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# Coparcenary: Position of Daughter

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## ABSTRACT

*In this paper the author focuses on the origin of term 'Hindu' and the types of Hindu School. The paper further throw some light on the concept of coparcenary and how it is different in Mitakshara school from Dayabhaga school. The paper also cover the concept of "who can be the coparcener" and further discusses the difference of the position of daughter in Pre-Amendment Hindu (Amendment) Act, 2005. To study this, the author has focused on Section 6(1), Hindu Succession (Amendment) Act, 2005 and have discussed if the Section 6, Amendment Act 2005 is prospective, retrospective or retroactive in nature. To clear the nature of Section 6, Hindu Succession (Amendment) Act,2005 the paper also throws some light on judicial opinion regarding the same.*

**Keywords:** *Hindu, Types of Hindu Law, Coparcenary, Position of Daughter, Pre and Post (Amendment) Hindu Succession Act,2005*

## I. INTRODUCTION

Before discussing this concept, firstly it is necessary to discuss with the concept of "Origin of Hindu" and "Schools of Hindu Law".

The term '*Hindu*' is of foreign origin as it was used to designate people living east of Hindu river also known as Indus river. Etymologically, the term Hindu was applicable to aal the inhabitants of India irrespective of caste and creed. In course of time, the tern Hindu associated with religion.

Let's discuss the Schools of Hindu Law:

Schools of Hindu Law widened the scope of Hindu Law and explicitly contributed to its development.

There are mainly two schools of Hindu Law:

1. Mitakshara School
2. Dayabhaga School

**Mitakshara School** is considered as one of the most important school. It owes its name from

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'Vijaneshwar Commentary' on the 'Yajanvalkya Smriti' by name of Mitakshara. This school is applicable throughout the territory of India except Assam and Bengal. This school has wide jurisdiction as comparable with Dayabhaga School because where Dayabhaga School is silent then the jurisdiction of this school prevails.

This school is divided into:

- Banaras Hindu Law School
- Mithila Hindu Law School
- Maharashtra Hindu Law School
- Punjab Hindu Law School
- Madras Hindu Law School

Dayabhaga School is also considered as an important school of Hindu Law. It owes its name from 'Jemutavahan Digest' on leading Smriti by the name of Dayabhaga. This school prevailed in Assam and West Bengal. It has limited jurisdiction as it deals with partition, inheritance and joint family. According to Kane, it was incorporated between 1090- 1130 AD.

This school is divided into:

- Dayatatyā
- Virmitrodaya
- Dattaka Chandrika
- Dayakarmosangrah

## II. MEANING: COPARCENARY

Coparcenary is a narrower body of persons within a joint family. It includes only those who acquire an interest by birth in the joint or coparcenary property. Coparcenary begins with a common male ancestor with his lineal descendant in the male line within four degrees inclusive of such ancestor.

### Concept of Coparcenary: In Mitakshara and Dayabhaga School

<u>BASIS</u>	<u>MITAKSHARA SCHOOL</u>	<u>DAYABHAGA SCHOOL</u>
<i>1. FORMATION</i>	The concept of <i>coparcenary</i> based on the notion of	It is based on the <i>notion of death right</i> .

	<p><i>birthright.</i></p> <p>It consists of four-generation: <b>great grandfather, grandfather, father and son.</b></p> <p>Ex. Suppose, Ram is the father and B, C, D, E, F, G, H are his seven lineal male descendants.</p> <p>Now, Ram is the last holder and he dies, then coparcenary consists of B, C, D, E. on the death of Ram, B becomes the last holder and E comes within the limit of four-generation, and if B dies then C become the last holder and C, D, E, F become the coparcener shows that F comes within the scope of four generations. So, from this illustration, it is clear that as the last holder dies then the next generation added, it means the removal of ancestor added the descendants.</p>	<p>The concept of coparcenary comes into the existence for the first time on the death of the father when the son inherits their father property. It cannot consist of four generations.</p> <p>Ex. Shaam is the father of A, then A does not have the right in the property by birth but only after his father died. He enjoys the status as a coparcener.</p>
<p><b>2. INCIDENT</b></p>	<p>Coparcener has an interest in the joint family property by birth, coparcener enjoy the</p>	<p>Coparcener has an interest in the property given only after the death of the last owner. It</p>

	<p>status as a coparcener by birth though until partition takes place, this shows that there is an existence of unpredictable and fluctuating interest which increases with the death and diminished with the birth in the family. It is based on the '<i>principle of ownership by birth</i>'.</p>	<p>means as long as the father is alive, he is the master of his own property, whether ancestor or self-acquired which signifies that during the lifetime of the father, no coparcener can ask for partition and demand his share. It is based on the '<i>principle of ownership of death</i>'.</p>
<b>3. UNITY OF OWNERSHIP</b>	<p>That till partition each member has got ownership extending over the entire property. Unity of ownership is not vested in a single coparcener. It is vested in the whole body of coparcener.</p>	<p>As we know, each coparcener has a fixed share. But till a partition by meets and bounds i.e., the distribution of properties takes place, no coparcener gets his share.</p>
<b>4. COMMUNITY OF INTEREST</b>	<p>The person born in the family, he acquires his interest in the property in the sense that he has a right of common enjoyment and common use of all property and if he wants to separate his interest, he can file a suit for partition.</p>	<p>No community of interest found in Dayabhaga School.</p>
<b>5. SHARE OF COPARCENER</b>	<p>The interest of the coparcener in coparcenary property is a fluctuating and unpredictable interest, which decreases with the birth and increases with the death of</p>	<p>the share of the coparcener is fixed. It is not a fluctuating and uncertain interest. <i>Let's take a look on an example:</i></p>

	<p>the coparcener.</p> <p><i>Let's discuss with an illustration:</i></p> <p><i>Thus, coparcenary consists of a father and his son. Each will take 1/2 share but if suppose 1 more child born then each will take 1/3 share.</i></p>	<p><i>A, a father dies leaving behind three sons then, each will get 1/3 share. It will not fluctuate with the birth and death of the coparcener.</i></p>
<p><b>6. DEVOLUTION OF PROPERTY</b></p>	<p>There is “<i>Doctrine of survivorship.</i>” This states that the property will be devolved upon the death of the coparcener to his next surviving generation, irrespective of considering who his heir is.</p>	<p>In this, the property devolved by the “<i>Doctrine of Succession</i>”. Therefore, if a coparcener dies, his share does not pass by survivorship to other coparcener but devolves by inheritance to his heirs.</p>

### III. PRE-AMENDMENT VS. POST AMENDMENT: HINDU SUCCESSION AMENDMENT ACT, 2005

#### *Can anyone become a coparcener, whether son or daughter?*

No, anyone cannot become a coparcener.

According to *Hindu Succession Act, 1956*, the only son had a right to become a coparcener. The daughter had no right to enjoyed the status as a coparcener.

#### *Section 6: Devolution of interest in coparcenary property-*

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 devolve by survivorship upon the surviving members of the coparcenary and not in accordance with this Act:

Provided that, if the deceased had left him surviving a female relative specified in class I of the schedule or a male relative specified in that class who claims through such female

relative, the interest of the deceased in the Mitakshara coparcenary property shall devolve of testamentary or intestate succession, as the case may be, under this Act and not by survivorship.

The concept of coparcener has been changed after the ***Hindu Succession Amendment Act, 2005***. Yes, the daughter also enjoys the status of Coparcener after the '*Hindu Succession Amendment Act,2005*'. According to ***Sec 6(1), the 'Hindu Succession Amendment Act,2005'*** daughter become the coparcener by birth.

***Section 6: Devolution of interest in coparcenary property-***

On and from the commencement of the Hindu Succession Amendment Act, 2005 in a Joint Hindu family governed by the Mitakshara law, the daughter of a coparcener-

- a) By birth become a coparcener in her own right in the same manner as the son
- b) Have the same rights in the coparcenary property as she would have had if she had been a son
- c) Be subject to the same liabilities in respect of the said coparcenary property as that of a son,

And any reference to Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener.

Provided that nothing contained in this sub section shall affect or invalidate any disposition or alienation including any partition or testamentary disposition of property which had been taken place before the 20<sup>th</sup> day of December,2004.

<b><u>BASIS</u></b>	<b>MITAKSHARA SCHOOL</b>	<b>DAYABHAGA SCHOOL</b>
<b>1. DAUGHTER AS A COPARCENER</b>	Before the <i>Hindu Succession Amendment Act, 2005</i> only son had a right to become a coparcener. But <i>Post-Amendment Act, 2005</i> changes the position of a daughter, as she also become a coparcener by birth with the same rights and liabilities as that of son.	In this school also the daughter enjoys the status of coparcener but with a limitation: she becomes the coparcener but the line of coparcenary cannot initiate with the daughters.

The law governing property rights of women in India underwent a significant change in 2005 vide the Hindu Succession (Amendment) Act, 2005. Prior to the amendment women as daughters, wives or widow had no claim in the ancestral property of their family. Coparcenary property earlier confined to the male members of the family only. The Amendment Act primarily reflects the recommendations of the Law Commission of India in its 174<sup>th</sup> Report- *Property Rights of Women: Proposed Reform under the Hindu Law*.

Post Amendment Act, 2005 the dynamics of share in coparcenary property has conferred equal rights to women and daughters in the Hindu Mitakshara coparcenary property.

The judicial opinion also helps in contouring the rights. Some important cases in this regime are being discussed below:

**Ganduri Koteswaramma & Anr. v. Chakiri Yanadi & Anr. , (2012) SC 169**

In this case, the Apex Court held that the rights of daughters in coparcenary property as per the amended section 6, Hindu Succession Act are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into the account the change in the law by the amendment of 2005.

**Prakash & Ors. v. Phulavati & Ors., (2016) 2 SCC 36**

*The two issues raised before the court were:*

- Whether, the daughters of the coparcener could be denied their share on the ground that they were born prior to the enactment of the Act, and therefore cannot be treated as a coparcener?
- Whether, with the passing of Hindu Succession (Amendment) Act,2005, the daughters would become coparcener “by birth” in their “own right in the same manner as the son” and therefore, entitled to equal share as that of a son?
- Whether the right would be conferred only upon the daughters who were born after the commencement of Amendment Act 2005 i.e., after September 9,2005?

Firstly, the Supreme Court held that the *Amendment Act of 2005 is applicable to living daughters of living coparcener on the date on which the Act came into force*. Secondly, the court stated *that daughter become the coparcener by birth in the same manner as son*. Thirdly, it was held that the *rights under the amendment are applicable to living daughter of living coparcener as on 9-9-2005 irrespective when such daughters are born*.



**Shreya Vidyarthi v. Ashok Vidyarthi and Ors., AIR 2016 SC**

In this case, Apex Court held that of *Hindu Succession Amendment Act, 2005* was done keeping in mind and respecting the position of a female member, the daughter shall by birth become the coparcener in the same way as a son.

**Danamma v. Amar Singh, AIR (2018)SC 721**

In this case, the Apex Court held that section 6, Hindu Succession (Amendment) Act, 2005 conferred full rights upon daughter, who would claim rights to the property irrespective whether her father passed away before the amendment take place i.e., before 9-9-2005.

**Mangammal v. T.B. Raju, AIR (2018) SC**

In this case court believed that the amendment is prospective in nature. But while the shares of the daughter in the partition the Court applied retrospectively applicability.

**Vineeta Sharma v. Rakesh Sharma, AIR (2020) SC**

*The issues raised before the court were:*

- Whether the amended Section 6, Hindu Succession Amendment Act, 2005 requires the coparcener to be alive as on 9-9-2005, for the daughter to claim rights in the coparcenary property?
- Whether the section 6, Hindu Succession Amendment Act, 2005 is prospective, retrospective or retroactive in nature?

On 11 August 2020, a three -bench judge bench of Apex Court held that ***the right conferred on a daughter in the coparcenary property is by birth and hence, it is not important that the father be alive a on 9-9-2005.*** As such the decision in Phulavati case has been overruled and the decision in Danamma case has been partly overruled to that the effect where it said that the coparcener father has to be alive as on 9-9-2005. The section 6, Hindu Succession (Amendment) Act, 2005 is ***retroactive in nature.***

**IV. CONCLUSION**

So, it is clear from the above discussion that there are two schools of Hindu Law i.e., Mitakshara and Dayabhaga. The concept of Coparcenary is also different in both schools. In Mitakshara School coparcenary consist of four generations of male descendant but after the Post-Amendment Act, 2005 the daughter also enjoys the status as a coparcener. As the main objective of Amendment Act, 2005 is to remove gender inequality and this amendment took place keeping the position of the female in our society. Whereas, in Dayabhaga School there

is no existence of four generations and the notion of interest in the coparcenary property based on the death of the last holder.

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