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Author:

Deepika Nain

Faculty of Law, Delhi University

1st Year, LL.B. (3 Years)

POSITION OF "CHILD IN THE WOMB" IN HINDU COPARCENARY

ABSTRACT

Since the inception of human civilization, rights of legal heirs have been one of the crucial concerns for the society. With the progress of law and justice in the course of time, special emphasis was also given to the unborn or 'in-womb' children under various legislations. We shall try to give an elaborate analysis on the position of children in the womb in the context of the Hindu Coparcenary.

As per Hindu Coparcenary, Coparceners includes Father and his 3 lineal descendants. Females have also been given the status of coparceners by the legislature through the enactment of Hindu Succession (Amendment) Act, 2005. Also, Section 5 of Transfer of Property Act, 1882 talks about transfer of properties between living persons only.[1] However, what is the position of an unborn child in Hindu coparcenary, this question has must crossed our minds once for sure.So, in this article we will talk about the legal position of an unborn child in Hindu Coparcenary.

Hindu Succession Act, 1956 gives due rights and benefits to a child in womb. Section 20 of this act explains if an intestate (a person without any valid will) dies and at the time of his death his child is in womb, and subsequently born alive then he/she shall have the same rights to inherit the property as if he/she was born before the death of the intestate.He will be given same rights and share as other heirs. Hence as per this section, an unborn child shall be treated at par with a born child. So, based on Section 20 following rules emerged:

1. The child in womb has legal right for the property of Hindu Undivided family.
2. The child is entitled for a share in property of Hindu Undivided family, only if he/she is born alive and not otherwise.

[1]The transfer of properties act, 1882.

3. A legal suit for reopening of partition is maintainable only if filed by the child after birth but not by anyone else on his behalf when he/she is still in womb.
4. In case partition among coparceners has already taken place, and the father has not reserved any share for himself, then the child has right to ask for reopening of partition after birth.[2]

Under Hindu law two viewpoints are followed while considering the rights of a child in womb. Under Hindu law, as per Smirities, Vishnu and Yajnavalkya follow different rule as from Gautama, Manu, Narada and Brihaspati regarding rights and position of a child in womb which are as follows:

1. Vishnu and Yajnavalkya follows that if partition has taken place and the child was in womb at that time, then after the birth of the child the partition should be re-opened to give the child his/her share.
2. Gautama, Manu, Narada and Brihaspati follows that if a child is born after the participation then he will only get the share from his father's property.

The philosophy of Mitakshara upon considering the conflict on whether the child will get property share from his/her father or from his ancestral property as it has been laid down by both the groups came to the conclusion that the latter texts take such share from the father's property the general rule, while the former texts follow a particular rule applicable to a child in the womb at the time of the partition.

The Mitakshara has two rules regarding the child in womb:

1. **When a child is in womb at the time of Partition of Hindu undivided family –** Hindu law for many purposes treats a child in womb as a living person or person in existence. Further, in this case two additional situations may arise a) When at the time of partition pregnancy is known and b) When at the time of pregnancy is not known
   a) When at the time of partition pregnancy is known one option available is to postpone partition till the child is born. But in case the coparceners are not ready for delaying

[2]Hindu Succession Act,1956.

partition then a share equal to the share of child needs to be reserved for the child in the womb. In case no share for the child is reserved then the child after birth can ask for reopening of the partition.

b) In case at the time of partition pregnancy was not known, and no share would be reserved for the unborn child, then also after birth the child can ask for reopening of the partition and ask for his share. This was held originally in the case of Yekayamain v. Aganiswarian, (1870) Mad. H.C.R. 307. This rule applies in case of partition between father and son only.

2. **Other when a child comes into womb after the Partition of Hindu undivided family** – Under this situation also twocases may arise a) When the father has taken a share out for himself out of partition and, b) When the father has not reserved a share out of partition for himself.

a) When the father has got a share out of the partition, then after the birth of the child, the child becomes a coparcener. After the death of the father, the child would get his estate by survivorship (Right by Survivorship means after the death of intestate the property is inherited by his surviving children.). Also, before the Hindu Succession Act, 1956 the child after his father's death used to get entire share of his father's property, excluding the divides sons. This was held in the case of Kalidas v. Krishan, (1869) 2 B.L.R. 103. But after the Hindu Succession Act, 1956 the divided/separated and undivided children are treated same for the purpose of succession According to Section 8 of the Act. The divided/separated and undivided children both will get the same share after their father's death.

b) In case the father has not taken any share for himself out of the partition, then also the child after birth can ask for reopening of partition and can ask for his share from the property as it was before partition.This was held in the case of Cbennagama v. Munisami, (1897) 20 Mad. 75. This rule applies in case of partition between father and son only not grandfather or grandson. For example - partition takes place between P and his two sons R and S. After partition a child T is born to P and a child U is born to R. Then in this case only the child of P i.e., T can ask for reopening of the partition and not U i.e., the son of R. the example follow the rule laid down in the cases of

Supra; Kusum v. Dasarathi, 1921 Cal. 487 and Sliivaji v. Vasantrao, (1909) 33 Bom. 267.

Another of such case may arise, where the coparcener has renounced his share in the Hindu Undivided family and the child is conceived or born after such renunciation, now the area of concern is if the child can ask for his share or reopening of partition. In this regard a full bench of Andhra Pradesh High Court held that after such renunciation the coparcener can no longer be treated as member of coparcenary, so also the son born after such renunciation cannot be a coparcener with the Hindu Undivided family. And therefore, the child cannot ask for reopening of partition. In of such case before the Court of Law, Chief Justice Reddy also said that the child can be a coparcener with his father, but he can-not be added as coparcener to the original Hindu coparcenary. It was held in the case of Anjaneyulu v. Ramayya, 19G5 A.P. 177.[3]

There is another confusion in regard to the child in womb, that is when does a Hindu Undivided family comes into existence, when a child is conceived or when the child is born? This question was cleared by the Supreme court of India in T. S. Srinivasan vs Commissioner of Income Tax 1966 AIR 984, 1966 SCR (2) 755. In this case the issue was same as whether to consider Hindu Undivided Family from the date the child was conceived or from the date the child was born. Therefore, in this case the court held that according to Hindu law a child is considered in existence from the date the child was conceived and this is done so as to save the child's right and safeguard the property rights of such a child. But for the purpose of Income tax purpose as was the case in case law, this doctrine does not fit. Income tax is a liability and the purpose of legislature was not to create liability for an unborn child but to save his rights. So, for the purpose of income tax assessment as a Hindu undivided family the child is not considered into existence.

In conclusion it can be said that a child is considered into existence from the date the child was conceived for the purpose of Hindu Laws and his due rights are reserved in every sphere of the law. Most of the legislations including Hindu Succession Act,1956;

[3]Modern Hindu Law – Paras Diwan

The Transfer of properties act,1882; etc. covers the aspects dealing with the rights and position of a child in womb.[4]

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[4]T. S. Srinivasan (Deceased) and Others v. Commissioner of Income Tax (High Court of Judicature At Madras) Tax Case No. 241 Of 1980 Tax Case No. 152 Of 1980) | 19-03-1998