A BIRDS-EYE VIEW OF THE LAW OF SUCCESSION AMONGST HINDU'S WITH REFERENCE TO THE RECENT FULL BENCH DECISION OF THE SUPREME COURT

The recent full Bench decision of the Hon'ble Supreme Court of India in the matter of ***Vineeta Sharma versus Rakesh Sharma & Ors.*** Diary No.32601 of 2018 is being lauded as a landmark decision removing any apparent ambiguity in the interpretation of section 6 of the Hindu Succession Act, 1956 ("the Act of 1956", for short) as amended by the Hindu Succession (Amendment) Act, 2005 ("Amendment Act", for short), which had arisen due to conflicting verdicts of two division Benches of the Supreme Court in ***Prakash & Ors. vs. Phulavati & Ors***., (2016) 2 SCC 36 and ***Danamma @ Suman Surpur & Anr. vs. Amar & Ors***., (2018) 3 SCC 343. It has been authoritatively held that that daughter shall remain a coparcener throughout her life, irrespective of whether her father was alive on the date the Amendment Act came into force or not. However, we must look at the scheme of the Act of 1956 in order be able to fully appreciate the scope of the Amendment Act and effect of the latest judgment of the Supreme Court. ***The codification of Hindu personal law was done for the first time by passing of the Act of 1956. It brought about some radical changes in the law of succession without abolishing the concept of joint Hindu family and coparcenary.***

Joint Hindu family & Coparcenary

The joint Hindu family is a creature of law and consists of the lineal descendants from a common ancestor and includes their mothers, wives or widows and unmarried daughters. Ownership and possession of joint family property is not a necessary condition to constitute a joint Hindu family. Though it emerged as conferring near absolute authority upon the father or the eldest male member, with efflux of time the power of the father was considerably reduced by induction of coparceners by virtue of their birth in the family. A Hindu coparcenary is a much narrower body than the joint family. It includes, the three generations next to the holder in unbroken male descent(this proposition must be read in the light of the development in the law after the Amendment Act).To fully understand the formation of a coparcenary, one must note the distinction between ancestral property and separate property. Property inherited by a Hindu from his father, father's father or father's father's father, is ancestral property. Property inherited by him from his other relations is his separate property.

Prior to the passing of the Act of 1956, if A, who had a son B, inherited property from his father, it became ancestral property in his hands, and B became a coparcener with his father entitling him to an equal interest with his father. On his father's death, B took the property by right of survivorship and not by succession. Separate or self-acquired property, once it descends to a male issue (through succession and not survivorship) of the owner, becomes ancestral in the hands of that male issue. Therefore, if B consequently had a son C, C would acquire an interest in that property by virtue of birth. H0wever, this doctrine has been materially by affected by passing of the Act of 1965, particularly section 8 which governs intestate succession.

Genesis of Coparcenary

A, a Hindu male who has not inherited any property from his father, grandfather or great-grandfather, acquires property by his own exertions. For instance, A has a son B, B does not take any vested interest in A's property during his lifetime and A is free to dispose of the same as per his whims and fancies. On A's death, B inherits the self-acquired property of A. If B has a son C, C takes a vested interest in the property by virtue of his birth and it becomes ancestral property in the hands of B, and B and C are coparceners. If B and C ***continue to be joint***, and a son D is born to C, he becomes a coparcener with B and C. Thereafter if C has a son E, he too becomes a coparcener.

The Act of 1956

The Act of 1956 is a codifying enactment. It does not merely crystallise or declare existing law upon the subject, but deliberately departs from the law in respect of various matters. Section 4 provides for an overriding application of the provisions of the Act. Therefore, all existing laws, whether in the shape of enactment or otherwise, which are inconsistent are repealed. ***Section 8 propounds a new and definite scheme of succession and lays down certain rules of succession to the property of a male Hindu who dies intestate after commencement of the Act of 1956***. The expression 'property' in this section means all property of the deceased inheritable under the Act. It includes not only his separate property, but his interest in Mitakshara coparcenary property in case he had no male issue and was survived by any female heirs or a daughter's son mentioned in Class 1 of the Schedule to section 8. It also includes property, which he might have inherited from his father or grandfather after the Act came into force and includes agricultural land. In the case of ***Eramma vs. Veerupana***, AIR 1966 SC 1879, the Supreme Court held that the section applies where on death of a male intestate devolution of his property takes place after the commencement of the Act and does not govern succession to the property of a male Hindu whose death took place before the commencement of the Act.

Questions have at times arisen as to whether a son who inherits self-acquired or coparcenary property of his father (ancestral property) takes it as his separate property or holds it as property of his own joint family. The Supreme Court in ***Commission of Wealth-tax vs. Chander Sen***, AIR 1986 SC 1753 clarified the position. In the said case, there was a joint family constituted by A and his son B. There was a partial partition and the business was divided between them in 1961. A, thereafter continued his separate business, and died in 1965. He was survived by his son B, and son's of B. ***Question arose whether the separate property left by A and inherited by B under section 8, was to be regarded as separate property of B or coparcenary property of the joint family in which A and B were members***. The Supreme Court held that B had inherited property as his separate property as an individual and that the property did not belong to the joint family of B and could not be included in computing the wealth tax of the joint family. It was categorically held by the Supreme Court that "*it would be difficult to hold today that the property which devolved on a son under section 8 of the Hindu Succession Act,*

1956, would be Hindu Undivided Family property in his hand vis-à-vis his own sons." The Supreme Court in the case of ***Yudhishter vs. Ashok Kumar***, AIR 1987 SC 558, reaffirmed this view.

In ***Uttam Singh vs. Saubhag Singh***, (2016) 4 SCC 68, the Supreme Court was of the view that by reason of death of a male Hindu leaving self-acquired property or by application of proviso to section 6 of the Act of 1956 (where the deceased Male Hindu leaves behind a female in Class 1 of the schedule or a male claiming through such female), such property would devolve by intestacy as per section 8. It was further observed that on a conjoint reading of sections 4,8 and 19, after the joint family property has been distributed in accordance with section 8, it ceases to be joint family property and the heirs hold the property as tenants-in-common and not joint tenants.

It is submitted that where on application of section 30 of the Act of 1956, the deceased male Hindu bequeathed any property, it too would not have the incidents of coparcenary property. A male Hindu can dispose of his property by executing a will, as a consequence succession under the Act stands excluded and the property passes to the testamentary heirs. [see: ***Sadhu Singh vs. Gurdwara Sahib Narike & Ors***., (2006) 8 SCC 75] The wordings of the proviso to section 6(1) of the Amendment Act, which saves any testamentary disposition made before 20.12.2004 further buttresses this proposition.

Savings as per proviso to section 6(1) and Explanation to section 6(5) of the Amendment Act

The legislature, being conscious of the implications of reopening concluded transactions has in its wisdom added a proviso to section 6(1) of the Amendment Act, providing that any dispositions or alienations, including partition or testamentary disposition, entered into before 20.12.2004 are not affected.

Section 6(5) of the Amendment Act states that nothing contained in this section shall apply to a partition affected before 20.12.2004. The Explanation to this sub-section defines partition as partition duly registered under the Registration Act or partition affected by decree of a Court.

The Supreme Court in the case of ***Ganduri Koteshwaramma vs. Chakiri Yanadi***, AIR (2012) SC 169 while interpreting section 6(5) of the Act of 1956 has held that the right accruing to the daughter by virtue of the Amendment Act is absolute, subject to the circumstances provided in the proviso to section 6(1) of the Amendment Act.

The definition of 'partition' in the Explanation to section 6(5) which recognizes only registered partitions or partition affected by decree of court stands modified after the pronouncement of the decision in the case of ***Vineeta Sharma vs. Rakesh Sharma*** (supra), which has diluted the rigours of Explanation to section 6(5) of the Amendment Act to some extent. Oral partition if supported by contemporaneous documentary evidence and acted upon for

a long time takes a case out of the purview of the Amendment Act. Although a heavy burden of proof is cast on those parties which are relying on oral partition, it facilitates genuine and bonafide transactions effected sans a registered deed. The decision of the Supreme Court in the case of ***Kale v. Deputy Director of Consolidation***, (1976) 3 SCC 119, wherein it was observed that a mere memorandum of family arrangement made after a previous oral family arrangement does not create extinguish any rights in immovable properties and consequently does not fall within the mischief of section 17(2) of the Registration Act, 1908 has been cited with approval in ***Vineeta Sharma vs. Rakesh Sharma*** (supra).

Concept of notional partition

Another important question is whether notional partition results in partition among all members of the coparcenary or is it merely done to ascertain the share of the deceased coparcener right before his death?

This issue has been dealt elaborately by the Supreme Court in ***Vineeta Sharma vs. Rakesh Sharma*** (supra) where it has been held that notional partition is for the limited purpose of ascertaining the share of the deceased coparcener immediately preceding his death, as if he had asked for partition, without going into the question whether he could have asked for partition or not. It does not result in actual partition.

Key takeaways from the judgment of Vineeta Sharma vs. Rakesh Sharma (supra)

The Supreme Court has held that:-

1. Provisions contained in section 6 of the Amendment Act confer status of coparcener ***on the daughter before or after*** amendment in the same manner as the son, with the same rights and liabilities;

2. The right can be claimed by the daughter born earlier(before the Amendment Act) w.e.f. 09.09.2005 subject to the savings as provided in section 6(1) as to disposition or alienation, partition or testamentary disposition which has taken place before the 20th day of December, 2004;

3. Notional partition is for the limited purpose of ascertainment of shares of the deceased coparcener in the exigencies mentioned therein. It does not result in severance of status of coparcenary amongst the remaining members of the family;

4. Notwithstanding that a preliminary decree has been passed before the Amendment Act, the change in law shall be taken into account and the daughters are to be given share in coparcenary equal to that of a son in pending proceedings for final decree or in appeal;

5. The rigours of Explanation to section 6(5) of the Amendment Act have been softened to an extent. Plea of oral partition can be accepted in exceptional cases where the plea is supported by public documents and partition is finally evinced in the same manner as if it had been affected by a decree of Court. A plea of partition solely based on oral partition cannot be accepted;

6. Section 6 is retroactive in operation, and operates from the antecedent event of birth of daughter. Therefore, the father of the coparcener need not be alive as on 09.09.2005;

7. Any contrary views expressed in ***Prakash vs. Phulavati*** (supra) stand overruled. ***Danamma @ SumamSurpur & Anr.*** (supra) stands partly overruled excepting certain observations made in paragraph 23 and 25 to 27 of the judgment.

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