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Unraveling the Rationale behind Cut-Off on Women's Right to Ancestral Property

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ABSTRACT

The Hindu Succession Act, 1956 being a prologue in women's property right, it could not bring in tenable equality as it did not embrace within its ambit, the ancestral property. The Hindu Succession Amendment Act, 2005 came as a windfall to the women whereby certain provisions uplifting the status of women, along with extending coparcener status to daughters, which entails women equal right to property even in the ancestral property. Accordingly, this progressive legislation in nature of a Declaratory Act might be given retrospective operation. This led to trepidation among individuals possessing a vested right by way of notional partition in the ancestral property. When the balance between the retrospective operation of the amendment and vested right was imprecise, the Supreme court by setting a cut-off on women's right to claim ancestral property in 2015 has opened the Pandora's box. Later, the Supreme Court has cleared the air in Vineeta Sharma v. Rakesh Sharma by securing Hindu women the coparcenary right by birth, and it has got nothing to do with the Father's life, and notional partition being a legal fiction will not lead to a vested right at all, in this context; this article essentially touches on various such interpretations, and attempts to elucidate the justifications.

I. INTRODUCTION

From time immemorial, the making of all property laws have been exclusively for the advantage of man. Woman has been treated as acquiescent and dependent on male². Also, they believe that lawmaking has predominantly remained within a man's control³ and reflects a male's point of view and does not reflect woman's role in making history and structuring society⁴.

Feminists believe that women's role in making history and structuring society is not recognized.

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² See 174th Report on "Property Rights of Women: Proposed Reforms under the Hindu Law", Law Commission of India, May 2000.

³ Cynthia Grant Bowman and Elizabeth M. Schneider, Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession, 67 (2), Article 2, Fordham Law Review, 249, 250, (1998).

⁴ Feminist Jurisprudence: An Overview, available at https://www.law.cornell.edu/wex/feminist_jurisprudence (last visited on 27-01-2016): Justice Sandra Day O'Connor that women judges display greater concern for context and community and less for abstract rules than do male judges- Sue Davis, The Voice of Sandra Day O'Connor, 77 Judicature 134, 138-39 (1993) (concluding that Justice O'Connor's record "do[es] very little to support the assertion that [her] decision making is distinct by virtue of her gender"). A recent article compared the decisions of Justices O'Connor and Ginsburg and concluded

Male-written history has created a bias in the concepts of human nature, gender potential, and social arrangements. The language, logic, and structure of the law are male-created and reinforce male values.

Fortunately, pulling off to the imminent need to establish gender justice, by ensuring equality of status of both men and women the Constitution of India reflected the doctrine of equality as an attribute; it promotes the principle of equality including gender equality⁵ by not only granting equality to women, but also enabling the state to adopt measures of positive discrimination in favor of women⁶. One specific area this paper confines is to, property rights.

Though the Hindu Succession Act, 1956 has recognized women's right to property, it did not recognize them as a coparcener. Gender disparity is apparent in various forms, especially in the field of proprietary rights. The quote from *Mulla: Principles of Hindu Law*⁷ will strengthen the notion:

"The law of inheritance was of later growth and, in general, applied only to property held in absolute severalty as distinguished from property held by the joint family. The fundamental conception of the Hindu joint family is a common male ancestor with his lineal descendants in the male line. Even under early Hindu law, the rights of sons were recognised and they acquired equal interest with the father in the ancestral property as coparceners."

The Amendment Act then came as a remedy. The recent Supreme Court decision on the Hindu succession (Amendment) Act, 2005⁸ has set another disqualification for women's right to ancestral property, this in turn is a setback for many women across India, the SC asserted that a daughter's right to ancestral property doesn't arise if the father died before the Amendment Act came in to force in 2005, the SC held that the Provision could not have retrospective operation in spite of being a social legislation. This paper attempts to unravel the intricacies in backing the Act and refuting the Act.

II. THE FACETS OF RETROSPECTIVE OPERATION OF A STATUTE

"Discrimination against women is so pervasive that it sometimes surfaces on a bare perusal of the law made by the legislature itself. This is particularly so in relation to laws governing the inheritance/succession of property amongst the members of a Joint Hindu family. It seems that this discrimination is so deep and systematic that it has placed women at the receiving

⁵ Art.14 THE CONSTITUTION OF INDIA, 1950.

⁶ Part- III, IV, IVA, THE CONSTITUTION OF INDIA, 1950.

⁷ Satyajeet A. Desai, MULLA: PRINCIPLES OF HINDU LAW, 277, (18th edn.,2001).

⁸ The Hindu Succession (Amendment) Act, 2005 herein after shall be referred as the Amendment Act.

end..... ”⁹

The Hindu Succession Act, 1956 stands an evidence to it. Though the Act had provisions recognizing Women's absolute right to self-acquired property, it did not recognize daughter as a coparcener. The Amendment Act meanwhile has declared that daughter shall be a coparcener, while this needs to be less explained as to the rationale for the same, owing to the prevailing imbalance. The object and intention of the legislature is to do away with the inequality thus helping to cure the discrimination persisting.

The purpose of the Act being, to cure a defect and to extend remedy by ending the discrimination should be given retrospective operation, remedial statutes are in general given retrospective operation¹⁰ if they don't impose penalty and don't create any new obligations¹¹. If an Act is clarificatory in nature, then the presumption is in favor of extending retrospective operation and to give effect from the inception¹².

The standard approach adopted by the court, with regard to Acts aimed to cure an existing evil emphasized that the scores of Acts are retrospective, and may even without express words be taken to retrospective.¹³

By drawing a conclusion on the above approaches which are based on equity more than the statutory or common law, a statutory provision has to be given retrospective operation if the object for the statute is to cure an evil.

The Amendment Act extends the coparcener status to daughters as well, and expressly states that it shall not affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004¹⁴. Incidentally it is warranted that the Amendment can be given retrospective operation. As the literal interpretation of the acts exempts only those partitions, which are crystallized before 20th of December, 2004.

The difficulty arises, when the retrospective operation tends to infringe a vested right. This brings us to the Doctrine of Vested Right.

⁹ *Supra* note 2

¹⁰ District Registrar and collector v. Canara Bank (2005) 1 SCC 496.

¹¹ Vepa. P Sarathi, INTERPRETATION OF STATUTES, 325, (5th edn.,).

¹² Shyam Sunder v. Ram Kumar (2001) 8 SCC 24.

¹³ R. v. Bristle (1889) 58 LJ MC 158.

¹⁴ Explanation Sec.6(5), The Hindu Succession (Amendment) Act, 2005.

(A) The Due Process of Law and the Doctrine of Vested Right

The constitution entails the powers and duties of the three organs of the government. The Doctrine of Separation of powers does not entail any organ has all-pervading power, the same goes for legislature in the law making process. It has limitations constitutional and by implications, one such limitation by necessary inference is the doctrine of vested rights¹⁵.

The doctrine of the vested right¹⁶, is one of the foundational doctrine of constitutional limitations¹⁷, which rests, not upon the written constitution, but upon the theory of fundamental and inalienable rights. It does not draw its authority from a written law, but on the footing of equity, justice and fairness. It is defined as a right which a particular individual has equitably acquired under the standing law to do certain acts or to possess and use certain things,

The doctrine of vested rights regards any legislative enactment infringing such a right, whether by direct intent or incidentally, without making compensation to the individual affected, as inflicting a penalty *ex post facto*¹⁸. While construing a statute the general rule is to literally interpret it, while giving retrospective operation it shall be construed with due regard to legislative intention. Hence, while considering the retrospective applicability of legislation by way of an amendment, by ordinary expectations it cannot be reasonably attributed that an amendment has to be given retrospective effect inspite of the fact that it encompasses upon a right in existence¹⁹.

This brings us to the Due process of law²⁰, as understood in the modern definition is that it should be a reasonable law²¹. To what extent is it due process for a legislature to compel one man to surrender property to another, predicated its action on a past transaction which gave rise to no legal compulsion? Clearly, due process does not allow a legislature by mere fiat

¹⁵ Edward S. Corwin, The Doctrine of Due Process of Law before the Civil War, Vol. 24 No. 5, HARVARD LAW REVIEW, 366, 375, (1911), available at <http://www.jstor.org/stable/1324692> (last visited on 27-01-2016).

¹⁶ The definition of a "vested right" is essentially that given by Chase, J., in *Calder v. Bull*, modified by Parker, C. J., in *Foster v. Essex Bank*, 16 Mass. 245 (1819).

¹⁷ *Supra* note 14, at 367; The doctrine of vested rights advanced from a mere interpretative principle of general statutes to a positive limitation upon legislative power in between 1797 and 1802 by Court of Appeals, Virginia.

¹⁸ Jefferson, The Notes on the State of Virginia, 48, THE FEDERALIST PAPERS PROJECT; Art.20, THE CONSTITUTION OF INDIA, 1950.

¹⁹ *Colonial Sugar Refining Co. Ltd. V. Irwing* 1905 AC 369: (1904-07) All ER Rep Ext 1620 (PC).

²⁰ *Supra* note 14, The phrase "due process of law" comes from Chapter 3 of Edw. III, which reads as follows:

"No man of what state or condition he be, shall be put out of his lands or tenements, nor taken, nor imprisoned, nor disinherited, nor put to death, without he be brought to answer by due process of law." This statute in turn harks back to the famous Chapter 39 of Magna Carta, which the Massachusetts Constitution of 1780 paraphrases thus: "No subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers or the law of the land."

²¹ *Lochner v. State of New York* 198 U. S. 45.

unpredicated upon some prior transaction.²²

Those claims which engross on a predicated right may not be entertained, even on the ground of change in public policy. For, it is not the due process and would be arbitrary.²³ It can be inferred that due process does not entertain prejudice to a vested right by giving retrospective effect.

Having regard to the settled rule against construing statutes as retroactive, unless there be express language which requires that construction.²⁴ This rule is qualified by holding that it is applicable where a statute merely adds a remedy for an existing right and does not affect vested rights²⁵.

Arbitrariness sways if the legislature seeks to upset existing proprietary titles by molding a legal obligation out of equitable principles. Apparently such an effect would be in accord with the reluctance of common law courts to upset vested property rights.²⁶

The general rule' as Halsbury puts it in Vol.36²⁷

*'..... is that all statutes, other than those which are merely declaratory, or which relate only to matters of procedure or of evidence, are prima facie prospective; and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.'*²⁸

In the interest of Due process of law, while extending retrospective operation to a statute which tends to cure an existing evil renders justice, denying the same when it intrudes in to an existing right attains greater justice.

III. PRAKASH & OTHERS V. PHULAVATI & ORS²⁹.

A note on Cut-off for claims on Coparcener status

(A) Introduction:

In the case of Prakash & others v. Phulavati & ors. aggrieved by the decision of the High court of Karnataka³⁰, Mr. Prakash brought an appeal before the Supreme Court of India on the

²² Medford v. Learned, 16 Mass. 215, 216 (1819).

²³ *Id.*

²⁴ Endlich, Due Process and Retrospective Legislation, Vol. 35, No. 2, 193, 194, (1921), available at <http://www.jstor.org/stable/1328202> (last visited on 27-01-2016). See Cooley, CONSTITUTIONAL PROHIBITIONS, 529, (7 ed.,).

²⁵ *Id.*

²⁶ Campbell v. Holt, 115 U. S. 620 (1885).

²⁷ *Supra* note 24

²⁸ *Supra* note 11, at 346.

²⁹ **2015 AIR SCW 6160**

³⁰ Phulawathi v. Prakash & others, First Appeal No. 743 of 2007, April 16, 2010, D.V. Shylendra Kumar and N.

ground that the Hindu Succession (Amendment) Act, 2005 cannot be given retrospective operation as it disrupts his vested right under sec.6 of the Hindu Succession Act, 1956. The Supreme Court has cleared the air by laying down a restraint to the claim of a daughter's coparcenary right to ancestral property under the Amendment Act, Which draws the balance between a woman's right under the Act and the vested right.

(B) Facts:

The respondent-plaintiff filed a suit³¹ in the court of Additional Civil Judge (Senior Division), Belgaum for partition and separate possession of her father's property acquired from his adoptive mother (ancestral). The trial court has partly decreed the suit to the extent of certain properties and not with respect to others, being aggrieved by the decision of the Trial court which did not recognize her as a coparcener (as per Hindu Succession (Amendment) Act, 2005) appealed to the High court of Karnataka for relief.

The High Court had taken a view that, even though a provision of law is prospective it is applicable to pending litigations , the only exemption being, it does not apply to partition under the Registration Act. The High court accordingly has granted the respondent-plaintiff relief treating her as a coparcener under the Hindu Succession (Amendment) Act, 2005.

Aggrieved appellant-defendant approached the Supreme Court for relief, the Supreme Court has come to a conclusion that, although the explanation of Sec.6 excludes transactions which took place before 20th of November, 2004 it does not imply that the main provision must be given retrospective operation. Further the court held that the legislative intent behind the rule is not to rule out notional partition of the main scheme of the Act. Accordingly the Division Bench of the Supreme Court has held that the Amendment Act applies only to living daughters of living father as on the date of amendment, section 6 is not retrospective in operation, and it applies when both coparceners and his daughter were alive on the date of commencement of Amendment Act, 9.9.2005.

(C) Principle:

The High court while interpreting the Amendment Act has relied on the principle of applicability of an amendment to the pending litigations. In *G.Sekhar v. Geetha*³² the Supreme Court held that, applicability of an amendment to a pending litigation cannot even be taken to, as retrospective effect but only the law as it stands on the day being made applicable. It has

Ananda JJ., (In the High Court of Karnataka (Circuit Bench At Dharwad).

³¹ Phulavathi v. Prakash O.S. No.12/1992.

³² G. Sekar Vs. Geetha and others, (2009) 6 SCC 99.

also narrowed the applicability of the explanation³³ which excludes the applicability of the amendment to any disposition or alienation including any partition or testamentary disposition of property which had taken place before the 20th day of December, 2004, as only partitions under a deed or a decree of a court of law. The Supreme Court has referred to the Harmonious construction of a statute when the main provision is found conflicting to the explanation.

Apparently, when the main provision being a substantive provision cannot be given retrospective operation and the explanation is a mere rule of evidence. The main provision prevails over the explanation.

Accordingly the Supreme Court has held that rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when daughters are born³⁴.

(D) Analysis:

Although the Amendment Act offers coparcener status to daughters, it shall commence prospectively³⁵, the Act being aimed at remedying the existing inequality in devolution of property, might be construed liberally under beneficial rule of construction in the absence of any vested right in the transaction, for the optimal realization of the purpose of the Act and to render justice. The intention is that being gender legislation aimed at according equal rights to the daughter in ancestral property by removing discrimination, should be applied retrospectively to realize the object to the fullest possible extent.

A remedial Act, on the contrary, is not necessarily retrospective; it may be either enlarging or restraining and it takes effect prospectively, unless it has retrospective effect by express terms or necessary intendment. In this amendment though two different interpretations are possible, one in favor of retrospective applicability and one against it, considering the former one upshot in denying a vested interest shall not be given effect to.

In the absence of a vested right a remedial statute should be given retrospective operation.

The Fact that under the same sec.6, notional partition is also provided, which has the effect of vesting interest in coparceners on death of an intestate cannot go unnoticed. Although the

³³ Sec.6 (1) Explanation, Hindu Succession (Amendment) Act, 2005. – “Provided that nothing contained in this sub-section shall affect or invalidate anywhich had taken place before the 20th day of December, 2004”.

³⁴ In *Mangammal vs. T.B.Raju; on the lines of Prakash vs. Phulavathi* It was held that there should be a living daughter of a living coparcener to inherit the property on the date of enforcement of the amended provisions of the 2005 Act.

³⁵ “Sec.6(1) Devolution of interest in coparcenary property.-(1) On and from the commencement of the” Hindu Succession (Amendment) Act, 2005.

explanation of the Amendment Act suggests a definition of ‘partition’ for the purpose of this section implies a partition under deed or decree, it is not an inclusive definition but comes as a rule of evidence.

The importance of notional partition in as quoted from Lord Asquith³⁶ in the following words:

“If you are bidden to treat an imaginary state of affairs as real, you must also imagine as real, the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accomplished it, and if the statute says that you must imagine a certain state of affairs, it cannot be interpreted to mean that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of the state of affairs”.

Consequently, when a main provision of an Act and the explanation are contrary to each other, the interest of justice requires that the main provision prevails, on application of harmonious rule of construction.

Sec.6(3) prevails over the explanation to Sec.6(5)

The High Court while adjudging the dispute applied the law that an amendment is applicable to pending litigations, and gave effect to the object and intention of the Act by sticking to beneficial rule of construction in order to end up the discrimination to the possible extent while the Supreme Court drew its logic based on the harmonious rule of interpretation of statute while construing the amended provisions and upheld the main provision will prevail over the explanation.

The judgment makes it imperative for the father to, be alive when the amendment came into force.

The Supreme Court by setting a cut-off to woman’s right to coparcener status has included another restriction, this would curb the counter balance which would have raised in the society, had retrospective operation been given to the provision .

‘It is recognized that the paramount duty of the judicial interpreter, is to put upon the language of the legislature, honestly and faithfully, it’s plain and rational meaning and to promote its objects’³⁷. When two interpretations are possible, the Supreme Court should go with the one

³⁶ The Court interpreted section 6 to mean that in fact that a partition had taken place between the deceased and the coparceners immediately before his death. This assumption, as per the Court, is irrevocable once made and all the consequences that would flow from a logical partition would follow which means that the share of the heirs must be ascertained on the basis that they had separated from one another and had received a share in the partition which had taken place during the lifetime of the deceased. Thus, the heir would get her share at the time of notional partition and will also receive a share at the time of inheritance, if entitled.

³⁷ Maxwell, 10th Ed., p.262

which does not interfere with an existing obligation.³⁸ The Supreme Court, eventually gave effect to the interpretation not violating a vested right, when two ways of interpretation are possible. Hence, it is inferred that the interpretation adopted by Supreme Court is to attain greater justice by striking a balance.

IV. VINEETA SHARMA V. RAKESH SHARMA³⁹

Re-affirming Equality

(A) Facts:

In present case, Vineeta Sharma, the Plaintiff/Appellant, had filed a suit claiming her share of ancestral property against her family members including her brother Rakesh Sharma. She contended that since her father, Mr. Dev Dutt Sharma had died intestate, she could have the right over the property among other heirs. According to Vineeta Sharma, as the property was not included in HUF, she is entitled to the 1/4 th of her father's property.

In this case, the Delhi High Court held that since the appellant's father died on 11th December, 1999, before the commencement of the Hindu Succession (Amendment) Act, 2005. The Hindu Succession (Amendment) Act, 2005, did not benefit the appellant. Aggrieved by this decision, the Plaintiff filed an appeal in the Supreme Court.

(B) Principle:

Factum of Birth; Survivorship is the rule for succession, while coparcenary status devolves upon birth. The 2005 Amendment Act extends coparcenary status to daughters, it's sufficient if the daughters or born before or after the amendment to become coparcener like sons and it is not essential that the father must be alive at the time of birth or at the time of Amendment. If a daughter is alive on the date of enforcement of the Amendment Act, she becomes a coparcener with effect from the date of the Amendment Act.

"Living daughters of living coparceners is no more the rule" The Supreme Court has rejected the effect of Notional Partition as it's only a legal fiction for ascertaining the share of deceased coparcener when he was survived by a female heir, of Class I as specified in the Schedule to the Act of 1956 or male relative of such female.

(C) Analysis :

The Supreme Court has rightly appreciated that coparcenary rights are by birth and due to the

³⁸ *Supra* note 22; Kent, Comm. 455. In general, see T. M. Cooley in 2 Cent. L. Journ. 2-4: Cooley admits that the validity of legislation in this class of cases [retrospective laws] depends upon the view the court may take of its justice, and thinks this an unsatisfactory state of the law.

³⁹ (2020) 9 SCC 1

legal imbroglio caused by conflicting decisions of various courts; justice to many daughters was being delayed. The court has overruled the contrary views upheld in *Prakash v. Phulavati*.

It is now settled that the death of a Hindu coparcener father or any other coparcener is only relevant for the succession of his coparcenary interest under section 6(3) of the Act of 2005.

Coparcenary status is not dependant on life or death of another coparcener, it is in fact of birth a person becomes a coparcener. Coparcenary interest may increase or decrease based on the birth and death of coparceners till the actual partition takes place. Generally, upon death of a coparcener notional partition happens to ascertain the share of that coparcener (for the benefit of those who claim through him) but, it does not disturb the other incidents of coparcenary, and even new coparceners can be added on account of birth till the time an actual partition. Coparcenary interest becomes definite only when a partition is affected.

V. CONCLUSION

While deciding up on retrospective operation of legislations, what is more pertinent is to lay down a pattern to reach a conclusion. Below drawn is one such attempt:

As a first step, the claimant as a general rule will have to raise a Presumption of Prospective operation to Legislations. The presumption is not vital; it may be rebutted in any of the forms below:

- The language of the legislature, in its plain and rational terms, in express terms, suggests retrospective operation of the legislation, or
- The objects and intention of the legislation, suggests in certain terms the retrospective operation of the legislation,
- When a remedial legislation doesn't surpass an existing right or interest recognized by the law.
- The legislation does not encompass into existing right or impose a new obligation.

For, retrospective legislation is not *per se* unconstitutional yet, it may be held invalid if it runs athwart due- process clause. It shall be maintained that even while construing a social legislation, protection of widest amplitude must not be deemed to have conferred upon those, for whose benefit the legislation may have been enacted. The underlying principle is simple, we cannot let the condition of, '*Rob Peter to pay Pal*' prevail.

Although the interest of justice requires effectuating women's property right to the maximum

possible extent, it shall not be entertained at the cost of infringing others vested right. With this concern the Supreme Court has setting a cut-off to women's right to ancestral property earlier. Later the Same Court delving deep into the conceptual background of "Coparcener" and "Notional Partition" has ruled that, notional partition being a fiction is not actual partition, according to the 2005 Amendment Act, as long as the actual partition is not done on the effective date, the amendment act applies to all the coparceners alike, without any distinction between daughters and sons.
