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## Notional Partition with the Narrative of women’s struggle for Rights

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*Access to inheritance rights to women is relatively new in India. Although several acts and provisions have been introduced over the years women still face discrimination in customary rights for owning and inheriting ancestral property. The following paper aims to trace the traditional social structuring and patriarchal schools such as Mitakshara and Dayabagha which inhibited women from claiming their rights and further trace the different pro-women acts introduced to provide an equal opportunity to women in property rights. We aim that our article turns out to be an exhaustive piece because with time there needs to be a barrage of amendments that should come through so that there is parity in the system. We also aim to strive through our article for a transparent system in the devolution of property that is gender-fluid and gender-neutral. As seen, in recent times, law scholars have become very pragmatic and try to cast away any draconian law or system we as a country are following or have been following. This ensures us that slowly and steadily devolution of property and the rights associated with it too will be more inclined towards equality than being gender-specific employed.*

**Keywords:** *inheritance rights, ancestral property, gender-fluid, gender-neutral.*

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## INTRODUCTION

As all practices go in the Hindu customs and religion, the practice of transfer of property was also layered with complications and customs which albeit had logic behind it but were very complicated for a common man to understand. The concept of a Hindu undivided family is unique in its true sense along with the legal recognition it has gained. To dive into this concept of notional partition we first must divulge into the schools of law which have all the concepts of succession acts and govern the Hindu Family Law. The two schools of law are, the Dayabhaga and the Mitakshara. The latter school of law has shaped up to be a little conservative when it comes to succession and transfer of property. This opinion revolves around the Mitakshara School of law as it only addresses the male members as the direct heir and right choice for the property transfer. Under this school of law, the property is not shared physically but done in numerical terminologies. This school of law is followed throughout the country barring some parts of Assam and West Bengal. The former school of law i.e., the Dayabhaga is more liberal in its true sense and because of its broad thoughts regarding the law of transfer and inheritance of property, it is going to last more in my opinion. This school of law is gender-neutral and gives uncontrolled power to the father to divide the property physically in the way he seems fit to all the deserving coparceners. The world is dwelling on economic compulsion and financial independence this is the reason why the Dayabhaga school of law would prevail over Mitakshara. Dayabhaga is currently just followed in parts of Assam and Bengal.

But this wave of independence and individual representation has come now but before this, there was no provision enlisted for the women in the family under Hindu Succession Act, 1956<sup>1</sup> and there was a need for a change and an amendment in this act. The Mitakshara school was proving to be very discriminatory against women and there was an urgent need for the change to happen. Then came the principle of Notional partition, in which, when one of the coparceners died, in respect of his undivided interest in the coparcenary property, there should be an equal distribution of that share between his male heirs and female heirs, particularly between his daughter and son. This might be tricky and a little confusing to laymen, to make it easy, let us use an example, in a family of 4, the grandfather, the grandmother, and two sons along with their wives and one son and daughter respectively. I suppose the eldest son dies in a car accident, and before that the property had not been divided and the son died intestate, in this case, the son and the daughter of the eldest son would get half of the property which

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<sup>1</sup> Hindu Succession Act 1956

would have been the share of their father if he was alive.<sup>2</sup> This equal division was only possible after amendments in the Hindu Succession Act and when the principle of Notional Partition came into existence in 2005 through a very important amendment. This amendment was pivotal in bringing equality in the devolution of property among male and female heirs. It iterated that the devolution of the property will be as indicated by the survivorship in case there are just male beneficiaries in the family and no female beneficiaries. Assuming the family has both male and female beneficiaries, the idea of survivorship would not matter, the devolution will happen to the beneficiaries recommended by the law. There were seven main changes or amends brought in 2005 to the Hindu Succession act,<sup>3</sup> some of the key points were, All the heirs will have equal rights irrespective of gender and they will be considered coparceners by birth.<sup>4</sup> The daughter of a deceased person has the same entitlement on coparcenary property as the right of a son. There is no difference when it comes to the liabilities, just as rights are equal, so also, the liabilities. In Mitakshara if there is any coparcenary's liability then it will apply to both son and daughter equally.<sup>5</sup>

These changes could only be possible because of the case laws which had been either before the amendment and cases which happened after the amendment has been pivotal in leveling the playing field in the devolution of property. The first case that was key before this amendment was *Bhaiya Ramanuj Pratap Deo vs Lalu Maheshanuj Pratap Deo & Ors.* (1981),<sup>6</sup> in which the hon'ble court held that that the rule of survivorship or the rule of lineal primogeniture is not applicable since the Act was already in force. It was also observed that the old Act is retrospective in nature.<sup>7</sup> One more case which was a result of the amendment made in 2005 was that of *Yogendra & Ors vs Leelamma N. & Ors.* (2009)<sup>8</sup>, in this case, the court utilised the amendments of 2005 and the court stated that due to the illegality of bigamy in the Hindu Marriage act, offspring of the second marriage would not be considered legitimate coparceners of the property but due to the amended act they would be considered as coparceners under the illegitimate child category.<sup>9</sup>

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<sup>2</sup> *Ibid*

<sup>3</sup> Hindu Succession (Amendment) Act 2005

<sup>4</sup> *Ibid*

<sup>5</sup> *Ibid*

<sup>6</sup> *Bhaiya Ramanuj Pratap Deo v Lalu Maheshanuj Pratap Deo & Ors* 1981 AIR 1937

<sup>7</sup> *Ibid*

<sup>8</sup> *Yogendra & Ors v Leelamma N & Ors* (2009) Civil Appeal Nos 4818-4819/2009

<sup>9</sup> *Ibid*

## CHANGE IN STATUS OF WOMEN FROM PAST TO PRESENT

While different acts and rights have been introduced over the years, it is only now that women of our country have experienced a taste of equal property rights. Historically, women have struggled with suppression, denial of equal opportunities, and access to resources which resulted in them not having any social position in society, and being only seen as homemakers. The primary reason behind this was the several personal religious laws that have unknowingly promoted patriarchy over the years. However, with the change in time so has the status of Indian women changed socially and economically. One such field of rights is the inheritance and property rights of women wherein the status has drastically improved.

It all began during the medieval periods when the Indian Sanskrit scholar and notable writer of legal and religious treaties '*Jimutavhana*' derived the inheritance system of 'Dayabhaga', whereas the 'Mitakshara' system was written by another scholar named '*Vijnaneswara*'. The key variation between these two schools of law was regarding the differences in family style. Mitakshara school of law dealt with a joint family wherein the male members of a family acquire an interest in the property by birth. This involved three generations of men which were son, grandson, and great-grandson. On the other hand, in Dayabhaga the property remained with the father until his death and was divided only physically among his children after his demise. An important observation relevant to our paper is that in both systems women were not given any rights to establish their claim over the ancestral property and had to accept the system which was managed by men. It can be seen that women during these times were hardly given any respect. It was only after several hundred years that **The Hindu Women's Right to Property Act, 1937** came into place. This act allowed widows, whose husbands had died intestate to have a limited share in the ancestral property as her son.<sup>10</sup> Before such act women were not involved in property division rather the property was passed on to other coparceners via survivorship. It is important to note daughters were still not given any status as the act only mentioned widows.<sup>11</sup> This act, however, faced a lot of backlash in courts and by several community members. In the High Court of Patna in the case of *Sahadeo Singh v. Chhabila Singh*,<sup>12</sup> it was held "that a widow cannot be a Karta of the joint family as she is not a coparcener. She has no legal qualification to become Karta".<sup>13</sup> Critics of the act claimed that according to Dayabhaga and Mitakshara's schools of law, inheritance cannot start with

<sup>10</sup> Hindu Women's Right to Property Act 1937

<sup>11</sup> *Ibid*

<sup>12</sup> *Sahadeo Singh v Chhabila Singh* AIR 1978 Pat 258

<sup>13</sup> *Ibid*

women, and further, they were also of the view that a woman had no legal right to be a Karta.<sup>14</sup> Fast forward to 1951 when the Constitution of India came into place.<sup>15</sup> While the constitution promoted equality for all and no discrimination with regards to gender, such practices were hardly implemented. With time the government realized this and came up with the **Hindu Succession Act 1956** which was the first and foremost law that provided equal rights of inheritance among Hindus, Sikhs, Buddhists, and Jains. It also recognized gender inequalities in the area of succession.<sup>16</sup> This act is said to be one of the most significant developments with respect to female property rights. For the first time under this act, the mother, daughter, and widow were added to the Class-1 heirs, in other words, the list of family members who would stand in line after the death of the Karta.<sup>17</sup> This would only be valid in case the coparcener had left behind a valid will mentioning any of the eight Class-1 heirs.<sup>18</sup> The introduction of such a provision helped daughters or wives get an equal share in the ancestral property which had been earlier denied to them. However, under Section 6 of the act preference was still given to men in case the coparcener died intestate. The law failed to recognize females as coparceners and thus devolution of interest in the property could only be done by way of survivorship which was limited to three degrees i.e., male son, grandson, and great grand-son.<sup>19</sup> An important judgment of a case that started gaining traction during the late 1990s was the case of *Uttam v. Saubhag Singh*<sup>20</sup> wherein the Apex Court held that “upon the demise of the Karta of the Hindu joint family, the entire property held by him for the family would go by intestate succession in view of the proviso to Section 6 of the Hindu Succession Act, 1956 for the existence of female relative to the propositus on his intestate death and consequently, the grandson would have no right in the joint family property.”<sup>21</sup>

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<sup>14</sup> Sarita Kumari, ‘Women Inheritance Rights In India: Some Reflections’ (2019) 6(1) IJRAR International Journal of Research and Analytical Reviews 336-45

<sup>15</sup> *Ibid*

<sup>16</sup> Hindu Succession Act 1956

<sup>17</sup> *Ibid*

<sup>18</sup> *Ibid*

<sup>19</sup> Hindu Succession Act 1956, s 6

<sup>20</sup> *Uttam v Saubhag Singh* (2016) 4 SCC 68

<sup>21</sup> *Ibid*

## MAJOR PRECEDENTS BEFORE AND AFTER THE AMENDMENT

Another major change was brought under Section 14 of the Act which allowed females to have absolute ownership of any property they possessed.<sup>22</sup> Earlier women were only allowed to have limited ownership along with their son or another family member. This was the key amendment brought about in this act, which promoted equality for women.<sup>23</sup> But the problem which arose was the lack of knowledge as most women in India at the time were unaware of their rights to full ownership of their property. Another major decision in the case of *Gurupad Khandappa v. Hirabai Khandappa Magdum*<sup>24</sup> which came out in 1981 which clarified the position of mothers or widows on whether they would inherit the shares of a deceased coparcener in addition to the shares she would own as a legal heir of the property.<sup>25</sup> The judgement held in the affirmative and was a landmark for women's struggles as earlier they were even denied any share in the property and now would be owning not only their legal share but also the share of the Karta upon his demise. Several years later with women gaining social status and importance in society, the time had come to change their inheritance laws as well.

In 2005, the **Hindu Succession Amendment Act, 2005** was introduced to provide equal opportunity to women in the field of property inheritance. The key change was brought about in Section 6 of the Act which enabled daughters to become a coparcener in the Hindu Joint Family by birth, in a similar way as the sons. Now survivorship could also take place up to three degrees of female heirs. While this amendment was highly regarded as the most progressive move by the Indian judiciary, there was a caveat to this, which was that to claim such rights both the daughter and father should be alive on the date of enactment of the act i.e., September 9, 2005. To this effect, a key judgment was passed based on this provision. In the landmark case of *Prakash vs Phulawati*,<sup>26</sup> it was held that the amendment act was meant to be prospective meaning that it operates,<sup>27</sup> from the date of its enactment conferring new rights.<sup>28</sup> This meant that the daughter claiming a share in her dead father's property would not get it as

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<sup>22</sup> Hindu Succession Act 1956, s 14

<sup>23</sup> *Ibid*

<sup>24</sup> *Gurupad Khandappa v Hirabai Khandappa Magdum* (1978) 3 SCC 383

<sup>25</sup> *Ibid*

<sup>26</sup> *Prakash v Phulawati* (2016) 2 SCC 36

<sup>27</sup> *Ibid*

<sup>28</sup> Hitendra Shah, 'Interpretation of Section 6 of Hindu Succession Act, 1956' (*TaxGuru*, August 2020)

<<https://taxguru.in/corporate-law/interpretation-section-6-hindu-succession-act-1956.html>> accessed 01 November 2021

they were not covered under the following amendment.<sup>29</sup> This interpretation of the Supreme Court, however, did not last long as the Hon'ble judges soon realised their error and rectified the same in the case of *Danamma vs Amar Singh*<sup>30</sup>. In the following case, the Supreme Court ruled exactly the opposite of what was held in *Prakash vs Phulawati*. The judges observed that if the daughter who claims a share in the ancestral property is well and alive post-September 9, 2005, then the daughter will receive her fair share irrespective of the fact whether the father had died before the commencement of the Amendment Act. The Court further stated that “it would defeat the very purpose and objective of the amended provisions if it were to interpreted that both the daughter and the coparcener needed to be alive on the date of the amendment.”<sup>31</sup> To settle these vastly different judgements the Supreme Court once and for all opined that its judgment in the case of *Prakash vs Phulawati* was inaccurate and thus overruled it in the case of *Sharma vs Sharma*<sup>32</sup>. In the following case, a three-judge bench ruled that the amendment will act retroactively meaning that it will operate in the future but,<sup>33</sup> its operation will be based upon the character or status, which arose earlier.<sup>34</sup> In this regard it was held that the father didn't need to be alive on the date of enactment of the amendment as the whole purpose of the amendment which was to make the female heirs coparceners by birth, would then be defeated.<sup>35</sup>

## CONCLUSION

In conclusion, although amendments have come in place for equality in this segment, the amendments have not been gender neutral at all, there are a different set of rules and conditions laid down in the amended act about the devolution of property amongst male heirs and female heirs, if things had to be equal there would have been just one set of rules and conditions applicable for both the genders.<sup>36</sup> Moreover, the societal aspect is yet to be amended people still think of their daughters not eligible for having a share in their property, which was the case in the Dayabhaga school of law, there are very few states which have fully executed the Mitakshara school of law which imparts gender fluidity and

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<sup>29</sup> *Ibid*

<sup>30</sup> *Danamma v Amar Singh* (2018) 3 SCC 343

<sup>31</sup> *Ibid*

<sup>32</sup> *Sharma v Sharma* (2020) 9 SCC 1

<sup>33</sup> *Ibid*

<sup>34</sup> Hitendra Shah (n 28)

<sup>35</sup> *Ibid*

<sup>36</sup> Shama BH Abbasi, 'India: Sharma v. Sharma – Constitutional Equality for Hindu Women?' (*OxHRH Blog*, September 2020) <https://ohrh.law.ox.ac.uk/india-sharma-v-sharma-constitutional-equality-for-hindu-women>> accessed 01 November 2021

neutrality.<sup>37</sup> The judiciary has tried its level best to mellow the interpretations to a common man's perspective but until and unless the society dwells onto this change and gets accustomed to this concept of devolution which does not favour any specific, then and only then the change will be impactful.

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<sup>37</sup> *Ibid*