC against the judgment and award dated 17-1-2004 passed in OS No.16271/2001 on the file of the XXVIII Additional City Civil Judge, Mayohall Unit, Bangalore, partly decreeing the suit for declaration and possession.



This RFA having been heard, coming on for pronouncement of orders, this day, **N. Kumar J.**, pronounced the following:

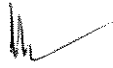
### **J U D G M E N T**

This is a plaintiff's appeal against the judgment and decree of the trial Court, granting her a decree for partition holding that she is entitled to 1/20<sup>th</sup> share in A, B and E Schedule properties and not 1/5<sup>th</sup> share in the suit properties as claimed by her.

2. For the purpose of convenience, the parties are referred to as they are referred to in the original suit.

3. The subject matter of the suit is five items of immovable properties. Two are urban properties and three are landed properties, which are more particularly described in the Schedule as, A,B, C, D and E schedule properties.

4. The case of the plaintiff is that her father, Sri D.N. Vasantha Kumar was the owner of all the suit schedule properties having acquired the same under the



registered partition deed dated 29.03.1967. He died on 31.12.1984, *inte state*. He left behind him, his wife V. Padma – the first defendant herein, the plaintiff and second defendant, the daughters and defendants-3 and 4, sons, as the legal heirs. All the children after his death have succeeded to his estate. They are all in joint possession of the suit properties. The plaintiff is entitled to  $1/5^{\text{th}}$  share in all the suit properties. 'A' Schedule property is earning a rent of Rs.1000-00 currently and the entire amount is appropriated by the defendants and no share is given to the plaintiff. Therefore, she is entitled to mesne profits to the extent of  $1/5^{\text{th}}$  share from the income of the said property. When she was not given her legitimate right in the property, she filed a suit for declaration that she is entitled to  $1/5^{\text{th}}$  share in the suit properties for partition and separate possession of her  $1/5^{\text{th}}$  share in the suit properties and also for mesne profits.

5. Defendants-1 to 4 after service of summons entered appearance and have filed a detailed written statement contesting the claim of the plaintiff. They admit the relationship. They admit the death of their father D.N. Vasanth

Kumar on 31.12.1984 leaving behind the legal heirs as mentioned in the plaint. They have denied the allegation that the suit properties exclusively belong to D.N. Vasanth Kumar. They also deny the joint possession. Their specific case is that the suit properties belong to Hindu Undivided Family of which Late D.N. Vasanth Kumar was the Kartha and co-parcener and his two sons, defendant-3 and 4 are the other two co-parceners. The schedule properties are ancestral properties acquired by late D.K. Nabhirajaiah, the father of D.N. Vasanth Kumar along with other properties. In the family partition which is evidenced by a registered deed of partition dated 29.03.1967, late D.N. Vasanth Kumar received the schedule properties towards his branch of the Hindu Undivided Family. Subsequent to the death of Sri D.N. Vasanth Kumar intestate on 31.12.1984, his legal heirs, i.e., the plaintiff and the defendants-1 to 4 have succeeded to his  $1/3^{\text{rd}}$  share in the suit properties and the other  $2/3^{\text{rd}}$  share in the schedule properties belong to defendants-3 and 4, the other two co-parceners. Presently, the possession of the schedule properties are with the first defendant, the eldest in the family, but for the



schedule 'D' property which has been lost under the Land Reforms Act, 1961 to the tillers of the land. Therefore, they deny the claim of the plaintiff to be entitled to 1/5<sup>th</sup> share in the joint family properties, but are ready to give the plaintiff the 1/20 share, to which she is entitled to in law.

6. In so far as the rental income from 'A' schedule property is concerned, two portions are rented out. Eviction proceedings are initiated against the tenants. The first defendant is receiving the monthly rent from the two shop premises and is appropriating the same towards her medicines and legal expenditures for prosecuting the eviction proceedings against the tenants. The plaintiff on many occasion has taken money from the first defendant for her personal and family needs which was never been accounted by the first defendant and if accounted it would far exceed the plaintiff's share in the shop rents which she is legally entitled to. Therefore, they sought for dismissal of the suit.

7. On the aforesaid pleadings, the trial Court framed the following issues:

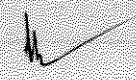


- (1) Whether the plaintiff proves that D.V. Vasanth Kumar died, intestate leaving schedule properties to plaintiff and defendants 1 to 4 to succeed?
- (2) Whether the plaintiff proves that she is entitled to 1/5<sup>th</sup> share in the schedule properties?
- (3) Whether the plaintiff proves that she is entitled for mesne profits?
- (4) What reliefs the parties are entitled to?
- (5) What decree or order?

8. The plaintiff in support of her claim examined herself as P.W-1 and she produced three documents, which are marked as Ex.P-1 to 3. On behalf of defendants, Sri N.V. Tej Kumar, the third defendant was examined as D.W-1. No documents are produced.



9. The trial Court on appreciation of the aforesaid oral and documentary evidence on record held that there was partition between Sri D.N. Vasanth Kumar and his brothers on 29.03.1967, in which partition, the suit properties fell to the share of D.N. Vasanth Kumar. Therefore, the suit properties are all ancestral properties/co-parcenary properties. Schedule C and D properties were lost under the Land Reforms Act, which is not disputed. As the schedule properties are co-parcenary properties, in view of Section 6 of the Hindu Succession Act, D.N. Vasanth Kumar would have got  $1/4^{\text{th}}$  share on partition between him, his wife and two sons and that  $1/4^{\text{th}}$  share of D.N. Vasanth Kumar would devolve on all the legal representatives equally and thus the plaintiff is entitled to  $1/5^{\text{th}}$  share in the  $1/4^{\text{th}}$  share of her father and not  $1/5^{\text{th}}$  share as claimed by the plaintiff. Therefore, it decreed the suit of the plaintiff granting her  $1/20^{\text{th}}$  share in A, B and E Schedule properties. It also held that as the 'A' Schedule property is rented out to tenants and a sum of Rs.1,147-00 being the rent collected from the two tenants, when admittedly no portion of the said amount is paid to the plaintiff, she is entitled to her



legitimate share in the rents also. However, a separate enquiry was ordered to determine mesne profits payable. Thus it decreed the suit of the plaintiff partly. Aggrieved by the said judgment and decree of the trial Court, the plaintiff is in appeal.

10. The said judgment was rendered on 17<sup>th</sup> January 2004. The Hindu Succession Act came to be amended by the Parliament by the Hindu Succession Act, 2005 (Act 39 of 2005) which came into force on 9<sup>th</sup> September, 2005. By the aforesaid amendment Act, Section 6 of the principal Act was substituted by new Section 6, providing for devolution of interest in co-parcenary property to a daughter of a co-parcener.

11. Sri. L. Govindraj, the learned Counsel for the appellant relying on the aforesaid amended provision of the Act, contended that, whether the schedule properties are the exclusive properties of the father or not, even if it is held to be co-parcenary property, as held by the trial Court, in view of the change in law, the plaintiff-daughter becomes a co-parcener by



birth in her own right in the same manner as the son and is entitled to same rights in the co-parcenary properties, and therefore, the appellant is entitled to 1/5<sup>th</sup> share in the schedule properties. Though the opening words states that 'On and from the commencement of the Hindu Succession (Amendment) Act, 2005, the daughter of a co-parcenary is treated as co-parcener, the effect of the said amendment is, the right is conferred on such daughter by birth, anterior to the amendment Act. The Parliament expressly has stated in what cases such a daughter is not entitled to a share by way of proviso. Admittedly, the suit properties are not alienated or partitioned before 20<sup>th</sup> December, 2004. Therefore, the plaintiff-appellant is entitled to equal share with the son, in the co-parcenary property also.

12. Per contra, Sri. R.B. Sadashivappa, the learned Counsel for the defendant-respondents contended that as the opening words of the amended provision suggests this provision is not retrospective in operation, but is prospective. On the death of the father, succession opened. The share to which each member of the family is entitled to, is determined

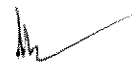


as on that date. Therefore the right to a particular share is vested in the sons on the date the succession opened. Such a vested right cannot be taken away by making this provision retrospective. The Section read as a whole do not expressly state that the said provision is retrospective. Even by implication, such an interpretation is not possible, as the Parliament has expressly stated in the opening words that it is only 'on and from the date of commencement of the Hindu Succession (Amendment) Act, 2005' such a right is conferred on the daughter. Therefore, he submits that notwithstanding the change in law during the pendency of the appeal, the benefit conferred on a daughter under the amended provision is not available to the plaintiff herein, as the amended provision is not applicable to the pending proceedings before the Court, as the right of the parties is to be determined in the light of the law which was in force on the date of the institution of the suit, and the date on which succession opened.



13. In the light of the aforesaid contentions, the points that arise for consideration in this appeal are as under:

- (1) What is the right of the daughter of a co-parcener in a Joint Hindu Family governed by Mitakshara Law in co-parcenary property by virtue of the amendment?
- (2) When Section 6 is not applicable to partitions already effected?
- (3) What is the right of a married daughter in a co-parcenary property?
- (4) Whether the amended provision is prospective or retrospective in operation?
- (5) Whether the amended provision applies to the pending proceedings before the Court?
- (6) What happens to the vested right under repealed Section 6 of (a) other female members (b) male members?

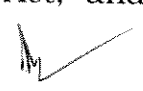


14. The answer to these questions depends on the interpretation to be placed on the amended Section 6. For a proper appreciation of the substituted Section 6 of the Act, four things are to be discerned and considered. They are:-

- (a) *What was the law before the amendment?*
- (b) *What was the mischief and defect, for which the earlier law did not provide for?*
- (c) *What is the remedy the parliament intended by amending the law?*
- (d) *The true reason for such remedy?*

15. Then the Judges shall place such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and to add force and life to cure the remedy, according to true intent of the makers of the Act.

16. In this background we have to see the law governing Hindu Joint Family, coparcenary, survivorship and succession. The joint family system comes first in the historical order. The law of inheritance is of later growth. When we talk about prior law, we have to keep in mind law prior to 1956 Act, and



subsequent Law till 2005 amendment Act. To understand the law of inheritance, we should know the meaning of the words "Mitakshara", "co-parcenary" and "Hindu Joint Family".

### **MITAKSHARA**

17. The term "*School of law*" as applied to different legal schools prevalent in different parts of India, seems to have been first used by Mr. Colebrooke. An account of the origin and development of the schools of Hindu law was given by the judicial committee of the Privy Council in the case of ***Collector of Madura v Mootto Ramalinga***: The remoter sources of the Hindu Law are common to all the different schools. The process by which those schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own glosses on the ancient text, and his authority having been received in one and rejected in another part of India, schools with conflicting doctrine arose. Mitakshara – a very modest title meaning a brief compendium – is a running commentary on the Code of Yajnavalkya and a veritable digest of Smriti law. It was written in the latter part of



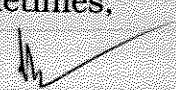
the eleventh century by Vijananeshwara, an ascetic. In Mitakshara which is more of a digest than a mere commentary on a particular Smriti, we find the quintessence of the Smriti law and its precepts and injunctions. The chief merit of the work consists in its comprehensive treatment of almost all important topics of the law and the synthesising of various Smriti texts. The meaning of the doctrine of sapinda relationship in the law of inheritance insisted upon by Vijaneshvara whereby of blood (propinquity) is to be preferred to community in the offering of religious ablations is the governing factor whereby under the Mitakshara law the right to inherit arises. According to the Mitakshara law, each son acquires at his birth an equal interest with his father in all ancestral property held by the father and on the death of the father, the son takes the property, not as his heir, but by survivorship. The position of the son or grandson in the Mitakshara is somewhat similar to that of "*sui heredes*" who under the Roman law are regarded as having a sort of dormant ownership in the estate of their father ever during his lifetime. The succession was not so much a succession as coming into



enjoyment of what in a sense had already partly belonged to them. It is usual to subdivide the Mitakshara School of Hindu law into four schools namely the Benares, the Mithila, the Bombay and the Madras School. The variances between the subdivisions of the Mitashara school are comparatively few and slight. Except in respect of the Bombay school, this division serves no useful purpose, nor does it rest upon any true or scientific basis. Mithakshara has for more than nine centuries occupied a place of ascendancy and authority unique and unrivalled in the annals of legal literature, Vijnaneshwara was one of the greatest of the juristheologians who contributed to the making of Hindu law. The Mitakshara holds sovereign sway in the whole of India except Bengal.

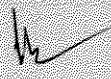
### **CO-PARCENARY**

18. A CO-PARCENER is one who shares (equally) with others in inheritance in the estate of a common ancestor. Otherwise called parceners, are such as have equal portion in the inheritance of an ancestor, or who come in equality to the lands of their ancestors. A person to whom an estate descends jointly and who holds it as an entire estate. But sometimes,



two or more persons together constituted the heir, and in this case they took the land as 'parceners' or 'coparceners', the latter expression being the more common. In theory of law, coparceners together constituted a single heir; 'they be but one heir and yet several persons'. They were called parceners because, every coparcener had a common law right to have a partition made.

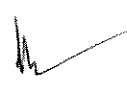
19. A male member of a joint family and his sons, grandsons and great grandsons constitute a coparcenary. In other words, three generations comes to the holder in unbroken male descendant. Co-parcenary is a creature of law. It cannot be created by act of parties. By adoption, a stranger may be introduced as a member thereof. It is a family unit. 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. No female can be a co-parcener.



20. The Supreme Court in the case of **BHAGWAN DAYAL (SINCE DECEASED) Vs. MST. REOTI DEVI (DECEASED)** reported in **AIR 1962 SC 287**, held as under:

"Coparcenary 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 recognise 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 specifically recognized by it. The acquisitions made by the members of different branches jointly cannot be impressed with the incidents of joint family property. They can only be co-sharers or co-tenants, with the result that their properties pass by inheritance & not by survivorship."



21. The Supreme Court in the case of **SUNIL KUMAR AND ANOTHER v. RAM PRAKASH AND OTHERS [(1988) 2 SCC 77]**, held as under : -

*"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 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 degree can offer spiritual ministrations to an ancestor. Only males can be coparceners."*

**HINDU JOINT FAMILY:**

22. The joint undivided family is a normal condition of a Hindu society. Joint Hindu Family consists of all persons lineal descended from a common ancestors and includes all wives and unmarried daughters. Undivided Hindu family is originally joint not only in estate but also in food and worship.

The existence of joint estate is not an essential requisite to constitute joint family and family which does not own any property, may nevertheless be joint. Hindu Joint Family is by birth and joint family property is only adjunct of the joint family. Joint or Undivided Hindu Family may consists of single male member and widows of deceased male members. The property of a joint family does not cease to be a joint family property belonging to any other family merely because the family is represented by a single male member. It may consists of a male Hindu and his wife. It may even consists of two joint members. However, there must be atleast two members to constitute joint family. The general principle is that a Hindu Family is presumed to be Joint unless the contrary is proved. A daughter ceases to be a member of her father's family, on marriage and becomes member of her husband's family.

23. The Privy Council in the case of **KALYANJI VITHALDAS Vs. COMMISSIONER OF INCOME-TAX, BENGAL**, reported in **AIR 1937 PC 36**, explained the meaning of Hindu undivided family as under:



*"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."*

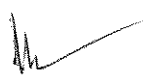
24. The Apex Court in the case of **SMT. SITABAI AND ANOTHER Vs. RAMACHANDRA** reported in **AIR 1970 SC 343** held thus:

*"Under the Hindu system of law a joint family may consist of a single male member and widows of deceased male members and the property of a joint family does 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. The property which was the joint family property of the Hindu undivided family does not cease to be so because of the "temporary reduction of the coparcenary unit to a single individual". The character of the property, viz. That it was the joint property of a Hindu undivided family remains the*

same. It is only by analysing the nature of the rights of the members of the undivided family, both those in being and those yet to be born, that it can be determined whether the family property can properly be described as 'joint property' of the undivided family."

25. The Supreme Court in the case of **GOWLI BUDDANNA Vs., COMMISSIONER OF INCOME-TAX, MYSORE** reported in **AIR 1966 SC 1523** held thus:

6. "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."

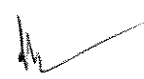


26. The Apex Court in the case of **BHAGWATI PRASAD SAH AND OTHERS Vs. DULHIN RAMESHWARI KUER AND ANOTHER** reported in **AIR 1952 SC 72**, held as under:

*"The general principle undoubtedly is that a Hindu family is presumed to be joint unless the contrary is proved but where one of the coparceners separates himself from the other members of the joint family and has his share in the joint property partitioned off for him, there is no presumption that the rest of the coparceners continued to be joint. 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 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."*

#### **LAW PRIOR TO 1956**

27. Prior to the Act of 1956, Hindus were governed by Shastric and Customary laws which varied from region to region and sometimes it varied in the same region on a caste basis. As the country is vast and communications



and social interactions in the past were difficult, it led to a diversity in the law. Consequently in matters of succession also, there were different schools, like Dayabhaga in Bengal and the adjoining areas; Mayukha in Bombay, Konkan and Gujarat and Marumakkattayam or Nambudri in Kerala and Mitakshara in other parts of India with slight variations. The multiplicity of succession laws in India, diverse in their nature, owing to their varied origin made the property laws even more complex.

28. The two systems of inheritance which is predominant amongst the Hindus in India are; Mitakshara system and Dayabhaga system. Dayabhaga system prevails in Bengal, Mitakshara system in other parts of India. The difference between the two systems arises from the fact that, while the doctrine of religious efficacy is the guiding principle under Dayabhaga School, there is no such definite guiding principle under Mitakshara School. Sometimes, consanguinity has been regarded as the guiding principle and at other times, religious efficacy.



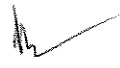
29. Mitakshara recognises two modes of devolution of property, namely, survivorship and succession. The rule of survivorship applies to joint family property, the rule of succession apply to property held in absolute severalty by the last owner. Dayabhaga recognises only one mode of devolution, namely, succession. It does not recognise the rule of survivorship even in the case of joint family property. The reason is that while every member of a Mitakshara joint family has only an undivided interest in the joint property, a member of a Dayabhaga joint family holds his share in quasi-severalty, so that it passes on his death to his heirs as if he was absolutely seized thereof, and not to the surviving coparceners as under Mitakshara law.

30. Under the Mitakshara law, on birth, the son acquires a right and interest in the family property. According to this school, a son, grandson and a great grandson constitute a class of coparcenars, based on birth in the family. No female is a member of the coparcenary in Mitakshara law. Under the Mitakshara system, joint family property devolves by survivorship



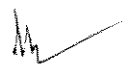
within the coparcenary. This means that with every birth or death of a male in the family, the share of every other surviving male either gets diminished or enlarged. If a coparcenary consists of a father and his two sons, each would own one third of the property. If another son is born in the family, automatically the share of each male is reduced to one fourth.

31. The rule of inheritance laid down in Mitakshara are followed by the Bombay, Madras, Benares and Mithila Schools, all the schools being sub-divisions of Mitakshara School. However, the rules of inheritance in force in the several states represented by these schools are not entirely the same. They differ in certain aspects namely, the order of inheritance as laid down in Mitakshara is not strictly followed in Bombay, Gujarat and the North Konkon. The order of succession to males in the Bombay State is different from that in other parts of India where Mitakshara law prevails. The reason is that in those places preference is given to the Vyavahara Mayukha of Nilkanta Bhatta on few points, where it differs from Mitakshara. The difference arises from the fact that the



Bombay School recognises as heirs certain females who are not recognised as heirs in other parts of India. In the Bombay State itself there is a difference between the order of succession in cases governed by the Mayukha. In the Bombay State, daughters do not take as joint tenants with benefits of survivorship, but they take as tenants-in-common. Further, a daughter in that State does not take a limited estate in her father's property, but takes the property absolutely. Thus if a Hindu governed by the Bombay School dies leaving two daughters, each daughter takes an absolute interest in a moiety of her father's estate, and holds it as her separate property, and on her death her share will pass to her own heirs as her stridhana.

32. The Dayabhaga school neither accords a right by birth nor by survivorship though a joint family and joint property is recognised. Neither sons nor daughters become coparceners at birth nor do they have rights in the family property during their father's life time. However, on his death, they inherit as tenants-in-common. *It is a notable feature of the Dayabhaga School that the daughters also get*



*equal shares alongwith their brothers.*

33. In the Marumakkattayam law, which prevailed in Kerala wherein the family was joint, a household consisted of the mother and her children with joint rights in property. The lineage was traced through the female line. *Daughters and their children were thus an integral part of the household and of the property ownership as the family was matrilineal.*

34. The earliest legislation bringing females into the scheme of inheritance is the Hindu Law of Inheritance Act, 1929. This Act, conferred inheritance rights on three female heirs i.e. son's daughter, daughter's daughter and sister, thereby creating a limited restriction on the rule of survivorship. Another landmark legislation conferring ownership rights on woman was the Hindu Women's Right to Property Act (XVIII of ) 1937. This Act brought about revolutionary changes in the Hindu Law of all schools, and brought changes not only in the law of coparcenary but also in the law of partition, alienation of property,



inheritance and adoption. The Act of 1937 enabled the widow to succeed along with the son and to take a share equal to that of the son. But, the widow did not become a coparcener even though she possessed a right akin to a coparcenary interest in the property and was a member of the joint family. The widow was entitled only to a limited estate in the property of the deceased with a right to claim partition. A daughter had virtually no inheritance rights.

35. The framers of the Indian Constitution took note of the adverse and discriminatory position of women in society and took special care to ensure that the State took positive steps to give her equal status. Articles 14, 15(2) and (3) and 16 of the Constitution of India, thus not only inhibit discrimination against women but in appropriate circumstances provide a free hand to the State to provide protective discrimination in favour of women. These provisions are part of the Fundamental Rights guaranteed by the Constitution. Part IV of the Constitution contains the Directive Principles which are no less fundamental in the governance of

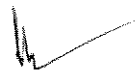


the State and inter-alia also provide that the State shall endeavour to ensure equality between man and woman.

**LAW AFTER 1956 ACT AND PRIOR TO 2005**

**AMENDMENT ACT:**

36. Sri Pandit Jawaharlal Nehru, the then Prime Minister of India expressed his unequivocal commitment to carry out reforms to remove the disparities and disabilities suffered by Hindu women. As a consequence, despite the resistance of the orthodox section of the Hindus, the Hindu Succession Act, 1956 was enacted and came into force on 17th June, 1956. It applies to all the Hindus including Buddhists, Jains and Sikhs. It lays down a uniform and comprehensive system of inheritance and applies to those governed both by the Mitakshara and the Dayabhaga Schools and also to those in South India governed by the the Murumakkattayam, Aliasantana, Nambudri and other systems of Hindu Law. Many changes were brought about giving women greater rights, yet in section 6 the Mitakshara Coparcenary was retained.

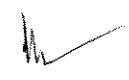


37. The provisions regarding succession in the Hindu Code Bill, as originally framed by the B.N.Rau Committee and piloted by Dr.Ambedkar, was for abolishing the Mitakshara coparcenary with its concept of survivorship and the son's right by birth in a joint family property and substituting it with the principle of inheritance by succession. These proposals met with a storm of conservative opposition. When Dr. Ambedkar was questioned as to how this happened in the Select Committee he said: "It was not a compromise. My enemies combined with my enthusiastic supporters and my enemies thought that they might damn the Bill by making it appear worse than it was".

38. Therefore, the Hindu Succession Act, 1956 enacted by the Parliament conferred on women and in particular to a daughter equal rights as that of the son. The limited ownership rights in the property conferred under earlier laws blossomed into full ownership in respect of any property possessed by a female Hindu whether acquired before or after the commencement of the Act by virtue of Section 14 of the Act. The explanation to Section 14(1) made it clear, the property



referred to in Section 14 includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of the Act. Therefore, a Hindu women with the advent of the Act enjoyed the absolute ownership rights in the property possessed and acquired by her and she was at liberty to exercise her right in the same as such absolute owner. In respect of the property of a male Hindu dying *intestate*, equal rights were given to a female Hindu by treating her as Class I heir along with son of the deceased. However, the said enactment had no application to coparcenary property. Prior to 1956 Act, the daughter in a Hindu Joint Family governed by Mitakshara law was not considered a co-parcener. Even after 1956 Act the position continued to be the same. The Act of 1956 did not deal with devolution of interest in the coparcenary property. Section 6



made it clear that, when a male Hindu dies after the commencement of the Act, having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolve by survivorship upon the surviving members of the coparcenary and not in accordance with the Act. Therefore, the Act was not made applicable to coparcenary property. However, the proviso to the said Section provided that, if a male Hindu dies leaving behind a surviving female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, the interest of the deceased in Mitakshara coparcenary property shall devolve by testamentary or intestate succession, as the case may be, under the Act and not by survivorship.

39. The inequality between a son and a daughter contained in the shastric and customary Mitakshara law continued to persist. The concept of the Mitakshara coparcenary property retained under section 6 of the Hindu Succession Act has not been amended ever since its enactment. It is a matter of some satisfaction that, five states in India namely, Kerala, Andhra Pradesh, Tamil Nadu,

Maharashtra and Karnataka took cognisance of the fact that a woman needs to be treated equally both in the economic and the social spheres. In the year 1994, the States of Karnataka, Andhra Pradesh, Maharashtra, for the first time brought in amendments to Section 6 conferring right on daughters in coparcenary property and treating them as co-parcenars. As per the law of four of these states, (Kerala excluded), in a joint Hindu family governed by Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son. However, the said benefit was not extended to the case of partitions anterior to the said law and to the married daughters. Kerala, however, has gone one step further and abolished the right to claim any interest in any property of an ancestor during his or her lifetime founded on the mere fact that he or she was born in the family. In fact, it abolished the Joint Hindu family system altogether including the Mitakshara, Marumakkattayam, Aliyasantana and Nambudri systems. Thus enacting that joint tenants be replaced by tenants in common. However, the other states instead of abolishing the right by birth



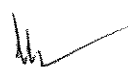
strengthened it, while broadly removing the gender discrimination inherent in Mitakshara Coparcenary.

40. Social justice demands that a woman should be treated equally both in the economic and the social sphere. The exclusion of daughters from participating in coparcenary property ownership merely by reason of their sex is unjust. Improving their economic condition and social status by giving equal rights by birth is a long felt social need. Undoubtedly a radical reform of the Mitakshara law of coparcenary was needed to provide equal distribution of property not only with respect to the separate or self-acquired property of the deceased male but also in respect of his undivided interest in the coparcenary property.

41. Therefore, notwithstanding such conferment of coparcenary property rights in property by birth, discrimination persisted between a married daughter and an unmarried daughter and the married daughter and a married son. It led to heart burning. The law prior to amendment denied the



daughter the status of coparcenar in a Joint Hindu Family and equal rights in the property with the son, and the State tolerated this in- equality for nearly 50 years. Article 13 of the Constitution declares that all laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part III fundamental rights shall, to the extent of such inconsistency, be void. The Act was enacted after the commencement of the Constitution. Article 13(2) declares that the State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of the said clause, shall to the extent of the contravention, be void. It took nearly 50 years to realise this inequality and restore equality. It is in this background the Parliament took note of the events for the last 50 years after the enactment, various pronouncements of the Apex Court while interpreting Articles 14, 15 and 16 and the attempts made by successive Governments to eradicate gender bias and came up with the Hindu Succession (Amendment) Act, 2005. That is the purpose of this amendment.



**POINT NO.1****HINDU SUCCESSION (AMENDMENT) ACT 2005  
(Act No. 39 of 2005)**

42. The Hindu Succession (Amendment) Bill, 2005 was passed by the Rajya Sabha on 16<sup>th</sup> August 2005, and by the Lok Sabha on 29<sup>th</sup> August 2005, and assented by the President of India on 5<sup>th</sup> September 2005. It came into force from 9<sup>th</sup> September, 2005. The provisions introduced by way of amendment has to be understood in the background of the law as it stood before, the mischief sought to be remedied by the amendment, and also the objects and reasons set out in the amendment Act.

**STATEMENT OF OBJECTS AND REASONS**

43. 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 Mitakshara 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 had led to oppression and negation of her fundamental right of equality guaranteed by the Constitution having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and 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. 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.

44. Before we interpret this provision, it is necessary to keep in mind the principle of interpretation which is relevant in interpreting this provision.

#### **INTERPRETATION**

The Apex Court in the case of **MAHADFOLAL KANODIA**  
**vs ADMINISTRATOR GENERAL OF WEST BENGAL** reported



in **AIR 1960 SC 936**, has laid down the principles to be applied as under: :

- (1) Statutory provisions which create or take away substantive rights are ordinarily prospective. They can be retrospective if made so expressly or by necessary implication and the retrospective operation must be limited only to the extent to which it has been so made either expressly or by necessary implication.
- (2) The intention of the legislature has to be gathered from the words used by it, giving them their plain, normal grammatical meaning.
- (3) If any provision of a legislation, the purpose of which is to benefit a particular class of persons is ambiguous so that it is capable of two meanings, the meaning which preserves the benefits should be adopted.
- (4) If the strict grammatical interpretation gives rise to an absurdity or inconsistency, such interpretation should be discarded and an interpretation which will give effect to the purpose will be put on the words, if



necessary, even by modification of the language used.

45. In **COMMISSIONER OF INCOME TAX VS. INDIAN BANK LIMITED (AIR 1965 SC 1473)**, the Supreme Court reiterated:

*"In our opinion, in construing the Act, we must adhere closely to the language of the Act. If there is ambiguity in the terms of a provision, recourse must naturally be had to well established principles of construction, but it is not permissible first to create an artificial ambiguity and then try to resolve the ambiguity by resort to some general principles"*

15.3. The principles are so succinctly stated in *American Jurisprudence (2<sup>nd</sup> Edition, Vol.73, page 434, Pr.366)*, quoted with approval in *S.R. Bommai Vs. Union of India (AIR 1994 SC1980)*.

*"While it has been held that it is duty of the courts to interpret as statute as they find it without reference to whether its provisions are expedient or inexpedient. It has also been recognised that where a statute is ambiguous and subject to more than*



one interpretation, the expediency of one construction or the other is properly considered. Indeed, where the arguments are nicely balanced, expediency may trip the scales in favour of a particular construction. It is not the function of a court in the interpretation of statutes, to vindicate the wisdom of the law. The mere fact that the statute leads to unwise results is not sufficient to justify the Court in rejecting the plain meaning of unambiguous words or in giving to a statute a meaning of which its language is not susceptible, or in restricting the scope of a statute. By the same token an omission or failure to provide for contingencies, which it may seem wise to have provided for specifically, does not justify any judicial addition to the language of the statute. To the contrary, it is the duty of the Courts to interpret a statute as they find it without reference to whether its provisions are wise or unwise, necessary or unnecessary, appropriate or inappropriate, or well or illconceived."

15.4. Rule of interpretation are meant to ascertain the true intent and purpose of the enactment and set right any anomaly, inconsistency or ambiguity, while giving effect to it. The several rules of interpretation when juxtapositioned may give an



impression that they are inconsistent with each other. Further, the same provision, when interpreted with reference to different Rules of interpretation may lead to different results. This is because the Rules of interpretation are meant to set right different types of defects. It is not possible to apply all rules of interpretation together, to a provision of law. An appropriate rule of interpretation should be chosen as a tool depending upon the nature of the defect in drafting which has to be set right. The Rules of interpretation are to be applied in interpreting the statutes, only if there is ambiguity, inconsistency, absurdity or redundancy. Where the words are clear the unambiguous, there is little need to open the tool kit of Interpretation."

46. Keeping in mind these principles, the substituted Section 6 is to be interpreted. Section 6 reads as under:-

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



- (a) by birth become a coparcener in her own right in the same manner as the son;
- (b) have the same rights in the coparcenary property as she would have had if she had been a son;
- (c) be subject to the same liabilities in respect of the said coparcenary property as that of a son, and any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener:

Provided that nothing contained in this sub-section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20<sup>th</sup> 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;
- (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 a predeceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-



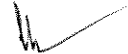
deceased daughter, as the case may be.

**Explanation.-** For the purposes of this sub-section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not.

(4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great-grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt;

Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005 nothing contained in this sub-section shall affect.-

- (a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or



- (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule or pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted.

*Explanation.-* For the purposes of clause (a), the expression "son", "grandson" or "great-grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005.

- (5) Nothing contained in this section shall apply to a partition, which has been effected before the 20<sup>th</sup> 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. The heading of the Section, "devolution of interest in coparcenary property" is retained. There is no change. The word "coparcenary" and "Joint Hindu Family" was used in all schools of Hindu Law, though the rights of coparcenars and members of the Joint family differed. The un-amended Section 6 dealt with interest of a male Hindu in a Mitakshara coparcenary property, as a female Hindu was not recognized as a coparcener at all. The parliament intended to change the existing law and create and confer such right on a daughter of a coparcener also. Therefore, they chose to make a declaration signaling the change in the law, as it existed till then and heralding a new era. The intention behind the amendment is to confer such coparcenary right on the daughter of a coparcener, which was hitherto not recognized both under the Shastric Hindu Law and the Act. The discrimination sought to be removed was not existing in all Schools of Hindu Law. It was existing only in Mitakshara School. Therefore, amended section makes it clear that the declaration made is confined only to "a Joint Family governed by the Mitakshara law". The equality to be restored was between son and daughter only and not



between male and female Hindu. Therefore, the Parliament consciously used the phrase "*the daughter of a coparcener*" is the person on whom they are conferring the right and not on any other female relative, who may be a member of Joint Hindu Family. This intention can be gathered from the fact that in the un-amended Section, the proviso conferred rights on a "female relative" and not only on a "daughter of a coparcener".

48. Then the next question, is What is the right that is created and conferred?

Two rights are conferred.

- (a) The daughter of a coparcener by birth become a coparcener in her own right in the same manner as the son. ***Equality in Status.***
- (b) The daughter of a coparcener would have the same rights in the coparcenary property, as she would have had, if she had been a son. ***Equal rights in coparcenary property.***

49. Thus, Gender discrimination between the son and daughter is removed, and bringing the law in conformity with the Article 14 and 15 of the Constitution which are fundamental rights.

50. The parliament took care to see that the daughter who is conferred rights in the coparcenary property on par with the son, is also saddled with the liabilities in respect of the said coparcenary property as that of a son, making it clear that the right in property conferred on her is not free from all encumbrances on the said property. The rights and liabilities are to be shared equally by the son and daughter, thus giving effect to the equality clause in letter and spirit.

51. With the change in the law, the legal concept of coparcenary underwent a radical change. The coparcenary hitherto the monopoly of male lineal descendants, and consisting of only male member of a Joint Hindu Family now has to accommodate a daughter, a female also. Therefore, a declaration is made to the effect that any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference



to a daughter of a coparcener. The exclusive club of males "a Hindu Mitakshara coparcenary" is now thrown open to the daughters also.

52. This declaration and conferment of right in coparcenary property, a salient and distinguishing feature of a coparcenary property in Mitakshara, is the right by birth. Once daughter is conferred the right of a coparcener, it follows that, she would get a right by birth in the coparcenary property. When the amending act came into force in 2005, naturally the question and a doubt would arise, as to when the daughter would get that right. The parliament realised this problem and did not want to leave any one in doubt about its intention. It is expressly stated in the section itself that this "right is by birth", leaving no scope for interpretation. This amendment is introduced by way of substitution. The result is, this amended provision is there in the statute on the day it came into force i.e., 17-6-1956. From that day till the amendment Act came into force on 9-9-2005, the daughter of the coparcener was not a coparcener and she became a coparcener only from 9-9-2005. Though her status was so declared on 9-9-2005, she



has been given right in the coparcenary property from the date of her birth. It would result in absurdity. Therefore, what the parliament did was to use the phrase, "on and from the commencement of the Hindu Succession (Amendment) Act, 2005", as the opening words of the Section, thus removing the absurdity.

53. If the aforesaid opening words were not there in the amended Section and it is inserted by way of substitution, when the right is given to a daughter by birth, such a right would have accrued to her prior to the date of the passing of the Act in 1956 itself. The intention of the Parliament was not to give her rights in a coparcenary property prior to the date of the Act as she had only a limited right in the property, whether ancestral or self acquired property of the father. Therefore, on a proper interpretation it follows that when the status of a coparcenar is conferred on the daughter on and from the date of the commencement of the Amendment Act, as the right is given to her by birth, she must have born after 17.6.1956, the day on which the Act came into force. It is only under the Act, her



limited estate blossomed into an absolute estate, and got equal rights with the son in the property of her father and mother.

54. The Apex Court in the case of **ERAMMA vs VEERUPANA [AIR 1966 SC 1879]** had an occasion to consider whether the Act is prospective or retrospective in operation. After analysing the various provisions of the Act it was held that, *there is nothing in the language of Section 8 to suggest that it has retrospective operation. The words "The property of a male Hindu dying intestate" and the words "shall devolve" occurring in the section make it very clear that the property whose devolution is provided for by that section must be the property of a person who dies after the commencement of the Hindu Succession Act.*

55. Again after referring to Section 6 of the Act, it was held that, *it is clear from the express language of the section that it applies only to co-parcenary property of the male Hindu holder who dies after the commencement of the Act. It is manifest that the language of Section 8 must be construed in the context of Section 6 of the Act. Accordingly, they held that the*



*provisions of Section 8 of the Hindu Succession Act are not retrospective in operation and where a male Hindu died before the Act came into force i.e., where succession opened before the Act, Section 8 of the Act will have no application.*

56. Therefore, it follows that the Act when it was enacted, the legislature had no intention of conferring rights which are conferred for the first time on a female relative of a co-parcener including a daughter prior to the commencement of the Act. Therefore, while enacting this substituted provision of Section 6 also it cannot be made retrospective in the sense applicable to the daughters born before the Act came into force. In the Act before amendment the daughter of a co-parcener was not conferred the status of a co-parcener. Such a status is conferred only by the Amendment Act in 2005. After conferring such status, right to co-parcenary property is given from the date of her birth. Therefore, it should necessarily follow such a date of birth should be after the Act came into force, i.e., 17.6.1956. There was no intention either under the unamended Act or the Act after amendment to confer any such right on a daughter of a co-parcener who was born prior to



17.6.1956. Therefore, in this context also the opening words of the amending section assumes importance. The status of a co-parcener is conferred on a daughter of a co-parcenaar on and from the commencement of the Amendment Act, 2005. The right to property is conferred from the date of birth. But, both these rights are conferred under the Act and, therefore, it necessarily follows the daughter of a co-parcenaar who is born after the Act came into force alone will be entitled to a right in the co-parcenary property and not a daughter who was born prior to 17.6.1956.

57. Thus, by virtue of the substituted provision what the Parliament intends to do is first to declare that, on and from the commencement of this Amendment Act in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son. Therefore, the Mitakshara law in respect of coparcenary property and co-parcenary consisting of only male members came to an end. By such a declaration the Parliament declared



that from the date of the amendment shastric and customary law of coparcenary governed by Mitakshara school is no more applicable and it cease to exist. Thus, by virtue of the aforesaid provision, a right is conferred on a daughter of a coparcenar for the first time. The said right is conferred by birth. Therefore, though such a right was declared in the year 2005, the declaration that the said right as a coparcenar enures to her benefit by birth makes the said provision retro *active*. Though on the date of the birth she did not have such right because of the law governing on that day by amendment the law, such a right is conferred on her from the date of the Act of 1956. A historical blunder depriving an equal right in spite of the constitutional mandate is now remedied and the lawful right to which the daughter was entitled by virtue of the constitution is restored to her from the date of her birth. This, the Parliament has done by using the express words that a daughter of a coparcener shall by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son.



58. After so declaring that the daughter of the coparcener shall by birth become a coparcener and have the same rights in the coparcenary property, the Parliament had in its mind the fall out of such declaration on the bona fide transactions entered into between the coparceners and the third parties for nearly four decades after coming into force of the Act, where coparcenary property was kept out of the purview of the Act. Therefore, they added a proviso to exclude certain transactions from the purview of the main Section.

**WHY IS A PROVISIO IS ADDED TO A SECTION.**

59. The normal function of a proviso is to except something out of the enactment or to qualify something enacted therein which but for the proviso would be within the purview of the enactment. When one finds a proviso to a section the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso. As a general rule, a proviso is added to an enactment to qualify or create an exception to what is in the enactment, and ordinarily, a proviso is not interpreted as



stating a general rule. The proper function of a proviso is that it qualifies the generality of the main enactment by providing an exception and taking out as it were, from the main enactment, a portion which, but for the proviso would fall within the main enactment. Except as to cases dealt with by it, a proviso has no repercussion on the interpretation of the enacting portion of the section so as to exclude something by implication which is embraced by clear words in the enactment. The language of a proviso even if general is normally to be construed in relation to the subject-matter covered by the section to which the proviso is appended. A proviso does not travel beyond the provision to which it is a proviso. It is a cardinal rule of interpretation, that a proviso to a particular provision of a statute only embraces the field which is covered by the main provision. It carves out an exception to the main provision to which it has been enacted as a proviso and to no other. The natural presumption is that but for the proviso, the enacting part of the section would have included the subject-matter of the proviso the enacting part should be generally given such a construction which would make the exceptions carved out by the proviso



necessary and a construction which would make the exceptions unnecessary and redundant should be avoided. This is so because, the legislative device of exclusion is adopted only to exclude a part from the whole, which but for the exclusion, continues to be a part of it and words of exclusion are presumed to have some meaning and are not readily recognised as mere surplusage. The general rule in construing an enactment containing a proviso is to construe them together without making either of them redundant or otiose. Even if the enacting part is clear effort is to be made to give some meaning to the proviso and to justify its necessity. Proviso, is used to remove special cases from the general enactment and provide for them specially.

60. The proviso states that nothing contained in subsection (1) of Section 6 shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before 20<sup>th</sup> day of December, 2004. In order to properly appreciate what are the transactions which are removed from the application of subsection (1) of Section 6, we have to know the meaning of the



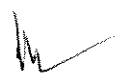
word "*disposition*", "*alienation*", "*partition*" and "*testamentary disposition*" used in this proviso.

61. The term "disposition" has been defined in Stroud's Judicial Dictionary as a devise "intended to comprehend a mode by which property can pass, whether by act of parties or by an act of the law" and "includes transfer and change of property. The word 'disposition' means giving away or giving up by a person of something which was his own. It is not a term of law. It has no precise meaning. Its meaning has to be gathered from the context in which it is used. The word 'disposition' in relation to property means disposition made by deed or will and also disposition made by or under a decree of a court. The word 'disposition' would ordinarily be used in reference to a written document and not to the effect of that document. The removal of a thing from one's self is involved in a disposal. The disposition is the provision creating the interest, not the interest itself. Therefore, disposition means a plan or arrangement for the disposal, distribution of something; definite settlement with regard to some matter.



62. The word 'alienation' is derived from the word 'alien'. It means to transfer or make over to another; to convey or transfer the property of a thing from one person to another. Alienate means to transfer property from one person to another. Alienation is to make alien, or to transfer from our dominion into a foreign one, or to transfer any thing into the power of another. "Alienee" means a person to whom ownership is transferred. "Alienation" imports an actual transfer of title. Alienation means transfer of ownership of property to another person. The word applies to absolute conveyance of immovable property and imports an actual transfer of title. The act whereby one man transfers the property and possession of lands, tenements, or other things, to another person; generally applied to absolute conveyances of immovable property.

63. The word "alienation" is distinct and different from 'partition'. The latter is not included in the former. Therefore, for the purpose of this section, it is specifically mentioned that the alienation includes partition.



64. The word "partition" has a different connotation in law. Partition is a division between co-owners (whether co-parceners, joint-tenants in common) of lands, tenements and hereditaments held by them, the effect of such division being that the joint ownership is terminated and the shares of the parties vested in them in severalty. In Sanskrit the word 'vibhaga' is used. It is the adjustment of diverse rights regarding the whole by distributing them on particular portions of the aggregate. A partition is a separation between joint owners or tenants in common of their respective interests in land, and setting apart such interest, so that they may enjoy and possess the same in severalty. Partition is the redistribution of pre-existing rights and not the acquisition of rights by a person for the first time. Distribution neither gives a new title to property nor transfers a distinct right in the estate of the deceased owner, but is simply declaratory as to the persons upon whom the law casts the succession and the extent of their respective interests; while partition, in most if not all of its aspects, is an adversary proceeding, in which a remedial right to the transfer of the property is asserted and



resulting in a decree which either *ex proprio vigore* or as executed, accomplishes such transfer.

65. When the word partition has been defined as explanation to Sub-Section (5) of Section 6, the meaning attributed to the said word is to be strictly construed. It states that for the purpose of this Section, partition means, any partition made by execution of deed of partition duly registered under the Registration Act, 1908 or partition effected by a decree of a Court. The meaning of the word 'partition' is very much restricted, narrow and to be confined only to Section 6, as expressly stated in the explanation.

66. Chapter III of the Act deals with testamentary succession. Section 30 of the Act provides 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 in accordance with the provisions of the Indian Succession Act, 1925 or any other law for the time being in force and applicable to Hindu. Explanation to that Section provides that the interest of a male Hindu in a Mitakshara co-parcenary



property shall notwithstanding anything contained in the Act, or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of this Section.

67. In the light of the aforesaid words used in the proviso to sub-section (1) of Section 6 it is clear the substituted Section has no application and it shall not affect or invalidate any disposition or alienation or partition or testamentary disposition which has taken place before the 20<sup>th</sup> day of December 2004. In other words, if there is no disposition or alienation of a property belonging to a Joint Hindu Family, the daughter who is conferred the status of a co-parcener by virtue of which she gets a right by birth is entitled to the same rights in the co-parcenary property in the same manner as the son. The language employed in the proviso is unambiguous and clear. The intention was to save disposition, alienation including any partition or testamentary disposition of property which had taken place before the 20<sup>th</sup> day of December 2004.



68. Sub-section (2) of Section 6 further declares that 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 the Act, or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition. Thus, equality is maintained after the daughter acquires right in the coparcenary property also, giving full effect to the object of the amended law when it clarified the legal position that any reference to a Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

69. Sub-section (3) of Section deals with succession of property after the commencement of the Hindu Succession Act, 2005, i.e., from 09.09.2005. Sub-section (3) of the amended Section provides that, 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. Therefore, with the passing of the Amendment Act, 2005, the concept of survivorship is given a go by once and for all.

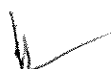
70. The word used is, "Hindu", implying both male and female. This provision deals with the interest of a Hindu in the property of a Joint Hindu Family governed by Mitakshara Law. If the said provision is contrasted with Sections 8 and 14, which deals with male and female, the said Sections deals with the self acquired or separate property of a male Hindu and female. Whereas, sub-section (3) deals with the Joint Hindu Family property. The Joint Hindu Family shall devolve by testamentary or *inte state* succession, as the case may be under this Act and not by survivorship. When this provision is contrasted with Section 6 prior to amendment, which dealt with devolution of interest in a co-parcenary property in respect of a male Hindu, his interest in the property shall devolve by survivorship upon the surviving members of the co-parcenary and not in accordance with this Act. Therefore, by this substituted provision, the devolution of interest by



survivorship is completely abolished after coming into operation of 2005 Act. Section 30 of the Act provided for testamentary succession. The explanation added to that Section made it clear that, the interest of a male Hindu in a mitakshara coparcenary property shall, notwithstanding anything contained in the Act or in any other law for the time being in force, be deemed to be property capable of being disposed of by him or by her within the meaning of the Section 30. i.e., he may dispose of his co-parcenary interest also by way of Will or other testamentary disposition. When the amended Section declared that, 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 by birth become a coparcener in her own right in the same manner as the son and have the same rights in the coparcenary property as she would have had if she had been a son, the question which arise for consideration is, as section 30 was not applicable to a female Hindu coparcener in a mitakshara law, how her interest in that property could be disposed of and whether Section 30 is



applicable to her. It is to clarify this, sub-section (2) of Section 6 is introduced. It is declared that, 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. Thus, the equality is achieved with a male co-parcener who is vested with the said power by virtue of explanation (1) to Section 30 of the Act. Therefore, by substituted Section 6, the daughter of a co-parcener in a Joint Hindu Family governed by Mitakshara Law has been conferred the status of a co-parcener by birth and conferred same rights in the co-parcenary properties as she would have had if she had been a son.



**POINT NO. 2****"PARTITION" UNDER HINDU LAW**

71. According to the true notion of an undivided mitakshara family, no individual member of that family whilst it remains undivided, can predicate of the joint property, he-that particular member – has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property, in other words, it consists in defining the shares of the co-parceners in the joint property. Once the shares are defined, whether by an agreement between the parties, or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds or they may continue to live together and enjoy the property in common as before. The property ceases to be joint and immediately the shares are defined and henceforth the parties hold the property as tenants-in-common. A disruption of joint family status by a definite and unequivocal indication to separate implies separation in interest and in right although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed



by virtue of the separate right. From the time of such disruption, each member holds his aliquot share as tenant-in-common irrespective of whether there is actual division of the properties by metes and bounds. It is established law that actual physical division or partition by metes and bounds is not an essential ingredient for the purpose of effecting severance of status. That is really a formality in the process of partition. Partition is a severance of joint status, and as such it is a matter of individual violation. All that is necessary, therefore, to constitute a partition is a definite and unequivocal indication of his intention by a member of joint family to separate himself from the family and enjoy his share in severalty. A partition may be effected without any instrument in writing. An instrument of partition in respect of immovable property of the value of rupees 100 and upwards requires registration under Section 17(1) of the Indian Registration Act, 1908. An unregistered deed of partition is not admissible to prove the contents or the shares allotted. However, if it merely acknowledges a prior partition it is admissible. An unregistered memorandum of partition can be relied on for collateral



purpose of proving intention to separate. But an agreement which by itself does not create any right or interest in immovable property but only a right to obtain an instrument on partition does not require registration. However, a memorandum of family settlement being not a partition deed does not require registration. Partition does not, however, amount to a transfer of property as partition means that the totality of the property of the family in which all the coparceners jointly had subsisting title would be transformed into separate titles of the individual coparceners in respect of several items of properties allotted to them respectively.

72. The institution of suit for partition by a member of a joint family as an unequivocal intimation of his intention to separate, and there consequently is a severance of his joint status from the date when it is instituted. A decree may be necessary for working out the results of the severance and for allotting definite shares, but the status of the plaintiff as separate in estate is brought about by his assertion of his right to separate, whether he obtains a consequential judgment or not. A suit must in substance be a suit for partition with a



desire on the part of the plaintiff to hold his share in severalty without being subject to the obligation of the joint status.

73. These concepts of partition as well understood in Hindu Law has no application, while interpreting amended Section 6 of the Act. The legislature has defined 'partition' for the purpose of Section, which alone is to be taken into consideration while interpreting Section 6 of the Act.

#### **PARTITION UNDER SECTION 6 OF THE ACT**

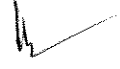
74. In Section 6 the word 'partition' has been defined. It is a very narrow definition of partition. As per the said definition a partition means,

- (1) Partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908).
- (2) Partition effected by a decree of the Court.

Unless the partition is evidenced by a registered document and has come into existence prior to 20<sup>th</sup> day of December 2004, the daughter who has now been conferred the status of a co-parcener cannot be denied the right to the co-parcenary



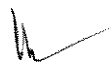
property which she has now acquired by birth. This provision became necessitated because when the Tamil Nadu legislature introduced amendment in the year 1994 conferring right on a daughter, the status of a co-parcener and made it clear that such a right is not available to a daughter in the joint family, if already partition has taken place, in order to deprive the legitimate share of a daughter spurious documents came into existence to defeat the operation of the amendment. This experience weighed with the Parliament while enacting this provision. Therefore, they made it clear a plea of partition if it is not supported by a registered deed of partition would not defeat the right of a daughter. Oral partitions, memorandum of partitions, agreements, which can be fabricated, concocted, after this Amendment Act came into force by antidating them and thus depriving the daughter of her legitimate right, had to be prevented. Therefore, in that background it is made clear that unless a partition is by a registered instrument, the daughter's right to the property is not taken away. In other words, if the partition is not evidenced by a registered document, then, the daughter of a coparcener who has been



conferred equal right in coparcenary property with that of the son would be entitled to a share in the coparcenary property as that of the son notwithstanding the fact that there was a partition of the coparcenary property as recognised under Hindu law vis-à-vis, the law of partition.

75. The second mode recognized as per the definition of partition is, partition "effected by a decree of a Court". The word decree is defined under the Civil Procedure Code 1908. The definition reads as under:

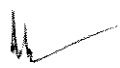
*"decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-*



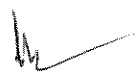
*(a) any adjudication from which an appeal lies as an appeal from an order, or*

*(b) any order or dismissal for default."*

76. It is a formal expression of an adjudication which so far as the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. A decree may be preliminary or final. In a partition suit, in a preliminary decree the Court declares the rights of the parties to the property in dispute. In other words, the shares to which each members of a joint family in the said joint family property or coparcenary property is declared. The said decree is appealable. When a trial Court decrees a suit and the decree is challenged by a competent appeal, the appeal is considered as a continuation of the suit, and when the appellate decree affirms, modifies or reverses the decree on the merits, the trial Court decree is said in law to merge in the appellate decree, and it is the appellate decree which rules. However, what the Court does in a preliminary decree is only a declaration of shares. It does not effect a

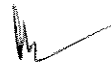


partition. A partition is effected when a final decree is passed giving effect to the shares declared in the preliminary decree by allotting specific share to the members of the family in the joint family property or the ancestral property or in both. Again, a final decree passed in a suit for partition is appealable. Therefore, the decree passed by the trial Court merges with the appellate decree and it is the final decree passed by the appellate Court which effects a partition. Therefore, it is the final decree of partition which has attained finality by which a partition is effected by a decree of Court. If a partition is effected by a decree of the Court, thereby meaning a final decree passed by a Court has attained finality, then, the daughter of a coparcener who has been conferred equal rights in the co-parcenary property under Section 6, would not be entitled to a share in the coparcenary property as that of the son. In this regard it is useful to refer to the two decisions of the Supreme Court on the point.



**PHOOLCHAND AND ANOTHER V. GOPAL LAL, AIR (1967)  
SC 1470:**

*"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. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specifically in partition suits, to have disputed rights finally settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in*



holding that in such cases there is a decree deciding these disputed rights: if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. 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; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed in a decree in itself which would be liable to appeal. We should however like to point out that what we are saying must be confined to partition suits, for we are not concerned in the present appeal with other kinds of suits in which also preliminary and final decree are passed. 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. In any case if two views are possible - and obviously this is so because the High Courts have differed on the question - we would prefer the view taken by the High Courts which hold that a second preliminary decree can be passed, particularly in partition suits where parties have died after the preliminary decree and shares specified in the preliminary decree have to be adjusted. We see no reason why in such a case if there is dispute, it should not be decided by the Court which passed the preliminary decree, for it 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 such due to deaths of some of the parties. Where there can be more than one final



decree does not arise in the present appeal and on that we express no opinion. We therefore hold that in the circumstances of this case it was open to the Court to draw up a fresh preliminary decree as two of the parties had died after the preliminary decree and before the final decree was passed. Further as there was dispute between the surviving parties as to devolution of the shares of the parties who were dead and that dispute was decided by the trial Court in the present case and therefore the preliminary decree already passed was mended, the decision amounted to a decree and was liable to appeal. We therefore agree with the view taken by the High Court that in such circumstances 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 for decision amounts to a decree. We should



however like to make it clear that this can only be done so long as the final decree has not been passed. We therefore reject this contention of the appellant.

**S. SAI REDDY vs S NARAYANA REDDY AND OTHERS. [(1991)**

**3 SCC 647]:**

"7. The crucial 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 share 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."



77. Therefore, it is clear that if on the date, i.e., 20<sup>th</sup> December, 2004, there is no partition effected by decree of the court thereby meaning a final decree for partition has not reached finality, then, the daughter of a coparcener is entitled to equal share in the coparcenary property as that of a son and Section 6 is applicable to such property. The legislative intention is clear. They wanted to give the benefit of this section to a daughter. Such a right, they did not want it to be defeated by mere plea of partition as well understood under Hindu law or merely because a suit for partition is filed or a decree for partition has already been passed by a trial Court. On those grounds they did not want to deny the daughter her legitimate share in the coparcenary property which ought to have been granted to her on the day the Act came into force namely 17<sup>th</sup> June 1956.

78. A registered partition deed could not be prepared, antedated and registered after the coming into force of the Act, Similarly a final decree for partition cannot be created or manipulated, just to deny the daughters their legitimate share



in the coparcenary property, and a partition by registered instrument and a final decree for partition that attained finality would reflect the bona fide conduct of the parties in the normal circumstances. They did not want those transactions to be affected by the substituted Section 6 of the Act. Therefore a partition effected in the aforesaid two manner before 20<sup>th</sup> December 2004 were kept away from the purview of Section 6. Except those two circumstances, whatever may be the course of conduct of the parties, the daughter of a coparcener was conferred a right in such property equal to that of a son.

79. Therefore, the concept of partition and severance of the status as under Hindu Law has no application under the Act in view of the definition of partition by way of Explanation to sub-section (5) of Section 6 of the Act and it is only such partitions which are not affected by the effect of amended Section 6 of the Act.



**POINT NO. 3****WHAT IS THE RIGHT OF A MARRIED DAUGHTER?**

80. The bill prepared by the Law Commission contained a provision making the amended provision not applicable to married daughters. That is precisely what is contained in the amendments carried out to the Act by the legislatures of Karnataka, Andhra Pradesh, Maharashtra and Tamil Nadu. However, in the bill passed by the Parliament we do not find the said provision. Rightly the said provision did not find favour with the representatives of the people and is deleted from the original bill even before it is presented to the Parliament. Therefore, the intention of the Parliament is clearly manifest from this Act. Secondly, the marriage has no relevance to the succession or inheritance of the property. When a male Hindu marries, his right to succeed to a property or inherit a property is in no way affected by the act of marriage. However, in the case of a daughter in a Hindu Family, a distinction was sought to be made. After her marriage as she ceased to be a member of the Hindu Undivided Family and becomes a member of the Hindu Undivided Family



of her husband, she was denied the right in the undivided family of her father. If she did not marry, her right was intact. The marriage had the effect of denuding her right to property in the family by birth. It stands to no reason. Therefore, the Parliament consciously has not used the word 'married daughter' in the entire Section as the case in the earlier State Amendment where they added an explanation, to exclude the married daughter. It is yet another indication and manifestation of legislative intent that they did not make any distinction between a married daughter and an unmarried daughter in respect to their rights to the properties of her father who is a co-parcener in a Hindu Undivided Family governed by Mitakshara Law. It is settled law that the intention of the Legislature is primarily to be gathered from the language used, which means that attention should be paid to what has been said as also what has not been said. It is contrary to all rules of construction to read words into an Act unless it is absolutely necessary to do so. Similarly, it is wrong and dangerous to proceed by substituting some other words for words of the statute. Therefore, we cannot import by an



interpretive process the word 'married daughters' in any form and in any context to defeat her rights conferred under amended Section 6, when the legislative intention is expressed clearly and unambiguously without leaving any scope for interpretation. Thirdly, the language employed and the declaration made in Section 6 makes the legislative intent explicit and clear, i.e., the daughter of a co-parcener shall by birth become a co-parcener in her own right in the same manner as the son and have the same rights in the co-parcenary property as she would have it if she had been a son. It means whatever right the son possesses in a co-parcenary property is sought to be conferred on the daughter. The son would not lose his right in a co-parcenary property because of his marriage. It is that right which is conferred on the daughter and, therefore, when by birth son acquires an interest in co-parcenary property and retains the same, notwithstanding his marriage, when the daughter is also conferred the same right, it means she acquires a right by birth in the co-parcenary property and she continues to hold the said right notwithstanding her marriage. The daughter's



marriage will not put an end to the right of the daughter to a co-parcenary property which she acquired by birth. If this is not the interpretation to be given to those words, then the Section would be violative of Section 14 of the Constitution which declares that there cannot be any discrimination between person and person on the basis of sex. There cannot be a distinction between a son and a daughter under the constitutional scheme. Further, any other interpretation would mean there will be a further discrimination between a married daughter and an unmarried daughter, which is again opposed to the equality clause found in Article 14 of the Constitution. Then the whole object of bringing about this amendment, by substituting the provision in the existing Act and declaring that the daughter would get a right by birth in the same manner as son, would be defeated, if any interpretation is to be placed making a distinction between a married daughter and an unmarried daughter or a married son and a married daughter. That is not the legislative intent and purpose. On the contrary, when such an attempt was made by the State Legislatures and the interpretation placed on the aforesaid provision resulted in



heart burning and also contrary to the constitutional mandate contained in Article 14 of the Constitution, the Parliament taking note of these deficiencies and restrictions on the right of a married daughter advisedly has framed this provision putting an end to any such controversies and conferring the benefit of the amendment on the married daughters also.

81. The Supreme Court in the case of **SAVITA SAMVEDI Vs. UNION OF INDIA** reported in **1996 SCC (L & S) 521**, held as under:

*"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."*

*"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), so as to claim the benefit.*

*Otherwise, it would be unfair, gender-biased and unreasonable and liable to be*

*struck down under Article 14 of the Constitution. It suffers from twin vices of gender discrimination inter se among the women on account of marriage and between a married daughter and a married son."*

**EFFECT OF AMENDMENT ON KARNATAKA STATE  
AMENDMENT i.e., SUB SECTION (d) OF SECTION 6-A**

82. Intestacy, succession, joint family and partition is at entry No.5 in Concurrent List, Schedule-VII of the Constitution of India. Both the parliament and the State Legislatures are competent to pass law in respect of the same. It is in pursuance of the power conferred under Article 245 of the Constitution of India the Indian Parliament passed the Hindu Succession Act, 1956. Section 6 of the said Act dealt with devolution of interest in co-parcenary property. Section 6 made it clear the devolution of interest in Mitakshara property is by survivorship upon the surviving members of the co-parcenary and not in accordance with the Act. No female member including daughter was a member of Mitakshara co-

parcenary. Therefore, the said provision did not confer any right on the daughter.

83. The Hindu Succession (Karnataka Amendment) Act, 1990 was enacted by the Karnataka Legislature inserting Section 6(A), (B) and (C) in the Hindu Succession Act, 1956, Central Act 30/1956 after Section 6. The State Act received the assent of the President on 28.7.1994 and it became Karnataka Act 23/1994. By the aforesaid Amendment Act for the first time equal rights to daughters in co-parcenary property was conferred by the Karnataka State Legislature. The said law was repugnant to Section 6. However, as the said Amendment Act received the assent of the President, though the State Law was repugnant to the Central Law, State Law prevailed over the Central Law. Sub-section (d) of Section 6(a) stipulated that the right conferred on a daughter in the co-parcenary property by birth shall not apply to a daughter married prior to or to a partition which had been effected before the commencement of the Hindu Succession (Karnataka Amendment) Act, 1990. The said provisions became a part of the Act. Thereafter, the Parliament passed the Hindu



Succession (Amendment) Act, 2005. In the amended provisions no distinction is made between the married daughter and unmarried daughter. Similarly, the word partition is intended to be confined only to a partition evidenced by a registered deed of partition or partition effected by a decree of a Court. These two provisions are repugnant to sub-section (d) of Section 6-A. The question is whether both these provisions can co-exist or intended to subsist. In order to answer this question it is necessary to refer to Article 254 of the Constitution which reads as under:-

***"Article 254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States***

*(1) If any provision of a law made by the legislature of State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament, whether passed before or after the law*



*made by the Legislature of such State, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of repugnancy, be void.*

*(2) Where a law made by the Legislature of State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in the State:*

*Provided that nothing in this clause 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."*

84. This Article was the subject matter of interpretation by the Apex Court on various occasions. In the case of **T. BARAI Vs. HENRY AH HOE** reported in **AIR 1983 SC 150**, the Supreme Court held as under:



"There is no doubt or difficulty as to the law applicable. Article 254 of the Constitution makes provision firstly, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and State Law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in Clause (1), Clause (2) engrafts an exception, viz., that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the union, both laws dealing with a concurrent subject. In such a case, the Central Act will give way to the State act only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to State Act is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override the provisions of the Central Act in their applicability to that State only. The predominance of the state law may however be taken away if Parliament legislates under the proviso to Clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent. Parliament may repeal or amend the repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law

made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together, the law made by parliament shall prevail over the State law under Article 254(1). That being so, when Parliament stepped in and enacted the Central Amendment Act, it being a later law made by Parliament "with respect to the same matter", the West Bengal Amendment Act stood impliedly repealed."

85. In the case of **THIRUMURUGA KIRUPANANDA VARIAYA THAVATHIRU SUNDARA SWAMIGAL MEDICAL EDUCATIONAL and CHARITABLE TRUST Vs. STATE OF TAMIL NADU**, reported in **AIR 1996 SC 2384**, the Apex Court held as under:

"The fact that the State Act has received the assent of the President would be of no avail because the repugnancy is with the Central Act which was enacted by Parliament after the enactment of the State Act. In view of the proviso to sub-Article (2) of Article 254 parliament could add to, amend, vary or repeal the State act. In exercise of this power Parliament could repeal the State Act either expressly or by implication

86. The Constitution Bench of the Apex Court in the decision rendered in the case of **M KARUNANIDHI Vs. UNION OF INDIA** reported in **1979 (3) SCC 431** held as under:

*"Before any repugnancy can arise, the following conditions must be satisfied. 1. That there is a clear and direct inconsistency between the Central Act and the State Act. 2. That such an inconsistency is absolutely irreconcilable. 3. That the inconsistency between the provisions of the two acts is of such a nature as to bring the two Acts into direct collision with each other and a situation is reached where it is impossible to obey the one without disobeying the other"*

87. The Supreme Court in the case of **M.P. SHIKSHAK CONGRESS Vs. R.P.F. COMMISSIONER, JABALPUR**, reported in **AIR 1999 SC 443**, held as under:

*".....Under Art.254(1) of the Constitution, if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by parliament, which Parliament is competent to enact, then subject to the provisions of Cl.(2), the law made by the parliament, whether passed before or after the law made by the Legislature of such State, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void. The ordinary rule, therefore, is that when both the State Legislature as well as Parliament are competent to enact a law on a given subject, it is the law made by Parliament which will prevail. The exception which is carved out is under Cl. (2) of Art. 254. Under this Cl. (2) where a law made by the*

*Legislature of a State with respect to one of the matters enumerated in the concurrent list contains any provision repugnant to the provisions of an earlier law made by Parliament, then the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in the State. Provided that nothing in this clause 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."*

88. Dealing with the question of implied repeal, the Supreme Court in the case of **KULWANT KAUR Vs. GURDIAL SINGH MANN**, reported in **AIR 2001 SC 1273**, held as under:

*"On the doctrine of implied repeal, Mr. Mehta contended that procedural law must be having a meaningful existence without being in conflict with a preliminary legislation. Undoubtedly, the doctrine of implied repeal is not to be favoured but where a particular provision cannot co-exist or intended to subsist in the event of there being the repugnancy between Central and State legislature the Courts cannot but declare it to be so on the ground of repeal by implication. Uniformity of law, being the basic characteristics of Indian jurisprudence cannot be termed to be at sufferance by reason of a state Legislation which runs counter to the Central legislation. It is not necessary that one legislation should be on the positive side whereas the other one in the negative. Such a stringent requirement is not the requirement in order to bring home the issue of repugnancy, but all the same it might result when both the legislations cover the same field. The observation find support from the*

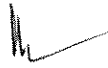
*decision of this Court in Zaverbhai amaidas v. The State of Bombay (1955)1 SCR 799: (AIR 1954 SC 752 : 1954 CrL. L.J. 1822) wherein this Court observed (para 11):*

*It is true, as already pointed out, that on a question under Article 254(1) whether the Act of Parliament prevails against a law of the State, no question of repeal arises; but the principle on which the rule of implied repeal rests, namely, that if the subject-matter of the later legislation is identical with that of the earlier, so that they cannot both stand together; then the earlier is repealed by the later enactment, will be equally applicable to a question under Article 254(2) whether the further legislation by Parliament is in respect of the same matter as that of the State law."*

89. Therefore, it is clear the proviso to Article 254(2) empowers the Union Parliament to repeal or amend a repugnant State law even though it has become valid by virtue of the President's assent. Parliament may repeal or amend the repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the subsequent law of parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two

laws. The law made by parliament shall prevail over the State law. Where a particular provision cannot co-exist or intended to subsist in the event of there being repugnancy between the Central and the State Legislature, the Courts cannot but declare it to be so on the ground of repeal by implication. If the subject matter of the later legislation is identical with that of the earlier, so that they cannot both stand together, then the earlier is repealed by the later enactment, which is the principle on which the rule of implied repeal rests.

90. Therefore, when the Parliamentary legislation which was subsequent to the Karnataka Amendment conferred the status of a co-parcener on the daughter of a co-parcener and gave right by birth in the co-parcenary property and did not exclude the married daughters from such status and right expressly or by necessary implication, the Central Act to that extent is repugnant to the State law. Similarly, the word partition used in the State Law is too wide and the Central law defines the word partition and giving it a narrow meaning for the purpose of Section 6. Again the said definition runs



repugnant to the State law. As the amended law is passed by the Parliament it prevails over the State law and the law passed by the State stands impliedly repealed to the extent of repugnancy. As such, the married daughter cannot be deprived of her right to a share in the co-parcenary property by birth. With the passing of the Amendment Act Section 6-A(d) stands repealed. Married daughter is entitled to equal share with the son in the coparcenary properties.

91. Therefore, a married daughter is also a co-parcener and is entitled to equal share with the son in the co-parcenary properties and her marriage in no way affects her right to equal share in the co-parcenary property. Even after marriage she continues to have the same right which she had before marriage, as her right to coparcenary property flows from her birth as that of the son. To find out what is the right of a daughter in a coparcenary property, find out what is the right of the son. Whatever rights the son has in the coparcenary property, by virtue of the amendment the daughter also has such right. That is the object behind the legislation i.e., to achieve equality in the right of inheritance.



**POINT NO. 4****RETROSPECTIVE OPERATION**

92. Literally defined, a retrospective law is a law that looks backward or on things that are past and a retroactive law is one that acts on things that are past. In common use, as applied to statutes, the two words are synonymous, and in this connection may be broadly defined as having reference to state of things existing before the Act in question. A statute which operates upon acts and transactions which have not occurred when the statute takes effect, that is, which regulates the future, is a prospective statute. On the other hand, a retrospective or retroactive law is one which takes away or impairs vested rights acquired under existing laws, or creates new obligations and imposes new duties, or attaches new disabilities in respect of transactions already past.

93. The Parliament in India is endowed with plenary powers of legislation and it is competent to legislate with prospective or retrospective effect. Retrospective legislation is one of the incidents of plenary legislative powers. Under the Constitution there is only one restriction imposed upon the power of retrospective legislation under Article 20. Every

legislation is prima facie prospective unless it is expressly or by necessary implication made to have retrospective operation.

94. The question whether a statute operates prospectively or retrospectively is one of the legislative intent. If the terms of a statute are clear and unambiguous and it is manifest that the Legislature intended the Act to operate retrospectively, it must unquestionably be so construed. If, however, the terms of a statute do not of themselves make the intention certain or clear, the statute will be presumed to operate prospectively. While considering the question of the retrospective operation of the statute, the nature of the right affected must first be considered. All laws which affects substantive rights or vested rights generally operate prospectively and there is a presumption against their retrospectivity if they affect vested rights and obligations unless the legislative intent is clear and compulsive. The rule that a statute is not to have retrospective operation is only applicable where it is doubtful from the language used whether or not it was intended to have such operation. Where language of a statute plainly gives it a retrospective operation, the rule has



no application, for, of course, it is obviously competent, for the Legislature, if it pleases, in its wisdom to make the provisions of an Act of Parliament retrospective. Where a section of a statute is amended, the original ceases to exist and the new section supersedes it and becomes a part of the law just as if the amendment had always been there. The amendment is retrospective in operation. Curative statutes are obviously retroactive, and hence entitled, as a general rule, to retrospective operation. Being retroactive in their very nature, they will not usually be given any prospective effect. Being subject to a liberal construction, any doubt should be resolved in favour of retrospective operation. Nevertheless, there are even limitations on the extent of the retroactive operation of curative acts. Obviously, they cannot violate provisions of the constitution. Nor should they interfere with or destroy vested rights of third parties. A retrospective statute contemplates the past and gives to a previous transaction some different legal effect from that which it had under the law when it occurred or transpired. A retrospective law is one which reaches back to and gives to a prior transaction some different



legal effect from that which it had under the law when it took place. If an Act provides that as at a past date the law shall be taken to have been that which is not, that Act is deemed to be retrospective.

95. The Supreme Court in the case of **E. PRABHAKAR RAO AND OTHERS, ETC., Vs. STATE OF ANDHRA PRADESH AND OTHERS ETC.**, reported in **AIR 1986 SC 210**, held as under:

*"Is it not open to the Court to give retrospectively to a legislation to which the legislature plainly and expressly refused to give retrospectively."*

*"While it is a general rule of law that statutes are not to operate retrospectively, they may so operate by express enhancement, by necessary implication from the language implied or where the statute is explanatory or declaratory or where the statute is passed for the purpose of protecting the public against some evil or abuse or where the statute engrafts itself upon existing situations etc., etc., But, it would be incorrect to call a statute 'retrospective', 'because a part of the requisites for its action is drawn from a time antecedent to its passing."*

*"We must further remember, quite apart from any question of retrospectivity, that, unlike in the United Kingdom here in India we have a written Constitution which confers justiciable fundamental rights and so the very refusal to make an Act retrospective or the non-application of the Act with*



reference to a date or to an event that took place before the enactment may, by itself, create an impermissible classification justifying the striking down of the non-retroactivity or non-application clause, as offending the fundamental right to equality before the law and the equal protection of the laws. That is the situation that we have here."

"The operation of the ordinance or the Act limiting the field of operation and introducing a classification which in order to be sustained must be shown to be reasonable and to have a nexus to the object to be achieved besides not being arbitrary."

96. In **BHAGAT RAM SHARMA VS. UNION OF INDIA**

**AND OTHERS [AIR. 1988 SC 740] it is held as under:-**

It is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. Such deletion has the effect of repeal of the existing provision. Such a law may also provide for the introduction of a new provision. There is no real distinction between 'repeal' and an 'amendment'.

97. Keeping in mind these legal principles we have to find out from the language used in substituted Section 6 of the Act, the amendment is prospective or retrospective. The first indication is found in Section 3 of the Amendment Act 39 of 2005. The words used read as follows:-



**"3. Substitution of new section for Section 6.-** for section 6 of the Principal Act, the following section shall be substituted."

#### **WHAT IS THE EFFECT OF SUBSTITUTION**

98. A Constitution Bench of the Apex Court in the case of **SHAMRAO V PARULEKAR & OTHERS Vs. DISTRICT MAGISTRATE THANA, BOMBAY AND OTHERS**, reported in **AIR 1952 SC 324**, dealing with the scope of the substitution of a provision by way of amendment, held as under:

*" The construction of an Act which has been amended is now governed by technical rules and we must first be clear regarding the proper canons of construction. The rule is that when a subsequent Act amends an earlier one in such a way as to incorporate itself, or a part of itself, into the earlier, then the earlier Act, must thereafter be read and construed (except where that would lead to a repugnancy, in consistency or absurdity) as if the altered words had been written into the earlier Act with pen and ink and the old words scored out so*

that thereafter there is no need to refer to the amending Act at all. This is the rule in England. It is the law in America. It is the law which the Privy Council applied to India."

99. In the case of **SHA CHUNNILAL SOHANRAJ - VS- T GURUSHANTAPPA, 1972(1) Mys. L. J 327**, a Division Bench of this Court held as under:

"An amending act is not regarded as an independent statute. The statute in its old form is superseded by the statute in its amended form, the amended section of the statute taking the place of the original section, for all intents and purposes as if the amendment had always been there. The amendment should be considered as if embodied in the whole statute of which it has become a part. Unless a contrary intent is clearly indicated, the amended statute is regarded as if the original statute had been repealed and the whole statute re-enacted with the amendment".

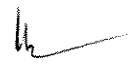
100. Yet another Constitution Bench of the Apex Court in the case of **SHYAM SUNDER AND OTHERS vs RAM KUMAR**



**AND ANOTHER [AIR 2001 SC 2472]** was dealing with the question, whether a substituted provision necessarily means the amended provisions are retrospective in nature, after reviewing the entire case law on the point held, *a substituted Section in an Act is the product of an amending Act and all the effects and consequences that follow in the case of an amending Act the same would also follow in the case of a substituted Section in an Act.* Further it was held, it is well settled that where an amendment affects vested rights the amendment would operate prospectively unless it is expressly made retrospective or its retrospective operation follows as a matter of necessary implication. Ordinarily when an enactment declares the previous law, it requires to be given retroactive effect. The function of a declaratory statute is to supply an omission or explain previous statute and when such an Act is passed, it comes into effect when the previous enactment was passed. The legislative power to enact law includes the power to declare what was the previous law and when such a declaratory Act is passed invariably it has been held to be retrospective. Mere absence of use of word 'declaration' in an Act explaining what

*was the law before may not appear to be a declaratory Act but if the Court finds an Act as declaratory or explanatory it has to be construed as retrospective. Further, they went on to hold, that the function of a declaratory or explanatory Act is to supply an obvious omission or to clear up doubts as to meaning of the previous Act and such an Act comes into effect from the date of passing of the previous Act.*

101. Therefore, it is clear from the aforesaid Constitution Bench judgment of the Apex Court, a vested right can be taken away by way of an amendment by the legislature by expressly saying so or by implication. Secondly, a declaratory law is retrospective in operation because the object of such declaratory law is to supply the omission. In the instant case, in 1956 when the Act was passed, the daughters of a co-parcener was not treated as co-parcener nor any right in the co-parcenary property by birth was conferred on her. Now, by a declaration such a right is sought to be conferred. It is done by way of substitution. In other words, the legislative intent is to supply the omission in the original Act. The parliament has not kept any one in doubt about their



intention. The effect is the Act as enacted in 1956 is to be read and construed as if the altered words/new section had been written into the earlier Act with the pen and ink and the old Section/Words scored out, so that thereafter there is no need to refer to the amending Act at all. The constitutional validity of the substituted section is not under challenge. On the contrary the substituted section is in conformity with the constitutional provision. The effect is old Section 6 is superseded by the new Section 6, the amended section taking the place of the original section, for all intents and purposes as if the amendment had always been there. This is the way the parliament has expressly made its intention clear to the effect the amendment is retrospective.

102. Secondly though the opening words of the section declares that "on and from the commencement of the Hindu Succession (Amendment) Act, 2005, the daughter of a coparcener in a joint family governed by the Mithakshara is conferred the status of coparcener, it is expressly stated that she becomes a coparcener by birth. Conferment of the status is different from conferring the rights in the coparcenery

property. The right to coparcenery property is conferred from the date of birth, which necessarily means from the date anterior to the date of conferment of status, and thus the Section is made retro active. By such express words the amended section is made retrospective.

103. Thirdly, the proviso to section 6(1) makes the intention of the parliament manifestly clear. The Parliament has expressly stated in the proviso to sub-section (1) of Section 6-the substituted provision that the declaration of right in favour of a daughter as a co-parcener though it takes effect by birth, i.e. anterior to the amendment, the same would not affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20<sup>th</sup> day of December 2004. The way this proviso is expressed makes it clear the substituted provision is retrospective in operation. By substitution it is made clear that this provision is there in the principal Act from 1956 itself. But, as the amendment came into force only in 2005, the question would arise that what should happen to the transactions between 1956 and 2005. It is in this context the



Parliament has expressly stated though the right by birth is given from 1956, if the dispositions, alienations including partitions, testamentary dispositions which had taken place subsequent to 1956 and before 20<sup>th</sup> December 2004 those transactions are not affected. This conferment of right by birth would not invalidate any of the aforesaid disposition of property. Therefore, the intention is clear. Though this provision is made retrospective, if third party interests have crept in or even the co-parceners on the assumption that it has become their separate property after the partition by way of registered partition deed or effected by a decree of the Court has made improvements or alienated the properties or parted with property by testamentary disposition, those transactions cannot be reopened. It is clear that, declaration of right of the daughter of a coparcenar and conferment of right by birth shall not affect or invalidate any "*disposition*" or "*alienation*" including any partition or testamentary disposition of property, which have taken place before the 20<sup>th</sup> day of December 2004. The amendment Act received the assent of the President of India on 5<sup>th</sup> September, 2005, and came into force from 9<sup>th</sup>

September, 2005. If the amendment Act is prospective in operation the amended law would not in any way invalidate any disposition, or alienation including any partition or testamentary disposition which had taken place before 20<sup>th</sup> December 2004. Then the entire proviso would have been redundant. If the proviso had not been introduced, all the dispositions, alienations including partition and testamentary dispositions would have to be set aside or declared not effecting the interest of the daughter of the co-parcener who was not a party to such transactions. It is because the legislative intent was to give retrospective effect to the amended provision. Being conscious of the fall out of the retrospective operation of this amended provision, the legislature stepped in and introduced a proviso to protect the interest of third party who have acquired interest in those properties. This is yet another clear manifestation of the intention of the legislature in making this provision retrospective. Therefore, the substituted provision is retrospective in operation as is expressly declared so in the Section itself. It is not prospective.



**POINT NO. 5****PENDING PROCEEDINGS**

104. The Parliament was conscious from the day the Act came into force till the Amendment Act, throughout the country there would be innumerable partition suits at various forums at various stages. Suits may be pending in the trial Courts for partition and separate possession. In some cases it is possible decrees are passed and they are under challenge in regular appeals. Similarly, the said decrees may be the subject matter of regular second appeals pending in the High Courts. The question is, whether these amended provisions would have any effect on the pending litigation. If a suit is filed for partition by any of the members of the family either seeking a partition in respect of coparcenary property or a suit filed by a member of the joint family including a female heir in respect of coparcenary property, on the death of a coparcener as provided under proviso to Section 6 of the unamended provision, the female members would be entitled to equal share with the sons in the share of the deceased coparcener. If the suit is between coparceners then each of them would be entitled to equal share

and no female member of the joint family would be entitled to any share. By virtue of these substituted provision once a daughter is given the status of a coparcener by birth even in respect of suits between coparceners with the expanded definition of coparcenary she would be entitled to a share equal to that of a son. If a daughter is claiming a share in her father's share in coparcenary property, as a coparcener now with the substituted provision she would be entitled to an equal share in the coparcenary property itself, in addition to an equal share in her father's property with others. Though with the filing of the suit for partition there is a severance of joint family status, by such act the joint family properties would not get partitioned. It is divided only when there is a final decree for partition. The intention was to give a right to the daughter in respect of the properties which are the subject matter of such litigation. To deny right to a daughter coparcener, partition has to be effected by a decree of a Court before 20<sup>th</sup> December 2004. Therefore, they have consciously chosen the word, "partition effected by a decree of the Court". Then the property is not available for partition. The daughter is not

entitled to a share. In other words, they have made it applicable to all the pending proceedings.

105. It is well understood in suits of partition, first there should be a preliminary decree, declaring the rights of the parties, thereafter in terms of the declaration of the preliminary decree in final decree proceedings the partition is effected by metes and bounds. Therefore, only in the case of a partition effected by a decree of Court, when it attains finality, a daughter of a coparcener is deprived of the benefit of the substituted provision. Therefore, this substituted provision applies to the pending proceedings in the trial Court, the Appellate Court, the second Appellate Court where the preliminary decree or a final decree is challenged. The language employed by the Parliament is clear, unambiguous and it also clearly demonstrates the intention of the Parliament to make this provision retrospective and give the benefit of the right of a co-parcener which devolves by birth on daughters.

106. Whether the change in the law will also affect pending appeals or not was the question considered by the



Apex Court in the case of **LAKSHMI NARAYAN GUIN AND OTHERS vs NIRANJAN MODAK [1985 (1) SCC 270]** and the observations made at paragraph-9 are as under:

*"9. That a change in the law during the pendency of an appeal has to be taken into account and account and will govern the rights of the parties was laid down by the court in Ram Sarup v. Munshi (1963)3 SCR 858: (AIR 1963 SC 553), which was followed by this Court in Mulla v. Godhu (1970)2 SCR 129: (AIR 1971 SC 89 ). We may point out that in Dayawati v. Inderjit (1966)3 275: (AIR 1966 SC 1423 at p. 1426), 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."... .."*

107. Again the Apex Court in case of **UNITED BANK OF INDIA, CALCUTTA vs. ABHIJIT TEA CO.PVT. LTD., & OTHERS [AIR 2000 SC 2957]** has observed thus:



*"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 the law affecting pending actions and to give effect to the same. If the law states that after its commencement, no suit shall be "disposed of" or "no decree shall be passed" or "no court shall exercise powers or jurisdiction". The Act applied even to the pending proceedings and has to be taken judicial notice by the Civil Court".*

108. In this background the explanation makes it clear mere passing of a decree for partition whether by the trial Court or by the appellate Courts is not enough. Till a partition is effected by a decree of a Court, thereby meaning till the decree for partition attained finality, the daughter cannot be deprived of her legitimate right in the said property. Therefore, the substituted/amended Section applies to all pending proceedings as the partition is not yet effected by a decree of the Court.

**POINT No. 6 VESTED RIGHT OF****(a) OTHER FEMALE RELATIVES**

109. Section 6 prior to amendment dealt with devolution of interest of a male Hindu of a Mitakshara co-parcenary property after the commencement of the Hindu Succession Act, 1956. The reason being only a male could be a member of a Mitakshara co-parcenary. Therefore, the said Section did not refer to a female. The proviso to Section 6 before amendment provided that when a Hindu male dies after the commencement of the Act, having at the time of his death, an interest in a Mitakshara coparcenary property, if he had left him surviving female relative specified in Class I of the Schedule or a male relative specified in that class who claims through such female relative, 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. The female relatives in Class I are, daughter, widow, mother, daughter of predeceased son, widow of a predeceased son and widow of a predeceased son of a predeceased son. Now, by Amendment Act of 2005, old Section

6 stands repealed, the amended Section is substituted, conferring on the daughter of a coparcenar, the right of a coparcener in a Joint Hindu Family. Thus, a daughter's interest is taken care of. Therefore, now the question is, if a male Hindu dies before the commencement of the Amended Act, the succession opens and what is the right of the male and female relative. Under the substituted Section, no provision is made for female relative other than the daughter. After the commencement of the substituted provision, how their rights are to be determined? Do they have a right? If a right is accrued to them and vested in them, what would be the effect of the substituted provision, viz-a-viz their right ? Does it amount to taking away their vested right.

110. It is in this context when the substituted Section is silent, we have to resort to the General Clauses Act, 1897.

111. Section 6 of the General Clauses Act, 1897 reads as under:-

**6. Effect of repeal.-** *Where this Act, or any [Central Acts] or Regulation made after the commencement of this Act, repeals any enactment*

*hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not:-*

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or*
- (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or*
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or*
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or*
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid.*

*and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had been passed.*

112. A power to make a law with respect to the topics committed to Parliament or State Legislatures carries with it a power to repeal a law on those topics. Substitution of a provision results in repeal of the earlier provision and its

replacement by the new provision. Substitution thus combines repeal and fresh enactment. Since repeal of a law takes effect from the date of repeal and the law repealed remains in operation for the period before its repeal without assistance of any saving clause for transactions past and closed, it can be retrospectively amended to affect such transactions even after its repeal. Section 6 of the General Clauses Act applies to all types of repeals. The section applies whether the repeal be express or implied, entire or partial or whether it be repeal simpliciter or repeal accompanied by fresh legislation. The effect of clauses (c) to (e) of section 6, General Clauses Act is, to prevent the obliteration of a statute in spite of its repeal to keep intact rights acquired or accrued and liabilities incurred during its operation and permit continuance or institution of any legal proceedings or recourse to any remedy which may have been available before the repeal for enforcement of such rights and liabilities. The distinction between what is, and what is not a right preserved by the provisions of section 6, General Clauses Act is often one of great fineness. What is unaffected by the repeal of a statute is a right acquired or

accrued under it and not a mere "hope or expectation of", or liberty to apply for, acquiring a right. A distinction is drawn between a legal proceeding for enforcing a right acquired or accrued and a legal proceeding for acquisition of a right. The former is saved whereas the latter is not. The question whether a right was acquired or a liability incurred under a statute before its repeal will in each case depend on the construction of the statute and the facts of the particular case. General savings of rights accrued, and liabilities incurred under a repealed Act by force of section 6, General Clauses Act, are subject to a contrary intention evinced by the repealing Act. In case of a bare repeal, there is hardly any room for a contrary intention; but when the repeal is accompanied by fresh legislation on the same subject, the provisions of the new Act will have to be looked into to determine whether and how far the new Act evinces a contrary intention affecting the operation of section 6, General Clauses Act. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them, for unless such an intention is manifested by the new

Act, the rights and liabilities under the repealed Act will continue to exist by force of section 6, General Clause Act. It is the repealing Act and not the Act repealed which is to manifest the contrary intention so as to exclude the operation of section 6. The silence of the repealing Act is consistent and not inconsistent with section 6 applying.

113. The amended Section is silent about the rights of other female relatives of a Hindu male dying before the commencement of the amended Act. There is nothing in the amended provision which evinces a contrary intention affecting the operation of the proviso to the unamended Section 6. The amended Section do not manifest an intention to destroy the rights conferred under the proviso to the amended Section. Sub-section (3) of the amended provision provides only for devolution of the interest on the death of a Hindu, after the amendment Act. In the case of a male, if he has left behind a female relative, the proviso to Section 6 applies, as the amended provision makes no provision for such a contingency. Therefore, the unamended Section remains in operation for the period before this repeal.

114. However, while determining the share of the male Hindu who has died before the commencement of the amended Act, i.e. 9.9.2005, who had an interest in a Mitakshara coparcenary property, if he has left him surviving a female relative, his share is to be determined treating his daughter also as a coparcener. Thereafter in the notional partition, the share to be allotted to him devolves as per proviso to the unamended Section 6 of the Act. Thus, the vested right accrued to the other female members is not affected by the amendment, as the said vested right is not taken away expressly or by necessary implication by the Parliament. May be the extent of their share may be diminished but it does not amount to taking away the vested right. That is the sacrifice the other female members who are none other than the mother, grandmother, a grand daughter, has to make in favour of a daughter.

115. Therefore, in so far as other female members left behind by a male co-parcener dying before the commencement of the Amendment Act, succession to this property is governed

by the unamended Section 6 by virtue of Section 6 of the General Clauses Act.

**(b) OTHER MALE MEMBERS**

116. In a co-parcenary property, the co-parcener acquires right by birth. Once he is born, the right in a co-parcenary property vests in him. This is a vested right. But what is the extent of that vested right, is not determined on the date of his birth. Though a co-parcener gets a right in the co-parcenary property by birth but the share of such co-parcenary is not definite and it will be fluctuating with the births and deaths of co-parceners. Therefore, no co-parcener can say with definiteness what his share at any point of time. The share to which a co-parcener is entitled to, is determined at a partition. On partition, his share is ascertained, whereas on birth, the right vests in a co-parcener. It is also well settled that in a partition suit, even after a preliminary decree, depending upon the intervening circumstances like births and deaths, the share allotted in a preliminary decree can be varied by the Court in the final decree proceedings till the properties are partitioned

by metes and bounds. The right to a share is a vested right, but the extent of that share is not a vested right.

117. It is contended that once succession opens with the death of a coparcener, the share of the other coparceners are also determined. Even though no partition by metes and bounds takes place immediately, the said share cannot be altered, as it is a vested right. A vested right cannot be taken away by amendment. In support of this contention, they relied on a decision of the Division Bench of this Court in the case of **M.PRITHVIRAJ AND OTHERS vs SMT. LEELAMMA N AND OTHERS [2008 (4) KCCR 2333]** where relying on a judgment of the Apex Court in the case of Sheela Devi and Others Vs Lal Chand and Another [2007 (2) Civil LJ 364] it was held, the amended provisions of the Hindu Succession Act, 2005 are not applicable to the facts of the case, since the succession had already opened in the year 1969 on the demise of K.Doddananjundaiah. The aforesaid judgment do not lay down any law. As is clear from the aforesaid observations the amended Act is not applicable to the facts of the case. The said judgment was rendered following the judgment of the Apex



Court in the case of Sheela Devi's case where the Supreme Court held as under : -

*"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 a 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). But once a son is born, it becomes a coparcenary property and he would acquire an interest therein".*

*"21. The Act indisputably would prevail over old Hindu Law. We may notice that the Parliament, with a view to confer right upon the female heirs, even in relation to the joint family property, enacted Hindu Succession Act, 2005. Such a provision was enacted as far back in 1987 by the State of Andhra Pradesh. The succession having opened in 1989, evidently, the provisions of Amendment Act, 2005*

would have no application. Sub-section (1) of Section 6 of the Act governs the law relating to succession on the death of a coparcener in the event the heirs are only male descendants. But, proviso heirs appended to sub-section (1) of Section 6 of the Act creates an exception. First son of Babu Lal, viz., Lal Chand, was, thus, a coparcener. Section 6 is exception to the general rules. It was, therefore, obligatory on the part of the plaintiffs-respondents to show that apart from Lal Chand, Sohan Lal will also derive the benefit thereof. So far as the second son Sohan Lal is concerned, no evidence has been brought on records to show that he was born prior to coming into force of Hindu Succession Act, 1956".

118. However, the Supreme Court after referring to the aforesaid judgment, in the case of **BHANWAR SINGH vs PURAN AND OTHERS [(2008) 3 SCC 87]** held as under :-

"22. In that case, as noticed hereinbefore, Babu Ram had no son in the year 1922 but a son, Lal Chand, was born to him in the year 1938 and another son, Sohan Lal, was born in 1956. It was in the aforementioned situation, this Court held that a joint family revived on the birth of Lal

*Chand. This Court, in that view of the matter also opined that as there was no proof as to whether the second son was born after the coming into force of the Hindu Succession Act, it was held that his heirs were not entitled to take the benefit of the coparcenary interest.*

*23. Sheela Devi, therefore, is not applicable to the fact of the present case."*

119. Therefore, the aforesaid judgments are purely on the facts of those cases and they were not really interpreting the amended provisions. Neither the Apex Court nor the High Court, in the aforesaid decisions were interpreting the amended section and they have not laid down any law. Therefore, the aforesaid judgments are of no assistance.

120. Even before the commencement of the amended Section 6, if succession opened and a co-parcenaar acquires a specific share in the co-parcenary property, which vests in him on the date the succession opens, it is open to the legislature in exercise of its plenary power to take away such vested right by making the law retrospective. It is only when the amended law

is silent about its application or ambiguous, when the Court is called upon to interpret such provision, the Court cannot place an interpretation which would take away a vested right, especially in matters of succession. But, the said Rule has no application when the legislature expressly or by necessary implication makes its intention clear by making such amended law retrospective. It is settled principle of law the legislature has the power to take away a vested right by enacting the law and by expressing its intention in clear terms.

121. Under the unamended Section 6 when a male Hindu dies after the commencement of the Act, his interest in the Mitakshara co-parcenary property devolve by survivorship upon the surviving members of the co-parcenary. Prior to the amended Section surviving members of the co-parcenary included only male members and sons. By the amended Section 6, a daughter is conferred the status of a co-parcener and she would become a member of the co-parcenary. To that extent the amended Section is inconsistent with the unamended Section 6. Therefore, the amended Section as it evinces contrary intention effecting the portion of unamended



Section 6 and also confers on such daughters, the right to property by birth, the rights which accrue to the male members of the co-parcener on the succession being open prior to the amended Section is affected, their share get reduced.

122. The Parliament wanted to give the benefit of the law to the daughters from 1956 itself. By giving such a right to the daughters even in pending matters all that happens is the shares of the sons would get reduced. But, the vested right which they acquired by birth is not extinguished. It is a curative legislation. This right ought to have been given to the daughters in the year 1956 itself when daughters were given the constitutional right of equality. The legislature has the power to take away such vested right by enacting a law and making its intention clear expressly or by necessary implication. By enacting the amended Section the legislative intent is clear. Not only the law is made retrospective but also affects such vested right of a male co-parcener. Therefore, the contention that the vested right of a co-parcener which had accrued by the opening of the succession prior to the amended Act cannot be taken away, is without any substance.



**WIND OF CHANGE**

123. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. How it is achieved. The civilization, culture, custom, usage, religion and law are founded upon the community life for man's well being. The man will obey the command of the community by consent. The law formulates the principles to maintain the order in the society to avoid friction. Democracy brings about bloodless revolution in the social order through rule of law. No right in an organised society can be absolute. Enjoyment of one's right must be consistent with the enjoyment of the rights of others. In a free play of social forces, it is not possible to bring about a voluntary harmony. The State has to step in to set right the imbalance. The directive principles, though not enforceable, Article 38 obligates the State to restructure social and economic democracy, enjoins to eliminate obstacles and prohibit discrimination in *inter state* succession based on sex.



124. The public policy and constitutional philosophy envisaged under Articles 38, 39, 46 and 15(1) and (3) and 14 is to accord social and economic democracy to women as assured in the preamble of the Constitution. They constitute core foundation for economic empowerment and social justice to women for stability of political democracy. In other words, they frown upon gender discrimination and aim at elimination of obstacles to enjoy social, economic, political and cultural rights on equal footing. Law is a living organism and its utility depends on its vitality and ability to serve as sustaining pillar of society. Contours of law in an evolving society must undergo change with march of time. Justice to the individual is one of the highest interests of the common man unless it would redefine the protection of the Constitution and the common law. If law is to adapt itself to the needs of the changing society, it must be flexible and adaptable. Law is the manifestation of principles of justice, equity and good conscience. Rules of law should establish a uniform pattern for harmonious existence in a society where every individual would exercise his rights to his best advantage to achieve

excellence, subject to protective discrimination. Law is the foundation on which the potential of the society stands.

125. After the advent of independence old human values assumed new complex; women need emancipation; new social order need to be set up giving women equality and place of honour, abolition of discrimination based on equal right to succession was the prime need of the hour and temper of the times. Therefore, when women are discriminated only on the ground of sex in the matter of *inte state* succession to the estate of the parent or husband, the Hindu Succession Act, revolutionised the status of a Hindu female and used Section 14(1) as a tool to undo past injustice to elevate her to equal status with dignity of person on par with man and removed all fetters of Hindu Women's limited estate which blossomed into full ownership. By legislation fiat the discrimination of *inte state* succession meted out to women was done away with. Articles 14, 15 and 16 frowns upon discrimination on any ground and enjoin the State to make special provisions in favour of women to remedy past injustice and advance their

socio economic and political status. Economic necessity is not a sanctuary to abuse women's person. Section 14, therefore, gives to every Hindu women full ownership of the property, irrespective of the time when the acquisition was made, namely, whether it was before or after the Act had come into force, provided she was in possession of the property. The Act also gave effect to the equality clause in the Constitution by giving the women equal rights in the property of a male Hindu dying *intestate* after the coming into force of the Act. Still inequality persisted in so far as co-parcenary property is concerned. The discrimination continued between the son and the daughter in the matter of sharing the co-parcenary property. It took nearly 50 years in free India to remedy the situation. Realising this inequality which is a blot on the democratic polity, which not only contributed to her discrimination on the ground of gender but also led to oppression and negation of her fundamental right of equality guaranteed by the Constitution and having regard to the need to render social justice to women, the Parliament has passed the Amendment Act, giving the daughter equal status with the

son and equal rights in the coparcenary property. The Amendment Act is curative, remedial in nature, and wants to undo the injustice done to her in the last 50 years. The amendment not only intends to give equal rights to the daughter, it wants to give such rights from the day the Act came into force, from which date such a legitimate right was denied to her. This is the will of the people of this country, opinion of the healthy elements of the population, who believe in the true spirit of the ancient culture of this country, which serves to inspire not only those of conservative spirit but also those desire in a loyal and disinterested spirit to make radical alterations to the organisation of existing society. This law is in conformity with the sense and needs and the mores of the community. What ever sacrifice the men have to make while giving effect to the law, has to be made with a smile, as it is the command of the community by consent, a revolution in the social order, through rule of law. It removes the blot on the Hindu society and the aspersions cast on Hindu men, over centuries. It is worthwhile to remember the words of Manu.



यत्र नार्यस्तु पूज्यन्ते रमन्ते तत्र देवताः ।

“Yatra Naryasthu Poojyanthe, Ramanthe Thatra Devethaha”

The deities smile on the family where the females are honoured (held in respect)

**ON FACTS:**

126. Coming to the facts of this case, it is not in dispute that it is conceded by the defendants that the schedule properties are co-parcenary properties. The kartha of the Joint Hindu Family, D.N.Vasanth Kumar died on 31.12.1984 *intestate*. There was no partition between him and his sons during his lifetime. He left behind 2 sons and the two daughters including the plaintiff apart from the 1<sup>st</sup> defendant widow. By virtue of the Amendment Act, the plaintiff-the daughter of a co-parcener in a Joint Hindu Family governed by the Mitakshara Law by birth becomes a co-parcener in her own right in the same manner as the son and have the same rights in the co-parcenary property as she would have had if she had been a son. There were 5 co-parcenars of the Hindu Undivided Family

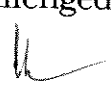
on the date prior to the date of the death of her father. She acquired the right by birth in the co-parcenary property. Therefore, she would be entitled to equal share in the co-parcenary property, i.e.,  $1/5^{\text{th}}$  share.

127. On the date of death of her father, the Amendment Act had not come into force. Therefore, the unamended Section 6 of the Act was applicable. A notional partition is to be effected prior to the date of the death of her father in which event her father, plaintiff, two sons defendants 3 and 4 and her sister defendant No.2 would have  $1/5^{\text{th}}$  share each. By virtue of the proviso to Section 6 of the unamended Section, the  $1/5^{\text{th}}$  share of Vasanth Kumar do not devolve by survivorship. It devolves by the testamentary or intestate succession. Admittedly, he had not made any Will. He has left behind female heirs. Therefore, in the  $1/5^{\text{th}}$  share to be allotted to Vasanth Kumar, the two sons, daughters and wife would be entitled to equal share, i.e., each one of them would be entitled to  $1/5^{\text{th}}$  share in the  $1/5^{\text{th}}$  share of Vasanth Kumar. As the amended provision has not made any provision for devolution

of interest of a Hindu male dying intestate leaving the female relative, Section 6 of the General Clauses Act is attracted. The share to which the first defendant-wife would be entitled to is governed by the unamended Section 6. Therefore, she would be entitled to  $1/5^{\text{th}}$  share in the  $1/5^{\text{th}}$  share of her husband, i.e., she would be entitled to  $1/25^{\text{th}}$  share in the schedule properties. Similarly, the plaintiff, defendants 2 to 4 would be entitled to  $6/24^{\text{th}}$  share each.

128. It is submitted on behalf of the defendants that they have sold the schedule property in favour of Hotel Sriveeba (P) Ltd., a Company represented by the Director Sri S. Narayan on 26.11.2004. In view of the proviso to sub-section (1) of Section 6 of the substituted Section, the said sale is not in any way affected by the amended provision and the sale deed would not get invalidated. If the aforesaid alienation had taken place prior to the institution of the suit, the defendants were justified in saying so. However, admittedly in this case the suit for partition is filed on 12.9.2001. The trial Court partially decreed the suit of the plaintiff on 17.1.2004. In the

suit on 10-10-2002 defendants 1 to 4 filed a memo (not to alienate) the suit property pending disposal of the suit. The present appeal is filed before this Court on 10.3.2004. Though the aforesaid sale deed is executed prior to 24.12.2004, the cut off date stipulated in Section 6 to save dispositions and alienations from Section 6(1) of the substituted Section, as the said alienation is made during the pendency of the proceedings, it is hit by the doctrine of lis pendence. Therefore, notwithstanding the aforesaid disposition/alienation before the cut off date, the said alienation would not take away the right of the plaintiff conferred on her under the substituted Section. It binds only the parties to the said instrument. The right of the plaintiff in respect of the said property is intact. Therefore, we do not see any substance in the said contention also. The finding of the trial Court that properties C and D schedule are not available for partition is not disputed and challenged in this appeal.



129. In that view of the matter, we pass the following order:-

- (i) *The appeal is allowed.*
- (ii) *The judgment and decree of the trial Court is set aside.*
- (iii) *It is declared that the plaintiff is entitled to 6/25<sup>th</sup> share in the plaint A, B and E schedule properties*
- (iv) *Plaintiff is also entitled to mesne profits. It is to be worked upon by her in the final decree proceedings.*
- (v) *Parties to bear their own costs.*

Sd/-  
JUDGE

Sd/-  
JUDGE

ckl/ksp/ujk