IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL JURISDICTION

SECOND APPEAL NO. 566 OF 2011
WITH
CAS/1762/2011 WITH CAS/498/2014 IN SA/566/2011

Shri Badrinarayan Shankar Bhandari and Ors. Appellants

versus

Ompraskash Shankar Bhandari Respondent

Mr. A.V. Anturkar, Senior Advocate i/b Mr. S.B.Deshmukh, Advocate for the Appellants. Mr. G.M.Joshi, Advocate for Respondent nos 1, 4, 5 and 6. Mr Vithaldas Shankar Bhandari, Respondent no.3 in-person. Mr.Drupad s. Patil, Advocate for Respondent no.7A to 7E.

WITH
SECOND APPEAL NO. 25 OF 2013

Shri Ashok Gangadhar Shedge Appellant

versus

Ramesh Gangadhar Shedge,

since deceased, through the legal heirs : 1a.Smt. Jayashree Ramesh Shedge and ors. Respondents Mr. G.S.Godbole i/b Mr. Drupad S. Patil, Advocate

for the Appellant. Mr.P.B.Shah i/b Kayval P. Shah for Respondent Nos 1A to 1C and 2. Mr. Pramod G. Kathane, Advocate for Respondent nos 4 to 6. WITH SECOND APPEAL NO. 846 OF 2003 WITH CAS/1287/2003 IN SA/846/2003 Smt.Vaijanta Vitthal Jadhav and Anr. Appellant versus Tanubai Vishnu Madane, deceased by heirs: A. Sau.Shalan Maruti Shirtode and ors. Respondents

WITH
SECOND APPEAL NO. 1096 OF 2012

WITH
CAS/2166/2012 IN SA/1096/2012

Vasant Dhondiram Choudhari Appellant
versus
Sadashiv Dhondiram Choudhari Respondent

Mr. Vaibhav P. Patankar h/f Mr. S.C.Wakankar, Advocate for the Appellant. Mr.G.S.Godbole a/w Mr Prashant More, Advocate for respondent nos 1 to WITH SECOND APPEAL NO. 132 OF 2009 Govind Gopal Khot @ Govind Rama Khot and Ors Appellants versus Smt. Suman Dhanpal Sawant and Ors Respondents Mr.P.P.Kulkarni, Advocate for the Appellants. Mr N.J.Patil, Advocate for respondent nos 1 and 9. WITH SECOND APPEAL NO. 240 OF 2011 WITH CAS/21/2012 IN SA/240/2011 Vasant Dhondiba Choudhari and Anr Appellants versus Sadashiv Dhondiba Choudhari Respondent Mr R.S.Apte, Senior Advocate i/b Mr Vaibhav P. Patankar, Advocate for the Appellants. Mr G.S.Godbole a/w Mr Parshant P More a/w Mr Pratap M. Nimbalkar,Advocate for Respondent nos 1 to 3. Mr. M.M.Mahajan, Advocate for respondent nos 4,5 and 6. 3 of 72 SA.566.2011

WITH
SECOND APPEAL NO. 466 OF 2011

Sushma Tukaram Salunkhe Appellant
versus

Smt.Ganhari Tukaram Salugade Respondent

Mr.V.S.Talkute with Mr S.R.Moray, Advocate for the Appellant. Mr Pankaj Shinde, Advocate for Respondent Nos. 1 to 3. WITH SECOND APPEAL NO. 607 OF 2013 WITH CAS/26/2014 IN SA/607/2013 versus Ratanamala Vilas More and Anr. Appellants Tanaji Machindra Pawar and Ors. Respondents Mr. Sandeep S. Salunkhe, Advocate for the Appellants. WITH SECOND APPEAL NO. 796 OF 2012

WITH
CAS/240/2013 IN SA/796/2012

Shri Sachin Vilas Londhe Appellant
versus
Smt. Kawribai Ramchandra Adhav Respondent

Mr Abhijit Kulkarni a/w Mr Manoj Badgujar, Advocate for the Appellant. Mr Ravindra Pachundkar h/f Mr Dilip Bodake, Advocate for Respondent no.1,2A to 2D , 3 and 4. WITH SECOND APPEAL NO. 641 OF 2013 WITH CAS/1551/2013 IN SA/641/2013 Padmini Dilip Pawar and others Appellants versus Shemanta Gajanan Pawar and others Respondents 4 of 72 SA.566.2011 Mr. P.J.Pawar, Advocate for the Appellants. Mr V.S.Tadke i/b Mr. Y.G.Thorat, Advocate for Respondent no.3.

WITH

SECOND APPEAL NO. 58 OF 2014
WITH
CAS/138/2014 IN SA/58/2014

Laxman Gangaram Meher Appellant
Versus
Ramdas Gangadhar Meher and Ors Respondents

Mr. Vaibhav P. Patankar, Advocate for the Appellant. Mr S.P.Golekar i/b Mr. T.D.Deshmukh, Advocate for respondent no.1. ig WITH SECOND APPEAL NO. 147 OF 2014 WITH

CAS/353/2014 IN SA/147/2014

Raosaheb alias Raoso Subrao Patil and Ors Appellants
versus

Sou.Kushali alias Mahadevi Patil and Anr. Respondents

Mr G.N.Salunke a/w Mr. N.B.Khaire, Advocate for the Appellants. WITH SECOND APPEAL NO. 220 OF 2014 Ramesh Gangadhar Shedge, since deceased, through his LRS 1A.Jayashri Ramesh Shedge and Ors Appellants versus 1.Shri Ashok Gangadhar Shedge and Ors. Respondents Mr. Mahesh Rawool i/b Mr K.P.Shah, Advocate for the Appellants. Ms Neha Valsangkar, Advocate for respondent nos 1 to 3. Mr Manoj Saverdekar i/b Mr P.G.Kuthane, Advocate for Respondent nos 4 to 6. 5 of 72 SA.566.2011

CORAM : MOHIT S. SHAH, C.J. AND
M.S.SANKLECHA AND

M.S.SONAK, JJ

Date of Pronouncing the Judgment : 14 August 2014

JUDGMENT - (Per Chief Justice) :

This Full Bench has been constituted on the reference made by a learned Single Judge of this Court (R.G.Ketkar, J.). This reference became necessary as the learned Judge doubted correctness of the decision rendered by Division Bench of this Court in Vaishali S. Ganorkar & Others v/s. Satish Keshavrao Ganorkar & Others 1 The following questions of law have been referred for our opinion:- "(a) Whether Section 6 of the Hindu Succession Act, 1956 as amended by the Amendment Act, 2005 is prospective or retrospective in operation? (b) Whether Section 6 of the Hindu Succession Act, 1956 as amended by the Amendment Act,2005 applies to daughters born prior to 17.6.1956? (c) Whether Section 6 of the Hindu Succession Act, 1956 as amended by the Amendment Act,2005 applies to daughters born after 17.6.1956 and prior to 9.9.2005? (d) Whether Section 6 of the Hindu Succession Act,1956 as amended by the Amendment Act,2005 applies only to daughters born after 9.9.2005? (e) Whether the decision of the Division Bench in the case of Vaishali Ganorkar is per in curium of Gandori Koteshwaramma and others?" 1 2012(5)-Bom.C.R.-210 6 of 72 SA.566.2011 2. The primary issue before the learned Single Judge was whether Section 6 of the Hindu Succession Act, 1956 (the Principal Act) substituted by Section 3 of the Hindu Succession (Amendment) Act, 2005 (the Amendment Act) is prospective or retrospective in operation. 3. Before dealing with the questions of law referred to us, it would be apposite to reproduce the erstwhile Section 6 as appearing in the Principal Act and the amended Section 6 of the Principal Act as substituted by Section 3 of the Amendment Act for the sake of convenience. The pre-amended Section 6 of the Principal Act reads as under:- "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 by testamentary or intestate succession, as the case may be, under this Act and not by survivorship. Explanation 1 - For the purposes of this section, the interest of a Hindu Mitakshara coparcener shall be deemed to be the share in the property that would have 7 of 72 SA.566.2011 been alloted 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. Explanation 2 - Nothing contained in the proviso to this section shall be construed as enabling a person who has separated himself 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." The substituted Section 6 of the Principal Act as amended by the Amendment Act which is in force w.e.f. 9 September 2005 reads as under:- 6. Devolution of interest of coparcenary property.- (1) 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 shall, (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 a 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 8 of 72 SA.566.2011 disposition of property which had taken place before the 20th day of December, 2004. (2) Any property to which a female Hindu becomes entitled by virtue of sub-section (1) shall be held by her with the incidents of coparcenary ownership and shall be regarded, notwithstanding anything contained in this Act or any other law for the time being in force in, as property capable of being disposed of by her by testamentary disposition. (3) Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a Joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be, under this Act and not by survivorship, and the coparcenary property shall be deemed to have been divided as if a partition had taken place and,– (a) the daughter is allotted the same share as is allotted to a son; (b) the share of the pre-deceased son or a pre- deceased daughter, as they would have got had they been alive at the time of partition, shall be allotted to the surviving child of such pre-deceased son or of such pre-deceased daughter; and (c) the share of the pre-deceased child of a pre-deceased son or of a pre-deceased daughter, as such child would have got had he or she been alive at the time of the partition, shall be allotted to the child of such pre-deceased child of the pre-deceased son or a pre-deceased daughter, as the case may be. Explanation. –For the purposes of this sub- section, the interest of a Hindu Mitakshara coparcener 9 of 72 SA.566.2011 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. (4) After the commencement of the Hindu Succession (Amendment) Act, 2005, no court shall recognise any right to proceed against a son, grandson or great- grandson for the recovery of any debt due from his father, grandfather or great-grandfather solely on the ground of the pious obligation under the Hindu law, of such son, grandson or great-grandson to discharge any such debt: Provided that in the case of any debt contracted before the commencement of the Hindu Succession (Amendment) Act, 2005, nothing contained in this sub- section shall affect– (a) the right of any creditor to proceed against the son, grandson or great-grandson, as the case may be; or (b) any alienation made in respect of or in satisfaction of, any such debt, and any such right or alienation shall be enforceable under the rule of pious obligation in the same manner and to the same extent as it would have been enforceable as if the Hindu Succession (Amendment) Act, 2005 had not been enacted. Explanation. –For the purposes of clause (a), the expression "son", "grandson" or "great- grandson" shall be deemed to refer to the son, grandson or great-grandson, as the case may be, who 10 of 72 SA.566.2011 was born or adopted prior to the commencement of the Hindu Succession (Amendment) Act, 2005. (5) Nothing contained in this section shall apply to a partition, which has

been effected before the 20th day of December, 2004." Explanation.- For the purposes of this section “partition” means any partition made by execution of a deed of partition duly registered under the Registration Act, 1908 (16 of 1908) or partition effected by a decree of a court. 4. The Division Bench of this Court in Vaishali S. Ganorkar (supra)1 had held that Section 6 of the Principal Act as substituted by Section 3 of the Amendment Act (amended Section 6) was prospective in operation and it applied to daughters born on or after 9 September 2005. As regards daughters born before 9 September 2005, the Division Bench held that they would get rights in coparcenary property upon death of their father-coparcener on or after 9 September 2005. 5. The learned Single Judge in his order dated 9 June 2014 while disagreeing with the view of the Division Bench held that amended Section 6 was retrospective in operation, that is applicable w.e.f. 17 June 1956 i.e. the date of commencement of the Principal Act and applies to all daughters of a coparcener who are born either before or after 9 September 2005 or daughters born before or after 17 1 2012(5)-Bom.C.R.-210 11 of 72 SA.566.2011 June 1956. The learned Single Judge held that a daughter by birth becomes a coparcener in a Hindu coparcenary in her own right in the same manner as a son, having the same rights in the coparcenary property as she would have had if she had been a son and subject to the same liabilities in respect of the said coparcenary property as that of a son in terms of sub-section (1) of the amended Section 6. 6. In order to properly appreciate the questions referred to us for opinion, it may be necessary to contextualize the same by briefly referring to the basis of decision of the Division Bench in Vaishali S. Ganorkar (supra)1. Reasons why learned Single Judge in his order dated 9 June, 2014 is in disagreement with the above view would be referred to later as many of them are also adopted as submissions. The decision of the Division Bench in Vaishali S. Ganorkar (supra)1 arose in the following facts:- (A) The Appellants therein were daughters of Respondent No.1(father). The father had taken a loan from the bank and mortgaged the property to the bank in the year 2008.(para 23 of the judgment) On failure to repay the loan, the bank initiated recovery proceeding under the Securitization Act. The daughters then filed a suit, claiming to be entitled to 2/3 rd of the property as their share in the coparcenary property. It was daughters' case that the property which had been mortgaged by the father was a Hindu Undivided 1 2012(5)-Bom.C.R.-210 1 2012(5)-Bom.C.R.-210 12 of 72 SA.566.2011 Family (HUF) property as it was purchased from the nucleus of the joint family property. The Single Judge refused to give ad-interim reliefs to the Appellants. In Appeal, the Division Bench was concerned with the issue whether the Appellant is entitled to a share in the property as a coparcener in the HUF property and if so, with effect from what date. (B) On the above facts, the Division Bench held as follows :- (i) On analysis of amended Section 6, the Court placed reliance upon the marginal note to Section 6 viz: -“Devolution of interest in coparcenary property” to take a view that the right of a daughter only arises upon devolution i.e. on the death of the ancestral coparcener. The rights of a daughter got crystallized in respect of coparcenary property only upon the death of an ancestor-coparcener. In this case, the coparcener-father of the appellants was alive and therefore the suit filed

by the daughters was pre-mature. This was as the Succession had not opened. The Division Bench held that on passing of the Amendment Act ipso facto all daughters do not become coparceners. A daughter born after 9 September 2005 certainly became coparcener by birth but a daughter born prior to 9 September 2005 became coparcener only upon the death of her ancestral coparcener. Thus the contention that the Amendment Act was retrospective and applies also to daughters born prior to 9 September 2005 was negatived. 13 of 72 SA.566.2011 (ii) Further the Division Bench referred to the grammar of the language found in Section 6 of the Principal Act as amended by Amendment Act to come to the conclusion that the section conferred rights in the future and did not affect past transactions. In particular, reliance was placed on the following to indicate that it is prospective : (a) Section 6(1) itself commenced with "On and from the commencement of the Hindu Succession (Amendment) Act 2005"; (b) The later part of Section 6 (1) which provides that the daughter of a coparcener shall would refer to future. Section 6(1)(a) using the word 'by birth become'; Section 6(1)(c) states that a daughter 'shall be subject to the same liabilities of a son; AND The first proviso to Section 6(1) providing that no alienation or disposition or partition of any property which has taken place before 20 December 2004 shall be affected by virtue of Section 6(1) of the Principal Act. All the above were indicative of Section 6 of the Principal Act as amended by Amendment Act being prospective. (iii) Besides, the Division Bench observed that a statute is not retrospective unless it is expressly stated to be so. In this case, 14 of 72 SA.566.2011 the words 'On and from' in amended Section 6(1) would itself indicate that it is prospective in nature otherwise these words 'on and from' would be rendered otiose. On the above analysis, the Division Bench concluded that a daughter born on and after 9 September 2005 would be entitled to coparcenary right by birth while daughter born prior to 9 September 2005 would be entitled to coparcenary property only on succession i.e. death of a coparcener to whose interest the daughter succeeds. (C) Moreover, the Division Bench also relied upon the decision of the Supreme Court in G. Shekhar Vs. Geeta2 and Sheeladevi Vs. Lal Chand and others3 wherein it was held that the Amendment Act of 2005 is prospective and would have no application where succession opened prior to the Amendment Act of 2005 coming into force. (D) The Division Bench did not agree with decision of the Karnataka High Court in Pushpalatha N. V. v/s. V. Padma4 wherein it was held that the Section is retrospective and would apply to all daughters who are born after 17 June 1956 and no matter whether the succession had opened or not. This was on the basis of mischief theory of interpretation. The aforesaid view of the Karnataka High Court was not accepted by the Division Bench as upon reading of the Amendment Act giving it retrospective effect would be against the provisions of the Amendment Act. 2 (2009)6-SCC-99 3 (2006)8-SCC-581 4 AIR-2010-Karnataka-124

On the above basis, the Division Bench in Vaishali S. Ganrokar (supra)1 held that the Appellant therein are not entitled to 2/3rd interest in the suit property

as Section 6 of the Principal Act was not retrospective in operation. 7. An Appeal filed against the order of the Division Bench in Vaishali S. Ganorkar (supra)1 was dismissed by the Apex Court by the order dated 27 February 2012 in SLP (C) No.6118 of 2012 - "Dismissed. However, the question of law is kept open". Thus, the question of law arising in the appeal was left open for consideration. Therefore, there is no final determination of the Supreme Court as yet on the above issue. 8. A group of matters came up before the learned Single Judge in Second Appeals challenging the view that amended Section 6 is prospective, which was the view taken by Division Bench of this Court in Vaishali S. Ganorkar (supra) 1. The Respondents in the Second Appeal before the learned Single Judge urged dismissal of the appeals as the issue stands concluded against the Appellants by the aforesaid decision of the Division Bench. On the other hand, the Appellants before the learned Single Judge submitted that the decision of the Division Bench in Vaishali S. Ganorkar (supra) 1 was 1 2012(5)-Bom.C.R.-210 1 2012(5)-Bom.C.R.-210 1 2012(5)-Bom.C.R.-210 1 2012(5)-Bom.C.R.-210 16 of 72 SA.566.2011 not correct as it was rendered per incurium not having noticed the decision of the Apex Court in Ganduri Koteshwaramma & Others v/s. Chakari & Others5 as the same was not cited before the Division Bench. 9. After taking a prima view that the decision of the Division Bench in Vaishali S. Ganorkar did not lay down the correct law, by a 39 page order dated 9 June 2014 the learned single Judge arrived at the following conclusions:- "(I) Section 6 of the Principal Act was substituted by Section 6 of the Amendment Act. In view thereof, for all intents and purposes, amended Section 6 is there from 17.06.1956,being the date of commencement of the Principal Act. (II) The daughter of a coparcener who is born before or after 17.6.1956 has by birth become a coparcener in her own right in the same manner as a son in terms of clause (a) and has the same rights in the coparcenary property as she would have had if she had been a son in terms of clause(b) and is subject to the same liabilities in respect of the said coparcenary property as that of a son in terms of clause (c) of sub-section (1) of amended Section 6. (III) The rights under clauses (a) and (b) and liabilities under clause (c)of sub-section (1) of amended Section 6 are recognized for the first time on and from 09.09.2005, being the date of commencement of the Amendment Act. 5 (2011)9-SCC-788 17 of 72 SA.566.2011 (IV) Even if the daughter of a coparcener has by birth become coparcener in her own right in the same manner as a son in terms of clause (a) and as also she has the same rights in the coparcenary property as she would have had if she had been a son in terms of clause (b), the same shall not affect or invalidate any disposition or alienation including any partition which is duly registered under the Registration Act, 1908 or effected by decree of a Court or testamentary disposition of property which had taken place before the 20th day of December 2004. (V) The decision of the Division Bench in the case of Vaishali Ganorkar is not per incurium of Gandori Koteshwaramma and others." The learned single Judge then referred the questions of law set out in opening para of this judgment. RIVAL SUBMISSIONS 10. Mr.A.V.Anturkar, learned Senior Advocate and Mr.Girish Godbole, learned Senior Counsel and the other learned Counsel for the Appellants in support of their submissions

that Section 6 of the Principal Act as amended is retrospective in operation submitted as under:- (a) The decision of the Division Bench of this Court in Vaishali S. Ganorkar (supra)1 holding it to prospective does not lay down the correct law for the following reasons : (i) A plain reading of amended Section 6 would show that the daughter of a coparcener becomes a coparcener in her own right in the same manner as a son and has the same right in the 1 2012(5)-Bom.C.R.-210 18 of 72 SA.566.2011 coparcenary property as she would have as if she had been a son. This was in light of the Statement of Objects and Reasons which specifically provided that the law as existing, excluding the daughter from participating in the coparcenary property, amounts to discrimination on the ground of gender, negating the fundamental rights guaranteed by the Constitution. It was proposed to remove this discrimination and give equal rights to the daughter as made available to a son, that the Amendment Act was being introduced. (ii) Further, the phraseology 'on and from commencement of the Hindu Succession (Amendment) Act, 2007' was a provision by which the earlier Section 6 of the Principal Act was amended by the Amendment Act as and by way of substitution. Therefore, the amended Section 6 is a part of the Principal Act from the time the Principal Act came in to force i.e. 17 June 1956. Thus the daughter whether born before or after 1956 would become a coparcener in her own right. Only, this right was recognized on and with effect from 9 September 2005. (iii) Proviso to Section 6(1) of the Principal Act as amended provides that nothing in Section 6(1) of the Act will affect or invalidate any disposition or alienation including any partition or testamentary disposition of the property which has taken place before 20 December 2004. This proviso was held to be controlled by the Explanation to Section 6(5) of the Principal Act for the purpose of defining partitions to be restricted to only those partitions which are done by execution of a registered deed of partition or by a decree of Court. All partitions made prior to 20 December 2004 would not be affected by the Amendment Act provided that the partition has been made only by a registered deed or a decree of a Court. Thus only those partitions which are done prior to 20 December 2004 in the above manner were saved and not others. 19 of 72 SA.566.2011 This would negative the contention that Section 6 of the Principal Act as amended is not retrospective in nature. (iv) The Division Bench of Karnataka High Court in Pushpalatha case (supra)1 held that as the Amending Act substituted the original Section 6 in the erstwhile Act, it had conferred rights upon the daughters w.e.f. 1956 i.e. the date of the enactment of the Principal Act. It was held that though this right of a daughter was declared w.e.f. the commencement of the Amendment Act, 2005, it would enure to daughters' benefit from the commencement of the Principal Act. This law being a declaratory law has to be retrospective in operation as the amendment was carried out by way of substitution. In other words, the legislative intent was to supply the omission in the original Act. The effect is that the old Section 6 has been superseded and substituted by the Section 3 of the Amendment Act. The substituted provisions for all intent and purposes is a provision which has to be read as always being there instead of the erstwhile Section 6 of the Principal Act. (v) The words 'on and from' is only restricted to conferring the status of a

coparcener to the extent a daughter becoming a coparcener by birth. The Court held that the confirmation of the status is different from conferment of rights in the coparcenary property. The conferment of right from the day of birth in Section 6(1) (a) would necessarily mean the status was conferred prior thereto. (vi) The proviso to Section 6(1) of the Principal Act states that it would not affect any disposition or alienation including any partition or testamentary disposition of the property which has taken place before 20th December 2004. The necessity of such a provision makes it clear that the intent is to give the Section a 1 AIR-2010-Karnataka-124 20 of 72 SA.566.2011 retrospective effect. However, where third party rights have been created after partition by way of registered deed or a decree of a Court, then such rights would not be affected by the Amending Act. (b) Keeping in view the Mischief Rule and/or purposive Rule of Interpretation on consideration of the law as existing earlier and purpose of the amendment to do away with gender discrimination and bringing it in line with the Constitution, it has to be given retrospective effect; (c) The retrospectivity of amended Section 6 of the Principal Act is also evident from the fact that the amended Section 6 has been introduced by substitution to the erstwhile Section 6 of the Act; and (d) The entire controversy is now settled in favour of retrospectivity as held by the Apex Court in Ganduri's (supra)5. 11. As against the above, learned counsel of the Respondents submitted that Section 6 of Principal Act as amended is only prospective in operation and submitted as under:- (a) The issue is no longer res-integra as the Division Bench of this Court in Vaishali S. Ganorkar (supra) 1 has decided the issue conclusively and even the appeal therefrom is dismissed by the Apex Court; (b) The statute is to be construed on its plain meaning and cannot be given retrospective operation on the basis of the intent of Parliament; 5 (2011)9-SCC-788 1 2012(5)-Bom.C.R.-210

(c) It is well settled that all Acts of Parliament are prospective in operation unless the statute itself provides for it to be retrospective. A retrospective effect should not normally be given to a statute as this would unsettle vested rights;
(d) The decision of the Supreme Court in Ganduri (supra)5 case has no application to the present facts as it was concerned with the case of reopening a preliminary decree of partition;
(e) The issue is settled in favour of prospective application of amended Section 6 of the Principal Act by decisions of the Supreme Court in G.Sekhar (supra) 2 and Sheela Devi (supra)3 wherein it held the Amendment Act to be prospective in operation. These decisions were not brought to the notice of Supreme Court in Ganduri (supra)5 case. DISCUSSION

12. We would dwell into the history and development of Hindu Law as well as look at the Law Commission Report, Report of the Standing Committee of Parliament and the Statement of Objects and Reasons of the Bill introduced in Parliament with the purpose of finding out the true intent of

the Parliament in amending Section 6 of the Principal Act by the Amendment Act, 2005. 5 (2011)9-SCC-788 2 (2009)6-SCC-99 3 (2006)8-SCC-581 5 (2011)9-SCC-788

13. As far as back in 1584 in Heydonas' case6 it was said that for sure and true interpretation of statute in general, four things are to be considered :

(a) what was the common law before making the Act,
(b) what was mischief and defect for which common law did not provide,
(c) what remedy Parliament has resolved and appointed to cure the disease; and
(d) what is the reason of the remedy. This Rule of interpretation/ construction is now popularly known as the Mischief Rule or Rule of Purposive Construction. This Rule was approved by the Supreme Court in Bengal Immunity Co. Ltd. v/s. State of Bihar7 and after setting out the above Rule, stated that it is the office of the Judge to always make such construction as would advance the remedy and suppress the mischief. Old Hindu Law

14. Before the enactment of the Principal Act, Hindus were covered by shastric and customary law which varied from region to region. Principally, there were two schools of Hindu Law in India i.e. Dayabhaga which was prevalent in eastern part of India i.e. Bengal and the adjoining areas and Mitakshara which was prevalent in the rest of India. Under the Mitakshara School of Hindu Law, woman in a 6 (1584) 76 ER Page 637 7 AIR-1955-SC-661 23 of 72 SA.566.2011 joint Hindu family had merely a right of maintenance/ sustenance but had no right of inheritance to property. The basis of Hindu joint family was a common male ancestor and the properties of the family were held as a coparcenary property with male member of the family having a right to the property by virtue of birth and their interest in the coparcenary property would keep varying depending upon the death or a birth of a male in the joint Hindu Family. The property of a male coparcener on his death used to pass by survivorship in the Mitakshara School of Hindu Law. No female is a member of the coparcenary though, she is a member of the joint Hindu family. The coparcenary would normally consist up to four degrees i.e. the common ancestor (coparcener), his son, grandson and great grand son.

15. Under the Dayabhaga School of Hindu Law, the daughters also got equal share along with their brothers. Under the Dayabhaga School property is transmitted by Succession and not by Survivorship. In this School, a female could be a coparcener. So far as the Dayabhaga School was concerned, there was no concept of a coparcenary property and every

member of a Hindu family would hold property in his/her own right and was entitled to dispose of the property as he/she deems fit either by gift or Will. There was no concept of passing of property by survivorship nor did a Hindu male in Dayabhaga School acquire rights to property merely by virtue of his birth. Consequently, women had a right equal to the rights to that of men belonging to the family in the Dayabhaga School of Hindu Law. 24 of 72 SA.566.2011

16. The earliest legislation with regard to right of female inheritance was made in1929 called the Hindu Law of Inheritance Act, 1929. This Act conferred inheritance right to three female heirs- son's-daughter, daughter's-daughter and sister. Thus bringing about restrictions on the exclusive Rule of Survivorship. The next legislation was the Hindu Womens Right to Property Act 1937. This Act enabled the widow to succeed along with the son of the deceased in equal share to the property of her deceased husband. However, the widow was entitled only to limited estate in the property i.e. life estate and could not dispose of the property during her life time. Principal Act

17. In 1950, while framing the Constitution, Articles 14, 15(2)& (3) and 16 of the Constitution of India, sought inter alia to restrain practice of discrimination against women and made equal treatment of women a part of the fundamental rights guaranteed under the Constitution. In line with the above Constitutional objective, the Parliament enacted the Hindu Succession Act,1956 i.e. the Principal Act. This Act applies to all Hindus including Buddhists, Jains and Sikhs. It lays down a uniform and comprehensive system of inheritance and applies to all Hindus, whether governed by Mitakshara or Dayabhaga School of Hindu Law. However, Section 6 of the Principal Act as originally enacted retained substantially the Rule of passing of property in a coparcenary by survivorship, although it did give rights of testamentary disposition to Hindu males 25 of 72 SA.566.2011 in respect of his properties including his coparcenary share. The erstwhile Section 6 of the Principal Act (pre-amended Section 6) inter alia provided that the interest of a coparcener in the coparcenary property if not disposed of by Will under Section 30 of the Principal Act, would devolve in terms of pre-amended Section 6. The main part of pre-amended Section 6 provided that the right of male Hindu at the time of his death in the coparcenary property will devolve by survivorship. However, the proviso provided that if the deceased coparcener has any female relatives specified in Class I of the Schedule to the Act, then the property will devolve in terms of pre- amended Section 6. The Explanation 1 provides that there would be notional partition immediately before his death so as to allocate the share in the coparcenary to the deceased coparcener.

18. It is interesting to note that the Hindu Code Bill wanted to do away with the Mitakshara coparcenary completely. However, the same was opposed to and the erstwhile Section 6 was enacted in the Principal Act.

Consequently, if a partition took place in the coparcenary property, then each male coparcener would get his share and the mother and wife/widow would not become a coparcener but would get a share in the coparcenary property. But a daughter would get no share in the coparcenary property. The daughter would only get a share as one of the heirs on the death of coparcener, out of the share of the deceased in the coparcenary property on notional partition, in view of proviso to pre-amended Section 8 of the Principal Act. In terms of Section 30 of the Principal Act, a Hindu male can dispose of his entire property including his interest in coparcenary 26 of 72 SA.566.2011 property by testamentary disposition/ Will and also in the process deprive his female heirs of any share. Making of Amendment Act, 2005

19. Keeping the aforesaid position of Hindu Law, in its 174 th Report (May 2000), the Law Commission of India was of the view that the gender reforms were called for to ensure equality. The Commission noted the fact that in various States such as Kerala, Andhra Pradesh, Tamil Nadu, Maharashtra and Karnataka, attempts had already been made to bring about the gender equality. But all these States, except Kerala, while conferring coparcenary rights on daughters also denied such rights to daughters married prior to State Acts coming into force.

20. The Law Commission recommended that the daughter should be made coparcener by birth and that she should be entitled to get a share on partition and/or on the death of the male coparcener. The Commission also recommended that a daughter who is married after the commencement of the Amendment Act, should be entitled to a share in the ancestral property as she has already become a coparcener prior to her marriage. One more recommendation of the Law Commission was to do away with the erstwhile Section 23 of the Principal Act which provided that a woman would have a right to stay in the family house as a member of the joint Hindu Family but unlike a male, she would have no right to demand a partition of the family 27 of 72 SA.566.2011 house. The Commission recommended that she should have rights equal to the male in respect of a family house.

21. The Law commission also observed that the Law of Succession falls under Entry V of the List III(concurrent list) in VII Schedule of the Constitution. In view of Article 246 of the Constitution of India the laws made by the above mentioned five States, would stand repealed to the extent they are repugnant to the Principal Act on amendment.

22. On 20 December 2004, the Hindu Succession Amendment Bill 2004 was introduced in the Rajyasabha, inter alia, seeking to amend the erstwhile Section 6 and doing away/omitting

the erstwhile Section 23 of the Principal Act. "Statement of Objects and Reasons for amending the 'Principal Act' read as follows:- STATEMENT OF OBJECTS AND REASONS The Hindu Succession Act, 1956 has amended and codified the law relating to intestate succession Hindus and gave rights which were till then unknown in relation to women's property. However, it does not interfere with the special rights of those who are members of Hindu Mitakshara coparcenary except to provide rules for devolution of the interest of a deceased male in certain cases. The Act-lays down a uniform and comprehensive system of inheritance and applies, inter alia, to persons governed by the Mitakshara and Dayabhaga schools and also to those governed previously by the Murumakkattayam, Aliyasantana and Nambudir laws. The Act applies to every person who is a Hindu by 28 of 72 SA.566.2011 religion in any of its forms or developments including a Virashaiva, a Lingayat or a follower of the Brahmo, Parathana or Arya Samaj; or to any person who is Buddhist, Jain or Sikh by religion; or to any other person who is not a Muslim, Christian, Parsi or Jew by religion. In the case of a testamentary disposition, this Act does not apply and the interest of the deceased is governed by the Indian Succession Act, 1925.

22. Section 6 of the Act deals with devolution of interest of a male Hindu in coparcenary property and recognizes the rule of devolution by survivorship among the members of the coparcenary. The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts to. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. Having regard to the need of render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property. The Kerala Legislature has enacted the Kerala Joint Hindu Family System (Abolition) Act, 1975.

23. It is proposed to remove the discrimination as contained in section 6 of the Hindu Succession Act, 1956 by giving equal rights to daughters in the Hindu Mitakshara coparcenary property as the sons have. Section 23 of the Act disentitles a female heir to ask for partition in respect of a dwelling house wholly occupied by a joint family until the male heirs choose to divide their respective shares therein. It is also proposed to omit the said section so as to remove the disability on female heirs contained in that section. 29 of 72 SA.566.2011

24. The above proposals are based on the recommendations of the Law Commission of India as contained in its 174th Report on 'Property Rights of

Women: Proposed Reform under the Hindu Law.

25. The Bill seeks to achieve the above objects." (emphasis supplied)

26. The Bill inter alia provided in proviso to proposed Section 6(1) that the Amendment Act would not apply to a daughter married before the commencement of the Amendment Act and also that the Amendment Act will have no application to a partition in case the partition had been affected before the commencement of the Amendment Act. The aforesaid Bill was thereafter referred to the Standing committee of Parliament. The Standing Committee after recording the historical growth of Hindu Law and Gender inequality with regard to the property right practiced against a female Hindu suggested that proviso 1 to proposed Section 6(1) of the bill which sought to exclude the daughter married before the commencement of the Amendment Act from the benefit of the Act should be done away with.

27. The Standing Committee also suggested that the partition of the Hindu family property should be properly defined in the Amendment Act. It was suggested that partition for all purposes should be either by registered documents or by decree of Court. However, where oral partition is pleaded, the same should be backed by evidence in support. Further omission of Section 23 as suggested by the Law Commission, will enable the Hindu Women to seek partition of a family house occupied by the family members just as male member could seek partition. 30 of 72 SA.566.2011

28. Thereafter on 9 September, 2005, the Amendment Act 2005 came to be passed as Act 39 of 2005. Section 3 of the Amending Act substituted erstwhile Section 6 of the Principal Act. The Amendment Act 2005 did away with exclusion of married daughter from getting the benefit of the amendment and also added a proviso to Section 6(1) of the Principal Act saving partitions done prior to 20 December 2004 (the date of introduction of the Bill in Rajya Sabha). The Explanation to Section 6(5) of the Principal Act provided that for the purposes of the Section 6 of the Act partition only means partition by registered document or decree of Court. QUESTIONS (a) AND (d)

29. Keeping the above historical development of law in mind, we shall now consider the questions referred to us by the learned Single Judge. Questions A & D will have to be taken up together. Question (a) - Whether Section 6 of the Hindu Succession Act 1956 as amended by the Amendment Act is prospective or retrospective in operation. Question (d) - Whether Section 6 of the Hindu Succession Act,1956 as amended by the Amendment Act,2005 applies only to daughters born after 9.9.2005?

30. We shall refer to the parties by the same nomenclature as acquired by them before the learned Single Judge i.e. the Appellants [challenging the view of the Division Bench in Vaishali Ganorkar 31 of 72 SA.566.2011

(supra)1 and Respondents (supporting the view of the Division Bench in Vaishali S. Ganorkar (supra))1.

31. It is the case of the Appellants before us that the Amending Act which substituted Section 6 of the Principal act is retrospective in operation and applies to all daughters born before 9 September 2005 and also the heirs of such daughter who died before 9 September 2005 are permitted under the Act to claim their right in the coparcenary property through the deceased daughter. As against the above, the stand of the Respondents is that Section 6 has to be read prospectively and it applies only to the daughters born on or after the effective date provided in the Act namely 9 September 2005. According to them, the entire issue stands covered by the order of the Division Bench of this Court in Vaishali Gaonkar (supra)1.

32. So far as the decision of our Division Bench in Vaishali S. Ganorkar (supra)1 is concerned, we find that it was decided in the peculiar facts of the case. The facts were indeed very gross. As already set out in para 6(A) hereinabove, the father having taken a loan from the Bank and mortgaged the suit flat as a security for the loan in 2008, failed to repay the loan. When the Bank initiated recovery proceedings under the Securitisation Act, to stall such recovery the daughters of the borrower filed the suit claiming to be 1 2012(5)-Bom.C.R.-210 1 2012(5)-Bom.C.R.-210 1 2012(5)-Bom.C.R.-210 1 2012(5)-Bom.C.R.-210 32 of 72 SA.566.2011 entitled to 2/3rd of the suit property as their share in the coparcenary property on the basis of Section 6 of the Hindu Succession Act, as amended by 2005 Amendment Act. The learned Single Judge refused to grant ad-interim relief to the daughters . In appeal also the Division Bench was required to decide whether the ad-interim relief should be granted against recovery proceedings initiated by the bank. The appeal was dismissed by the Division Bench and the Supreme Court also dismissed the Special Leave Petition leaving the question of law open. The bank could have argued in the alternative that even if the suit flat was a coparcenary property, the father as 'Karta' of HUF had made alienation of the suit flat by way of mortgage for a legal necessity. Therefore, alienation by way of mortgage was binding on all members of the coparcenary.

33. Apart from the above factual aspects, it must be acknowledged that when the questions of law were argued in Vaishali Ganorkar case1, the legislative history as well as Statement of Objects and Reasons for the Amendment Act were not brought to the notice of the Division Bench. Even the binding judgment of the Supreme Court in Ganduri (supra)5 was not brought to the notice of the Division Bench. That judgment was directly on the scope and ambit of amended Section 6 of the Hindu Succession Act. On the contrary the Division Bench was persuaded to follow the principle laid down by the Supreme court in G.Sekhar (supra) 2, in which dealing with the provision of Section 23 of the Hindu Succession Act, it was held that if the date of opening of the succession to the property of

a 1 2012(5)-Bom.C.R.-210 5 (2011)9-SCC-788 2 (2009)6-SCC-99 33 of 72 SA.566.2011 coparcener took place before the Amendment Act 2005, then Section 23 of the pre-Amended Act would apply. In the above context, the Division Bench noticed that the father coparcener (respondent No.1 in the appeal) was still alive on 9 September 2005, and the occasion to apply Amended Section 6 would arise only on the death of the coparcener. The Division Bench gave importance to the marginal note and the grammar in the Amended Section 6. We have given our utmost anxious consideration, particularlyy since one of us (Chief Justice) was a party to the decision in Vaishali S.Ganorkar's case (supra)1.

34. Having regard to various considerations, which we shall advert to in detail when we examine the arguments advanced on behalf of the parties, as well as reasoning of the learned single Judge, we are compelled to reach the conclusion that the principle enunciated in Vaishali S.Ganorkar's case (supra) 1 was erroneous and it must be corrected. As observed by Justice P.N.Bhagwati in Umed Vs. Raj Singh8 "Since I was a party to the decision in Mohd. Yunus Saleem Vs. Shivkumar Shastri (supra), which is now being overturned by us, I think I must explain why we take a different view from the one taken in that decision. The point decided in that case has been elaborately discussed before us and we find on a fuller argument that the view taken by the Court in that case was erroneous 1 2012(5)-Bom.C.R.-210 1 2012(5)-Bom.C.R.-210 8 (1975)1-SCC-76 34 of 72 SA.566.2011 and needs to be corrected. To perpetuate an error is no heroism. To rectify it is the compulsion of judicial conscience. In this we derive comfort and strength from the wise and inspiring words of Justice Bronson in Pierce Vs. Delameter : A Judge ought to be - wise enough to know that he is fallible, and therefore ever ready to learn; great and honest enough to discard all mere pride of opinion, and follow truth wherever it may lead; and courageous enough to acknowledge his errors."

35. We agree with the submission of the Respondents that normally a statute should be construed on its plain meaning. However, when the plain reading of the provision is not very clear then, in that case, one has to apply an appropriate tool of interpretation to unearth the intent, object and purpose of the enactment. In such cases, particularly, in cases of socio-economic legislations like the one we are concerned with, we must apply the Mischief or Purposive Rule of interpretation to find out the true and correct meaning of the statute. If we look at the history of legislation with regard to women in India and also the law prevailing prior to the legislation when under the Shastric/ Customary Law, though the Hindu woman was part of the joint Hindu family, she had no right in the joint property. The property in such case would pass to the coparcener (who could only be a male) by survivorship and any birth or death of a male would reduce or increase the share of the surviving coparcenersrs in the coparcenary property.y. The rights of a coparcener were transmitted only by survivorship. 35 of 72 SA.566.2011

36. The Hindu Succession Act, 1956 made a conscious departure from the Shastric/Customary Law, but only in two respects :

(i) Section 30 gave a right to Hindu coparcener to make testamentary disposition of his property including his share in the coparcenary property.
(ii) Section 6 of the Principal Act as enacted in 1956 provided for property passing in the absence of a female heir in Class- I by survivorship upon the death of the coparcener. However, if the coparcener had any female relative such as widow, daughter or a grand daughter, specified in class-I of the Schedule then the interest of such deceased coparcener would not pass by way of survivorship but would pass by succession as provided under the Principal Act.

34. However, the Principal Act did not provide any rights to the daughters in respect of the partition of the property or any rights to demand partition of the property or even claim a share in the coparcenary property. The only right of the daughter would be to get a share in the father's share in the coparcenary property and the same would arise only on the death of her ancestor -coparcener. This led to gender discrimination and daughters were left out from enjoying the coparcenary property being violative of Articles 14 and 15 of the Constitution of India which provide for equal rights to all citizens and a mandate not to be discriminated on account of religion, caste, sex or birth. Realizing the dichotomy and gender discrimination being sanctioned by the law, Law Commission of India undertook the study of the provisions of Hindu Law with regard to the laws of inheritance 36 of 72 SA.566.2011 and particularly, with regard to rights of daughters. On detailed study, the Law Commission submitted 174 th Report in 2000 and recommended that the daughter of a coparcener should be given equal right as that of a son by virtue of her birth in the joint Hindu family. On the basis of the Report of the Law Commission, the Government introduced a Bill in Parliament. However, the Bill also provided in proposed Section 6 (5) that the amended Section shall have prospective effect i.e. the amendment shall not apply to a partition effected before the commencement of the Amendment Act. It also provided that it shall not apply to a daughter married before the commencement of the Amendment Act. However, the Act when passed did not have any provision curtailing the rights of a daughter married before coming into force of Amendment Act. The observations in the report of Standing Committee leave no room for doubt that Parliament was against "a whole generation of woman, contemporary to passage of this important enactment will lose out all their property rights". That would be the consequence of holding that Amendment Act of 2005 confers coparcenary rights only on daughters born after the amended Act coming into force. So also the view of the Division Bench that a daughter born prior to amendment will get rights in her father's coparcenary property only on the death of the father would not

only postpone conferment of valuable property rights on crores of daughters who may also lose everything upon the father and other coparceners disposing of the coparcenary property during lifetime of the father. The Legislature, therefore, did not and could not have intended to confer equal rights in the coparcenary property only upon daughters to be born after coming into force of the Amended Act, 2005. 37 of 72 SA.566.2011

35. Amended Section 6(1) requires to be analyzed. For the sake of convenience it is quoted again: "6(1). 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 shall,-

(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 bad 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 a 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 taken place before the 20th day of December, 2004." It needs to be noted that clauses (b) and (c) of sub-section (1) of Section 6 and what follows clause (c) are not circumscribed by clause (a). Therefore, sub-section (1) of Section 6 has to be read as under :-(For convenience, the words "the Hindu Succession (Amendment) Act, 2005" have been referred to as "the Amendment Act") 1(a) On and from the commencement of the Amendment Act, in a Joint Hindu family governed by 38 of 72 SA.566.2011 Mitakshara law, the daughter of coparcener shall by birth become a coparcener in her own right as the son; 1(b) On and from the commencement of the Amendment Act, in a Joint Hindu Family governed by Mitakshara law, the daughter of coparcener shall have the same rights in the coparcenary property as she would have if she would have been a son; 1(c) On and from the commencement of the Amendment Act, in a Joint Hindu family governed by Mitakshara law, the daughter of coparcener shall be subject to the same liabilities in respect of the said coparcenary property as that of a son; On and from the commencement of the Amendment Act, in a Joint Hindu family governed by Mitakshara law, any reference to Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener; (emphasis supplied)

36. However, learned counsel for respondents would like us to read Amended Section 6(1) as under- "in a Joint Hindu family governed by Mitakshara law, the daughter of a coparcener, who is born on and from 39 of 72 SA.566.2011 the commencement of the Hindu Succession (Amendment) Act, 2005 shall become a coparcener in her own right in the same manner

as the son and shall have the same rights in the coparcenary property as she would have had as a son and shall be subject to the same liabilities in respect of the coparcenary property as that of a son and any reference to the Hindu Mitakshara coparcener shall be deemed to include a reference to a daughter of a coparcener." ig (emphasis supplied)

37. Since sub clauses (b), (c) and subsequent part of sub- section (1) are not conditioned or circumscribed by clause (a), a daughter born before the date of commencement of the Amendment Act shall also have the same rights in her father's coparcernary property, (but of course with effect from the date of commencement of the Amendment Act), as she would have if she had been a son. Similarly, her liabilities in respect of her father's coparcenary property shall be as that of a son, but only with effect from the date of commencement of the Amendment Act. The view that amended Section 6 would only apply to daughters born after the commencement of the Amendment Act would, therefore, clearly militate against the express language of clauses (b) & (c) and subsequent part of Amended Section 6(1). Unfortunately clause (b) conferring rights in coparcenary property on daughters was not referred to in Vaishali Ganorkar's case (supra)1. 1 2012(5)-Bom.C.R.-210

38. (i) A prospective statute operates forwards from the date of its enactment conferring new rights on parties without reference to any anterior event, status or characteristic; (ii) Retrospective statute, on the other hand, operates backwards, attaches new consequences, though for the future, but to an event that took place before the statute was enacted. It takes away vested rights. Substantive benefits which were already obtained by a party are sought to be taken away because of legislation being given effect to from a date prior to its enactment. The rules of interpretation of statute raise a presumption against such retrospective effect to a legislation. In other words, if the Legislature has not expressly or by necessary implication given effect to a statute from a date prior to its enactment, the Court will not allow retrospective effect being given to a legislation so as to take away the vested rights. Statutes enacted for regulating succession are ordinarily not applicable to successions which had already opened, as otherwise the effect will be to divest the estate from persons in whom it had vested prior to coming into force of the new statutes. (Muhammed Abdus Samad Vs. Qurban Hussain)9 (iii) There is the intermediate category called "Retroactive Statute" which does not operate backwards and does not take away vested rights. Though it operates forwards, it is brought into operation by a characteristic or status that arose before it was enacted. For example, a provision of an Act brought into force on 1 9 ILR.26-Allahabad-119 (129) P.C. 41 of 72 SA.566.2011 January 2014, the Act applies to a person who was employed on 1 January 2014 has two elements : (a) that

the person concerned took employment on 1 January 2014 - an event; (b) that the person referred to was an employee on that day - a characteristic or status which he had acquired before 1 January 2014. Insofar as the Act applies to a person who took employment on 1 January 2014, the Act is prospective. Insofar as the Act applies to a person who had taken employment before 1 January 2014, the Act is retroactive. 39. The first celebrated case in the intermediate category is R Vs. Inhabitants of St.Mary, Whitechapel10, wherein the Court was called upon to construe Section 2 of the Poor Removal Act, 1846, which provided that "no woman residing in any parish with her husband at the time of his death shall be removed from such parish, for twelve calendar months next after his death, if she so long continues a widow". In that case it was sought to remove a widow within twelve months from the date of the death of her husband who had died prior to the Act came into force; and it was argued that to apply the Act to such a case was to construe it retrospectively. In rejecting the contention, Lord Denman, C.J. made the following oft- quoted observations : "It was said that the operation of the statute was confined to persons who had become widows after the 10 1848(2)-QB-120 42 of 72 SA.566.2011 Act was passed, and that the presumption against a retrospective statute being intended supported this construction : but we have before shown that the statute is in its direct operation prospective, as it relates to future removals only, and that it is not properly called a retrospective statute because a part of the requisites for its action is drawn from time antecedent to its passing." (Emphasis supplied) While the Indian cases in this category are catalogued in the "Principles of Statutory Interpretation" by Justice G.P.Singh (13 th Edition 2012, Chapter 6, Pages 561-567), it is necessary to refer to the leading decision of the Constitution Bench of the Supreme Court in State of Jammu & Kashmir Vs. Triloki Nath Khosa 11 wherein the Court was called upon to examine the challenge to the service rules which after amalgamating different cadres of engineers into one class, prescribed Bachelor's Degree in Engineering as a qualification for promotion, though such qualification was not prescribed for promotion from the cadre of Assistant Engineers before amalgamation of cadres. It was contended that requiring the Assistant Engineers already in service to possess such qualification for promotion amounted to making a retrospective rule. Turning down the challenge, the Supreme Court observed thus : "16. ... ... It is wrong to characterise the operation of a service rule as retrospective for the reason that it applies to existing employees. A rule which classifies such employees for promotional purposes, 11 (1974)1-SCC-19 43 of 72 SA.566.2011 undoubtedly operates in future, in the sense that it governs the future right of promotion of those who are already in service. The impugned Rules do not recall a promotion already made or reduce a pay scale already granted. They provide for a classification by prescribing a qualitative standard, the measure of that standard being educational attainment. Whether a classification founded on such a consideration suffers from a discriminatory vice is another matter which we will presently consider but surely, the Rule cannot first be assumed to be retrospective and then be struck down for the reason that it violates the guarantee of equal opportunity by extending its arms over the past. If rules governing conditions of service

cannot ever operate to the prejudice of those who are already in service, the age of superannuation should have remained immutable and schemes of compulsory retirement in public interest ought to have founded on the rock of retroactivity. But such is not the implication of Service Rules nor is it their true description to say that because they affect existing employees they are retrospective. ... ..." In the same vein, in Dilip Vs. Mohd. Azizul Haq and another12, the Supreme Court observed, inter alia, as under : "9. ... ... We must bear in mind that the presumption against retrospective legislation does not necessarily apply to an enactment merely because a part of the requisites for its action is drawn from time antecedent to its passing. The fact that as from a future date tax is charged on a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that a tax is retrospectively imposed as held in Commrs. Of Customs and Excise Vs. Thorn Electrical Industries Ltd. (1975)1- WLR-1661. ... ..."

12 (2000)3-SCC-607

40. A bare perusal of sub-section (1) of Section 6 would, thus, clearly show that the legislative intent in enacting clause (a) is prospective i.e. daughter born on or after 9 September 2005 will become a coparcener by birth, but the legislative intent in enacting clauses (b) & (c) is retroactive, because rights in the coparcenary property are conferred by clause (b) on the daughter who was already born before the amendment, and who is alive on the date of Amendment coming into force. Hence, if a daughter of a coparcener had died before 9 September 2005, since she would not have acquired any rights in the coparcenary property, her heirs would have no right in the coparcenary property. Since Section 6(1) expressly confers right on daughter only on and with effect from the date of coming into force of the Amendment Act, it is not possible to take the view being canvassed by learned counsel for the appellants that heirs of such a deceased daughter can also claim benefits of the amendment.
41. Learned counsel for the appellants would, however, vehemently submit that because the Legislature has provided to ignore partitions other than partitions effected by registered deeds or decrees of the Court, the amendment was intended to be retrospective and would apply even to a daughter who died before 9 September 2005 and ignoring all partitions (other than those effected by registered deeds or decrees of Court), the coparcenery properties which existed on 17 June 1956 will continue to be coparcenery properties in which the daughter of the coparcener or the heirs of the deceased daughter will get rights with effect from 9 September 2005. 45 of

72 SA.566.2011 Reference is also made to the decision of Division Judge of Karnataka High Court in Pushpalatha case (supra)4.

42. Two conditions necessary for applicability of Amended Section 6(1) are :

(i) The daughter of the coparcener (daughter claiming benefit of amended Section 6) should be alive on the date of amendment coming into force;

(ii) The property in question must be available on the date of the commencement of the Act as coparcenary property. Proviso to Section 6(1) reads as under:- "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 taken place before the 20th day of December, 2004."

43. It is significant to note that amended Bill was introduced in Rajya Sabha on 20 December 2004 and therefore Parliament saved all dispositions or alienations including partition and testamentary disposition of property, which had taken place before introduction of the Bill in Rajya Sabha, but even registered partition deeds and the partitions obtained by decree of Court after 20 December 2004 are not saved. Otherwise some people might have executed such registered 4 AIR-2010-Karnataka-124 46 of 72 SA.566.2011 partition deeds or obtained collusive decrees of the Court between 20 December 2004 and 8 September 2005 to deprive daughters of their rights in the coparcenary property by removing the property in question from the stock of coparcenary property, thus changing the nature of the property by such device. Similarly, sub-section (5) of Section 6 makes it clear that nothing in amended section shall apply to a partition which was effected before 20 December 2004.

44. Learned counsel for the appellants would, however, submit that explanation to Section 6 clearly provides that partition means any partition made by execution of a deed duly registered under the Registration Act, 1908 or a partition effected by a decree of a Court and therefore, if an oral partition had taken place before 20 December 2004, such partition would not be saved either by the proviso to sub-section (1) or sub-section (5) of Section 6. It is, therefore, submitted that oral partition effected of coparcenary property even if effected in the year 1957, would not be saved and therefore Section 6 must be held to be retrospective with effect from 17 June 1956.

45. Though the argument may prima facie appear to be attractive, it does not recognize the distinction between an oral partition or partition by unregistered document which is not followed by partition by metes and bounds on the one hand and oral partition or 47 of 72 SA.566.2011 partition by unregistered document which was acted upon by physical partition of the properties by metes and bounds and entries made in the public record

about such physical partition by entering the names of sharers as individual owner/s in the concerned public record, (such as records of the Municipal Corporation or the Property Registers maintained by the Government) on the other hand. It is only where an oral partition or partition by unregistered document is not followed by partition by metes and bounds, evidenced by entries in the public records that a daughter would be in a position to contend that the property still remains coparcenary property on the date of coming into force of the Amendment Act. Thus for the Amended Section 6 to apply, not only the daughter should be alive on the date of commencement of the Amendment Act, but also the property should be coparcenary property on the date of the commencement of the Act i.e. 9 September 2005 or atleast on 20 December 2004, when the Amendment Bill was introduced in Rajya Sabha.

46. Learned counsel for the appellants submitted that Section 3 of the Amendment Act 2005 substituted Section 6 of the Principal Act and therefore strong reliance is placed upon the decision of the Supreme Court in Zile Singh vs State Of Haryana & Others13 in support of the contention that a substitution results not only in old rule ceasing to exist but also that new rule is brought into existence in place of the earlier rule. It is, therefore, contended that the daughter of the coparcener has equal right in the coparcenary property, as if she had been the son right from June 1956 and not merely from 9 September 2005 when the Amendment Act came into force. It is 13 (2004)8-SCC-1 48 of 72 SA.566.2011 contended that amended Section 6 would, therefore, cover all coparcenary property except that which was covered by any testamentary dispossession or alienation including any partition, provided such partition was made by the execution of the deed of partition duly registered under the Registration Act 1908 or partition effected by the decree of the Court.

47. We have serious doubt about the above contention advanced on behalf of the appellants for more than one reason. In the first place, though Section 3 of the Amendment Act of Hindu Succession (Amendment) Act 2005 has substituted with effect from 9 September 2005, erstwhile Section 6 by the new Section 6, it cannot be said that the new Section 6 relates back to 17 June 1956, when the Principal Act came into force. In fact, sub-section (1) of amended Section 6 opens with the specific words "On and from the commencement of the Hindu Succession (Amendment) Act, 2005". Secondly, sub-section (3) of Section 6 also opens with the words "Where a Hindu dies after the commencement of the Hindu Succession (Amendment) Act, 2005, his interest in the property of a joint Hindu family governed by the Mitakshara law, shall devolve by testamentary or intestate succession, as the case may be and not by survivorship ... ...". Amended Section 6 no where provides as to what is to happen to a case where Hindu died before commencement of 2005 Amendment Act. Obviously, Legislature did not intend to leave any vacuum for the period prior to 9 September 2005 when the Amendment Act came into force.

Case of a Hindu, who died prior to 49 of 72 SA.566.2011 9 September 2005 continues to be governed by pre-amended Section

48.

49. For all these reasons, it is not possible to accept the contention urged on behalf of the appellants that the Amendment Act 2005 is retrospective in nature and that it relates back to 17 June 1956 when the Principal Act came into force, so as to unsettle all the partitions which were not effected by decrees of Court or registered documents even if executed prior to 20 December 2004. The learned counsel for the Appellants went so far as to contend that the retrospective effect of the Amendment Act of 2005 would even set at naught all notional partitions under the proviso to Section 8 of the pre-amended Principal Act if such notional partition is not followed by partition by metes and bounds. We are not impressed because the Amendment Act of 2005 affects partitions inter vivos which were effected without decree of Court or by registered partition deed. There is nothing in the Amendment Act to indicate that statutory partitions are rendered nugatory. In case of statutory partition, there would be no possibility of any contrived or got up partition.

50. To conclude this debate, we would like to quote the following statement of law made by Staughton LJ in Secretary of State for Social Security Vs. Tunnicliffe14 : 14 (1991)2-ALL ER-712

"In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree. The greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended." The above statement of law was reiterated by House of Lords in L'Office Cherifien Vs. Yamashita Limited 15, wherein Lord Mustill explained the rule of presumption against retrospectivity in following words : "... ... ... rule is none more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after an event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adopt themselves to individual circumstances, and which tend themselves

to become the subject of minute analysis, where what ought to be analysed is the statute itself." (emphasis supplied) 15 (1994)1-ALL ER-20 51 of 72 SA.566.2011

51. We will now deal with the arguments which appealed to the Division Bench in Ganorkar's case the first being Title to amended Section 6 "Devolution of interest in coparcenary property". The Division Bench laid great emphasis on the said marginal note to come to the conclusion that even on or after 9 September 2005, unless the coparcener died and his succession opened, there is no devolution of interest and hence no daughter (born before 9 September 2005) of such coparcener would be entitled to become a coparcener or to have rights or liability in the coparcenary property alongwith son of such coparcener.

52. While earlier legal position was that the marginal note appended to the section cannot be referred to for the purposes of construing the statute, even now, the settled legal position is that marginal note cannot control or obstruct the meaning of the body of the section, when the language of the section is clear and unambiguous (Dilawar Balu Karane Vs. State of Maharashtra 16 and Union of India Vs. National Federation of Blind17).

53. It is necessary to note that the pre-amended Section 6 dealt only with the devolution of the property on the death of the coparcener and therefore the marginal note to pre-amended Section 6 was "Devolution of interest in coparcenary property". However, in the amended Section 6, only sub-section (3) provides for devolution of property upon the death of the coparcener. In other words, sub-section (1) of pre-amended Section 6 has been converted into sub-section (3) 16 (2002)2-SCC-135 17 (2013)10-SCC-772 52 of 72 SA.566.2011 of the Amended Section 6 with certain modification. But sub-section (1) of Section 6 is entirely new provision, which confers new rights on a daughter of coparcener without contemplating death of the coparcener. It appears to be sheer inadvertence on the part of the draftman of the Amendment Act, 2005 that marginal note of Section 6 is not amended, though Parliament drastically amended existing law on the subject, by conferring on crores of daughters rights in the coparcenary property, even without reference to death of the coparcener in sub-section (1) & sub-section (2) of the Amended Section 6.

54. In view of above discussion, in our view the correct legal position is that Section 6 as amended by the 2005 Amendment Act is retroactive in nature meaning thereby the rights under Section 6(1)(b) and (c) and under sub-Rule (2) are available to all daughters living on the date of coming into force of the 2005 Amendment Act i.e. on 9 September 2005, though born prior to 9 September 2005. Obviously, the daughters born on or after 9 September 2005 are entitled to get the benefits of Amended Section 6 of the Act under clause (a) of sub section (1). In other words, the heirs of daughters who died before 9 September 2005 do not get the benefits of amended Section 6. QUESTIONS (b) & (c)

55. So far as questions (b) and (c) are concerned, they are being considered together, as the discussion would be common. So 53 of 72 SA.566.2011 far as question (d) is concerned, it is already answered while dealing with question (a).

(b) Whether Section 6 of the Hindu Succession Act, 1956 as amended by the Amendment Act, applies to daughters born prior to 17.6.1956?
(c) Whether Section 6 of the Hindu Succession Act, 1956 as amended by the Amendment Act, applies to daughters born after 17.6.1956 and prior to 9.9.2005?

55. Learned counsel for the Appellants submit that the Act applies to daughters whenever they are born. They submitted that though Section 6 of the Amendment Act is retrospective w.e.f. 17 June 1956, the benefit of the same would be applicable to all daughters whenever born even after 17 June 1956. The operation of Section 6 of the Principal Act cannot be restricted. Reliance is placed on the decision of a Division Bench of Karnataka High Court in Pushpalatha N.V. Vs. V.Padma (supra)4.
56. Learned Counsel for the Respondents opposed the application and submitted that Section 6 of the Principal Act would only apply to daughters born after 9 September 2005 and in support, rely on the submissions made earlier viz. :

(a) Opening words of Section 6(1) clearly state "On and from the commencement of Hindu Succession Amendment Act 2005" which itself signifies that the same would be applicable only to daughters born after 9 September 1995; 4 AIR-2010-Karnataka-124 54 of 72 SA.566.2011
(b) In case the benefit of amended Section 6 is given to daughter born before 9 September 2005, it would lead to a lot of uncertainty and displace vested rights; and
(c) Without prejudice, it is submitted that in any case, benefit of amended Section 6 of the Act cannot be extended to daughters born prior to 17 June 1956. This is so as the Principal Act itself came into force on that date.

57. We have considered the rival submissions. On an examination of amended Section 6 of the Principal Act and bearing in mind the words 'on and from commencement of the Hindu Succession Act, 2005' found in Section 6, it must follow that the rights under the amended Section 6 can be exercised by a daughter of a coparcener only after the commencement of the Amendment Act 2005. Therefore, it is imperative that the daughter who seeks to exercise such a right must herself be alive at the time when the Amendment Act, 2005 was brought into force. It would not matter whether the daughter concerned is born before 1956 or after 1956. This is for the simple reason that the Hindu Succession Act 1956 when it came

into force applied to all Hindus in the country irrespective of their date of birth. The date of birth was not a criterion for application of the Principal Act. The only requirement is that when the Act is being sought to be applied, the person concerned must be in existence/ living. The Parliament has specifically used the word "on and from the commencement of Hindu Succession (Amendment) Act, 2005" so as to ensure that rights which are already settled are not disturbed by virtue of a person claiming as 55 of 72 SA.566.2011 an heir to a daughter who had passed away before the Amendment Act came into force.

58. Since the Appellants have relied upon the decision of the Karnataka High Court in Pushpalata case (supra) 4, we may set out reasoning and conclusion of the Karnataka High Court : "101. ... ... a vested right can be taken away by way of an amendment by the legislature by expressly saying so or by implication. Secondly, a declaratory law is retrospective in operation because the object of such declaratory law is to supply the omission. In the instant case, in 1956 when the Act was passed, the daughters of a coparcener was not treated as coparcener nor any right in the coparcenary property by birth was conferred on her. Now, by a declaration such a right is sought to be conferred. It is done by way of substitution. In other words, the legislative intent is to supply the omission in the original Act. The parliament has not kept any one in doubt about their intention. The effect is that the Act as enacted in 1956 is to be read and construed as if the altered words/new section had been written into the earlier Act with the pen and ink and the old Section/Words scored out, so that thereafter there is no need to refer to the amending Act at all. The constitutional validity of the substituted section is not under challenge. On the contrary, the substituted section is in conformity with the constitutional provision. The effect is old Section 6 is superseded by the new Section 6, the amended section taking the place of the original section, for all intents and purposes as if the amendment had always been there. This is the way the parliament has expressly made its intention clear to the effect the amendment is retrospective. 4 AIR-2010-Karnataka-124 56 of 72 SA.566.2011

59. Secondly, though the opening words of the section declares that "on and from the commencement of the Hindu Succession (Amendment) Act, 2005, the daughter of a coparcener in a joint family governed by the Mithakshara is conferred the status of coparcener, it is expressly stated that she becomes a coparcener by birth. Conferment of the status is different from conferring the rights in the coparcenary property. The right to coparcenary property is conferred from the date of birth, which necessarily means from the date anterior to the date of conferment of status, and thus the Section is made retroactive. By such express words the amended section is made retrospective.

60. Thirdly, the proviso to Section 6(1) makes the intention of the parliament manifestly clear. The Parliament has expressly stated in the proviso to sub- section (1) of Section 6 - the substituted provision, that the declaration of right in favour of a daughter as a coparcener though it takes

effect by birth i.e. anterior to the amendment, the same would 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 2004. The way this proviso is expressed makes it clear the substituted provision is retrospective in operation. By substitution it is made clear that this provision is there in the principal Act from 1956 itself. But, as the amendment came into force only in 2005, the question would arise that what should happen to the transactions between 1956 and 2005. it is in this context the Parliament has expressly stated though the right by birth is given from 1956, if the dispositions.

61. Having carefully gone through the above reasoning and conclusion in Pushpalatha case (supra)4, while we agree that the legislative intent was to protect interest of the third parties who 4 AIR-2010-Karnataka-124 57 of 72 SA.566.2011 acquired interests in the coparcenary property and also to protect the interest of the scarcenesshere coparcenary became their separate properties, as already discussed in paragraph 45 hereinabove, it is not possible to agree with the view in Pushpalata case (supra) 4 that a daughter of a coparcener born before 9 September 1996 became a coparcener by birth anterior to the amendment. As already indicated earlier, clause (a) of sub-section (1) of amended Section 6 only applies to daughter born on or after the date of commencement of the Amendment Act i.e. born on or after 9 September 2005. It is only by virtue of clauses (b) and (c) of sub-section 1 of Amended Section 6 that the daughters born before 9 September 2005 acquired rights in coparcenary property and acquired the status of scarceness with effect from 9September 2005. For the reasons already indicated in this judgment, the view taken by the Karnataka High Court in Pushpalata case (supra)4 that a daughter of the coparcener gets right in coparcenary property with retrospective effect from 17 June 1956 or from the date of birth prior to 9 September 2005 does not commend to us. As held by us earlier, the provisions of Amended Section 6 are retroactive in operation, and daughter living on 9 September 2005 gets rights in coparcenary property with effect from 9 September 2005.

62. In the above view of the matter, so far as questions (b),

(c) and (d) are concerned, we hold that the Amendment Act applies to daughters born any time provided the daughters born prior to 9 September 2005 are alive on the date of coming into force of the 4 AIR-2010-Karnataka-124 4 AIR-2010-Karnataka-124 58 of 72 SA.566.2011 Amendment Act i.e. on 9 September 2005. There is no dispute between the parties that the Amendment Act applies to daughters born on or after 9 September 2005. QUESTION (e)

61. The Supreme Court held in Ganduri Koteshwaram (supra)5 that the amended Section 6 will apply to a partition suit wherein the final decree was not passed before the date of commencement of the Amended

Act of 2005. Those observations have to be examined in the context of the facts of that case, partition had taken place between father and two sons, each of them getting 1/3rd of the coparcenary property. Thereafter, when the father died, his interest in the coparcenary property was divided on notional partition in terms of proviso to erstwhile Section 6(1) of the Principal Act between two daughters and two sons. A preliminary decree was passed in 1999, which was amended in 2003. The final decree for partition was not yet passed, when the Amendment Act 2005 came into force on 9 September 2005. In view of the said amendment, two daughters sought a share in the property claiming to be equal to their brothers' share and prayed for amendment of the preliminary decree on that basis. The Trial Court allowed the daughters' application by order dated 15 June 2009 and held that they were entitled for re-allotment of shares in the preliminary decree, i.e., they are entitled to 1/4th share each and separate possession. The plaintiffs/brothers challenged the order of 5 (2011)-9-SCC-788 59 of 72 SA.566.2011 the Trial Court in appeal before the Andhra Pradesh High Court. The single Judge of the High Court allowed the appeal and set aside the order of the Trial Court. In the appeal filed by sisters, the Supreme Court set aside the order of the High Court and restored the order of the Trial Court and directed the Trial Court to proceed for preparation of the final decree in terms of its order dated 15 June 2009.

62. While rendering its decision in the above case, the Supreme Court made the following observations:- "9. The 1956 Act is an Act to codify the law relating to intestate succession among Hindus. This Act has brought about important changes in the law of succession but without affecting the special rights of the members of a Mitakshara coparcenary. The Parliament felt that non- inclusion of daughters in the Mitakshara coparcenary property was causing discrimination to them and, accordingly, decided to bring in necessary changes in the law. The Statement of Objects and Reasons of the 2005 Amendment Act, inter alia, reads as under :".....The retention of the Mitakshara coparcenary property without including the females in it means that the females cannot inherit in ancestral property as their male counterparts do. The law by excluding the daughter from participating in the coparcenary ownership not only contributes to her discrimination on the ground of gender but also has led to oppression and negation of her fundamental right of equality guaranteed by the Constitution. Having regard to the need to render social justice to women, the States of Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra have made 60 of 72 SA.566.2011 necessary changes in the law giving equal right to daughters in Hindu Mitakshara coparcenary property."

63. With the above object in mind, the Parliament substituted the existing Section 6 of the 1956 Act by a new provision vide 2005 Amendment Act. .....

64. The new Section 6 provides for parity of rights in the coparcenary property among male and female members of a joint Hindu family on and from September 9, 2005. The Legislature has now conferred substantive right in favour of the daughters. According to the new Section 6, the daughter of a coparcener becomes a coparcener by birth in her own rights and liabilities in the same manner as the son. The declaration in Section 6 that the daughter of the coparcener shall have same rights and liabilities in the coparcenary property as she would have been a son is unambiguous and unequivocal. Thus, on and from September 9, 2005, the daughter is entitled to a share in the ancestral property and is a coparcener as if she had been a son.

65. The right accrued to a daughter in the property of a joint Hindu family governed by the Mitakshara Law, by virtue of the 2005 Amendment Act, is absolute, except in the circumstances provided in the proviso appended to sub-section (1) of Section 6. The excepted categories to which new Section 6 of the 1956 Act is not applicable are two, namely, (i) where the disposition or alienation including any partition has taken place before December 20, 2004; and (ii) where testamentary disposition of property has been made before December 20, 2004. ...." 61 of 72 SA.566.2011

66. Perusal of the above decision of the Supreme Court leaves no room for doubt that the amended Section 6 came to be applied to a case where daughters were born long prior to the date of coming into force of the Amendment Act, 2005 and still the Supreme Court gave them the benefits of amended Section 6 by recognizing rights of daughter to get share in the coparcenary property, as if she had been a son.

67. Learned counsel for respondents would, however, submit that only question which the Court considered was set out in the later portion of paragraph 12 of the judgment, which reads as under:- In the backdrop of the above legal position with reference to Section 6 brought in the 1956 Act by the 2005 Amendment Act, the question that we have to answer is as to whether the preliminary decree passed by the trial court on March 19, 1999 and amended on September 27, 2003 deprives the appellants of the benefits of 2005 Amendment Act although final decree for partition has not yet been passed. And, therefore, the Supreme Court was not called upon to examine the question which is posed for our consideration.

68. It is true that the question of retrospective, retroactive or prospective operation of Section 6 does not appear to have been argued in so many words and, therefore, the Respondents appear to be invoking “sub silentio” principle. We may refer to Salmond on Jurisprudence, Twelfth Edition, Chapter-V-Precedent, wherein the sub silentio principle is explained as under : 62 of 72 SA.566.2011 “27. Circumstances destroying or weakening the binding force of precedent : A decision passes sub silentio, in the

technical sense that has come to be attached to that phrase, when the particular point of law involved in the decision is not perceived by the Court or present to its mind. The Court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour; but point B was not argued or considered by the Court. ig In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub silentio. ... ... The rule that a precedent sub silentio is not authoritative goes back at least to 1661M, when counsel said :"... An hundred precedents sub silentio are not material"; and Twisden J; agreed :"Precedents sub silentio and without argument are of no moment". This rule has ever since been followedN. But the Court before whom the precedent is cited may be reluctant to hold that its predecessor failed to consider a point directly raised in the case before itO, and this reluctance will be particularly pronounced if the sub silentio attack is levelled against not one case but a seriesP." It would thus appear that only a Court of coordinate jurisdiction would be in a position to decline to follow a precedent on the ground of sub silentio. However, since the view taken by us independently M R. Vs. Warner (Ward) 1 Keb. 66, 1 Lev. 8 N O'Shea Vs. O'Shea and Parnell *1890)15-P.D. 59 at 64 (C.A.) O Gibson Vs. South American Stores Ltd. (1950)Ch.177 at 196-197 (C.A.) P Young Vs. Sealey (1949) 1 All E.R. 92 at 108 63 of 72 SA.566.2011 also accords with the view taken by the Supreme Court in Ganduri Koteshwaramma's case5, we are not required to dwell on this aspect any further.

69. With respect to the learned counsel for respondents, it would defy logic to say that without considering whether the amended Section 6 is prospective, retrospective or retroactive, the Supreme Court could have decided the question whether the preliminary decree modified by the Trial Court upon coming into force of Amendment Act, 2005 was in accordance with amended Section 6 or not. Observations of the Supreme Court in paras 9 to 12 of the decision in Ganduri Koteshwaramma's case (supra)5 leave no room for doubt that the Supreme Court applied the provisions of amended Section 6 retroactively i.e. by applying the amended Section 6 to a case where the rights of the parties had not become final. If amended Section 6 was applicable only to daughters born after 9 September 2005, the Supreme Court could not and would not have applied amended Section 6 to a partition suit pending on 9 September 2005, the daughters of the deceased coparcener having obviously been born before 1999. In our view, therefore, the binding force of the decision in Ganduri Koteshwaramma's case (supra)5 is not weakened on the ground urged on behalf of the Respondents. 5 (2011)9-SCC-788 5 (2011)9-SCC-788 5 (2011)9-SCC-788

70. Learned counsel for the respondents, however, submitted that in Ganduri's case (supra)5, which the Supreme Court decided on 12 October 2011, the attention of the Supreme Court was not invited to its decision in G.Sekhar v/s.Geeta and ors. (supra) 2 wherein it was in terms held that operation of the Amendment Act of 2005 is prospective in nature and not retrospective. Strong reliance was placed on the following observations made in para 30 of the judgment- Neither the 1956 Act nor the 2005 Act seeks to reopen vesting of a right where succession had already been taken place. The operation of the said statute is no doubt prospective in nature. The High Court might have committed a mistake in opining that the operation of Section 3 of the 2005 Act is retrospective in character, but, for the reasons aforementioned, it does not make any difference. What should have been held was that although it is not retrospective in nature, its application is prospective.

71. Though the argument advanced on behalf of the respondents may seem attractive at first blush, we must remember that G.Sekhar case (supra)2 was concerned with Section 23 of the Hindu Succession Act, 1956, prior to its deletion with effect from 9 September 2005. The judgment in G.Sekhar case (supra) 2 opens with words : 5 (2011)0-SCC-788 2 (2009)6-SCC-99 2 (2009)6-SCC-99 2 (2009)6-SCC-99

"Leave granted. Effect of the amendment in the Hindu Succession Act, 1956 (for short"the Act") by reason of the Hindu Succession (Amendment) Act, 2005 (for short"the 2005 Act") insofar as therein Section 23 has been omitted is the question involved herein."

72. The suit property was owned by G.G died on 9 November 1996 leaving behind one son and four daughters. Two daughters filed a suit for partition in 1996 on the premise that G died intestate. The suit property, inter alia, consisted of residential house. The son contended that the deceased had executed a Will bequeathing the suit property in his favour and in any event having regard to provisions of Section 23 of the Act, the suit for partition of a residential property was not maintainable. The Will was contested. The single Judge of the Madras High Court on the Original Side held that the son could not prove execution of the Will in view of suspicious circumstances surrounding alleged execution of the Will and the learned single Judge also rejected the contention based on Section 23 of the Act in 2001. Thereafter the Amendment Act 2005 came into force. The Division Bench of the Madras High Court applied the amended Act and held that in view of deletion of Section 23, there was no embargo on partition of the residential property after 9 September 2005. After 9

September 2005, any family member can seek partition even in respect of the dwelling house. Therefore, the question of applying bar of Section 23 of the Act no longer survives for consideration.

73. The plaintiff-brother challenged the above decision of the Division Bench before the Supreme Court and contended that 66 of 72 SA.566.2011 Amendment Act of 2005 is prospective and cannot be held to have retrospective effect and therefore, rights and obligations of the parties under Section 23 should have been determined as were obtaining on the date of institution of the suit.

74. After referring to the Report of the Law Commission and the Statement of Objects and Reasons of the Amendment Act of 2005, the Supreme Court made the following observations in paras 25, 26, 40 & 55 :-

75. It is, therefore, evident that the Parliament intended to achieve the goal of removal of discrimination not only as contained in Section 6 of the Act but also conferring an absolute right in a female heir to ask for a partition in a dwelling house wholly occupied by a joint family as provided for in terms of Section 23 of the Act.

76. Section 23 of the Act has been omitted so as to remove the disability on female heirs contained in that Section. It sought to achieve a larger public purpose. If even the disability of a female heir to inherit the equal share of the property together with a male heir so far as joint coparcenary property is concerned has been sought to be removed, we fail to understand as to how such a disability could be allowed to be retained in the statute book in respect of the property which had devolved upon the female heirs in terms of Section 8 of the Act read with the Schedule appended thereto.

77. It is merely a disabling provision. Such a right could be enforced if a cause of action therefor arose subsequently. A right of the son to keep the right of the daughters of the last male owner to seek for partition of a dwelling house being a right of the male owner to keep the same in abeyance till the division takes place is not a right of enduring in nature. It cannot be said to be an accrued right or a vested right. Such a right indisputably can be 67 of 72 SA.566.2011 taken away by operation of the statute and/or by removing the disablement clause.

78. Even otherwise, it is not a fit case where we should exercise our discretionary jurisdiction under Article 136 of the Constitution of India as the fact remains that Section 23 of the Hindu Succession Act as it stood was to be applicable on the date of the institution of the suit. Respondents may file a new suit and obtain a decree for partition. The principle laid down by the Supreme Court in Sheeladevi's case (supra)3, therefore, does not militate against the view taken by us that the Amendment Act of 2005 applies to a daughter of coparcener, who (the daughter) is born before 9 September 2005 and alive on 9 September 2005, on which date the

Amendment Act of 2005 came into force. Of course, there is no dispute about the entitlement of daughter born on or after 9 September 2005.

79. Thus, finally the Supreme Court confirmed the decision of the Division Bench of Madras High Court in enforcing the daughter's rights to demand partition of a dwelling house in the proceedings which were pending before the Division Bench of Madras High Court, when the Amendment Act of 2005 came into force. The Supreme Court considered the erstwhile provision of Section 23 as a mere disability and not conferring substantive right on the son. Hence, the disability could be removed by a retrospective legislation. 3 (2006)8-SCC-581

80. It is necessary to note that in para 12 of the judgment, the Supreme Court did set out the contention of the appellant-brother in the following words: "If Section 23 of the Act is given retrospective effect, Section 6 of the Act will also stand amended with retrospective effect." The Supreme Court, however, did not express any opinion on this question at all. It cannot, therefore, be said that the decision of the Supreme Court in Ganduri's case (supra)5 rendered in 2011 runs counter to the decision rendered on 15 April 2009 in G.Sekhar's case (supra)2.

81. In any view of the matter, there is nothing in the decision of the Supreme Court in G.Sekhar's case (supra) 2 indicating that the Amendment Act 2005 is not to apply to daughters born prior to 9 September 2005.

82. Coming to the Supreme Court decision in Sheeladevi's case (supra)3, the learned counsel for the Respondents placed heavy reliance on the following observations in paragraph 21 of the judgment, which were also referred to by a Division Bench in Vaishali Ganorkar's case (supra)1 : 5 (2011)9-SCC-788 2 (2009)6-SCC-99 2 (2009)6-SCC-99 3 (2006)8-SCC-581 1 2012(5)-Bom.C.R.-210 69 of 72 SA.566.2011 "21. The Act indisputably would prevail over the old Hindu law. We may notice that Parliament, with a view to confer 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 the 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, the 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 an exception to the general rules. It was, therefore, obligatory on the part of the respondent- plaintiffs 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 record to

show that he was born prior to coming into force of the Hindu Succession Act, 1956." (emphasis supplied) In the above case, the Supreme Court was concerned with a fact situation where Baburam died in the year 1989 leaving behind two sons and three daughters. The elder son Lal Chand was born in 1938 whereas Sohan Lal was born in 1956. Baburam had inherited the 70 of 72 SA.566.2011 share in the coparcenary property left by his father. The High Court considered the question whether the provisions of Section 8 of the 1956 Act would apply or the law as applicable prior to 1956 Act would apply. The High Court held that the law applicable before 1956 would govern the rights of the parties and not the provisions of 1956 Act. In the appeal preferred by the sisters, the Supreme Court held that the succession having opened in 1989 on the death of Baburam, evidentally, the Hindu Succession Act, 1956 would apply and the provisions of the Amendment Act of 2005 would have no application.

83. As indicated by us earlier, the case of coparcener who died before 9 September 2005 would be governed by pre-amended Section 6(1) of the Act. It is only in case of death of a coparcener on or after 9 September 2005 that the amended Section 6(3) of the Act would apply. The Division Bench was, therefore, not right in relying upon the Supreme Court decision in Sheeladevi (supra)3 for the purpose of holding that the daughters born prior to 9 September 2005 would get a share in the coparcenary property only upon the death of the coparcener after 9 September 2005. In other words, the provisions of the amended Section 6(3) do not and cannot implinge upon or curtail or restrict the rights of daughters born prior to 9 September 2005 under sub-Sections (1) and (2) of the amended Section 6 of the Act. Sub-Sections (1) and (2) of amended Section 6 of the Act on the one hand and sub-Section (3) of the amended Section 6 of the Act on the other hand operate in two different fields. 3 (2006)8-SCC-581

We are, therefore, of the view that the binding force of the Supreme Court decision in Ganduri Koteshwaramma (supra)5 is not weakened by non consideration of the Supreme Court decisions in G.Sekhar's case (supra)2 and in Sheeladevi's case (supra)3. We, therefore, answer question (e) in the affirmative that is to say, the decision of the Division Bench in Vaishali Ganorkar's case (supra)1 is per incurium the Supreme Court decision in Ganduri Koteshwaramma (supra)5. 77. In view of the above discussion, we now answer the questions posed in the reference for our opinion as under:- (I) Question (a) - Section 6 of Hindu Succession Act, 1956 as amended by the Amendment Act of 2005 is retroactive in operation, as explained in this judgment. In brief : Clause (a) of sub-section (1) of amended Section 6 is prospective in operation; Clauses (b) and (c) and other parts of sub-section (1) as well as sub- section (2) of amended Section 6 are retroactive in operation, as indicated hereinafter. 5 (2011)9-SCC-788 2 (2009)6-SCC-99 3 (2006)8-SCC-581 1 2012(5)-Bom.C.R.-210 5 (2011)9-SCC-788 72 of

72 SA.566.2011 (II) Questions (b), (c) and (d) - Amended Section 6 applies to daughters born prior to 17 June 1956 or thereafter (between 17 June 1956 and 8 September 2005), provided they are alive on 9 September 2005 that is on the date when the Amendment Act of 2005 came into force. Admittedly amended Section 6 applies to daughters born on or after 9 September 2005; (III) Question (e) - Yes. Decision of the Division Bench of this Court in Vaishali S. Ganorkar1 is per incurium the Supreme Court decision in Ganduri Koteshwaramma5 case. (CHIEF JUSTICE) (M.S.SANKLECHA, J.) (M.S.SONAK, J.) mst 1 2012(5)-Bom.C.R.-210 5 (2011)9-SCC-788