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Notional Partition Under Hindu Law: Meaning and Implications

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ABSTRACT

The idea of a Hindu joint family is one of a kind to Hindus and it is legitimately perceived. There are two schools of regulation that oversee the law of succession of the Hindu Undivided Family under Indian law, Dayabhaga and Mitakshara.

Mitakshara law school just alludes to the male individual from the joint family and is stretched out to child, grandson, and extraordinary grandson of the family. A child by birth gets an interest in the responsibility for tribal property of the joint family. All male individuals from the joint family by and large have coparcenary (co-ownership) in the tribal property. After the 2005 Change of the Hindu Succession Act, a female can legally be a coparcener and is qualified for the segment. In this framework, the property can't be shared actually yet the offer can be found out in mathematical terms. This exists all through India except in Bengal and Assam.

Dayabagha law school isn't intended for any orientation. After the death of the father, the right of property wins to the children however not naturally after birth like in the Mitakshara system. The father has full and uncontrolled control over the genealogical property until his demise. This framework is significantly seen in Bengal and Assam. In this framework, the property is truly isolated into explicit parcels and is appointed to each coparcener.

In 2005, the Indian governing body made a few changes to the Hindu Succession Act, 1985. It iterated that the devolution of the property will be as per the survivorship assuming there are just male beneficiaries in the family and no female beneficiaries. On the off chance that the family has both male and female beneficiaries, the idea of survivorship won't make a difference, the devolution will happen to the beneficiaries endorsed by the law.

I. INTRODUCTION

The concept of '**Notional Partition**' particularly deals with devolution of undivided interest of a coparcener in the coparcenary property upon his heirs if he dies intestate. This concept has been dealt in detail in hereinafter contained chapters. The Hindu Succession (Amendment) Act, 2005 makes it clear that when a coparcener dies before partition and intestate and also leaving behind his heirs then his interest would not devolve as per the rule of survivorship. The rule of

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survivorship has not completely abrogated. In a case where there are no heirs then his interest would definitely devolve by the rule of survivorship. Its reference is find under Hindu Law of Succession. This concept particularly came into being with HINDU SUCESSION (AMENDMENT) ACT, 2005 (39 of 2005). The Section 6 of the said Act has been totally replaced by a new provision. This new provision has wide sweeping ramifications on Hindu Joint Family. This Amendment Act abolished many discriminating provisions against women.

The Amendment is based on the 17th report of Law Commission of India on "Property Rights of Women: Proposed Reforms under Hindu Law" under the chairmanship of Justice B.P. Jeewan Reddy Dated 5th May, 2000. This commission recommended for the removal of anomalies and ambiguities with regard to property rights of Hindu women under the Act of 1956. Therefore, the Amending Act gives full fledged property rights to daughters in ancestral property along with sons.

Today, we have one uniform law of succession for all Hindus. Old Hindu law and customary law of succession stand abrogated.

II. PARTITION UNDER HINDU LAW

Vibhajan (partition) is defined by the Mitakshara as the allotment of individuals of definite portions of aggregates of wealth over which many persons have joint ownership. Under Mitakshara the coparceners do not have a definite share and it is only on partition that a coparcener becomes entitled to a definite share. According to Dayabhaga, vibhajan means the indication of the ownership of one out of many by the casting of a ball or pebble on a definite part of the land or cash. It arises with reference to a portion only but which is indefinite because it is not possible to deal specifically with a particular portion since there is nothing to show for certain what portion belongs to whom.

According to Dayabhaga there is no ownership by birth. Every son takes a defined share, the moment the ownership of the father ceases owing to death etc. Under Hindu law partition puts to end the joint status in Hindu Joint family. On partition the joint family ceases to be joint and nuclear family or families may come into existence. However, partition under the Dayabhaga and Mitakshara School is not the same. Since, under the Dayabhaga school the interests of the coparceners specified and certain, partition under Dayabhaga school means physical division of the property or what is called partition by metes and bounds.

(A) Subject matter

It is only the coparcenary property that can be subject matter of partition. Separate property

cannot be the subject of partition, nor can property which by custom descends to one member of the family to the exclusion of other members. Coparcenary property is that property which belongs only to the joint family as a whole. Ancestral property which is another term for the same is property inherited by a male Hindu from his father, father's father and so on. According to the Mitakshara law the essential characteristic of ancestral property is that sons, grandsons and great grandsons of the person acquires an interest and the rights attached to such property at the moment of their birth.

(B) Persons who have a right to partition and entitled to a share

1. Father*:* The father has not merely a right to partition between himself and his sons but he has also the power to effect a partition among the sons inter Se, This seems to be the last survival of father's absolute powers. The Mitakshara expressly confers this power on the father in respect of not only father's separate property (every person has the power to distribute or give away one's own property as one wish to do) but also in respect of joint family property.1

2. Son, grandson and great-grandson: Under the Dayabhaga school, there is no coparcenary consisting of the father and his lineal male descendants and, therefore, sons, grandsons or great-grandsons have no right to partition. On the other hand, under the Mitakshara school, son, son's son and son's son's son have a right to partition. If the father is not joint with anyone of the aforesaid relations, sons have a right of partition against their father.

3. Son born after partition*:* the after born son could get the share of his father alone. The Mitakshara reconciled the conflict by holding that the latter texts lay down the general rule, while the former texts lay down a particular rule applicable to a son in the womb at the time of the partition. On the basis of the Mitakshara formulation, we have now two rules; one in respect of a son in the womb at the time of partition, and the other in respect of a son who comes into the womb after partition.

4. Son conceived at the time of partition but born after partition: The Hindu law has for many purposes equated person in the womb to a person in existence. The texts lay down that if the pregnancy is known, the partition should be postponed till the child is born. In case no share is reserved for the son in the womb, he can, after his birth, demand reopening of the partition

5. Adopted son: The Hindu Adoptions and Maintenance Act, 1956, has codified and reformed Hindu law of adoption. Section 12 of the Act lays down that "an adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes...." It is submitted that this provision could be marshalled to establish equality between the adopted son and the aurasa son in partition also.

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6. Son of void marriage or annulled voidable marriage: Since son of a void marriage or annulled voidable marriage is not a coparcener, he cannot sue for partition. The contrary view is not correct.

7. Illegitimate son: Illegitimate sons fall under two categories: (a) The Dasiputra, or a son born to a concubine (avarudha dasi) exclusively and permanently kept by a Hindu, and (b) an illegitimate son born of a woman who is not a dasi. Their position is as under (1) An illegitimate son of both categories is not entitled to partition or to a share on partition among the first three classes as he is not a coparcener. He is entitled to maintenance. (2) Among the Sudras, the dasiputra has a somewhat superior position. The Mitakshara states the position thus: "A dasiputra obtains a share by the father's choice or at his pleasure, but after (the death of) the father, if there be sons of wedded wife, let these brothers allow dasiputra to participate for half a share, that is let them give him half [as much as is the amount of one brother's allotment.

8. Minor coparcener: The minor coparcener has also a right of partition. A suit for partition may be filed on behalf of the minor by his next friend or guardian. It is here that some distinction is made. Thus, if a Karta is squandering the joint family property to the prejudice of the minor coparcener, if he is ill-treating him or discriminating him, or is, on the whole, unfavourably disposed towards the minor, the minor's guardian may deem it proper to effect a partition on behalf of the minor. When the guardian or the next friend files a suit for partition on behalf of the minor, the court has to be satisfied that the partition will be for the benefit of the minor. If the court comes to the finding that the proposed partition is not for the benefit of the minor, the partition will not be allowed.

9. Alienee: A purchaser of a coparcener's interest in a court sale, or in a private sale where the coparcener has such a power (In Bombay, Madras and Madhya Pra4esh he has such a power), can demand partition as he steps into the shoes of the coparcener for the purpose of working out his equity.

10. Absent-Coparcener: When the coparcener is absent at the time of partition, a share has to be allotted to him. In case no share is allotted to him, he has a right to get the partition re-opened.

(C) Persons who are entitled to a share if partition takes place

All the persons discussed under the previous head are those who have a right to partition and who are also entitled to a share if partition takes place either at their instance or at the instance of some other person, there is another category of members of the joint family who have no

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right to partition but, if partition takes place, they are entitled to share. In this category fall three females: father's wife, mother and grandmother.

1. Father's wife: If a partition takes place between her husband and his son, the father's wife is entitled to a share equal to the share of a son. She can hold it and enjoy it separately from her husband. If there are more than one wife, each wife is entitled to a share equal to the share of a son.
2. Mother: A widowed mother has a right to take a share equal to the share of a son if a partition takes place among the sons. This right accrues to her only when partition by metes and bounds is made. Under the Mitakshara school, when partition takes place after the death of the father among the sons, the mother, including a stepmother even if she is childless, is entitled to a share. Mother and stepmother each take a share equal to the share of a son.' Under the Dayabhaga school, a childless stepmother is not entitled to a share on partition.
3. Grandmother: In the Mitakshra school, the paternal grandmother and step-grandmother are entitled to a share on partition in the following situations

(1) When partition takes place between her grandsons (son's sons), her son being dead, she is entitled to a share equal to the share of a grandson.'

(2) When partition takes place between her son and sons of a predeceased son, she is entitled to a share equal to the share of a grandson."

(3) When partition takes place between her sons and their sons, according to the Allahabad and Bombay High Courts, she is not entitled to a share, but according to the Calcutta and Patna High Courts," she is entitled to the share equal to the share of a grandson.

4. Coparcener's widow: It, now seems to be settled law that when two or more widows succeed to the property of their husband (each widow having a right of survivorship), either widow has the right to partition (with or without the consent of the other or others), and put an end to joint status. Even when a father's widow succeeds along with her sons, she has the right to partition. If a partition takes place among the brothers, after the death of the brother, his widow is entitled to a share.
5. Partition by daughter: The daughter was not in possession of any property, her father had died leaving behind his self acquired property which was in possession of other heirs. Daughter should be presumed notionally that she was in possession and enjoyment of Joint family property.

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III. NOTIONAL PARTITION UNDER HINDU LAW

The Section 6 of the Act has been extensively amended by the Hindu Succession (Amendment) Act, 2005. This Section has been completely reworded and old section has been deleted. This provision came into force from 9th September, 2005. The old section still favoured the sons due to the concept of notional partition so to bring the daughters at par with sons, by virtue of this section the daughters have been made coparceners along with the sons. She becomes a coparcener in her own right in the manner as son, she would have same rights in the coparcenary property as she would have had if she had been a son and she would obviously be subject to same liabilities in respect of the said coparcenary property as that of son. Further by virtue of this section the interest of a coparcener would go by inheritance-intestate or testamentary and not by survivorship.

Under the Mitakshara school, the joint family property devolves by the survivorship. This mode of devolution has been retained in the modern law. The Hindu Succession Act, 1956, Section 6 runs:

When a male Hindu dies after the commencement of this Act having at the time of his death an interest in a Mitakshara coparcenary property, his interest in the property shall devolves by survivorship upon the surviving members of the coparcenary and not in accordance with this Act.

Proviso to the section lays down that if a Mitakshara coparcener diesleaving behind a female relative or a male relative claiming through a female in Class I, his undivided interest will not devolve by survivorship but by succession as provided under the Act. The proviso will not apply if there had been a partition before the death of the coparcener[2]. The proviso affects the Mitakshara coparcenary vitally as it may be that, more often than not, his interest will devolve by inheritance.

The relations falling under the proviso, are, mother, widow, son's widow, son's son's widow, daughter, son's daughter, son's son's son's daughter, daughter's daughter (these are the eight female heirs in Class I), or daughter's son (he is the heir in Class I who claims through a female). The presence of any of these relations of a deceased of a deceased coparcener will prevent his interest devolving by survivorship to other coparceners[3].

It is a rule of the Mitakshara school that immediately on the death of a coparcener, his interest passes by survivorship to other coparceners, with the result that on his death he leaves behind

[2] Thirupusundari V. Annamalai, (1972) 2 MLJ 79
[3] Ranganathan V. Annamalai, AIR Mad 65

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nothing. It is also a rule of the Mitakshara that a coparcener's interest in the joint family property can be specified and served only by partition. Thus, to know what is the share of a deceased Mitakshara coparcener, Parliament was left with no optio but to import the fiction of notional partition. This is what explanation 1 to Section 6 says: "For the purpose of this 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 property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not."

Notional or deemed partition: Like many other fictions of law, the fiction of notional partition Is meant for specific purpose and it should be confined within the framework of that purpose. The notional partition is not a real partition[4]. It neither affects the severance of status nor does it demarcate the interest of the other coparceners or of those who are entitled to a share on partition. It has to be used to demarcate the interest of the deceased coparcener, once that is done, rest should be forgotten. It should not stick in our minds that in notional partition[5], what happens to the shares of the coparceners and others who are apparently allotted a share? Nothing happens as no shares are in fact allotted to them; allotment of shares to them is a fiction, though a necessary fiction without the aid of which it would be impossible to demarcate the interest of the deceased coparcener.

On the death of the coparcener there is no automatic partition under Hindu law but, it seems, in reference to notional partition, severance of status deemed from the date of the death of the coparcener who has left an heir in terms of proviso to Section 6[6].

The demarcation of the interest of the deceased coparcener that has to be made is of his interest of the date of his death, not as it may exist when properties are actually allotted to his share. His share gets fixed on the date of his death, subsequently changes in the fortunes of the coparcenary do not affect it[7].

Share in notional partition- The notional partition is merely a device for demarcating the interest of the deceased coparcener had he got partition effected before he died. In other words, shares are to be allotted (though notionally) to all persons who would have been entitled to a share on a real partition. On the basis of this allotment, we get the share of the deceased coparcener demarcated. It is this share which will go by inheritance.

In **Rangubai V. Laxman**, Patel J. propounded the view thus: "when the interest of the deceased

[4] State of T.C. V. Shanmuga, AIR 1953 SC 333
[5] Govindran V. Chetumal, AIR 1970 Bom 231
[6] Shive Honda V. Director
[7] Karuppa V. Palaniammal, AIR 1963 Mad 254

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coparcener is to be determined, the court should first determine what is the property available for partition…, then partition the coparcenery property setting aside the share of the widow to which she is entitled in her own right and divide the share of the deceased coparcener amongst the heirs; and by decree make proper provision for the maintenance and marriage expenses of the daughters and award the widow her due share in the coparcenary property and divide the property of her husband among the heirs. One wonders why the learned judge did not add the words, "award the coparceners their shares," as the aforesaid logic of Patel, J. converts what was notional partition into real partition. The view has been substantially confirmed by Kantawala, C.J. who was given leading judgment in the Full Bench decision in ***Sushila V. Narayanrao***[8]. The learned judge, after reviewing the entire case law old and new, has confirmed the view of Patel, J. but adds, referring to the judgment taking contrary view, that in none of these cases the coparcenary of that quality. The learned Judge seems to mean thereby that if a coparcenary consists of more than two coparceners, he would be prepared to take a different view. Patel, J's view has been confirmed by the Supreme Court in ***Gurupad V. Hirabai***[9]. In the leading judgment, Chandrachud, CJ, observed that the fact that it is a mere notional partition should not "boggle" our imagination and explanation to Section 6 compels the assumption of a fiction that in fact 'a partition of the property had taken place,' immediately before the death of the coparcener. This plainly means that, what was meant to be a 'notional partition' has been converted into an actual partition and his Lordship has no hesitation in saying that "the assumption which the statute requires to be made that a partition had in fact taken place must permeate the entire process of ascertainment of the ultimate shares of heirs, through all the stages." The learned Chief Justice fortifies his argument by holding that, Section 6, Hindu Succession Act is nothing but the culmination of a process of social legislation that began with the Hindu Law of Inheritance (Amendment) Act, 1929 with a view to ameliorate the lot of Hindu women. In this process, it is submitted that the learned judge overlooked the fact that the Mitakshara coparcenary has not yet been abolished and neither a coparcener's wife nor his daughter is a coparcener. These decisions virtually lay down that if a coparcener dies leaving behind a female heir in terms of proviso to Section 6, there is automatic statutory partition and the Mitakshara coparcenary comes to an end. The Supreme Court is trying to abolish Mitakshara coparcenary by judicial legislation what the Kerala State has purported to do by a statute. It is most respectfully submitted that the notional partition as contemplated in Section 6 does not amount to an statutory partition; nor does severance of status take place on the death of

[8] AIR 1975 Bom 257
[9] AIR 1978 SC 1239

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coparcener. The fiction of notional partition is used as a device to find out the share of the deceased coparceners and it would be confined to that and our imagination should not "boggle" under the oppressive feeling that were the legislature stops in taking a measure of social reform to its logical end (for the reasons that we still do not want to abolish the Mitakshara joint family), the judiciary should step in[10].

Divided coparceners and their heirs not entitled to succeed under Section 6,

Explanation II

Nothing contained in the proviso to this section shall be construed as enabling a person who has separated herself from the coparcenary before the death of the deceased or any of his heirs to claim on intestacy a share in the interest referred to therein.

This visualizes a case of partition in respect of coparceners[11]. For instance, a coparcenary consists of A and his two sons, B and C. B partitions and takes away his 1/3 share. In the remaining 2/3, A and C continue to be joint. Subsequently, A dies leaving B and a daughter D. A's share will be half of the remaining 2/3, i.e., 1/3. This one-third will go to C and D, each taking1/6. B will be totally excluded. For instance, a coparcenary consists of P and his three sons, A, B and C. C partitions and takes away his 1/4 share in 1956. He dies in 1958 leaving behind her son CS and cannot claim any share as a son of a predeceased son who had separated before the death of the intestate has no right to a share[12].

IV. IMPLICATIONS

(A) Introduction of daughters as coparceners: Amendment to section 6 of the Hindu Succession Act

Since the daughter has been made a coparcener by way of the amendment she has been put at par with the son and gets a birth right in the ancestral property owned by the coparcenary. For example, the daughter would have a birth right in the property separately owned by her paternal grand-father, and if he dies intestate leaving behind his son (the father of the daughter) then the daughter shall have an interest in the said property as a coparcener and she would be entitled for partition along with the right to demand partition from her father.

According to this amendment if the daughter dies intestate; her interest in coparcenary would devolve by succession in accordance with section 15 of the HSA and if the daughter is left alone by deceased male coparcener, she shall inherit his entire property of which she would become

[10] Kanhaya Lal V. Jamda Devi, AIR 1973 Del 160
[11] Shivaji V. Rukminiamma, AIR 1973 Mys 113
[12] Venubai V. Saraswati, (1980) Mad LJ 107

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absolute owner and after her death, if she dies intestate shall devolve upon her heirs as per section 15. Further, the daughter now has the right to dispose of her interest in coparcenary by making a will and if she is a lone heir she shall become absolute owner of the property and shall also have a right to alienate it during her life time.

This amendment also created a right to have a share in the joint property during the partition favour of children of the daughter and her pre-deceased daughter, in case of their death, that is to say a son of a pre-deceased daughter of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased daughter; daughter of a predeceased son of a pre-deceased daughter; daughter of a pre-deceased daughter of a pre-deceased son, are also now included in Schedule to HSA as Class I heirs. The said heirs, not being coparceners, would not have right to demand partition but they would be entitled to their share as provided in amended section 6 of the HSA.

(B) Supreme Court

The Supreme Court in the case of ***Sheela Devi and Ors. v. Lal Chand and Anr***[13] dealt with the question of right of a coparcener of a Mitakshara family under the old Hindu Law vis- a`- vis Hindu Succession Act, 1956. The contention raised therein that the provisions of the Amendment Act, 2005 will have no application as the succession had opened in 1989 was negatived, holding:

"The Act indisputably would prevail over the 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 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. Thus, it was the half share in the property of Babu Ram, which would devolve upon all his heirs and legal representatives as at least one of his sons was born prior to coming into force of the Act".

[13] MANU/SC/43182006

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In ***M. Yogendra and Ors. Vs. Leelamma N. and Ors.***[14], the Supreme Court held that "The Act indisputably would prevail over the 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…It is clear from the express language of the section that it applies only to coparcenary property of the male Hindu holder who dies after the commencement o the Act. It is manifest that the language of Section 8 must be

construed in the context of Section 6 of the Act. We accordingly hold 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."

In ***Anar Devi and Ors. Vs. Parmeshwari Devi and Ors***.[15] the Supreme Court held that "Thus we hold that according to Section 6 of the Act when a coparcener dies leaving behind any female relative specified in Class I of the Schedule to the Act or male relative specified in that class claiming through such female relative, his undivided interest in the Mitakshara coparcenary property would not devolve upon the surviving coparcener, by survivorship but upon his heirs by intestate succession. Explanation 1 to Section 6 of the Act provides a mechanism under which undivided interest of a deceased coparcener can be ascertained and, i.e., that the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have been allotted to him if a partition of the property had taken place immediately before his death, irrespective of whether he was entitled to claim partition or not. It means for the purposes of finding out undivided interest of a deceased coparcener, a notional partition has to be assumed immediately before his death and the same shall devolve upon his heirs by succession which would obviously include the surviving coparcener who, apart from the devolution of the undivided interest of the deceased upon him by succession, would also be entitled to claim his undivided interest in the coparcenary property which he could have got in notional partition. In the case on hand, notional partition of the suit properties between Nagarmal and his adopted son Nemi Chand has to be assumed immediately before the death of Nagarmal and that being so Nagar Mal's undivided interest in the suit property, which was half, devolved on his death upon his three children, i.e., the adopted son Nemi Chand and the two daughters who are plaintiffs in equal proportion. Nemi Chand, the adopted son, would get half of the entire

[14] 2010(1)ALLMR(SC)490
[15] AIR 2006 SC 3332

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property which right he acquired on the date of adoption and one third of the remaining half which devolved upon him by succession as stated above. This being the position, each of the two plaintiffs was not entitled to one-third share in the suit property, but one-sixth and the remaining properties would go to the adopted son, Nemi Chand. The suit properties in the hands of Nagar Mal were ancestral one in which his son Nemi Chand got interest equal to Nagar Mal after his adoption and from the

date of adoption, a coparcenary was constituted between the father and the adopted son. Upon the death of Nagar Mal, the property being ancestral, the half undivided interest of Nagar Mal therein devolved by rule of succession upon his three heirs, including Nemi Chand. This being the position each of the daughters would be entitled to one-sixth share in the suit properties and the remaining would go to the heirs of Nemi Chand, since deceased."

The Supreme Court in ***R. Mahalakshmi Vs. A.V. Anantharaman and Ors***.[16] held that: "Perusal of the aforesaid provision of law makes it abundantly clear that the daughters who have got married prior to 1989 may not have equal share as that of a son but the daughters who got married after 1989 would have equal share as that of a son. In other words, daughters who got married after 1989 would be treated at par with son having the same share in the property." It is now a well settled principle of law that the question as to whether a statute having prospective operation will affect the pending proceeding would depend upon the nature as also text and context of the statute. Whether a litigant has obtained a vested right as on the date of institution of the suit which is sought to be taken away by operation of a subsequent statute will be a question which must be posed and answered. We are, therefore, of the view that where a repeal of provisions of an enactment is followed by fresh legislation by an amending Act such legislation is prospective in operation and does not affect substantive or vested rights of the parties unless made retrospective either expressly or by necessary intendment. We are further of the view that there is a presumption against the retrospective operation of a statue and further a statute is not to be construed t have a greater retrospective operation than its language renders necessary, but an amending act which affects the procedure is presumed to be retrospective, unless amending act provides otherwise".

(C) High Court

In the case of ***Smt. Bhagirathi and Others V. S. Manivanan and Anr,***[17] the Madras High Court has held as under:

[16] (2009)9 SCC 52
[17] AIR 2008 Madras 250

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"A careful reading of S. 6(1) read with 6(3) of the Hindu Succession (Amendment) Act clearly indicates that a daughter can be considered as a coparcener only if her father was a coparcener at the time of coming into force of the amended provision. It is of course true that for the purpose of considering whether the father is a coparcener or not, the restricted meaning of the expression 'partition' as given in the explanation is to be attributed. In the present case, admittedly the father of the present petitioners had expired in 1975. Section 6(1) of the Act is prospective in the sense that a daughter is being treated as coparcener on and from the commencement of the Hindu Succession (Amendment) Act, 2005. If such provision is read along with Section 6(3), it becomes clear that if a Hindu dies after commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property shall devolve not by survivorship but by intestate succession as contemplated in the Act." The Madras High Court, in ***Smt. Bagirathi and Ors. vs. S. Manivanan and Anr.***[18]**,** opined that: "a careful reading of Section 6(1) read with 6(3) of the Hindu Succession (Amendment) Act clearly indicates that a daughter can be considered as a coparcener only if her father was a coparcener at the time of coming into force of the amended provision. It is of course true that for the purpose of considering whether the father is a coparcener or not, the restricted meaning of the expression "partition" as given in the explanation is to be attributed. In the present case, admittedly the father of the present petitioners had expired in 1975. Section 6(1) of the Act is prospective in the sense that a daughter is being treated as coparcener on and from the commencement of the Hindu Succession (Amendment) Act, 2005. If such provision is read along with Section 6(3), it becomes clear that if a Hindu dies after commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property shall devolve not by survivorship but by intestate succession as contemplated in the Act."

Further in the case of ***Valliammal V. Muniyappan***[19], the Madras High Court has observed as under:

"In the plaint, it is stated that the father of the plaintiffs died about thirty years prior to the filing of the suit. The second plaintiff as P.W.1 has deposed that their father died in the year 1968. The Amendment Act 39 of 2005 amending S. 6 of the Hindu Succession Act, 1956 came into force on 9-9-2005 and it conferred right upon female heirs in relation to the joint family property. The contention put forth by the learned Counsel for the appellant is that the said Amendment came into force pending disposal of the suit and hence the plaintiffs are entitled to

[18] Smt. Bagirathi and Ors. vs. S. Manivanan and Anr AIR 2008 Mad 250
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the benefits conferred by the Amending Act. The Amending Act declared that the daughter of the coparcener shall have the same rights in the coparcenary property as she would have had if she had been a son. In other words, the daughter of a coparcener in her own right has become a coparcener in the same manner as the son insofar as the rights in the coparcenary property are concerned. The question is as to when the succession opened insofar as the present suit properties are concerned. As already seen, the father of the Plaintiffs died in the year 1968 and on the date of his death, the succession had opened to the properties in question. In fact, the Supreme Court in a recent decision in Sheela Devi and Ors. V. Lal Chand and Anr., 2007 (1) MLJ 797 (SC) considered the above question and has laid down the law as follows:

The Act indisputably would prevail over the old Hindu Law. We may notice that the Parliament, with a view to confer the right upon the female heirs, even in relation to the joint family property, enacted the 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. In view of the above statement of law by the Apex Court, the contention of the appellant is devoid of merit. The succession having opened in the year 1968, the Amendment Act 39 of 2005 would have no application to the facts of the present case."

In ***Angammal and Chinnammal Vs. C. Sellamuthu and Senthilkumar***[20], the Madras High Court while rejecting an amendment application to enlarge the shares of the daughters held that "Admittedly, the plaintiffs have got married in the years 1965 and 1970 respectively. In these circumstances, as per law which is relied upon by the plaintiffs, the plaintiffs are not entitled to larger share since the Amendment Act is prospective in nature and there is no question of enlargement of devolution of share to the plaintiffs. When that is so, the amendment has to be necessarily rejected."

The High Court of Madras, in the same case, went on to say that: "In any event, inasmuch as under the amended provision, especially the provisos to Section 6(1) and 6(5) of the Act, any partition effected before 20th December, 2004 has been saved and on the facts of the case as it is narrated in the written statement that in the partition suit there has been a final decree passed on 11.8.1999 itself and on the basis of memo of compromise filed in which Chennimalai Gounder, who was a coparcener, ultimately died on 23.6.2004. Even as per the explanation, notional partition has taken effect from the date of his death, viz., 23.6.2004 before which time the partition has already been effected by way of final decree and therefore, as rightly pointed

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out by the learned trial Judge, there is no substance in the contention of the petitioners that by advent of law, viz., by way of amendment, the division of shares gets enlarged. In view of the same, there is no illegality or irregularity in the order of the learned trial Judge and the revision fails and the same is dismissed."

V. CONCLUSION

The Hindu Succession Act in a subtle way seeks to bring an end to the concept of joint family property on the death of a Hindu in each case by incorporating the concept of notional partition under Section 6 of the Act. This Act seeks to place female heir of the deceased Hindu i.e Mother, Daughter, wife at par with son as heir to inherit a share in the individual property of the deceased. This Act contains overriding effect upon the all-other previous laws providing for the different principle enacted or customary or sastric practices in vogue prior to its enactment. This Act confers the right to individual to execute testamentary document for his share in the ancestral Hindu family vide Section 30.

Under the provisions of section 6 of the Hindu Succession Act, 1956, where a Hindu male dies intestate on or after 17th June 1956, having at the time of his death an interest in a Mitakshara coparcenary property leaving behind a female heir of the class I category, then his interest in the coparcenary property shall devolve by succession under that Act and not by survivorship. The interest of the deceased will be carved out for devolution as if a notional partition had taken place before the death of the deceased. This is the concept of notional partition.

Notional partition and destruction of the family: -The notional partition only crystallizes the share due to the female heir and does not disrupt the joint family

In fact, the widow of a deceased coparcener is entitled to the share of the deceased in a Hindu individual family governed by Mitakshara Law according to section 6 of Hindu Succession Act, 1956 continues to be member of HUF until she files suit for partition.

Notional partition exists under the Income-tax Act: - In order that a claim for partition has to be recognized under the Income-tax Act, the claim for partition must fulfil the condition laid down in section 171.

A mere notional partition by operation of a statute like the Hindu Succession Act, 1956 is not sufficient for recognizing a partition under the Income-tax Act.

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