



Chandigarh Judicial Academy
Experts Corner

“COPARCENARY PROPERTY- DEVOLUTION”



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A. The legal position prior to the coming into force of the Hindu Succession Act, 1956

Prior to the coming into force of the Hindu Succession Act, 1956, the devolution of coparcenary interest in the property, on the death of a coparcener was governed by the Mitakshara School of Hindu Law.

As per the Mitakshara School of Hindu Law, a coparcenary came into existence when a person inherits property from his father, grand father or great grand father. In that event he holds it as a joint tenant (coparcener) with his sons, grand sons and great grandsons. Once a coparcenary comes into being, the interest of a deceased coparcener in the coparcenary property devolves through survivorship and not through succession. In other words, the coparceners hold the property as joint tenants and not as tenants-in-common. *Karta* of a coparcenary could alienate the coparcenary property only for benefit of estate or legal necessity. In case the property was alienated *dehors* the above, the alienation was liable to be set aside.

B. Legal position after the coming into force of the Hindu Succession Act, 1956

(i) On coming into force of the Hindu Succession Act, 1956, legal position mentioned at “A” hereinabove underwent a drastic change. The first change was brought about by the provisions of Sections 4 and 8 of the Act. Section 4 of the Act gave it an overriding effect over all the rules of Hindu Law/custom/usage, which prevailed immediately before the commencement of the Act.

Section 8 of the Hindu Succession Act, 1956 laid down the rule of succession in case of males. The Hon'ble Supreme Court of India in **CWT v. Chander Sen (1986) 3 SCC 567** held that if a person, possessed of self acquired property, dies after the coming into force of the 1956 Act, his property shall devolve through succession under section 8 of the 1956 Act. And in that eventuality his successors shall hold the property as tenants-in-common and not as joint-tenants. The reason given by the Hon'ble Supreme Court of India for this conclusion was that the successors, as per schedule to the Act, are different than the coparceners as per the Mitakshara Hindu Law. Therefore, the provision of section 8 of the Act is in direct conflict with the Mitakshara Law and would override it by virtue of section 4 of the Act. The necessary sequel to this holding is that if a Hindu male owns self acquired property prior to the coming into force of the 1956 Act, the property shall devolve as per section 8 of the Act if he dies after the coming into force of the said Act. The acquisition of self acquired property prior to or after the coming into force of the 1956 Act is irrelevant where the death takes place after the coming into force of the 1956 Act. In both eventualities, the ratio in Chander Sen would apply and on succession the property shall not assume the character of coparcenary property in the hands of the heirs. The decision given by the Hon'ble Supreme Court of India in Chander Sen supra have been reiterated by the Hon'ble Supreme Court in **Yudhisther vs.**

Ashok Kumar, (1987) 1 SCC 204 and Bhanwar Singh vs. Puran, (2008) 3 SCC 87.

(ii) In so far as a coparcener dying after the coming into force of the 1956 Act is concerned, qua the properties which have already assumed the character of coparcenary property before the coming into force of the Act, the situation would be governed by section 6 of the Hindu Succession Act, 1956. Section 6 of the Act (prior to 2005 Amendment) provided that if a male Hindu dies leaving behind a female relative specified in Class-I of the Schedule or a male relative who claims through such female, then the interest of the deceased in the coparcenary property shall devolve by testamentary or intestate succession and not by survivorship. To ascertain the interest of the deceased coparcener, it was provided that a notional partition shall take place. The share of the coparcener thus computed shall devolve through succession under section 8 of the Act or through testamentary succession under section 30 of the 1956 Act. On such devolution having taken place, the property in the hands of the heirs/successors shall lose the character of coparcenary property. And shall thereafter remain separate property of the heirs who shall hold the same as tenants-in-common until partition. This notional partition is effected only for the purpose of ascertaining the share of a deceased coparcener when he was survived by a female heir of Class I or a male relative of such female. This has been so held by the Hon'ble Supreme

Court of India in **Vineeta Sharma vs. Rakesh Sharma and Others, (2020) 9 SCC 1.**

C. Legal position after the coming into force of the Hindu Succession (Amendment) Act, 2005 w.e.f. 9.9.2005

In the year 2005, through Act 39 of 2005 (w.e.f. 9.9.2005) section 6 of the 1956 Act has been amended. It provides that on the commencement of the Amendment Act, 2005 the daughter of a coparcener shall by birth become a coparcener in the coparcenary property in the same manner as the son; shall have the same rights in the coparcenary property as a son has. It was, however, provided that this amendment shall not invalidate any disposition, alienation, partition or testamentary disposition of property that had taken place prior to 20th day of December, 2004. It has also been provided in section 6(3) that if after the commencement of the Amendment Act, 2005, a Hindu coparcener dies, his interest in the property shall devolve by testamentary or intestate succession and not by survivorship. To ascertain his share the coparcenary property shall be deemed to have been divided as if a partition have taken place. In the notional partition under section 6 of the 1956 Act, as amended in the year 2005, the share of the deceased coparcener shall be computed by allotting to a daughter a share equal to that of a son.

D. Holding of the judgment of the Hon'ble Supreme Court of India in "Vineeta Sharma versus Rakesh Sharma and Others", (2020) 9 SCC 1.

In this judgment the Hon'ble Supreme Court of India has held as under:

- i. Provisions contained in the substituted Section 6 of the Hindu Succession Act, 1956 confer status of coparcener on the daughter born before or after the Amendment Act, 2005 in the same manner as son with the same rights and liabilities.
- ii. The rights can be claimed by the daughter born earlier with effect from 9.9.2005 with savings as provided in Section 6(1) regarding the dispositions or alienations, partition or testamentary dispositions which had taken place before the 20th day of December, 2004.
- iii. Since the right in coparcenary is by birth, it is not necessary that father of daughter coparcener should be living as on 9.9.2005.
- iv. The statutory fiction of partition created by the proviso to Section 6 of the Hindu Succession Act, 1956 as originally enacted did not bring about the actual partition or disruption of coparcenary. The fiction was only for the purpose of ascertaining share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the 1956 Act or male relative of such female. The provisions of the substituted section 6 are required to be

given full effect. Notwithstanding that a preliminary decree has been passed, the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in an appeal.

E. The Impact of the judgments by the Hon'ble Supreme Court of India referred to hereinabove, in a nutshell, is as under :-

- I. If a Hindu male, possessed of self acquired property, dies after the coming into the force of the Hindu Succession Act, 1956, his heirs would inherit the property as *tenants-in-common* and not as *joint-tenants*. Meaning thereby that the heirs have a non-fluctuating, definite and separate share in the property and not a fluctuating coparcenary interest. In other words whenever a succession takes place under section 8 of Hindu Succession Act, 1956, the subject matter of the succession shall not acquire the character of coparcenary property. This is the holding in Chander Sen and other judgments on the point mentioned under **Heading B**.
- II. The notional partition referred to under section 6 Hindu Succession Act, 1956 (both prior and after the Amendment Act 2005), is solely for the purpose of ascertaining the share of the deceased coparcener when he is survived by a female heir of Class I / male relative of such female. It does not effect actual partition of the coparcenary. No severance of the

coparcenary character of the property thus takes place on such notional partition. This is only a fiction created by proviso to section 6 of the Hindu Succession Act, 1956. This does not bring about the actual partition or disruption of coparcenary. See **Vineeta Sharma** supra.

III. After coming into force of the amendment of the year 2005, the daughter of a coparcener has also by birth become a coparcener in her own right in the same manner as the son. This right is exercisable by the daughter w.e.f. 9.9.2005 (i.e. the date on which the Amendment Act 2005 came into force). The right however accrues to her from the date of her birth. Meaning thereby that if a daughter claims any right in the property on the basis that the property is coparcenary and she is a coparcener therein, her right shall be worked out retrospectively from the date of her birth. **The retrospective effect given to 2005 Amendment prior to 20.12.2004 is qualified in the sense that it will not affect / impact the dispositions, alienations, partition or testamentary disposition effected prior to 20.12.2004. These dispositions and alienations however have to be valid as per the law prevailing at that time. If from the date of commencement of the 1956 Act till 20.12.2004 the property in question has not been subjected to any disposition etc. (referred to hereinabove), the amended provision of section 6 shall have full play with effect from the coming into force of the**

1956 Act (i.e. w.e.f. year 1956 itself). The dispositions referred to hereinabove would mean voluntary dispositions and not include devolution through intestate succession.

- IV. Alienations of coparcenary property effected prior to 20.12.2004 can be challenged by the daughters in proceedings initiated after 9.9.2005 on the ground that the said alienations were without legal necessity or benefit of the estate. It will be no defence that the said alienations have been effected prior to the daughter becoming a coparcener inasmuch as the amendment to section 6 of Hindu Succession Act effected in the year 2005 confers the coparcenary status on the daughter from the date of her birth. Though the right is exercisable after 9.9.2005.
- V. The alienations /dispositions /partitions made during the period 20.12.2004 onwards can be challenged by the daughters (who have attained coparcenary status) by initiating proceeding after 9.9.2005. In these proceedings it will not be a valid defence that the aforementioned dispositions were effected as per the law prevailing at that time. **For this period a complete retrospective effect has been accorded to the 2005 Amendment.** To illustrate: a partition is effected among male coparceners, say in January 2005, through a registered partition deed. This partition is

absolutely valid as per the law prevailing on the date it was effected. The daughter coparcener in a civil suit filed after 9.9.2005 can aver that the aforementioned partition is not valid because it gives to the other coparceners her share also in the coparcenary. And her share in the coparcenary has been illegally usurped by the male coparceners. This plea of the daughter would be valid in law.